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CENTRE AND STATES IN FOREIGN AFFAIRS: A CASE STUDY OF UNITED STATES OF AMERICA FEDERAL APPARATUS

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I. The Federal Scheme of the Constitution

Federalism in America was seen by the Constitution framers as a political compromise. There were 13 colonies (now states), which were not ready to secede power to the national government.[1] The federal government did not create the states, the states created the federal government.[2]

The United States of America is a federal republic with a bicameral parliament. The Congress consists of an upper house, the Senate, which comprises two members elected from each State, and a House of Representatives, which is directly elected according to population. The Executive is made up of the President and the Cabinet, the latter is appointed by the President.

The most remarkable fact about the U.S constitution at the time of its ratification was its unfinished character, as well as what Tocqueville called as 'incomplete national government', in terms of traditions of limited government via 'federalism, judicial review, and the separation of powers — giving priority to adapt to inculcate a kind of moral virtue of liberty with moral responsibility and to govern themselves.'[3]

The U.S. Constitution gives specific enumerated powers to the national government known as delegated powers, while reserving other powers to the states called as reserved powers. It also contains several potential powers for the national government. These potential powers, also called implied powers, which includes Congress's power under Article I, Section 8, to make laws that are necessary and proper' for carrying out its enumerated powers.[4]

Article I of the Constitution provides that 'all legislative powers herein granted shall be vested in a Congress of the United States.' Article I, Section 10 of the U.S. constitution elaborate upon state powers that, 'no State shall, without the Consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of Peace, enter into any Agreement or Compact with another State, or with a foreign power, or engage in War unless actually invaded, or in such imminent danger as will not admit of delay.'[5]

Each state rules supreme under its own constitution and within its own boundaries to the extent that it does not encroach on federal power or violate the federal constitution. The existence of the

states was constitutionally guaranteed, which was not to protect communal or primordial identities, but to protect individual liberties and communitarian liberties of local self government against a tyrannicalcentre.[6]

The Congress:-

The House of Representative is the house of people, while the Senate is the council of states.[7] The legislative process is same in both the chambers. However, the revenue bills can only originate in the House. The Senate is seen as a federal chamber with equal representation to all states, whereas the House is seen as a national chamber as based upon its membership from states on population. The senate is a smaller house with membership of 100 whereas the House is large as compared with membership of 435.[8]

Senators serve six-year terms and, as in the House of Representatives, can serve an unlimited number of terms. Unlike in the House, though, Senate vacancies may be filled immediately by gubernatorial appointment, and such appointees serve until the next regular election, when voters elect a permanent replacement to fill for the remainder of the term. Also unlike the House, only one-third of senators stand for election every two years.

The structure of the composition of the senate and state representation was a heated issue at the time of the Philadelphia Convention. The larger state wanted proportional representation, while smaller states wanted equal representation. As the issue became crucial, it was resolved by agreeing to grant the states equal suffrage in the Senate. This feature of equal suffrage is exempted from ordinary amendment under Article V.[9]

The senate works upon the basis of consent. Its smaller size makes it a compact house where rules are strictly observed. Second chamber in the federal set up is often looked upon as a delaying house. Due to its smaller size, long tenure, techniques of filibustering, advice and consent to treaties etc which often prevent smooth legislation, the senate is this regard is also seen as an obstructionistchamber.[10] The federal Constitution does not establish any formal institutions that require the participation of state officials. Thus the Senate is looked upon as an inter-governmental structure.

In US Presidential system, the executive works independently of the Congress. For the process of Presidential election, each state, along with the District of Columbia, has a number of electoral votes equal to its representatives plus senators, for a total of 538 electoral votes. Thus, the smallest states have three electoral votes each, and California has the most electoral votes (55). The states are free to award their electoral votes as they see fit. The composition of the Electoral College leads the presidential candidates to plan strategy, in a manner totarget the fifteen to twenty states that are sufficiently competitive.

Article IV of the U.S. Constitution, holds that every state is guaranteed a 'Republican Form of Government'. This is an important yardstick for constitutional design of the state institutions. All states have presidential systems, the chief executive is called the 'Governor', and the state legislatures, like the national legislature are bicameral (leaving out Nebraska).

The Executive:-

Article 2 of U.S constitution deals with the powers and functions of the President who is the real executive.[11] All executive action of the republic is taken in his name. He enforces federal laws and order throughout U.S. He is responsible for guaranteeing to every state a republican form of government and protecting them against invasion and domestic violence. The President is the supreme commander of armed forces of the state.

The election of President is indirect but it has become virtually direct because of the growth of the political parties. The President is elected by an electoral college. Total number of electors is equal to total members of House of Representative plus total number of members in Senate plus three members of Washington D.C., therefore the total strength of Electoral College is 435+100+3=538. The president requires absolute majority so he needs 270 votes.

Since the Twenty Second Amendment Act (1947), a President cannot contest for more than two terms.[12] If the post of the President becomes vacant for reason of death or impeachment then the Vice President becomes President. If the remaining term is less than two years, then the Vice President can stand in the election for two times. If remaining time is more than two years, then the Vice-President can contest only for one more two terms.

The President represents the U.S in foreign relations. He negotiates treaties and agreements with foreign states. All treaties with foreign states must be ratified by a two-third majority of the Senate. The President is not to face any difficulty if majority in the Senate belongs to his party. It is only in the final stage that the treaties are placed before the Senate.

The President can enter into the executive agreement which does not require ratification by Senate. Executive agreement is the method to bypass the recalcitrant Senate. The Congress can also confer authority on the President to make war-agreements with other nations. Reciprocal Trade Act 1934 authorized the President for three years to enter into trade agreement with foreign countries and lower the tariff rules by proclamation to the extent of fifty percent without the consent of the Senate. These powers were later extended also with time. The President has the sole authority to extend American recognition to a new foreign state. It was according to this right that President Roosevelt granted recognition to Soviet government in 1933.

Separation of Powers:-

Consistent with the theory of separation of power, the constitution intended the President and the Congress to be in separate apartments. Hence the President does not possess the authority to summon prorogue and dissolve the Congress. He cannot initiate any bill directly in the Congress. The President is not the leader of the majority party of the house. He does not sit in the Congress nor deliberates in its delegation.

Although President does not have direct control over the legislature, he has virtually become chief legislator in practice. Without the consent of the President, no bill can become an act. He may reserve the bill with him in which case it becomes the law at the expiry of ten days without his signature provided the Congress is still in session. The bill in such a case lapses if the Congress adjourned before the expiry of ten days which is known as pocket veto. If the President rejects any bill and the Congress pass again the bill by two-third majority then it will be obligatory for the president to give his assent.

It is argued that the President is far more powerful than the British monarch but more dependent than 'young George III is upon the Parliament (the Congress)'.[13] There are experts like Louis

Fisher who hold that although the Constitution anticipated anticipates a government based on separation of powers, in reality these powers are largely shared, sometimes exclusive.[14]

The Judiciary:-

The American Supreme Court has the power of judicial review where executive and legislative acts, which do not confirm to the Constitution, can be struck down.

The state courts also have the same power. However, if an act is invalidated owing to non-conformity with the state constitution, it cannot be appealed to the U.S. Supreme Court.

The theory of dual federalism or 'Checks and Balances' holds that there is a division of responsibilities between the federal national government and the states which can be seen in, 1. Presidential actions and 2. Supreme Court decisions, that prohibited national government incursions into certain (mostly domestic) policy domains on the grounds that such actions would invade state sovereignty.

The process of selection of federal judges involves nomination by the president and confirmation by the Senate, and serves during good behaviour. Although state governments have no formal role in the appointment process, senators exert significant influence in selecting appellate and district judges. This power of President to nominate judges and get it approved fluctuates with conjunction and disjunction within the Congress. E.g. In the year 2000, President Bush declared that his nomination must get Senate vote but the democratic Senate turned it out saying that there was no constitutional obligation that exists for it.[15]

Party System:-

The American government traditionally has had a two-party system. Since the Civil War there have been two parties, the Republicans and Democrats. It is argued that in America there are only two sides to a given conflict. Every issue through a prism of left- the Democrats and right- the Republicans.

In Presidential system, the winner takes all model works. There is a strong tendency toward two parties because voters act strategically, preferring to vote for legitimate contenders than cast a 'spoiler' vote for a third-party candidate. Political parties in Parliamentary system use proportional representation meaning where the political party receives legislative representation proportionate to the percentage of the vote it receives during the election, which is congenial for multi-party system to prevail.[16]

The structure of political parties resembles a pyramid. There is a single leader at the top called the national chairman, a broad base of grassroots workers at the bottom and several layers of local, state, and national committees in between. Decision-making, however, is not simply a top-down centralised process. The different committees are in loose confederation with each other and maintain a certain level of autonomy.

II. The Treaty Making Powers in the U.S. Constitution

The concept of 'state' is largely missing from American political discourse. It is supplicated by the term 'government'. The preamble begins with a ringing declaration that 'We, the people of

United States' which Kincaid questions that does it mean 'We, the whole people f the whole of United States', or 'We the people of the several states of these United States?'[17]

Let us begin by probing as to who has the power to enter into treaties? Article II, clause 2, section 2 of the United States Constitution provides that the President shall have power, by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur.[18]

Treaty Making Power under the Articles of Confederation and the Federalists' Debates:-

Tracing the genealogy of treaty making power in the US, we look to debates in the Philadelphia convention. Federalists like Hamilton held the view that the prerogative of foreign policy is essentially an executive function, whereas Madison argued that the aspect of foreign policy is essentially a legislative function by virtue of the Senate's treaty-making and war powers. Hamilton further held that the treaty-making power is neither executive nor legislative in character, but seems to form a distinct department, what John Locke called the 'federative' power pointing essentially to it being a shared power.

Hamilton outlined the framework of a strong executive that the latter is looked upon for security, maintain laws and order prevent wars. He argues that failure on part of the executive can be a probable cause of weakness/harm to the nation.[19]Though he argues for constitutional checks and balances of legislature and executive, he also indicates that indicated that the executive is 'the fit agent' in 'the management of foreign negotiations'. [20] Jefferson, however, differed on this view of power to the executive. He looked upon it as a tendency towards creating a mono-crat. At that time, it is held that he drawing inferences from English monarchical system, he feared that he saw the new constitution should be a testing ground for a republican form of government.[21]

Under the articles of Confederation, treaty making power belonged to the congress. The new states retained considerable autonomy in foreign affairs, especially international trade. The states engaged in trade wars, pursued military campaigns, and carried out independent diplomacy. Deficiencies in the Articles of Confederation prompted its repeal and the ratification of a new Constitution creating a federal system of government comprised of a national government and states.

The federalist gave primacy to federal national arrangement, as opposed to previous experiences of the confederation. Hamilton, Jay, Madison believed only a strong central government could provide the new nation with the economic, political and military cohesiveness which would be needed to maintain its independence. To quote their ideas, 'weakness before nation, anarchy within political climate favouring self-interest and regional focus to detriment of whole society security' will be the outcome in absence of a strong Union.[22] Further it was also debated that treaties signify bargaining power of the nation, and it has to be asserted in absolute terms due to change in requirements of national interest with time.[23]

Ratification of the United States Constitution circumscribed the freedom of the states by giving the federal government supremacy over foreign relations, including the regulation of commerce with foreign nations. Under the 1787 Constitution, there are fifty-one governments in the United States, each with its own sphere of power. As James Bryce observed in 1888, that if we compare the Federal President with the State Governor, the former has foreign policy to deal with, the

latter has none. It is the federal government rather than the states that exercise control over foreign affairs.

Anti-Federalists versus Federalists[24]	
Anti federalist objections to the Constitution	Federalist defenses of the Constitution
Opposed strong central government. Opposed a standing army and a 10 square mile federal stronghold (later District of Columbia)	National government needed to be strong in order to function. Powers in foreign policy needed to be strengthened while excesses at home needed to be controlled.
Strong national government threatened state power.	Strong national government needed to control uncooperative states.
Strong national government threatened rights of the common people. Constitution was created by aristocratic elements	Men of experience and talent should govern the nation. "Monocracy" threatened the security of life and property.
Anti federalists - states' rights advocates, backcountry farmers, poor farmers, the ill-educated and illiterate, debtors, & paper-money advocates.	Federalists - well educated and propertied class. Most lived in settled areas along the seaboard.

Strengthening of the Federal Government:-[25]

Under Articles of Confederation	Under Federal Constitution
A loose confederation of states—a firm league of friendship.	A firm union of people where the national government was supreme.
One vote in Congress for each state	Two votes in Senate for each state; representation by population in House (Art. I, Sections II., II)
.2/3 vote (9 states in Congress for all important measures)	Simple majority vote in Congress, subject to presidential veto (Art. I, Section VII)

Laws executed by committees of Congress	Laws executed by powerful president (Art. II, Sections II, III)
No congressional power over commerce. State free to impose levies and restrictions on trade with other state and enter economic agreements with foreign countries.	Congress to regulate both foreign and interstate commerce (Art. I, Section VIIl)
No federal court – state free to resolve their matters, or conflict with their state.	Extensive power in congress to levy taxes Art.I, Sec. VIII
Unanimity of the state for amendment	Amendment less difficulties (Art. V) -2/3 Congress and ¾ of the states
No federal court – state free to resolve their matters, or conflict with their state.	Federal courts, capped by supreme court (Art. III)
No authority to act directly upon individuals and no power to coerce state	Ample power to enforce laws by coercion of individuals and to some extent of state

Treaty Making Power under the U.S. Constitution:-

Article II, section 2, clause 2 of the Constitution requires approval by two-thirds of the Senate, before the President can ratify a treaty. There is no requirement to consult the House of Representatives. Clause 1 of Article I, section 10 provides that no State shall enter into any treaty, alliance or confederation. Clause 3provides that no State shall, without the consent of Congress, enter into any agreement or compact with a foreign power.

Treaty making in the United States has seven steps, which can be listed as: negotiation of the draft, bringing out the final version, signing by the executive, advice and consent of the Senate, Ratification, proclaim of ratification instrument for formal notice to the external world, and lastly proclamation.

In some nations like Brazil, which authorize the President as supreme signatory and spokesperson for treaties, the latter become the law of the land only when the Parliament enacts legislation in the domestic law and are subject to constitutional review. Treaties about human rights have hierarchal placement over ordinary legislation.[26] They do not enjoy what the United States Constitution guarantees ,i.e. the Supremacy Clause as stated in article VI, clause 2, that:-

'All treaties made under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound by them, not with-standing anything to the contrary in the Constitution or laws of any State.'

The Supremacy Clause represents an important compromise reached by the Founders to resolve conflicts between state and federal law. Thus in case of conflict with the state law, the federal

law shall prevail.[27] This supremacy clause also implies, as interpreted in a different prism, by Chief Justice Marshall that treaties shall become law of the land, without any legislative provisions and thereby needs to be faithfully executed if it drives its sanctity from theconstitution.[28]

Thus, 'dual federalism' has often come in crisis. In the case of *Ware v. Hylton* (1796), the Supreme Court debated the issue of validity of state law over federal treaties, and decided upon the invalidity of the state law under the supremacyclause.[29]

This supremacy clause was seen to be silent in terms of distinction between federal statute and the treaty. The Supreme Court Judgement in case of *Whitney v. Robertson* (1888) pointed out that--

'By the Constitution of the United States, a treaty and a statute are placed on the same footing, and if the two are inconsistent, the one last in date will control, provided the stipulation of the treaty on the subject is self-executing.'[30]

To make terms of the treaty binding in the nation, the legislative aspect of the Congress in important. Here in there shall be a distinction between self-executing and non self-executing treaties. If the treaty is non-self-executing, Congress has the power to make the changes in domestic legislation necessary to implement the provisions of the treaty. If the treaty is self-executing, it is automatically supreme law of the land'[31] e.g.: United Nations Charter. Chief Justice Marshall's judgement in *Foster & Elam v. Neilson* (1829) case is worthy to be noted in this regard:-

'A treaty is in the nature of a contract between two nations, not a legislative act. Our Constitution declares a treaty to be the law of the land. When the terms of the stipulation import a contract, the Legislature must execute the contract before it can become a rule for the Court.'[32]

In international law, the dualist theory points that there are two set of laws: domestic and international law. When two realms are in conflict, the judgment given by Chief Justice Marshall in case of *Murray v. The Schooer Charming Betsy* (1804) is often cited for conceptual guidance in the US federal domain. "Charming Betsy Canon' is a principle of interpretation applied to United States domestic laws which states that national/domestic laws should not be constructed and interpreted in a manner that it comes into conflict with international law. Inthe words of Chief Justice Marshall in that case:-

'An act of congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.'[33]

There is no mention in the constitution about the power to terminate treaties. As per prudence it is taken as a political power to be decided by the international realities and domestic equations. The Constitution also does not state whether Congress must be involved in the denunciation of a treaty. However, it is generally accepted that the power to denounce a treaty is held by the President, as part of his or her power in relation to foreign affairs and that Congressional or Senate approval is not required.[34]

The Senate's Role:-

Treaty ratification by two-thirds of the Senate and Senate confirmation of Foreign Service officers provide the states with certain leverage over foreign policy. States ay not enter any treaty, alliance, or confederation, but they may enter an agreement or compact with a foreign power with the consent of the Congress. States cannot be sued by citizens or subjects of any foreign state without their own consent.

The treaty clause of the Constitution is flexible enough that the exact role of Senate and executive comes out of what is in operation in actual practice.[35] The Senate in its practice of Constitution powers has been one of most powerful upper chambers. The Senate was modernized some two centuries ago, but it continue still today as a deliberative body as envisioned by the Constitution makers.[36]

Once a treaty is sent to the Senate for its consideration, it is usually referred to the Foreign Relations Committee. The Committee conducts an inquiry, holds public hearings, and recommends whether the Senate should approve the treaty, conditionally approve it or reject it. The treaty is then referred back to the Senate, where the Committee may consider it, article by article.

As a matter of practice, both the Senate Foreign Relations Committee and individual senators are frequently consulted during the negotiation process. The Foreign Relations Committee conducts an inquiry into the treaty, and then recommends to the Senate whether the treaty should be approved or rejected, or approved subject to conditions.

Votes are taken on the treaty and any proposed amendments or conditions to ratification. These votes can be passed by an ordinary majority. It is only the final vote on the treaty which requires a two-thirds majority before the President may ratify the treaty. Once the Senate ratifies the treaty, it cannot attach its reservation or any other clause later, nor does it have any say in the interpretation of the treaty.

Foreign relations committee has been an important tool in legislation over foreign affairs. However, there have been critics who have pointed out that "the average Senator knows much less about questions of foreign than of domestic policy, he is under obligation to confront to the necessity of informing himself as to foreignrelations.'[37] This view can be seen to be ill-founded.

In case of the Treaty of Versailles under the Woodrow Wilson administration, after the first world war forty-nine senators voted to give the Senate's consent to ratification, while thirty-five senators voted in the negative — a clear majority in favour of presidential ratification, which was short of the necessary two-thirds majority. This resulted in US failure to ratify the treaty. President Carter did not sent Strategic Arms Limitation Treaty- SALT II with Soviet Union to the Senate when there appeared chances of its defeat, later President Reagan also did the same. The Senate's vote of forty-eight in favour of and fifty-one against giving advice and consent to the Comprehensive Test Ban Treaty in Clinton administration was also a crucial rejection of the agreement under the two-thirds rule.

Seen from this prism, other treaties which met the same fate of rejection by the senate, as before 1995, can be named as, Convention on the Law of the Sea, Protocol II to the Geneva Conventions, the Convention on Biodiversity, the Convention on the Elimination of All Forms of Discrimination against Women, the Vienna Convention on the Law of Treaties.[38] As argued by a leading jurist V.R. Krishna Iyer, 'with Senate validation absent, presidentially signed treaties have been casualties.'[39] Quite often, the Senate was looked upon as the graveyard of treaties.

Voting Difficulties for Bi-Partisan Foreign Affairs:-

There are some facts about bipartisan consensus to be pondered over in relation to the rejection of multi-lateral treaties, by the Senate:-[40]

Date	**January 29, 1935**
Subject to Treaty	**World Court**
Vote	**Yes=52; No=36**

Date	**May 26, 1960**
Subject to Treaty	**Law of the Sea Convention**
Vote	**Yes=49; No=30**

Date	**March 08, 1983**
Subject to Treaty	**Montreal Aviation Protocols**
Vote	**Yes=50; No=42**

Date	**October 03, 1999**
Subject to Treaty	**Comprehensive Nuclear Test Ban Treaty**
Vote	**Yes=48; No=51**

Foreign Affairs Beyond the Treaty Power:-

The President, as an epitome for the conduct of vigorous foreign affairs, has the following options in the diplomatic strategy which can be listed as:-[41]

1. He may make use of the Article II procedure and submit an agreement to the Senate and obtain a two-thirds-majority vote, or
2. He may submit an agreement to both chambers of Congress as a "congressional-executive' agreement and obtain a simple-majority vote from each house, or

3. He may entirely bypass both chambers of Congress and simply declare the treaty in question to be an 'executive agreement/trade agreement' (called by many a 'sole executive agreement') not requiring any consent from Congress before ratification.

The Article II procedure is not the exclusive means of entering into treaties. The President also has power, under the general executive power, to enter into 'executive agreements' without the consent of the Senate. Such agreements usually relate to foreign relations or military matters, and do not tend to directly affect the rights and obligations of citizens.

Another means of entering into treaties is through the Congressional-Executive agreement process. Under this process the Congress passes a joint resolution of Houses, or passes legislation, authorizing or approving the conclusion of an international agreement by the President. The main difference with the Article II procedure is that there is no requirement to obtain two-thirds approval of the Senate. There need only be a simple majority in approval in each House in order to authorize the ratification of the treaty. This process is often used for trade agreements, as the Congress has constitutional authority to regulate commerce with foreign nations under Article I of the Constitution.

The simple majority of both houses, needed for such type of agreement eliminate the chances of the treaty being defeated in the Senate. The House of Representatives also get to have a role in treaty process, which scholars have interpreted as 'undemocratic' anachronism exclusion from the treaty-makingprocess.[42]

The popular appeal of this mechanism can be underlined in the fact that in the first fifty years of American history, the nation concluded twice as many treaties as non-treaty agreements, since World War II the nation has concluded more than ninety percent of its international agreements through a non-treaty mechanism. If we place it in context of American Constitutional history, data reveals that in 1952, the United States signed 14 treaties and 291 executive agreements. In the current situation, the United States is party to nearly 900 treaties and more than 5,000 executive agreements.[43]

Professors Bruce Ackerman and David Golove hold that there is no significant difference between the legal effect of a congressional-executive agreement and the classical treaty approved by two thirds of the Senate. They rely upon on the Necessary and Proper Clause of the Constitution and lie outside constitutional amendment outside of Article V. This inter-changeability became 'part of the living Constitution' since Second World War.[44]

Theorists like John Yoo hold that complete inter-changeability should be rejected because it creates severe distortions in lawmaking. Allowing statutes to completely replace treaties eliminates the restrictions upon Congress's enumerated powers. This undermines the separation of powers in foreign affairs.[45]

The Constitution gives Congress exclusive authority to set tariff rates and decide the terms of commerce with foreign nations, while the executive is empowered to conduct international negotiations. Over the course of the United States' existence, this constitutional separation of powers has resulted in the legislative and executive branch playing widely varying roles in this regard. One thing that has been constant is the increasing ascendancy of the executive branch over the matters.

III. National Government and States in Federalism

The various phases of federalism in America via centre-state interaction can be summed up as:-[46]

Dual federalism: 1790-1930: It is known as 'layer cake federalism', with clearly enumerated powers between the national and state governments, and sovereignty in equal spheres.

Cooperative federalism: 1930-1960: It is known as 'marble cake federalism', involved the national and state governments sharing functions and collaborating on major national priorities.

Creative federalism: 1960-1989: It is known as 'picket fence federalism', characterized by overloaded cooperation and crosscutting regulations.
New federalism: 1981-Present: It is called 'on your own federalism,' is characterized by further devolution of power from national to state governments, deregulation, but also increased difficulty of states to fulfill their new mandates.

Beginning with the Civil War, the Thirteenth (demolishing slavery)", Fourteenth (citizenship rights), Fifteenth Amendment (right to vote to all citizens, irrespective of any differences), under Lincoln Presidency extended the powers of the federal government.[48] The era of Wilson presidency around the First World War led to the Seventeenth Amendment in 1913, which ended the selection of senators by state legislatures.[49]

At the time of Roosevelt's New Deal, the policy decision required federal and state agencies to work jointly.[50] Theorists also hold that the problems which came along in industrialization and modernization necessitated a cooperative, intergovernmental approach to their solutions. Dual federalism and cooperative federalism were intertwined.[51]

Conventionally1900-1937 is seen as an era of dual federalism, which came to be change with time. The Sixteenth Amendment allowed the Congress to levy income tax, without appropriating it with states. The Johnson Administration 'Great Society Program' during 1960s led to federal-state co-operation. The federal grants-in-aids were highest in 1970.

The crisis of the Nixon Administration Watergate, the Arab oil embargo, the national truckers strike and the collapse of South Vietnam did not augur well for the federal government. The Reagan era gave new orientation shift within the federal departments and regulatory agencies by reducing federal regulation of state activities and oversight of intergovernmental programs.[52] Accumulation of programs, revenue sharing and block grants, gave presidents great flexibility in interacting with the federal system.[53]

John Kincaid theorizes it as a political response to the policy challenges of market failure, post-war affluence, racism, urban poverty, environmentalism, and individual rights. With time, the pressures to expand the power of national government, led to replacement of fiscal stimulus by federal regulation to ensure supremacy of the federal policy. This gave rise to coercive federalism. However, in this movement from co-operative to coercive, there has been no consensus on dimensions of New Federalism.[54]

IV. States in Foreign Affairs:

We employ Earl Fry's distinction of foreign policy and foreign affairs to focus upon discussion to flow. 'Foreign Policy' can be defined as 'the goals that the nation's officials seek to attain abroad, the values that give rise to those objectives, and the means or instruments used to pursue them'. National Government consist of many parts, where the cross-border activities of states in federations, which he sees as a hybrid of Keohane and Nye's trans-governmental and transnational interactions, is referred to as 'foreign affairs'.[55]

The US has the largest and most technologically powerful economy in the world, with a per capita GDP of $47,200. The exports contribute $ 1.27 trillion, as CIA, the World Fact Book Records 2010. As we contextualize the circumstances under which the constitution was written and the present state of affairs, it can be asserted that the jurisdiction was created as a compromise among economic modernizers seeking to build national market economies, and regional traditionalists wanting to preserve their old ways and privileges. After the reconstruction, rapid industrialization of the country created forces of nationalization which laid the basis of growth of federal power.[56]

Divided sovereignty was not conceptually problematic in the early years of the Republic. Economic integration ushered in by the process of globalization and political devolution have become common in the era of rapid changed world scenario brought by technology and communication, leading to faster movement of goods and services. Better connectivity, communication, have made citizens to put onus on States to ensure their interests. The increase in capabilities and political openness of the states, in turn, led to dramatically shift in power within the federal government, as vigorous state governments challenged congressional controls. This opened opportunities for the federal executive branch to deal with the increasingly complicated interactions between the national and state governments.

Kincaid holds that the role of states in international affairs have been factored in by custom, political practice, and intergovernmental aspects than by enforcement of constitutional and statutory rules.[57] As America has become increasingly involved beyond U.S. borders--through trade, immigration, travel, internet-the federal government is less able to regulate the multiple strands of US. Involvement in the world. State governments increasingly shape the ways Americans cope with the outside world[58]. These calls for consensual basis of federal polity by constant federal-state co-operation.[59]

In the present globalizing world of integration and fragmentation, national boundaries and identities are losing their significance. Regions and other sub national communities simultaneously want to retain their specific identities and be players on a world stage.[60] The agenda of foreign affairs as it remained divided along the axiom of interactional-domestic, federal-state, witnessed blurring of this demarcation towards the end of eighties, especially in areas of inter-national trade.

The Pacific Salmon Commission was formed in 1985 by the governments of Canada and the United States to implement the Pacific Salmon Treaty which had representation from commercial and recreational fisheries as well as federal, state and tribal governments from both nations, for conservation and harvest sharing of Pacific salmon to the Governments of Canada and the United States. This depicts how the national government played its role, within a diversified group of organizational actors involved in cross-border resource management regime, thereby pointing to plethora of actors negotiating at international issue.[61]This justifies the idea of Susan Strange (1998) that the state (federal government) is not the only actor in international political economy.

Governor's Changing Role:

'Creative Destruction' is the terminology used by Earl Fry (1998) to define the churning between federal and sub-national government in foreign affairs. Continuing international interdependence and modernization of state governments are likely to sustain and increase state involvements in international relations, especially trade relations.

As chief of state, the governor is in the best position to initiate and conduct international relations on behalf of his or her state. This reasons up well that since the New Deal, governors have acquired considerable skill and experience as intergovernmental diplomats representing their states in negotiations with the federal government as well as other states.[62]Governors have lead overseas missions seeking investment and promoting trade, establish international offices, meet with heads of government, and receive ambassadors.

The proliferation of sub-national government ties beyond America's borders is complicating intergovernmental relations and questions of constitutionality, jurisdiction, and propriety are looming large. With the rise of gubernatorial activities, Governors are venturing into broader areas, they often speak out against Presidential policies.[63]This has become a matter of concern in separation of power system, as this has enhances the status of the governor over the national legislature. It is also held that state needs are distinct, therefore the legislatures are multi-headed bodies, are less capable of carrying out the quasi-diplomatic role of the Governor.[64]

Cooperative institutions have a new role for allowing sub-national input into policymaking like National Governors Association[65]. The National Governors Association found in 1908, and in present times works as a specialised agency to work upon the collective voice of the nation's governors. It identifies priority issues and deal collectively with policy issues at the state and national levels. On several matters of international trade, the NGA has voiced concerns over State economies are becoming increasingly globalized, and more U.S. companies are competing in markets and against firms worldwide.[66]These grassroots initiative into foreign foray is beneficial as it is fostering efforts from the local level within the system.

States' in the International Realm:-

The United States is a net exporter of globalisation. The American Constitution was created for designing a commercial republic which leads to no friction in fundamental cultural and intellectual ideas surrounding American federalism and globalisation.[67]Further, the national government has also resisted commitments to many international treaties that may have lead to opposition by the states, example in area of climate change.

The distinction between foreign and domestic policy spheres increasingly blurred with sub national units entering an arena which was customarily regarded as prerogative of federal government. The de-facto shifting of policy responsibilities in the absence of constitutional change points up the continued importance of informal interactions in federal evolution.[68]

The level of state international activity has increased since 1991. A study by Conlan, Dudley, and Clark has probed through the 2001-2002 legislative sessions, where approximately 886 bills and resolutions with significant international implications were introduced. Some states had

virtually no international legislative activity, whereas others were very active. Levels of various states' international exports were an important cause for this variation in legislative business.[69]

This also underlines the fact that states venture into foreign affairs is not a uniform pervasive phenomenon. However, it still is of significant to comprehend the processes of federalism and globalisation that cannot be ignored. The increased international foray of sub-national units is attributed to factors, namely, job creation, quest for revenue, globalization of production, and ease in establishing liaisons, impressive and expanding economic base, political uncertainty and constitutional ambiguity.

Individual states such as California, New York and Texas have GDPs which rival industrialized nation-states. California state-GDP[70] is pegged around $1.9 trillion, Texas $1.2 trillion and New York is $1.16 trillion.[71] Minnesota looked towards international trade and export and in the 1980s; it became the first of the 50 states to create an agency the Minnesota Export Finance Authority and opened the Minnesota Trade Office and the Minnesota World Trade Centre.[72]

States have taken initiatives upon stem cell research, where the national government has moved slowly. E.g. The California Institute for Regenerative Medicine (CIRM), which is the state's stem cell agency, and the government of the Australian state of Victoria have ventured for international collaboration on stem cell research.[73] States like Texas dispatches its observer to Oil and Petroleum Exporting Countries (OPEC).[74] Global interdependence has made states aware about overlapping areas of domestic and foreign policy. Several trade agreements exist between states and Canadian provinces. States like California oppose unitary system of taxation to quell dissatisfaction of Multinational Corporations using separate accounting method, and thereby not adhering to the Commerce clause of the Constitution.[75]

U.S is a signatory to North America Free Trade Agreement (NAFTA) with Canada and Mexico. In the figures dated for the year of 2006, it was found that thirty-nine states exported more to Canada than any other nation, and two exported more to Mexico than any other nation. There is no guidance on part of national government or any uniform pattern.-I Each state accounts for what it suits the best, even in dealing with foreign nations, and thereby acts.[76]

The National Guard's State Partnership Program (SPP) partners U.S. states with foreign nations. In areas of 'high' politics', states acquire an increased say in foreign affairs.[77] In its implementation aspect, example of, Maryland and Estonia partnership, where the individual state of Maryland actively participated in bilateral framework events, leader mentorships, support security cooperation activities.[78] Estonia even converted the Maryland Military Liaison Team to the Bilateral Affairs Officer.[79]

With rise of non-traditional security dimensions where the threats cut across attacks on World trade centre, states have been on vigil for their own safety. borders, like Terrorism in wake of September 11, 1999 individual states like New York enacted Anti terror laws.[80] The Homeland Security Act 2002 was an instance of largest reorganization of unprecedented federal-state and even local collaboration. Globalization seems to have enhanced inter-governmentalization of foreign affairs.[81]

Drawing a comparative contrast, between US States and Canadian provinces[82], we need to note that Canadian provinces like Ontario maintains offices abroad, Quebec seeks international recognition, yet this is modest as seen with respect to US states foray into international arena.

The Judicial Stand upon States in Foreign Affairs:-

It was in 1840 that the U.S. Supreme Court issued its first major decision limiting state powers in foreign relations.[83] In the *Missouri v. Holland* case (1920), the Supreme Court held that, in the United States, the federal government has unfettered power to implement treaties. This line of argument was repeated time and again. The Supreme Court in *Perpich Case*[84] turned down the Governor request over 1986 law that gives the U.S. Department of Defence authority to assign a state's National Guard units to active-duty overseas training without the consent of the governor. In *United States v. Locke* case (2000), the court held that the states are junior partners to federal government in foreign affairs and it struck down state regulations applying to international oil tankers operating in waters of Washington.[85]

The Constitution is ambiguous about the precise responsibilities given to federal and state governments, but somehow, the federal government held a federal monopoly on foreign relations - or, as the Supreme Court occasionally has asserted about 'one voice' in U.S. foreign relations. The Court's language with respect to the absoluteness of federal power in foreign affairs may be unrealistic.[86]

Though the Tenth Amendment has been derided in the Supreme Court decisions, the legal theorists are of the opinion that it shall be continuously to be re-defined as courts and legislatures address the balance of federal and state power.[87]

The Dynamic Federal-State Interaction:-

Law and practice, and theories of American federalism, have moved from the earlier concept of dualism to a dynamic view. Today the national government and the states do not check each other but rather balance each other out by constant interaction to assert power.[88]

It is pointed out that states journey into the realm of US foreign affairs has been sporadic, largely devoid of long term vision and constitutional continuity.[89] The consultations between federal government and units has been 'minimal and observers have expressed concern that this state of affairs may well hurt country international interests'.[90] The silver lining in the cloud is that even though intergovernmental co-operation may be missing out via federal pre-emption, the overall conduct of centre-state interaction in federalism has been co-operative.

There are fears that it leads to weakening of power of national governments' to have a unified stand on issues and gives chances to other governments and non-state actors to profit from the over-lapping of powers.[91]

The traditionally accepted constitutional balance between the federal government and the States are being thought over again. Rise of states in foreign affairs challenges the traditional prevailing view that states have no place in foreign affairs. State and local governments have taken initiatives on foreign trade, investment, education exchanges, humanitarian aid, and environmental concerns as global warming, stem cell research. Individual states have become more responsible to look after their local needs in the global sphere.

V. Decision Making Mechanism for International Trade and Multilateral Treaty Beyond the Senate

Beginning its journey after it gained independence from Britain, U.S. maintained a policy of isolation from the rest of the world. The Monroe Doctrine, weak military capability, quest to develop the economy after the civil war aftermath, geographic separate location made US not to involve itself with other countries.[92]

The Wilson administration's role in establishing the League of Nations, the Roosevelt administration opposing the America First Committee[93] in 1940 and coming up strategy to check German power in Second World War by Pearl Harbour attack, etc were events that made isolationism a by-gone premise for U.S. international standing.

The period after the war saw America change itself from isolationism from a leading world player. The changed scenario saw that the nation engaged in trade negotiations which accelerated at an alarming speed with time.

International Trade Agreements and Fast Track:-

As discussed, there are ways for trade diplomacy for international treaties, beyond the Senate's avenue. Fast Track was developed as an institutional mechanism by the Congress as a means to avoid congressional modification of trade agreements after they were negotiated.[94] Critics look upon it as a way to ease the complex way of Senate ratification of treaties. Congress limits itself to only approve or reject trade deals negotiated by the executive. This denies the legislators and the public the appropriate time to think over the effects of these agreements. The Congress then compensates for its reduced ambit of influence in foreign affairs, by requiring extensive consultation between the Congress and the executive branch before and during trade negotiations.[95] Fast—track procedures do not allow floor amendments, which limits the debate. It calls upon a 'yes' or 'no' vote within ninety days.

Executive Diplomacy and GATT Rounds:-

From 1890 to 1934, Congress delegated its authority to negotiate tariff terms to the executive branch. The Fordney—McCumber Tariff of 1922 was passed after the First World War due to increased wartime demand in agriculture goods and exports. The 1920 Presidential election which led to a Republican Congress which allowed the executive to proclaim tariff adjustments to equalize the costs of production across countries as a trade protection business strategy.[96]

Theorists like Epstein and O' Halloran look upon delegation of Congress power to the executive as a distributional politics that comes from party dynamics to cater to group interests, where they opine that Republicans enacted higher tariffs and Democrats lower ones. The Republicans have been protectionist while the democrats have been for free trade in terms of their orientations.[97]

The Smoot Hawley Act of 1930 was a commercial policy instrument that was protectionist in times of economic nationalism during the time of Great Depression.[98] The 1934 Reciprocal Trade Agreements Act (RTAA), at time of Roosevelt administration, authorized the President to enter into reciprocal agreements with foreign powers making mutual trade concessions for the purpose of expanding foreign markets for American products. This was done without Congress implementing vote and therefore, controversial in Congress, and was initially to be used only as an emergency measure for three years.

This was repeatedly extended, where the Executive had tariff proclamation authority, for original 1947 GATT and four rounds of further GATT negotiations.[99]With the transfer of tariff-making

authority to the executive, the United States could make commitments and make use of the market power to liberalize international trade. Despite later modifications, the RTAA set the fundamental institutional framework for international trade politics.[100]

The delegating authority to the president eliminated protectionist logrolling.[101]The RTAA system was instituted by a Democratic majority which had core interests to favour liberal trade policies. It narrowly survived the Republican majorities in the 1940s and 1950s because of growing divisions over the trade issue within the Republicans' electoral base that led the party to support more export-oriented constituencies in the South and West. The long-term shift in U.S. industrial practises lead to comparative advantage by capital intensive production. This also led to the change that many in the Republican camp also supported trade liberalization.[102]

Although primarily a U.S led initiative, GATT became affiliated with the United Nations alter the Geneva round in 1956. The main reason for this is that the proposal to establish an International Trade Organization (ITO), which U.S was leading, failed to obtain Senate approval. There were five rounds of GATT negotiations between 1947 and 1962 which talked about reducing the tariff barriers.

The major challenge to extended RTAA came when Truman administration decided to use it to negotiate tariffs within GATT. Looking at the problem of international treaties superseding the U.S. Constitution, the Republicans who were upset by Franklin Roosevelt's and Harry Truman's foreign policies in the 1940s and 1950s.

Backed the Bricker Amendment[103] to get back to old days of isolationism. It forbade executive agreements made in lieu of treaties, bypassing the advise-and- consent treaty-review process.

The new international role of America was seen to be there due to the initiatives by the President. At that time, it became a test of political leadership for Eishen however as he battled with the Congress.[104]When the amendment was introduced in 1952-53 Republican Congress, it got bipartisan support. At that time, Senate Minority Leader Lyndon Johnson — perhaps thinking about the executive power question in the context of his own presidential aspirations, teamed up with Eisenhower to kill the amendment by one vote.[105]

The trade expansion Act of 1962 paved way for the Kennedy Round of GATT. As agenda of GATT negotiations increased from tariff to non-tariff barriers, President Johnson annoyed the congress by negotiating upon U.S. antidumping law. This required changes in U.S. law if the United States was to implement them, but legislation is not the function of the executive.

At that time, Senate passed the resolution which stated that the president should not engage in negotiations on matters for which there has been no prior congressional authorization. Congress reasserted its role by establishing a form of legislative veto. Congress did not provide any new delegation of presidential trade authority from 1967 to 1975.

After the Kennedy Round meltdown, the Tokyo round of GATT negotiations (1973-1979), focused upon nontariff trade barriers of labour and environment standards, technical barriers to trade, import licensing procedures, customs valuation, and other aspects of international trade. The hundred negotiating countries, produced agreements, also called as 'codes'.

The Nixon Administration sought new authority to negotiate the Tokyo Round in the GATT, which Congress granted in the Trade Act of 1974. It was argued that there is a need to reduce

parochial pressures upon trade policy making. Also it was emphasized that regular congressional debate and amendment procedures shall hamper the purpose for delegating trade negotiating authority to the President.

The Nixon White House's disregard for separation of powers, global economic breakdown where non-tariff issues were considered a possible economic remedy, lack of opposition from the Republican party (which was the main player in constitutional criticism of the Reciprocal Trade Agreements Act) were factors that enabled Fast Track. [106]

The Senate agreed to a Fast Track system that would allow the president to negotiate on tariff and certain non-tariff issues and sign and enter into agreements before a congressional vote, with a later vote guaranteed on the already signed pacts within a set amount of time under controlled floor-voting rules.[107] Under fast track procedures, Congress can only approve or reject trade deals negotiated by the executive, but cannot change their content. The GATT Tokyo Round was completed under this form of Fast Track. The Fast Track authority was extended for an additional eight years in 1979.

The Reagan administration transformed Nixon's consolidation of presidential trade— agreement power into a new instrument expanding presidential power over an array of new non-trade policy matters that were central to implementing Reagan's *laissez-faire* ideology. The Trade and Tariff Act of 1984 further liberalized the negotiating power of the president. The Omnibus Trade and Competitiveness Act of 1988 (OTCA) extended the president's authority to enter into trade agreements before June 1, 1993, but extended the application of fastrack procedures only for agreements entered into before June 1991.

The 1984 and 1988 Fast Tracks authorized the president to negotiate and enter into agreements that set rules for service-sector, intellectual property, financial and investment policy. This remarkable new expansion of presidential authority — which allowed the branch to diplomatically legislate on a wide swath of domestic on-trade issues — was used to launch the Uruguay Round GATT talks in 1986.

The WTO and NAFTA:-

North American Free Trade Agreement (NAFTA) is an example of regional integration which is first-world trade bloc, involving U.S, Canada and Mexico. Though NAFTA is an example of integration marked by geographic proximity, WTO does not have a regional agenda for free trade.

NAFTA and the WTO have certain similarities. They are different from previous international agreements because of the intrusive nature of the signatories' commitments which impact areas of public policy and penetrate deep into the member states' jurisdiction. Their judicial processes are authoritative for member states which are judged to have broken the new rules. As regimes with their own institutional structures, NAFTA and the WTO can also generate new rules that affect their members. [108]

Ratification of NAFTA was a political issue in 1992 Presidential campaign, where the democratic ideology spoke against it in terms of labour issues involved. The Clinton administration arrived in 1993 with the NAFTA negotiated by the Bush administration signed and ready to go to Congress under Fast Track.

President Clinton. made it a make-or-break issue for his presidency which was resented by the unions and other core Democratic supporters. In an attempt to win votes for it, President Bill Clinton there are reports which show that the President offered support at the next election for Republicans who vote for it.[109]

NAFTA gathered a favourable vote in the Senate of only sixty-one saying yes to thirty-eight senators opposing it. When it was submitted to the House of Representatives, 234 members were in favour and 200 representatives opposed. The president ratified NAFTA shortly there-after. At that time international talks were ongoing to establish the WTO.

Unlike NAFTA, President did not get a signed agreement on Uruguay Round of GATT. The treaty expanding the General Agreement on Tariffs and Trade (GATT) leading to establishment of the World Trade Organization (WTO)[110] inform original GATT agreements were not submitted to the Congress at all.

All duties and quantitative restrictions were eliminated and NAFTA created the world's largest free trade area, linking 450 million people and producing $17trillion worth of goods and services.[111] Unchecked migration, labour and environmental issues, estimated 6,82,900 U.S. jobs have been 'lost or displaced' because of the agreement and the resulting trade deficit, have been the problems within NAFTA which led to its unpopularity.[112]

The operationalisation of NAFTA- created difficulties over labour and environment standards. Many Republican Members insist that labour and environmental provisions not be a part of fast-track legislation, while many Democratic Members maintain that labour and the environment must be principal objectives. But overall, the picture was that the renewal of fast track could only be done only if president allows for the Congress to negotiate standards.

There were fears that the concentration of trade policymaking power in one elected president, who faces election after every four years, meant that accountability was extremely attenuated, in this mechanism. The Fast Tracked trade agreements were establishing and empowering supranational institutions like WTO.

Congress pointed towards objectionable non-trade provisions neither in the pacts, which were nor under executive powers. Therefore, the legislation to renew the President's trade negotiation authority was considered in the 104thand 105th Congresses but not enacted into public law.

The studies on analysis of the NAFTA bill showed that the urban and sub-urban democrats were both opposed to it. There were also strong differences amongst anti-and pro NAFTA camp of Republicans. Senate voted in favour of trade agreements, representatives tend to become protectionist because of prospect off acing re-election.[113]

The 1993-1994 votes on NAFTA, Fast Track and the WTO respectively got huge opposition due to pressure from public-interest coalitions; growing Democratic congressional concern about the Clinton trade agenda and with a Republican-controlled Congress', partisan politics prevailed. The Clinton administration, known for its trade-expansion agenda, witnessed that from1995 through 2002, there was no congressional delegation of trade authority.[114]

The WTO Ratification:—

WTO is an international treaty, so it should have gone through the advice and consent, the treaty review process of the Senate. In contrast, the picture that came forward was different.

Lame Duck Session occurs in United States Constitutional practice, after a new successor is elected but before the ending of term of the current Congress.[115]The participants present in that session may not be present in the new session.

Before 1933, the last regular session of the Congress was always lame duck. The Twentieth Amendment changed the situation that such a session can occur only for specific reason for an action by the Congress or the President.[116]The Congressional Research Service archives point out that between 1940 to 2008, Congress has had 17 lame duck sessions. In some cases, the Congress meets after the election break in November and adjourns after Christmas, whereas in other cases, it may be for a specific 'pro-forma' matter. The 1994 lame duck session was to deal with a specific situation- the GATT/WTO.[117]

In 1994, the early ratification of Uruguay Round was stressed on part of all major signatories. The Congress was on recess break till October. It was reconvened on November 28 for the specific reason for passing the bill for new General Agreement on Tariffs and Trade (GATT). The bill received support in both houses, in House on 29 November and in Senate on 1st December 1994. However, it was passed by simple majority but not put for voting in the Senate. Congress approved GATT under Fast Track during a lame duck session of Congress on December 1st, 1994.[118]

Had the draft been sent to Senate it would have rejected it. Critics also point out that this would have endangered nearly eight years of parleys and negotiations in the UR. The Uruguay Round Agreements Act (URAA) was an Act of Congress in the United States that implemented in U.S. law the provisions agreed upon at the Uruguay Round of negotiations of the General Agreement on Tariffs and Trade (GATT).[119]

During the ratification period after the Uruguay Round Agreement was signed, there were remarks on the issue of sovereignty effects of the WTO. As a result, 4] congressmen urged President Clinton to delay the vote on the Uruguay Round until July 1995. The decision of the then Chairman of the Senate's Commerce Committee to hold up, as well as President Clinton's threat to keep Congress in session until the implementing legislation is disposed off, created new fears over ratification of Uruguay Round.

There appeared to be a political compromise between President Clinton and the Congress; the Clinton Administration supported Republican Senator Bob Dole's proposals to set up a Commission to determine if U.S. interests would be harmed by DSB decisions WTO Dispute Settlement Review Commission and, in exchange, the Congress ratified the Uruguay Round Agreement without delay at the end of 1994.[120]

From the year 2002 till present:-

When President George W. Bush came into office, he sought trade-negotiating authority.[121]Without fast-track, it is virtually impossible to work out a trade deal without getting bogged down in Congress disputes.[122]

In the wake of the September 11 attacks, the U.S. House approved Fast Track by one vote in December 2001, and the Senate approved Fast Track in May 2002. Because the House and Senate bills were different, they were reconciled in a 'conference report'. That version of Fast Track was voted on again, passing in both the House and the Senate, and went on to be signed by the president.

Many Democrats who had ardently supported past Fast Tracks led the fight against this one, focusing on the implications of providing the executive branch with enormous authority to implement non-trade policies. After eight years when the Congress restored trade authority, it signified a commitment towards new global negotiations. This helped the US executive to lead the way in launching Doha Development Round, after what happened in Seattle. China and Taiwan were also brought under WTO.[123] The Bush administration dispensed with executive-legislative coordination practices.

The end of Bush era, the expiry of fast track and lack of initiative shown by the Obama administration to renew the same, hopes are being pinned upon consensual basis of policy stand in international trade. This should involve meaningful consultation about provisions of trade pacts where state rights and issues are affected. Political commentators have pointed that Congress needs to respect state sovereignty and that sane policy decision implies that states should be informed before signing any trade pact.

The political environment in Congress, as seen from votes on trade agreements like NAFTA has been highly partisan, juxtaposed with the difficulties in Senate treaty process. This makes the following options available for the Congress for the future of Congress that can be summed up as: 1. No TPA Renewal, 2. Extend it temporarily, 3. Renew TPA or 4. Grant permanent TPA authority. Let us see which course the Congress shall take in future depending upon contextual forces determining the balancing delegating act.[124]

The States grievances and WTO:—

WTO is an example of authoritative supranational governance. Any WTO member can challenge the nonconforming federal and state policies, which violates the international trade agreement in trade tribunals. State governments do not have standing before these tribunals. The state officials have to rely upon federal government to defend their policies.

If a state law or policy is not in conformity with WTO rules, which have been agreed upon by the federal government, the latter can use all use all constitutionally available powers — for instance pre-emptive legislation, lawsuits and cutting offfunding — to force state governments to comply with trade tribunal rulings. The procurement rules contained in trade pacts such as the WTO Government Procurement Agreement (GPA) hinder the ability of states in the economy, via the need to promote indigenous material, prevent off-shoring of state jobs etc.[125]

Today's international trade agreements are no longer about traditional trade matters of tariffs and taxes, but non-tariff /non-trade state level regulatory issues. In mid 1990s, it is argued that if thirty seven governors agreed to adhere to WTO procurement rules, studies have researched how this consent level has declined, in other negotiations upon international trade. e.g.: during the Central America Free Trade Agreement (CAFTA) debate in 2005, only nineteen governors choose to do so.[126]

The United States has made commitment towards GATS in WTO, in areas like finance, telecommunications, energy, mining, fishing, health insurance. The extensive regulatory aspect of GATS affects how states can deliver on these services, which are under their domain. This affects states ability to regulate upon the service sector committed upon in GATS, which has been done without consulting them. [127]

The states have made their opposition towards trade agreements. With the commitments by the federal government in free trade agreements, they have been able to perceive that losses incurred by them are more than the gains offered. There have been instances where state representatives have approached federal authority to voice their concerns. Example: In 2006, governors of Maine, Oregon, Michigan, and Iowa wrote to USTR, in relation to threatening impact of off-shoring of service sector jobs as detrimental to states interests.[128]

Several state legislature passed resolutions upon expiry of fast track, criticizing the way it has dismissed checks and balances in international trade and did not provide for any meaningful consultation with states.[129]States have also put forward the need to have debates in state legislatures and vote on whether to 'optin' before being bound to any international trade issues that impinges upon their jurisdiction.

USTR and IGPAC:-

The Congress established many advisory committees to provide feedback from outside the federal government to negotiators in the office of the United States Trade Representative (USTR), which is an executive office of the President. The USTR is a mediating forum and interface between the executive, the states, and business investors in international trade. It was established in 1962 as a consequence of the Trade Expansion Act 1962, which made it mandatory for the Executive to appoint trade representatives to consult the Congress in trade negotiation rounds.

In 1988, the Intergovernmental Policy Advisory Committee (IGPAC) was formed to advise the USTR. It prepared a comprehensive review of the NAFTA and GATT agreements prepared by state and local officials. The members of IGPAC were appointed by the president, despite the change in administration in 1993, there was substantial continuity between the 35 IGPAC members who reviewed NAFTA and reported on it to President George Bush and the Congress in September 1992 and the 30 IGPAC members who reported to President BillClinton on the Uruguay Round Agreement in January 1994.

With its foundation in 1962, and with an annual budget of $ 44 Million and an elaborate staff, the work of USTR has not been impressive on the federal front. It has gained significance as the nation moves ahead with its trade agenda, however consultative mechanisms with the states have remained ad-hoc.

USTR met IGPAC on ad-hoc basis. The major arguments of IGPAC over the years have been that there is lack of clear structure upon federal-state policy consultation. These trade agreements have binding international obligations, which the nation has to fulfil regardless of its internal politics. Terms of an international trade agreement like Uruguay round of GATT leading to WTO; have expanded from tariffs- quotas, to non-tariff barriers like economic development policies. The latter affects the constitutional domain of not only the federal, but the state government also. The demand of IGPAC has been over the years to broaden non-partisan trade policy dialogues.[130]

It is not that states are averse to trade to trade liberalisation. In the past also, the states have supported the various bilateral, multilateral trade initiatives of the executive. Given the comparative difference in states exposure to international domain, lack of structure to deal with extrageneous dispute settlement, articulation of states interests upon trade issues, impact of trade and investment upon their jurisdiction, there is a need for balanced analysis of trade agreements.

In this changed atmosphere, where the states have the pressure generated upon by the external forces, the states have also voiced the need for effective linkage mechanisms. The internationalization of policy aspects renders the conventional mechanisms non-workable. If there has to be any meaningful federal partnership or engagement, must be increased capacity for communications and coordination between state governments and the federal trade policy system in the office of theUSTR.[131]

Reforms:-

The executive branch is scattered and internally un-coordinated. There is a need for an extra agency for international trade issues on line of National Security Guard which looks after the defence plans of the executive. Bay less Manning proposed idea of United States Council on International and Domestic Affairs, to manage the national government policy in foreign affairs with that of stateinitiatives. However, such a council never came to existence.[132]

The use of fast track to negotiate trade agreements is not an apt mechanism in the present times when international trade is no longer the exclusive domain of the federal government. Its impact penetrates towards the issue of state interests.

The TPA represented a balance and compromise between the legislature and executive, with the executive needed to the consult the legislature. Rising trade deficits, job-loss, income equalities and absence of right channels of coordination with the Congress and states, trade promotion authority became problematic.

In international reality, where there is a distinction between hard (military, defence, security) and soft (trade, culture, environment) issues, in the realm of high-low politics. The federal strategy used to work out ratification mechanism of WTO (international trade is a soft issue), via the fast track, has been dubbed by theorists as 'using hard laws in international economics'. Its peculiar characteristics of revolves around the need to reduce intergovernmental transactional costs. In the federal context, it can be seen as an attempt to put things in line by passing the Senate treaty exclusivity.[133]

In a recent 2004 report, major policy actions which are demanded on part of USTR have been the creation of Federal-State Investment Policy Commission to provide an institutional structure for bipartisan US federal-state trade policy. The major recommendations are as follows:[134]

1. Trade policy capacity with resources relevant to state concerns.
2. Inclusionary attempt by USTR to update states about issues, by sending copies to Governors, state leaders, attorneys, instead of its present single point attempt.
3. Improved trade data analysis, with comparison of different states against different global trading regions, with insight into allocation of resources.
4. Need to discuss issues of international procurement from states perspective.

The National Conference of State Legislatures, bipartisan organization that serves the legislators and staffs of the nation's 50 states, opines that states supports broadening participation in the WTO.[135] Its concern to improve federal-state interaction in the global trade integration are the following:-[136]

- Need for federal legislation that to consultation between the states and the federal government on trade policy,
- Need to have federal-state commission on international trade,
- U.S. negotiators must consult regularly with the Intergovernmental Policy Advisory Committee as well as other state policy and regulatory bodies to ensure that the U.S. position incorporates and protects state interests,
- USTR's policy of communicating only with governors on procurement issues does not adequately provide for consultation with state legislatures or consider a need to change state law to adjust and obligate state procurement policy.

There is need to have states' prior informed consent shall also indirectly work to safeguard the constitutional division of power and curtail unilateralism. An example in this regard can be the Trade Reform, Accountability, Development and Employment Act (TRADE) Act, introduced by Democratic Senator Sherrod Brown and Democratic Rep. Mike Michaud in June 2009 with 103 original co- sponsors. It seeks to put in place a new mechanism of trade negotiation by the executive in place of the fast track, where state consultation is high. E.g.: permitting states to determine to which investment, service sector and procurement regulatory terms they will be bound.[137]

The use of trade agreements rather than treaties for U.S. participation in such economic entities as NAFTA and WTO is sign of weakening of federalism and the powers of the states considerably. One reason for this weakening is that such agreements are not subject to the two-thirds vote rule in the U.S. Senate. This rule was placed in the U.S. Constitution mainly to protect southern economic interests by ensuring that commercial treaties would not be approved by Congress without southern support. By contrast, trade agreements are approved by a simple majority vote of both houses of Congress. Congress does not actually vote on these agreements per se; instead, it votes on domestic legislation to implement the agreements. It is quite likely that neither NAFTA nor WTO would have been approved if they had been submitted to the Senate for ratification as treaties. Consequently, the scope of the 'Agreement or Compact' power (Art. 1, Sec 10) remains an open question.[138]

VI. Massachusetts Burma Law Case

Massachusetts is a state in the New England region of North-Eastem United States. Even at the time of the American Revolution, the capital of Boston revolted against British Colonialism in the famous Boston tea party.[139]

The Case History:-

Looking at the atrocities committed by the military Junta in Myanmar, previously called Burma, the state declared a law in 1996, with the tough 'Selective Contracting' law which targeted companies doing business in Burma, called Bill H2833, sponsored by Rep. Byron Rushing, passed the State Senate by unanimous voice vote. It then went to the then Gov. William Weld for signing.

The Massachusetts bill prohibited the state's purchasing managers from buying goods or services from any company doing business in Burma. With a colossal budget, it put billions of dollars of state purchasing power in the economic boycott. 'Doing businesses had a large connotation like

having headquarters and franchises, providing financial services, trade in goods and services etc. Most of these aspects are also under the agenda of WTO, to which US is a signatory.

Bi-partisan Burma sanctions bills were at that time pending in the US House and Senate.[140] Though cities like San Francisco, Oakland had passed bills against Burma, but The Massachusetts bill was the first state level Burma sanctions bill in the US.

Three months after this, the Congress also passed a statute for sanctions upon Burma. As declared in the statement upon the Omnibus Consolidated Appropriations Act, 1997, the executive vowed to use sanctions as a tool of extra- territoriality in foreign affairs diplomacy.[141] The sanctions imposed by the Burma statute were more severe than the Congress sanctions.

In the past also, at the time of South African apartheid regime, foreign divestment in form of selective purchasing created financial flux. Laws for selecting purchasing against Apartheid regime in South Africa were passed by nearly 25states over resistance to the racial regime.

Burma's pro-democracy movement, led by Nobel Peace Prize holder Aung San SuuKyi, appealed for the help by the international community in terminating the rule of the military junta. Widespread use of forced labour, abuse of human rights, curbing pro-democracy protests, were the humanitarian grounds for opposition to the military junta.[142] Massachusetts was the first state to terminate purchasing contracts with companies doing business in Burma.

The Massachusetts Burma Law Case initiated a debate over inter-connected nature of inter-state commerce, blurring of domestic-intemational agenda and most important about using the arena of judiciary to debate the federal govemment's commitments made at the international front, which clashes with the powers of the state.

From 1998-1999:-

In April 1998, a consortium of United States firms formed the National Foreign Trade Council (NFTC), a non profit organisation based in Washington. This industry association challenged the Massachusetts Burma Law, as it is an unconstitutional act by the state. NFTC in their suit against Charles D. Baker, the then Secretary of Administration and Finance of the Commonwealth of Massachusetts, held that the law by Congress already exists and should pre-empt the state law.[143]

In November 1998, Federal District Court ruled against the Burma law on the basis that looking at the broad constitutional scheme; it encroaches upon federal foreign affairs power. In June 1999, the First Circuit Court of Appeals also found the Massachusetts law to violate both the dormant Foreign Commerce Clause and the more general foreign affairs power.

The verdict re-iterated the stand that has been held in previous cases, like *Zschernig v. Miller* (1967), that in issues which involve state in foreign affairs and lntemational relations, the Constitution entrusts this power solely to the Federal Government. This judgement over the Oregon law illustrated the dangers which may arise if each State, speaking through its probate courts, is permitted to establish its own foreign policy.[144]

The WTO-GPA and States Pleas:-

As the deliberations over the case went, significant issues concerning federalism, foreign affairs, foreign commerce, pre-emption of state law, and also about mechanisms to negotiate

international trade agreements in global times where there are overlapping power domains, amongst others, came forward.

It was argued that whether state law should be pre-empted whenever Congress adopts a related foreign policy law that does not contain a statement of intent to pre-empt state law. If no, then why this bill be pre-empted. If yes, then there are hundreds of state laws that could be affected by congressional adoption of the eighteen agreements of the World Trade Organization.''[145]

The EU and Japan challenged the law at the WTO in 1997. They asked the World Trade Organization (WTO) to determine whether the 'Burma law' violated lnternational trade rules. It was argued that the Massachusetts law went against WTO procurement agreement. It imposes restrictions purely on observed political considerations, which do not confirm to the economic considerations as needed tobe implied as a sanction under unfair trade practices.

The Government is the biggest purchaser of goods. At the same time, there is political pressure to favour domestic suppliers over their foreign competitors. The Agreement on General Procurement ensures that the government procurement more transparent and to ensure it does not discriminate against foreign products or suppliers or protect domestic supplier.[146]

The GPA covers 27 countries in terms of the national agencies and sub national governments and U.S. is one of its signatories. Their names are indicated in the list of appendices to the agreement. Price and Performance are the only two criteria to determine procurement under GPA. Location and process of production are therefore excluded as criteria.

The WTO Agreement on Government Procurement does not look into non- economic considerations for trade sanctions. This leaves out any room for state autonomy.

Later, EU suspended this panel over Burma Law in WTO[147], thus the debate over aspects of WTO agreements and state rights did not take place. Though EU challenged this law on temporary basis in WTO since it was without legal effect. While expressing displeasure over US extra-territorial economic sanctions, it also alerted the US authorities about the danger of proliferation of such laws in future as the then Governor Weld hoped that other states should follow the same.[148]

Interestingly at the very same time, the European Union filed an Amicus Brief before the Supreme Court. In subtle ways while pointing how it affects EU- US relations, it made issues that cases like Massachusetts Law, interfere with the normal conduct of international relations and raise questions about the ability of the United States to honour its international commitments by highlighting that it' calls into question the settled lines of authority in US'.

Had it been debated, think tanks argue that it would have created a crisis within federalism and international trade agreements. As per data provided by legal and trade institutes, there are nearly 29 states like Alabama, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Virginia, Washington and Wisconsin, with reciprocal preference laws, whichsupports policy of buy with America Laws. This contradicts with WTO-GPA.[149]

If successful, the WTO challenge would have provided a basis for the WTO to authorize Japan and the EU to impose trade sanctions on the United States. This would not have had any effect

upon the Massachusetts law, as article XXII: 7 of WTO-GPA holds that under trade rules do not have pre-emptive effect on state Laws.[150]

Massachusetts echoed its surprise that they were asked to adhere to WTO procurement rules, one of the parts of the lntemational trade agreement of WTO, which they had never approved. The United States adopted a politically feasible method to incorporate concerns of the state. While signing the GPA, the executive asked all the state governors to submit their voluntary letters of commitment, and obligated thirty-seven states to follow the GPA based on letters solicited from governors of those states. At that time Governor Bill Weld, did agree to the GPA.[151]Later the Governor sent a letter to USTR highlighting the absence of any consultative mechanism with the state, which should let the state adhere to terms of contracted treaty. Though Massachusetts is listed in the U.S. commitments under the GPA, the letter from William Weld, then Governor of Massachusetts did not commit the state to follow the GPA.[152]

The Judicial Verdict:-

At this time there were fears that this instance shall create new fears about the states assertive voice for the future of WTO agreements that the President and theCongress were trying to negotiate.

In November 1999, the U.S. Supreme Court accepted the case. As the proceedings began, seventy eight Members of Congress, twenty two State Attorneys General, sixteen City and County Governments, seven State and Local Government Associations, sixty six non-profit Organizations[153], came forward and supported Massachusetts law by filing amicus curiae, 'friend of the court'. The states used their own tools of litigation, from their own finds, (not expensive although). This was remarkable to display their solidarity for other states rights and their vision of federal bargaining in foreign affairs.[154]

It was argued that the tenth amendment is a safeguard of state jurisdiction of powers. The Court often uses 'pre-emption' under the 'presumption' of dormant foreign affairs by the states to invalidate state laws and give primacy to the federal government. In this case, Massachusetts did not establish direct contacts with the people of Burma, so question of intruding upon federal foreign policy is ruled out. The foreign commerce and foreign affairs powers of Congress and the President do not contradict the safeguards of federalism under the first and tenth amendments.

In the case of *American Insurance Association v. Garamendi* (2003)[155] the Court invalidated Califomia's Holocaust Victim Insurance Relief Act (HVIRA) , where the California Act required insurance companies doing business in California to disclose all policies issued in Europe between 1920 and 1945. The executive agreement between President Clinton and German Chancellor Schroder that had been set up a fund to compensate Holocaust victims , was neither approved by the Senate as a treaty nor enacted by Congress as a statute. According to the Court, the state's law unconstitutionally interfered with the foreign affairs power of the national government, and such agreements are generally 'fit to pre-empt state law, just as treaties are.'

The US Supreme Court also struck down the Burma law upon the same premise as that of the lower courts. It was held that unconstitutionally impinged on the federal government' exclusive authority to regulate foreign affairs, and interfered with the federal govemment's ability to speak with 'one voice'. In this case, the court did not attempt to demarcate what can be realms of state action in foreign affairs. The executive and the congress have always distanced themselves from this question.

A multilateral trade treaty like WTO is an instance of coercive federalism in two important ways: imposing standards e.g. labour, environment upon the states, and the politics of pre-emption that lets state laws be considered null and void to give primacy to federal laws. With dawn of New Federalism, the U. S. Supreme Court was expected to become protector of "states' rights. However, it moved away rather from enforcing the Tenth Amendment and did not device any measure for safeguarding state rights in relation to the Congress.[156] As in the past, states governments are not happy with their 'domestic place in an exclusively vertical federal arrangement and seek recognition of their capacities in the larger world. The judiciary should be sensitive to these concerns.[157]

The court needs to also have a look at the pulse of the current time. The intensified competition among states that has come with economic globalization and the disaggregation of the nation-state- are the main factors determining the constitutional norms beyond the traditional foreign relations law canon. Further, the federal courts have done little to differentiate between U.S. treaties and international agreements.[158]

The mechanics of constitutional law, which are constrained and legitimated by an indigenous instrument and executed by judicial institutions, come at odds to factor in the new external inputs.[159] The U.S. foreign relations law is to rethink how its jurisdictional doctrines will apply in a world in which "foreign relations" is no longer a distinctive category.[160]

The Congress and Pre-emption of State Laws:-

In case of clash of a state law and a national law, the federal government has three options:

1. Permit the state,
2. Work out an inter-dependence strategy via co-operative federalism, and lastly
3. Displace the state act via coercive federalism. This trend was also seen in judicial decisions based on the logic that too many laws shall breed in efficiency and the net result would be loss of market sake in presence of multiple regulating regimes.[161]

Pre-emption can be categorised as: 1. Conflict pre-emption happens when the state rule obstructs the achievement of federal objectives. 2. Field pre-emption occurs when the federal interest in the field is dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.[162]

The Congress did not pre-empt Burma Law. Even in the past it has pre-empted state laws where interstate co-operation did not produce the result. Though states are equal under the Constitution, yet Congress can employ three ways to pre-empt state laws. Congress at its will may employ its delegated powers prospectively or retrospectively to enact pre-emption statutes, subject to court challenges.

The nature of congressional pre-emption is complex. There are three broad types of pre-emption statutes——complete, partial, and contingent. Complete pre- emption statute, removes all state regulatory powers in a specified field a Partial pre-emption statute, either removes state regulatory authority from part of a field or establishes minimum standards allowing states to continue to regulate provided they establish and enforce standards at least as stringent as the national standards. Continent pre-emption statute, is applicable to a state or local government only if a specified conditions exists within the unit or states fail to enact harmonious regulatory

policies in a field by a congressionally.[163] The very of pre-emption take the soul away from Constitutional framers vision of a republican union, leading toCongress asserting powers in Unitary ways.

The Congress is the most accountable branch in the federation. At this time, the Congress had delegated authority to the executive to negotiate trade rules. It is argued that the silence of Congress, in its powers of pre—emption, may be seen as a token to garner states support for lntemational trade agreements. An assertive Congress could have further annoyed the states.

Glimpse of Constituent Diplomacy:-

The Massachusetts law marked an important step in Constituent Diplomacy. The lack of federal resistance also created a suitable groundwork for the notion of constituent diplomacy to proceed uninhibited. The case led to important thoughts upon important issue that how courts, as seen in the three levels of appeal, should formulate the foreign relations test which should allow greater sub-national participation while simultaneously protecting national interests and preventing federal exclusivity.[164] It presented a new face of an actor that can influence statist dominated agenda of international relations, beyond the power of the state, namely sub-unit of Massachusetts that imposed sanctions.[165]

Therefore, it highlighted the relationship between federalism, foreign affairs, commerce and commitments towards multilateral trade agreements and the need for consultative mechanism.

Conclusion:-

The federal-state relationship is a crucial aspect. It cannot have a definite answer in any age as it is a product of every generation, growth and evolution. The change within the paradigm of treaty making and foreign affairs within the federal apparatus is a product of the same.[166]

The discourse on foreign affairs needs to be contextualized in terms of macro framework where state governments have reasons to think about their international role, by being a part of the compact union. The global phenomena cannot be interpreted by isolating the local. The institutional strategy of fast track was constitutionally legitimate, yet federally deficient looking at how globalisation has put international trade in an arena of overlapping jurisdictions. A good federal practice needs ethos of enlargement of trust and co-operation between the two levels of government. This calls for reforms in working of institutional mechanics and intergovernmental co-operation. The judicial stand may not be in favour of tenth amendment and state new assertion, yet the beauty of federal design lies in pondering over this delicate balance with time again.

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