THE WTO AND FCTC DISPUTE SETTLEMENT SYSTEMS: FRIENDS OR FOES?

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ABSTRACT

This article examines the relationship between the dispute settlement mechanisms of the World Trade Organization ("WTO") and the Framework Convention on Tobacco Control ("FCTC"). It concludes that since the two regimes relate to different international legal obligations, no conflict of jurisdiction exists between their dispute settlement bodies. In any case, the mere existence of an alternative dispute settlement system (i.e., the FCTC) does not preclude a WTO panel from examining a dispute with respect to any alleged violation of WTO obligations.

The article also notes that the relevant WTO case law clearly establishes that an extraneous agreement concluded between WTO Members may constitute a legal impediment to the exercise of jurisdiction by a panel only if it clearly reveals such intention, relates to a specific dispute, and does not lead to the violation of applicable WTO provisions. This means that even the amended version of Art. 27.2 of the FCTC, which precludes recourse to other dispute settlement mechanisms with respect to national

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tobacco control measures, will not have any legal consequences for the jurisdiction of a WTO panel.

KEYWORDS: *FCTC, WTO, conflict of jurisdictions, competing jurisdictions, tobacco control*

I. INTRODUCTION

Today's world of fragmented and specialised international legal regimes poses complex legal challenges. Different specialized systems may provide their own mechanisms for the settlement of international disputes. Thus, the fragmentation of international law may relate not only to substantive rules but also to institutional arrangements for settling disputes between states (or between states and private parties as in case of international investment arbitration). This heterogeneity may, in turn, lead to jurisdictional overlaps between various fora, result in contradictory judgments/decisions that can affect the coherence of the international legal order, and finally undermine its legitimacy.

The relationship between the dispute settlement mechanisms provided, on the one hand, by the Framework Convention on Tobacco Control[1] (hereinafter "FCTC" or "Convention") versus, on the other, by the World Trade Organisation (hereinafter "WTO"), bilateral investment treaties (hereinafter "BIT"), and regional trade arrangements[2] (hereinafter "RTAs"), has recently attracted the attention of not only scholars but also states. One reason behind this increased interest is the number of high profile international litigations that have been launched in recent years by transnational tobacco companies (hereinafter "TTCs"), acting either directly or indirectly, against states. As a consequence, some countries have argued that the FCTC should be privileged over other dispute settlement mechanisms when national tobacco control measures are at stake.[3] Advocates of this approach see it as an efficient way to protect the sovereign rights of states in the FCTC's regulatory sphere. There are, however, also those who believe more generally that the fragmentation of dispute settlement mechanisms is a characteristic and inevitable development in international law, with various mechanisms simply applying to different aspects of a dispute.[4]

The focus of this article is on the relationship between the FCTC and WTO dispute settlement mechanisms. Its aim is to determine whether, and

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[1] World Health Organization, WHO Framework Convention on Tobacco Control, *opened for signature* June 16, 2003, 2302 U.N.T.S. 166 (entered into force Feb. 27, 2005) [hereinafter FCTC].

[2] A new generation of RTAs, such as the recently signed Comprehensive Economic and Trade Agreement (between the European Union and Canada) or the Trans-Pacific Partnership (between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States (until 23 January 2017) and Vietnam) also include investment chapters that provide for an investor-state dispute settlement mechanism.

[3] See the discussion in *infra* Section 3.

[4] *See generally* YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS (2003) (and the literature cited there). *See also* PHILIPPA WEBB, INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION (2013) (particularly Part 5).

under what conditions, the FCTC dispute settlement mechanism may take precedence over its WTO counterpart by removing the jurisdiction of a WTO panel (or by making a case inadmissible)[5] in a dispute that relates to national tobacco control measures that have some international trade aspect. The restricted approach taken by this article is justified for two reasons. First, international investment and RTA law remains a largely fragmented system. As a consequence, any examination of problems posed by competing/overlapping jurisdictions will need to take into account this fragmentation, which is a task that simply goes beyond the modest objective of this text.[6] Second, the relevant case law on jurisdictional overlaps remains limited under international investment and RTA law. On the other hand, the WTO dispute settlement bodies have already had a chance to address this problem and have set out some general guidelines on the relationship between the WTO and external dispute settlement mechanisms. This obviously makes the WTO case study more interesting and less speculative. In this context, it also should be added that while this article is focused on the issue of jurisdiction, its concluding part also briefly discusses the possible ways in which decisions of an *ad hoc* FCTC arbitration tribunal may be taken into account by panels in WTO proceedings.

The article proceeds as follows. The first part briefly summarises the basic rules of the FCTC, including its provisions on dispute settlement. The second part looks at the recent tobacco-related international litigations and the reaction of some FCTC Parties to these developments. The third part of the article turns its attention to the character of the relationship that exists between the WTO and FCTC dispute settlement mechanisms, looking at it through the prism of WTO case law. It also attempts to assess the legal consequences of any potential future modification of the FCTC dispute settlement clause. The fourth part offers conclusions.

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[5] Note that the WTO dispute settlement bodies, unlike other international tribunals, does not make a formal distinction between admissibility and jurisdiction. Both terms have been used in the past interchangeably by the WTO panels and the Appellate Body. *Cf.* GRAHAM COOK, A DIGEST OF WTO JURISPRUDENCE ON PUBLIC INTERNATIONAL LAW CONCEPTS AND PRINCIPLES 2 (2015).

[6] As a general remark it may be stated that an investment tribunal cannot decline its jurisdiction just because some other alternative dispute settlement system might be available to assess the same factual situation (*e.g.*, introduction of a governmental measure). Note that there are different parties in both settings (*e.g.*, State Parties in the FCTC dispute settlement system, compared to private investors and a host State in investment arbitration). Under the dominant theory of direct rights, an investor is not a proxy for the State, and has his own direct dispute settlement rights. Even if a clause in a treaty prohibits a recourse to investment arbitration, this would create an obligation between State Parties and cannot restrict the rights of an investor that arise from a bilateral investment agreement (or other treaty that provides an investment arbitration mechanism). For more detailed discussion, see Brooks E. Allen & Tommaso Soave, *Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration*, 30(1) ARB. INT'L 1 (2014).

II. THE FCTC AND ITS DISPUTE SETTLEMENT SYSTEM

The FCTC is an international framework treaty adopted in 2003 under the auspices of the World Health Organisation (hereinafter "WHO"), with almost universal participation (180 parties).[7] The objective of the Convention is to contribute to the protection of global public health by setting up a new system of governance in the area of tobacco control (*i.e.*, "to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke").[8]

The Convention establishes various general standards for national demand- and supply-related tobacco control measures. As far as the first group is concerned, the FCTC encourages Parties to adopt price and tax measures that increase the price of final products and, as a consequence, reduce demand for them (Art. 6). The catalogue of non-price measures includes regulations protecting against exposure to tobacco smoke in indoor workplaces, public transport and indoor public places (Art. 8); regulations on the contents and emissions of tobacco products (Art. 9); disclosure requirements imposed on manufactures and importers relating to the constituents and emissions of tobacco products (Art. 10); various packaging and labelling requirements, such as those which determine a minimum size of health warnings (Art. 11); and comprehensive bans on tobacco advertising, promotion and sponsorship (Art. 13). The provisions relating to the supply side address the prevention and fight against illicit trade in tobacco products (Art. 15); restrictions on the sale of tobacco products to minors as well as other measures limiting the access of underage persons to such products (Art. 16); and promotional activities for economically viable alternatives for tobacco workers, growers and individual sellers (Art. 17).

The FCTC establishes two bodies: a permanent Convention Secretariat and the Conference of the Parties (hereinafter "COP"). The first body supports the Parties in their implementation efforts, provides necessary support for the COP, and executes its decisions. The COP is the highest governing body of the Convention, and is comprised of all FCTC Parties. Its main task is to regularly review the operation of the Convention. It can also take decisions necessary to promote its effective implementation, adopt additional protocols, annexes or amendments to the Convention (Art. 23.5), and develop guidelines for the implementation of the provisions of

[7] Data as of 4 March 2017. The full list of the FCTC Parties is available at UNITED NATIONS TREATY COLLECTION: STATUTE OF TREATIES, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&clang=_en (last visited Mar. 10, 2017).
[8] FCTC, *supra* note 1, art. 3.

the FCTC. As of 4 March 2017, the COP has so far adopted seven guidelines.[9] Regular sessions of the COP are held every two years.

The FCTC also contains its own dispute settlement mechanism, which is available for disputes over the interpretation or application of the Convention. The FCTC dispute settlement clause resembles the mechanisms conventionally included in multilateral environmental treaties. In particular, according to Art. 27.1, the Parties are obliged to seek settlement of their disputes through diplomatic methods such as negotiation, good offices, mediation, or conciliation (this option is available to all FCTC Parties). The FCTC also envisages, for disputes that are not resolved through diplomatic means, a compulsory *ad hoc* arbitration. This option, however, is only available for Parties that have explicitly accepted it in a separate declaration.[10] So far only three countries have submitted such declarations[11] . But in line with the principles of general international law, the consent of parties can arguably be also expressed *post factum* (*i.e.*, after a dispute emerges). This mechanism, however, has never been used in practice, nor has the COP adopted any arbitration procedures as required by Art. 27.2 of the FCTC.

III. INTERNATIONAL TOBACCO-RELATED LITIGATIONS AND CALLS FOR REFORM

TTCs have a long tradition of relying on international trade and investment obligations in their strategy of discouraging countries from adopting restrictive tobacco control measures. For example, Canada decided to withdraw in the 1990s from its plans to introduce plain packaging after Philip Morris warned that it would launch a dispute over

[9] These include Arts. 5.3, 6, 8, 9 and 10, 11, 12, 13 and 14 of the FCTC. All guidelines are available at the official FCTC webpage: ADOPTED GUIDELINES, http://www.who.int/fctc/treaty_instruments/adopted/en/ (last visited Mar. 10, 2017).

[10] FCTC, *supra* note 1, art. 27.2 specifically provides:

> When ratifying, accepting, approving, formally confirming or acceding to the Convention, or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 of this Article, it accepts, as compulsory, ad hoc arbitration in accordance with procedures to be adopted by consensus by the Conference of the Parties.

[11] These are Azerbaijan, Belgium and Vietnam. The Vietnamese declaration is however very restricted as it requires a separate agreement between the Vietnam and another FCTC Party before the arbitration process can be initiated. Conversely, Brazil and the Czech Republic have declared that they will not support any proposal to utilize the FCTC in a manner that runs contrary to free trade principles.

the expropriation of its intellectual property rights.[12] The same company also threatened Canada with a challenge under North American Free Trade Agreement (hereinafter "NAFTA") rules over its proposal to ban misleading descriptors (*e.g.*, light and mild).[13] Similar occurrences can be found in other parts of the world.[14]

However, it was only recently that TTCs began taking a more aggressive stance by actually launching legal proceedings against states at the international level.[15] In 2010, Philip Morris, through one of its subsidiaries, initiated a proceeding under the BIT between Switzerland and Uruguay (hereinafter "Switzerland–Uruguay BIT"),[16] claiming that various tobacco control measures adopted by Uruguay, such as an increase in the size of health warnings on cigarette packages and a single presentation requirement (*i.e.*, limiting each cigarette brand to just a single variant or brand type), are incompatible with various provisions of the Switzerland–Uruguay BIT.[17] BITs are international agreements concluded between states which set certain standards for the protection of investments made by the nationals of one state in a host state. Most BITs establish a compulsory dispute settlement mechanism in the form of international investment arbitration, where a foreign investor can bring a claim directly against a state (without the need to exhaust local remedies or the intermediation of its own state). The Switzerland–Uruguay BIT is no exception, and provides that disputes should be decided by *ad hoc* arbitration tribunals under the ICSID Arbitration Rules. In this specific case, the tribunal issued its ruling in 2016. It ultimately dismissed all the Philip Morris claims, finding that the measures adopted by Uruguay were *bona fide* health measures which did not violate Uruguay's obligations under the BIT.[18]

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[12] Cynthia Callard, Neil Collishaw & Michelle Swenarchuk, *An Introduction to International Trade Agreements and Their Impact on Public Measures to Reduce Tobacco Use*, at 17 (Apr. 2001), http://www.smoke-free.ca/pdf_1/Trade&Tobacco-April%202000.pdf (last visited Mar. 10, 2017).

[13] Ellen R. Shaffer, Joseph E. Brenner & Thomas P. Houston, *International Trade Agreements: A Threat to Tobacco Control Policy*, 14(Supp. II) TOBACCO CONTROL ii19, ii22 (2005).

[14] Sabrina Tavernise, *Tobacco Firms' Strategy Limits Poorer Nations' Smoking Laws*, N.Y. TIMES (Dec. 13, 2013), http://www.nytimes.com/2013/12/13/health/tobacco-industry-tactics-limit-poorer-nations-smoking-laws.html (last visited Mar. 10, 2017) (describing the case of Namibia, Gabon, Togo and Uganda).

[15] Note that there are also examples of such disputes in the past (*e.g.*, Report of the Panel, *Thailand — Restrictions on the Importation of and Internal Taxes on Cigarettes*, DS10/R (Nov. 7, 1990), GATT BISD (37th Supp.), at 200 (1989)).

[16] Agreement on the Reciprocal Promotion and Protection of Investments, Switzerland–Uruguay, Oct. 7, 1988, 1976 U.N.T.S. 389 (entered into force Apr. 22, 1991).

[17] FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Request for Arbitration, ¶¶ 76-86 (Feb. 19, 2010).

[18] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016). For a more detailed analysis of the award, see Andrew D. Mitchell, *Tobacco Packaging Measures Affecting Intellectual Property Protection Under International Investment Law: The Claims Against Uruguay and*

In 2012 another subsidiary of Philip Morris initiated[19] a proceeding against Australia under the Hong Kong and Australia BIT (hereinafter "HKA BIT"). [20] The claimant argued that the new Australian plain packaging law, which sets restrictions on the colour, size and format of the packaging of tobacco products and determines the rules applicable to the appearance of brand, company and variant names on packs, violated various provisions of the HKA BIT (*e.g.*, by constituting an unlawful expropriation of Philip Morris' investment in Australia and by failing to provide fair and equitable treatment). The investment tribunal eventually did not address the merits of the dispute, as it ruled that it did not have jurisdiction to hear the case since the assets composing the investment were transferred to the Hong Kong subsidiary for the sole purpose of gaining protection under the HKA BIT.[21] According to the tribunal this constituted an abuse of a right. Consequently, it concluded that the claims were inadmissible.[22]

In the same year, Ukraine[23] also initiated a WTO dispute settlement proceeding against Australia over its plain packaging law.[24] It argued that the law violated several provisions of the Agreement on Trade Related Aspects of Intellectual Property Rights (*e.g.*, by limiting the use of trademark in an unjustified manner), the Agreement on Technical Barriers to Trade (*e.g.*, as not being the least trade restrictive alternative), and the General Agreement on Tariffs and Trade 1994 (*e.g.*, because of, as argued by Ukraine, its discriminatory character). [25] Ukraine, which ultimately

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Australia, *in* THE NEW INTELLECTUAL PROPERTY OF HEALTH BEYOND PLAIN PACKAGING 213 (Alberto Alemanno & Enrico Bonadio eds., 2016).

[19] Philip Morris Asia Ltd. (H.K.) v. The Commonwealth of Australia, PCA Case No. 2012-12, Notice of Arbitration (Nov. 21, 2011).

[20] Agreement for the Promotion and Protection of Investments, Austl.–H.K., Oct. 15, 1993, 1770 U.N.T.S. 387, 1993 A.T.S. 30.

[21] Phillip Morris transferred all its Australian assets to the Hong Kong subsidiary—Philip Morris Asia Limited—about 10 months after the announcement by the Australian government of its plan to introduce plain packaging, but before the final adoption of the act.

[22] Philip Morris Asia Ltd. (H.K.) v. The Commonwealth of Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶ 588 (Dec. 17, 2015). For the good analysis of the legal arguments raised in this case, see Tania Voon & Andrew Mitchell, *Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia*, 14(3) J. INT'L ECON. L. 515, 519-44 (2011).

[23] A WTO dispute settlement proceeding can be initiated only by WTO Members. It is, however, common knowledge that both British American Tobacco and Philip Morris have supported complainants. *Cf. e.g.*, Andrew Martin, *Philip Morris Leads Plain Packs Battle in Global Trade Arena*, BLOOMBERG (Aug. 22, 2013, 12:01 PM), http://www.bloomberg.com/news/2013-08-22/philip-morris-leads-plain-packs-battle-in-global-trade-arena.html (last visited Mar. 10, 2017).

[24] Request for Consultations by Ukraine, *Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS434/1 (Mar. 15, 2012).

[25] For detailed analysis of the dispute, see Tania Voon & Andrew Mitchell, *Face Off: Assessing WTO Challenges to Australia's Scheme for Plain Tobacco Packaging*, 22(3) PUB. L. REV. 218

dropped the case, was followed by other WTO Members (*i.e.*, Cuba, the Dominican Republic, Honduras and Indonesia). Eventually four panels have been established and their reports are expected in the second half of 2017.[26]

Considering the above developments, it should not be surprising that some Parties to the FCTC have expressed their dissatisfaction with the dominant position occupied by trade and investment dispute settlement mechanisms and the non-existent role of FCTC *ad hoc* arbitration. Already in 2012 Philippines proposed, at the meeting of COP5, an addition to a draft decision put forward by Canada that would, among the other things, advise "the Convention Secretariat to . . . remind member parties that there is an existing mechanism under Article [27] of the WHO Framework Convention on Tobacco Control for dispute settlement, and that this should first be exhausted before resorting to other international bodies"[27] (arguably even if there is a strong trade or investment component in a contested tobacco control measure). The proposal, although supported by some countries (*e.g.*, India), turned out to be too controversial for others and eventually it was rejected. In particular, some of the Parties felt that the proposal either went beyond the scope of the initial draft prepared by Canada or interfered unduly with the sovereign prerogatives of states.[28]

During the 2014 COP6 meeting, Uruguay asked for the establishment of an expert group that would investigate the FCTC dispute settlement mechanism and suggest possible enhancements in order to increase its attractiveness to the states.[29] Once again, some FCTC Parties supported this initiative but the COP chose a different option and simply asked the FCTC Secretariat to prepare a report investigating: (i) possible procedures for settling disputes within the FCTC, (ii) the kind of disputes that may be subject to such procedures and (iii) their interaction with other dispute settlement mechanisms.[30] At the same time, the COP noted in another

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(2011); for an opposing view, see Susy Frankel & Daniel Gervais, *Plain Packaging and the Interpretation of the TRIPS Agreement*, 46(5) VAND. J. TRANSNAT'L L. 1149 (2013).

[26] Other notable examples include: Grand River Enterprises Six Nations, Ltd. et al. v. United States of America, UNCITRAL Arbitration Rules, Award (Jan. 12, 2011); Philip Morris Norway AS v. The Norwegian State, Case E-16/10, Judgment, European Free Trade Association Court [Eur. Free Trade Ass'n Ct.] (Sept. 12, 2011); Case C-358/14, Poland v. Parliament and Council, Judgment, ECLI:EU:C:2016:323 (May 4, 2016); Case C-547/14 Philip Morris Brands SARL, Judgment, ECLI:EU:C:2016:325 (May 4, 2016).

[27] Conference of the Parties to the WHO Framework Convention on Tobacco Control, *Summary Records of Committees*, at 156, FCTC/COP/5/REC/2 (Nov. 12-17, 2012). The notion "other bodies" arguably includes WTO panels and international investment tribunals.

[28] *Id.* at 157-58.

[29] Interview with one of the participants of the COP Committee B meeting (on file with the author).

[30] Conference of the Parties to the WHO Framework Convention on Tobacco Control, *Issues Related to Implementation of the WHO FCTC and Settlement of Disputes Concerning the Implementation or Application of the Convention*, ¶ 1, FCTC/COP/6(18) (Oct. 18, 2014).

decision that "the tobacco industry has used and might use international trade and investment rules to challenge tobacco control measures taken to implement the WHO FCTC."[31] In this context, it encouraged the Parties "to cooperate in exploring possible legal options to minimise the risk of the tobacco industry making undue use of international trade and investment instruments to target tobacco control measures."[32]

The requested report was published in July 2016, just a couple months before the COP7 meeting.[33] The document did not propose any specific procedures for settlement of disputes under the FCTC, but only indicated the elements that are conventionally included in such procedures.[34] It identified (again very briefly) possible disputes that may fall within the scope of Art. 27 of the FCTC (*e.g.*, acts originating in the territory of one Party undermining the effectiveness of the domestic tobacco control measures—as required by the Convention—of another Party). The document also looked at the relationship between the FCTC and other dispute settlement mechanisms (such as that of the WTO), but remained very general. In this context, it concluded that:

> [T]he implications [of the decision of an FCTC ad hoc tribunal] for a trade or investment dispute would depend on the circumstances, and could be relatively limited. The use of the WHO FCTC Article 27 dispute settlement would not, for example, preclude a dispute being brought under a trade or investment agreement. If the treaty and related instruments which provided it with jurisdiction or otherwise gave it the competence to hear the dispute, a trade or investment tribunal would not be bound to decline or stay proceedings that included matters also before a WHO FCTC dispute settlement panel. In addition, whether, and how, a tribunal hearing a dispute under a

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[31] Conference of the Parties to the WHO Framework Convention on Tobacco Control, *Trade and Investment Issues, Including International Agreements, and Legal Challenges in Relation to Implementation of the WHO FCTC*, at 1, FCTC/COP6(19) (Oct. 18, 2014).

[32] *Id*.

[33] Convention Secretariat, *Issues Related to Implementation of the WHO FCTC and Settlement of Disputes Concerning the Implementation or Application of the Convention*, FCTC/COP/7/20 (July 27, 2016). Conversely, Brazil and the Czech Republic have declared that they will not support any proposal to utilize the FCTC in a manner that runs contrary to free trade principles.

[34] The report also suggested to the COP the development of guidelines or procedures to facilitate the settlement of disputes under Art. 27.1. *Id*. ¶ 13. With respect to the arbitration mechanism it identified a number of procedures adopted under other conventions that could serve as a useful example (*e.g.*, the Convention on Biological Diversity, Art. 27 and Annex II.1; the Vienna Convention on the Ozone Layer, Art. 11, COP Decision VCI/7 and Annex II; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Art. 20 and Annex VI). *Id*. ¶ 16.

> trade or investment agreement might take account of the determination of a WHO FCTC dispute settlement panel would depend on the particular circumstances of the case, including the jurisdiction of the relevant tribunal (and the limits to such jurisdiction).[35]

The COP7 never discussed the report during its plenary session. However, the more general problem of the relationship between trade/investment and FCTC regimes was still addressed at the meeting. In particular, the COP7 adopted a decision in which it asked the FCTC Parties to increase coordination between their health and trade departments when negotiating new trade and investment agreements (presumably to ensure that legitimate tobacco control measures are properly safeguarded in such agreements). It also instructed the FCTC Secretariat to investigate "best practices" in promoting and safeguarding public health (including tobacco control) measures under existing trade and investment agreements, to record decisions of international forums and tribunals relating to national tobacco control measures, and identify those measures which are most frequently targeted by the tobacco industry.[36] Overall, however, the position taken by the COP7 was rather conservative, as it basically only asked for the collection of relevant information. This should not be surprising, taking into consideration the real disagreement between the Parties over the best approaches for accommodating public health considerations in trade and investment treaties. The cautious nature of the report prepared by the FCTC Secretariat, warning that any decision of an *ad hoc* FCTC arbitration tribunal could have limited implications for a trade and investment dispute settlement body, might have also played a role.

IV. RELATIONSHIP BETWEEN THE FCTC AND WTO DISPUTE SETTLEMENT MECHANISMS

As has been already mentioned, the FCTC provides for the exclusive jurisdiction[37] of its *ad hoc* arbitration tribunal for all disputes concerning the interpretation or application of the Convention. Nevertheless, the FCTC

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[35] *Id.* ¶ 23 (footnote omitted).

[36] Conference of the Parties to the WHO Framework Convention on Tobacco Control, *Trade and Investment Issues, Including Agreements, and Legal Challenges in Relation to the Implementation of WHO FCTC*, at 2, FCTC/COP7/21 (Nov. 12, 2016).

[37] For a discussion on the types of exclusive jurisdiction clauses, see LUIZ EDUARDO SALLES, FORUM SHOPPING IN INTERNATIONAL ADJUDICATION: THE ROLE OF PRELIMINARY OBJECTIONS 228 *et seq*. (2014).

dispute settlement clause remains a weak one, as the use of diplomatic methods needs to precede recourse to the arbitration mechanism (note that in this regard the Convention does not set any deadlines or procedural requirements). Unlike its WTO counterpart, it is available only to those Parties that have submitted relevant declarations.[38] Moreover, the FCTC does not provide for any sanction mechanisms.

The WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes[39] (hereinafter "DSU") establishes the exclusive jurisdiction of WTO dispute settlement bodies (*i.e.*, panels and the Appellate Body) over all disputes arsing under WTO law. In particular, Art. 23(1) of the DSU provides that "[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding."[40] A number of other provisions of the DSU also confirm that the jurisdiction of WTO dispute settlement bodies is compulsory and exclusive with respect to the violations of WTO law. For example, Art. 3.3 of the DSU identifies the prompt settlement of disputes as essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members. In addition, Art. 6.1 provides that if a complaining party so requests, a panel shall be established, while Art. 7.2 requires a panel to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute. So it is appropriate to ask here: what are the legal consequences of these two sets of provisions with regard to dispute settlement mechanisms?

As an initial observation, it should be noted that strictly speaking we do not have any conflict of jurisdiction between the two dispute settlement mechanisms discussed here. In order to speak about such a conflict there needs to be a situation "where the same dispute or related aspects of the same dispute could be brought to two distinct institutions or two different dispute settlement systems."[41] Note, however, that each regime is concerned with distinct obligations and the claims raised by parties will be

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[38] *Cf.* Pieter Jan Kuijper, *Conflicting Rules and Clashing Courts: The Case of Multilateral Environmental Agreements, Free Trade Agreements and the WTO*, 10 ICTSD'S PROGRAMME ON DISP. SETTLEMENT 1, 31 (2010) (coming to this same conclusion with respect to similarly worded dispute settlement clauses in multilateral environmental agreements).

[39] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter the DSU].

[40] *Id.* art. 23(1).

[41] Kyung Kwak & Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction Between the World Trade Organization and Regional Trade Agreements*, *in* REGIONAL TRADE AGREEMENT AND THE WTO LEGAL SYSTEM 465, 467 (Lorand Bartels & Federico Ortino eds., 2006).

completely different. The FCTC introduces certain standards for national tobacco control measures, either requiring or suggesting (depending on the specific provision) their implementation in national law. On the other hand, WTO law, in principle, establishes anti-discriminatory standards by prohibiting different treatment between domestic and imported goods or goods coming from different Members (the most-favoured-nation and national treatment principles respectively).[42] It does not say anything about whether (and how) WTO Members shall pursue any specific tobacco control policies. So when it comes to litigation in front of these two international adjudicative bodies the substantive claims raised by the parties will be different. They are grounded in the specific legal instrument that provides a legal basis for the jurisdiction of a particular international body. As eloquently put by Pauwelyn and Salles "the jurisdiction of international tribunals is specific and depends . . . on the treaty it is enforcing . . . . The treaty-based jurisdiction of international tribunals means that even where there is overlapping jurisdiction, each tribunal decides a different aspect of the dispute."[43]

For example, a claim under the NAFTA can be only made on the basis of NAFTA rules. Similarly, a claim in the WTO dispute settlement system (even if it is concerned with the same measure and—in terms of substance—the same obligation) will need to relate to a violation of WTO law.[44] While in such a situation (*i.e.*, an RTA v. the WTO) there might be a stronger case for finding a conflict of jurisdiction (despite the formal differences in applicable law, the essence of the obligation may be the same), this is not the case for the FCTC and the WTO. As noted above, both regimes provide completely different sets of obligations, both at the formal and substantive level. As a consequence, in case of a dispute over a tobacco control measure that can have some trade impact, it is difficult to talk about a "same dispute" being considered by two international

[42] Of course, WTO law also contains many other obligations that go beyond the non-discrimination principles. For example, it prohibits national measures that are more trade restrictive than necessary to achieve legitimate regulatory objectives (*cf.* Agreement on Technical Barriers to Trade art. 2.2, Apr. 15, 1994. Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120), or unjustified restrictions on the use of a trademark in the course of trade (*cf.* Agreement on Trade-related Aspects of Intellectual Property Rights art. 20, Apr. 15, 1994. Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299). However, even these provisions provide different obligations than those which may be found in the FCTC.

[43] Joost Pauwelyn & Luiz E. Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)possible Solutions*, 42 CORNELL INT'L L.J. 77, 84 (2009).

[44] *Cf.* DSU, *supra* note 39, art. 3.2, which provides that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements . . . ."

adjudicating bodies. An FCTC *ad hoc* arbitration tribunal will be solely entitled to examine whether a particular measure complies with the requirements of the Convention, and a WTO panel will only have jurisdiction over WTO-related claims.[45] This does not preclude possible overlap regarding terms of the facts underlying the two disputes. Indeed, the very same facts might give rise to claims under both regimes. However, the lack of similarity between their laws' application would make these two disputes different.[46]

As already noted above, the DSU does not envisage the possibility for a WTO panel to decline to exercise its jurisdiction over a claim concerning an alleged violation of one of the WTO agreements because of the availability of some other dispute settlement mechanism.[47] To the contrary, such a move would go against the explicit language of the DSU (*e.g.*, to address a potential violation of relevant WTO provisions) and would undermine the principle of prompt settlement of disputes as required by Article 3.3. This is also an approach that is conventionally taken by other international courts and tribunals.

It is therefore not surprising that the WTO dispute settlement bodies hold that the mere existence of another dispute settlement mechanism under which some aspects of the dispute could be addressed does not release the panel from a duty to examine a complaint relating to the violation of WTO law (even if a defendant in a particular case is in favour of using such other mechanism).[48] For example, the Appellate Body in *Mexico — Soft Drinks* concluded that a panel does not have the right to decline its jurisdiction if the same complaint could also be addressed in another dispute settlement

[45] The sameness of the dispute was identified as an important element by one of the WTO panels. In *Mexico — Soft Drinks*, when discussing the problem of conflicting/concurrent jurisdictions, it noted that the claims made by the parties were entirely different (*i.e.*, discrimination and market access). *See* Panel Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, ¶ 7.14, WTO Doc. WT/DS308/R (adopted Mar. 24, 2006) [hereinafter Mexico — Soft Drinks Panel Report] (as modified by Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WTO Doc. WT/DS308/AB/R (adopted Mar. 24, 2006) [hereinafter Mexico — Soft Drinks Appellate Body Report]). This finding was subsequently upheld by the Appellate Body.

[46] An international (or any legal) dispute needs always be defined through reference to specific provisions of international law (*cf*. Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 I.C.J. Rep. 65, at 74 (Mar. 30), defining a dispute as "a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations").

[47] For a similar conclusion, see Duane W. Layton & Jeffery C. Lowe, *The Framework Convention on Tobacco Control and the World Trade Organization: A Conflict Analysis Under International Law*, 9(6) GLOBAL TRADE & CUSTOM J. 246, 249 (2014).

[48] For a complete analysis, see Lukasz Gruszczynski, *Tobacco and International Trade: Recent Activities of the FCTC Conference of the Parties*, 49(4) J. WORLD TRADE 665 (2015).

mechanism.[49] In that specific case, Mexico asked the panel to decline its jurisdiction in favour of a NAFTA arbitral panel.[50] According to Mexico, the WTO panel should have refrained from exercising its jurisdiction whenever "'the underlying or predominant elements of a dispute derive from rules of international law under which claims cannot be judicially enforced in the WTO, such as the NAFTA provisions' or 'when one of the disputing parties refuses to take the matter to the appropriate forum.'"[51] The Appellate Body disagreed. After referring to several provisions of the DSU (*i.e.*, 3.2, 7.1, 7.2, 11, 19.2, and 23), it concluded that the panel did not in this specific case have the discretion to decline to exercise its jurisdiction. The Appellate Body also stressed, as an additional observation, that not only "the subject matter [or] the respective positions of the parties are [not] identical in the dispute under the NAFTA . . . and the dispute before us",[52] but also that the dispute in the NAFTA was actually never resolved.[53]

It is therefore clear that the mere existence of the FCTC dispute settlement mechanism, in its current form, does not affect the jurisdiction of WTO dispute settlement bodies to examine disputes emerging under one of the covered agreements. Does this mean, however, that a WTO panel can never decline to exercise its jurisdiction?[54] What if another international treaty or other agreement between the parties precludes recourse to the WTO dispute settlement system by explicitly providing for its primacy or giving parties a choice between two mechanisms, such as a "fork-in-the-road" clause? Of course, the FCTC contains no such obligations. However, considering past attempts of Parties to leverage the FCTC dispute settlement system, it is worth analysing here the consequences of such clauses/agreements between parties.

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[49] Mexico — Soft Drinks Appellate Body Report, *supra* note 45, ¶ 52. *See also* Mexico — Soft Drinks Panel Report, *supra* note 45, ¶ 7.8.

[50] The dispute was just one episode of the long disagreement between the US and Mexico over the Mexican sugar industry's access to the American market, which was guaranteed under NAFTA rules. Mexico eventually decided to initiate a dispute settlement procedure under NAFTA, but the US blocked the establishment of a panel. As a retaliation, Mexico introduced discriminatory taxes on the use of sweeteners other than cane sugar in soft drinks (a move that affected US producers). The US initiated the dispute in the WTO. For additional details, see Joost Pauwelyn, *Adding Sweeteners to Softwood Lumber: The WTO–NAFTA "Spaghetti Bowl" Is Cooking*, 9(1) J. INT'L ECON. L. 197 (2006).

[51] Mexico — Soft Drinks Appellate Body Report, *supra* note 45, ¶ 42.

[52] Mexico made a market access claim under the NAFTA that did not have its equivalent in the WTO provisions.

[53] Mexico — Soft Drinks Appellate Body Report, *supra* note 45, ¶ 54 (note that the NAFTA panel was established but it never commenced its work).

[54] *Cf.* the panel statement in *Mexico — Soft Drinks*, where it concluded that it "would seem therefore not to be in a position to choose freely whether or not to exercise its jurisdiction." Mexico — Soft Drinks Panel Report, *supra* note 45, ¶ 7.8.

This issue was discussed for the first time in *EC — Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*.[55] This case raised the question of whether two Understandings on Bananas between the European Communities ("EC"), the US, and Ecuador prevented the complainants from initiating compliance proceedings with respect to the European regime for the importation of bananas. Although the Appellate Body concluded that the Understandings did not have this effect,[56] it also held that the parties could in principle agree to waive their rights to have recourse to Art. 21.5 of the DSU. According to the Appellate Body, this can be done either explicitly or by necessary implication, but intention of the parties needs to be clear and openly revealed.[57] While this was an important development, it remained unclear whether these findings were of a general character or only limited to the compliance proceedings.[58]

The Appellate Body in *Mexico — Soft Drinks* had a chance to develop this issue further, but ultimately it refused to make any such findings as it found them not relevant to resolving the dispute. It only noted that Mexico did not exercise its rights provided by the exclusion clause of Art. 2005.6 of the NAFTA, an article which is a typical example of a "fork-in-the-road" provision (*i.e.*, "once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4."). As a consequence, the Appellate Body did not determine whether such clause could constitute a legal impediment to the exercise of jurisdiction by a WTO panel.

Neither did the next case provide any definitive answer. The panel in *Argentina — Poultry Anti-Dumping Duties*[59] was confronted with the following situation: Argentina imposed anti-dumping duties on imports of poultry from Brazil. The measure was subsequently challenged by Brazil in

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[55] Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas: Second Recourse to Article 21.5 of the DSU by Ecuador/Recourse to Article 21.5 of the DSU by the United States*, WTO Doc. WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA (adopted Dec. 22, 2008).

[56] The Appellate Body found in particular that the Understandings only provided for a series of steps to be taken by the parties to resolve the dispute, and therefore could not constitute a mutually agreed solution. It also concluded that the Understandings did not provide for relinquishment of the right to initiate compliance proceedings (*cf. id.* ¶¶ 214, 221).

[57] *Id.* ¶ 217.

[58] Note that the Appellate Body heavily relied in its analysis on Art. 3.7 of the DSU, which explicitly speaks about mutually agreed solutions as a preferred option of dispute settlement. The waiver of the right to have a compliance proceeding may be an important part of such a solution. *Cf. id.* ¶¶ 209-29.

[59] Panel Report, *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil*, WTO Doc. WT/DS241/R (adopted May 19, 2003).

front of a MERCOSUR *ad hoc* tribunal, which found in favour of Argentina (under the relevant MERCOSUR rules). In response to this development, Brazil decided to initiate a WTO proceeding. Despite the objections of Argentina, the panel confirmed that it could exercise its jurisdiction. In particular, the panel was not persuaded by the estoppel argument advanced by Argentina, and concluded that reliance on the principle of estoppel would require a showing that Brazil had acted in bad faith in bringing a subsequent claim to the WTO. According to the panel, Argentina failed to make such a showing, as Brazil had not made any clear and unambiguous statement that it would not resort to the WTO dispute settlement mechanism. However, what is potentially most important for the purposes of this article is the fact that the panel looked at the 2002 Protocol of Olivos (hereinafter "the Protocol"), which also had a "fork-in-the-road" provision.[60] It concluded, however, that the Protocol was not yet in force and could not apply to disputes already decided between Argentina and Brazil under the MERCOSUR.[61] This conclusion released the panel from the need to examine the problem further.

This issue was clarified only recently in *Peru — Agricultural Products*.[62] Peru argued that, by way of the free trade agreement (hereinafter "FTA") between the two countries involved,[63] Guatemala had waived its right to have recourse to the WTO dispute settlement mechanism with respect to the specific measure in question (*i.e.*, a price range system for certain agricultural products). In particular, Peru argued that in such a situation bringing the case to the WTO would be contrary to the good faith principle enshrined in Arts. 3.7[64] and 3.10[65] of the DSU.[66] Peru also

[60] Art. 1 of the Protocol provides that once a party decides to bring a case under either the MERCOSUR or WTO dispute settlement forums, that party may not bring a subsequent case regarding the same subject-matter in the other forum (*id.* ¶ 7.38).

[61] *Id.*

[62] Appellate Body Report, *Peru — Additional Duty on Imports of Certain Agricultural Products*, WTO Doc. WT/DS457/AB/R/Add.1 (adopted July 31, 2015) [hereinafter Peru — Agricultural Products Appellate Body Report].

[63] The FTA between Peru and Guatemala provided in paragraph 9 of Annex 2.3 that "Peru may maintain its Price Range System . . . with regard to the products subject to the application of the system marked with an asterisk (*) in column 4 of Peru's Schedule as set out in this Annex". The Free Trade Agreement Between Peru and Guatemala, Peru–Guatemala, annex 2.3.9, Dec. 6, 2011, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2620 (last visited Mar. 10, 2017).

[64] DSU, *supra* note 39, art. 3.7 provides: "[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred". The Appellate Body interpreted the first sentence of Article 3.7 as "reflect[ing] a basic principle that Members should have recourse to WTO dispute settlement in good faith, and not frivolously set in motion the procedures contemplated in the DSU." Appellate Body Report, *Mexico — Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States: Recourse to Article 21.5 of the DSU by the United States*, ¶ 73, WTO Doc. WT/DS132/AB/RW (adopted Nov.

maintained that the two countries had modified, on the basis of the FTA, their WTO obligations as between themselves (*i.e.*, an *inter se* modification),[67] taking the advantage of the possibility envisaged by Art. 41 ("Agreements to modify multilateral treaties between certain of the parties only")[68] of the Vienna Convention on the Law of Treaties (hereinafter "VCLT").[69]

The panel took a similar approach as in the *Argentina — Poultry* case and relied on the fact that the FTA between Peru and Guatemala was not yet in force. Consequently, it rejected both arguments advanced by Peru.[70] The Appellate Body did, however, decide to go beyond a mere formal analysis and considered two aspects more generally, *i.e.*, the possibility of waiving WTO procedural rights by an external agreement between WTO Members, and making *inter se* modifications to the WTO obligations.

With respect to the first issue, the Appellate Body started its analysis by referring to its previous report in *EC — Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)* and confirmed that the relinquishment of the rights granted by the DSU cannot be lightly assumed, and that the language in the agreement between the parties must clearly reveal their

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21, 2001).

[65] DSU, *supra* note 39, art. 3.10 states:

> It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

[66] Panel Report, *Peru — Additional Duty on Imports of Certain Agricultural Products*, ¶¶ 7.43-51, WTO Doc. WT/DS457/R (adopted July 31, 2015) [hereinafter Peru — Agricultural Products Panel Report], as modified by Peru — Agricultural Products Appellate Body Report, *supra* note 62.

[67] Peru — Agricultural Products Panel Report, *supra* note 66, ¶ 7.508.

[68] Vienna Convention on the Law of Treaties art. 41, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) specifically provides:

> 1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
> (a) the possibility of such a modification is provided for by the treaty; or
> (b) the modification in question is not prohibited by the treaty and:
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

[69] *Id.*

[70] Peru — Agricultural Products Panel Report, *supra* note 66, ¶¶ 7.88, 7.92, 7.527-28 (*e.g.*, "In the light of this fact, it is not necessary for this Panel to express an opinion on whether the parties may, through the FTA, modify between themselves their rights and obligations under the covered agreements . . . .").

intention. The Appellate Body connected a waiver with the principle of good faith (as expressed in Arts. 3.7 and 3.10 of the DSU), and it observed that commencing a legal action in the WTO in such a situation could indeed be regarded as a failure to act in good faith.[71] In other words, the Appellate Body confirmed that WTO Members can, in principle, waive their WTO procedural rights in an extraneous agreement. In this context however, the Appellate Body clarified that such a waiver must comply with certain requirements.

First, as was already stated in *EC — Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, such a waiver has to be clearly formulated. This however does not need to be an explicit statement and may be in the form of a necessary implication.

Second, such an agreement can be made only with respect to the settlement of a specific dispute (*i.e.*, "we do not consider that Members may relinquish their rights and obligations under the DSU beyond the settlement of specific disputes"[72]). This means that any general clause in an extraneous agreement that would preclude a recourse to all other dispute settlement systems (including the WTO system) with respect to a whole category of disputes will not meet this requirement (*e.g.*, in the context of the FCTC, a provision that would remove all disputes relating to national tobacco control measures). In other words, an agreement between the parties needs to be concluded after the emergence of a specific dispute and therefore it has to have a *post facto* character. It seems a "fork-in-the-road" provision cannot satisfy this requirement. Although it may be argued that a decision of the parties to use a specific dispute settlement system is always individualised (as this type of provision only provides for an option), such a consent will not be expressed by both parties. Note that recourse to a particular dispute settlement mechanism, to the exclusion of another, in most cases will be simply triggered by an action of a complainant, without a need for consent of the defendant.

Third, the Appellate Body also noted that such an agreement cannot lead to a violation of applicable WTO provisions. In other words, a measure which may be eventually *de facto* removed from the WTO dispute settlement system has to be consistent with WTO obligations. This means that a WTO panel will need, in any case, to examine the contested measure with respect to its substance. Only *if* it finds that a measure is not inconsistent with WTO law may it proceed to an additional analysis of an agreement between the parties, precluding recourse to the WTO dispute settlement mechanism. Such an approach places the WTO obligations in a

[71] Peru — Agricultural Products Appellate Body Report, *supra* note 62, ¶ 5.25.
[72] *Id.* at 21, n. 106.

privileged position, as its dispute settlement bodies will always be entitled to review a measure. Although this solution may seem paradoxical (a panel concludes that it does not have jurisdiction only after examining the substance of the case), it can be justified by the need to preserve the integrity and coherence of WTO law. WTO Members are simply precluded from making arrangements that would be incompatible with their WTO obligations.

With respect to the second issue, *i.e.*, *inter se* modifications to WTO obligations, the Appellate Body simply rejected, without providing any detailed analysis, the possibility of such modifications (in the form of amendments or waivers). In this context, it observed in particular that "WTO agreements contain specific provisions addressing amendments, waivers, . . . which prevail over the general provisions of the Vienna Convention, such as Article 41."[73] Consequently, the Appellate Body either considered the relevant WTO provisions on amendments and waivers (*i.e.*, Art. IX:3 and 4 as well as Art. X of the WTO Agreement[74]) as *lex specialis*, which take precedence over Art. 41 of the VCLT (on the basis *lex specialis derogate legi generali* principle), or regarded them as implicitly prohibiting *inter se* modifications.[75]

How does one reconcile the above findings of the Appellate Body on the possibility of waivers with respect to procedural rights, and the prohibition of *inter se* modifications? At first glance, the approach taken by the Appellate Body appears to be self-contradictory (*i.e.*, if *inter se* modifications are not permissible, how can WTO Members agree to waive their rights to use the WTO dispute settlement system?). One possible reading of the report is to assume that the Appellate Body generally excluded a recourse to the Art. 41 of the VCLT, irrespective of whether such modifications or waivers relate to procedural or substantive provisions of WTO law. A procedural (*i.e.*, jurisdictional) waiver was, therefore, accepted not through the channel provided by the VCLT, but on the basis of the good faith principle reflected in the specific provisions of the DSU (*i.e.*, Arts. 3.7 and 3.10).[76] Such an approach, although not without its own

[73] *Id.* ¶ 5.112.

[74] Marrakesh Agreement Establishing the World Trade Organization arts. IX:3-4, X, Apr. 15, 1994, 1867 U.N.T.S. 154.

[75] Note that this conclusion goes against the approach advocated by many distinguished scholars. *See, e.g.*, JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 475 (2003); International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 306, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

[76] The distinction between substantive and procedural waivers (modification) arguably results from the fact that the good faith principle is included in the DSU and therefore can be relevant only to procedural rights.

deficiencies,[77] allowed the Appellate Body to preserve the integrity and coherence of the WTO law (*i.e.*, Members cannot modify their substantive WTO obligations), while at the same time recognizing that Members may agree between themselves not to take advantage of their WTO procedural rights (because finding a mutually acceptable solution to a dispute is a preferred option). However, as noted above, the integrity and coherence of WTO law must always remain secure—violation of applicable WTO provisions cannot be waived.

The analysis presented above is of course theoretical when it comes to the FCTC's *ad hoc* arbitration. As already noted, the Convention does not currently provide any exclusion or "fork-in-the-road" clause that would prevent a recourse to other international dispute settlement mechanisms (including the WTO's). From the point of view of current WTO law, the mere existence of an alternative FCTC dispute settlement mechanism is irrelevant for establishing the jurisdiction of a panel. In addition, the WTO case law clearly shows that even if the FCTC Parties decide to amend Art. 27 of the Convention,[78] this will not change the above conclusion. A clause that gives preference to an extraneous dispute settlement system over its WTO counterpart for a whole category of disputes will be simply disregarded by WTO dispute settlement bodies. As a consequence, it seems the only possible situation under current WTO case law that would exclude WTO jurisdiction over a dispute is a bilateral agreement between the parties that precludes their recourse to the WTO dispute settlement system in the circumstances of the case.

The fact that the FCTC is a multilateral treaty with quasi-universal participation (rather than a bilateral arrangement between some WTO Members) does not change the above conclusions. Although the Appellate Body has so far dealt in its case law only with the second category, its findings appear to be of a general character. In particular, the Appellate

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[77] One of the weaknesses of the Appellate Body approach, as noted by Geraldo Vidigal, is that

> Article 41 is not about amendments but about bilateral agreements to modify rules inter se – VCLT Article 40, on amendments, is displaced by amendment provisions, and specifically states so. ¶ 5.112 implies that the mere fact that a handful of provisions in WTO law establish modification procedures precludes inter se agreements. This clearly cannot be the case, or there would be no inter se agreement.

Geraldo Vidigal, Comment to Trachtman, *Peru—Agricultural Products: WTO Versus RTAs (and Other Non-WTO International Law)*, INT'L ECON. L. & POL'Y BLOG (Aug. 5, 2015, 11:37 AM), http://worldtradelaw.typepad.com/ielpblog/2015/08/peru-agricultural-products-wto-versus-rtas-and-other-non-wto-international-law.html (last visited Mar. 10, 2017).

[78] *A fortiori*, decisions of the COP cannot have this effect either. They not only face the same difficulties as a treaty's text, but also can hardly be regarded as binding international instruments. *Cf. also* Gruszczynski, *supra* note 48, at 670-75.

Body did not distinguish between those two categories of the treaties—a waiver with respect to procedural rights is simply available if certain conditions are met, irrespectively of the character of the agreement that contains such a waiver. The same is true for inter se modifications. While the Appellate Body dealt with the FTA and saw Art. XXIV of the General Agreement on Tariffs and Trade as a *lex specialis* to Art. 41 of the VCLT, Arts. IX and X of the WTO Agreement got the same label. Consequently, the Appellate Body's conclusions extend beyond the context of FTAs and cover all extraneous agreements. In any case, it would be odd to treat substantive waivers differently depending on the underlying legal instrument.

V. CONCLUSIONS: EXCLUSIVE JURISDICTION OF THE WTO DISPUTE SETTLEMENT BODIES AND BEYOND

The FCTC and WTO legal regimes provide distinct sets of obligations. Due to this normative difference (both formal and substantive), there is no conflict of jurisdiction between their dispute settlement bodies. Each of them simply has an authority to address a different aspect of a dispute (understood in a broad sense). Moreover, even if such conflict would exist, the mere fact that another dispute settlement mechanism is available does not deprive a WTO panel of its jurisdiction over claims advanced under one of the covered agreements.

At the same time, the WTO case law clearly establishes that an extraneous agreement concluded between parties may constitute a legal impediment to exercise of jurisdiction by a WTO panel only if it clearly reveals such an intention relates to a specific dispute and does not lead to a violation of applicable WTO provisions. This means that even the amended version of Art. 27.2 of the FCTC, which precludes recourse to other dispute settlement systems with respect to disputes concerning national tobacco control measures, will not have any legal implications for the jurisdiction of a WTO panel.

The above does not mean, however, that hypothetical decisions of an *ad hoc* FCTC arbitration tribunal will remain completely irrelevant in the context of the WTO and the rulings of its dispute settlement bodies. To the contrary, such an external ruling can be regarded as a concretization of the general FCTC obligations in a specific dispute, and arguably can be taken into account by a WTO panel or the Appellate Body as a factual matter that confirms, for example, the existence of specific tobacco-related risks or the effectiveness and necessity of a measure employed by a WTO Member. As correctly noted in the report by the FCTC Secretariat, the Convention itself, FCTC guidelines, and COP decisions can strengthen parties' legal

positions, including in the context of WTO dispute settlement proceedings. In particular:

> These instruments can demonstrate broad international consensus on the seriousness of the harm caused by tobacco use and on the types of measures that contribute to reducing tobacco use and protecting and promoting public health; inform the interpretation or application of particular provisions in trade or investment agreements, such as whether a measure is "necessary" to protect health; and provide evidence of factual matters that may be in dispute, such as the regulatory goal of a tobacco control measure implemented by a party to the WHO FCTC, the contribution such a measure makes to the achievement of a state's regulatory goal, and the importance of a regulatory goal pursued.[79]

The above statement is particularly true in the context of the WTO dispute settlement system. Both the panels and the Appellate Body have on some occasions used various extraneous normative (or quasi-normative) materials as a basis for determining certain factual issues relevant for deciding a WTO dispute or in order to establish a consensus of the international community over the meaning of specific terms that were the subject of interpretation. For example, the Appellate Body in *US — Shrimp*, analysing whether the US importation ban could be regarded as relating to the conservation of natural resources, used a number of extraneous international instruments to determine whether turtles could be regarded as an endangered species.[80] Similarly, in *Brazil — Retreaded Tyres*, the panel referred to the non-binding Basel Convention Technical Guidelines on the Identification and Management of Used Tyres in order to determine specific facts (*e.g.*, risk of tyre fires and risk to the environment resulting from the stockpiling of waste tyres).[81]

The WTO panel has also a chance to look at the probative value of the FCTC and its guidelines. In *US — Clove Cigarettes*, the panel used the Partial Guidelines for implementation of Arts. 9 and 10 of the Convention as evidence of an international consensus on specific aspects of tobacco control policies and the existence of underlying concerns (*i.e.*, risks

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[79] Convention Secretariat, *supra* note 33, ¶ 24.

[80] Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 132, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

[81] Panel Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, ¶¶ 7.81, 7.187-89**,** WTO Doc. WT/DS332/R (adopted Dec. 17, 2007), as modified by Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007).

connected with the use of flavoured cigarettes).[82] This was an appropriate approach as both the FCTC and its guidelines are based on reliable and up-to-date scientific evidence, reflecting the best available research. In this context, it is worth recalling that the Foreword of the Convention clearly states that the FCTC is an evidence-based treaty while the Preamble stresses that the parties are "[d]etermined to promote measures of tobacco control *based on current and relevant scientific, technical and economic considerations*." (Emphasis added.)

The awards of an *ad hoc* FCTC arbitration tribunal can potentially receive the same treatment. Note that such awards simply interpret and apply the provisions of the Convention in the circumstances of a specific dispute. If the FCTC and its guidelines are regarded by the WTO dispute settlement bodies as a useful source for determining certain factual issues, there is no reason to treat awards of *ad hoc* FCTC arbitration tribunal in a different way.[83]

Although the two dispute settlement systems may appear as foes if one looks at them only through the lens of jurisdiction (or at least entirely neutral towards each other), in fact the WTO dispute settlement bodies can take a quite friendly approach to external rules of international law. The *Clove — Cigarettes* case confirms that the FCTC, its guidelines and possibly awards of an FCTC arbitration tribunal can constitute an important point of reference for a panel when examining trade-related tobacco control measures.

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[82] *Cf. e.g.*, Panel Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 7.414, WTO Doc. WT/DS406/R (adopted Apr. 24, 2012), as modified by Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc. WT/DS406/AB/R (adopted Apr. 24, 2012). *See also* WORLD HEALTH ORGANIZATION, CONFRONTING THE TOBACCO EPIDEMIC IN A NEW ERA OF TRADE AND INVESTMENT LIBERALIZATION 73 (2012), http://apps.who.int/iris/bitstream/10665/70918/1/9789241503723_eng.pdf (last visited Mar. 10, 2017).

[83] Note that it is not argued here that the WTO dispute settlement bodies should apply *res judicata* or *lis pendens*—the proposed approach to simply use external judgements/awards as evidence of certain facts. On the difficulties of applying these principles, see Son T. Nguyen, *The Applicability of Res Judicata and Lis Pendens in World Trade Organization Dispute Settlement*, 25(2) BOND L. REV. 123 (2013).

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