Tobacco and international trade - recent activities of the FCTC Conference of the Parties

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Abstract
The article analyzes three recent proposals made by the State-Parties to the Framework Convention on Tobacco Control (FCTC), which appears to be relevant for determining the relationship between trade and health rules in the area of tobacco control. In this context, it attempts to answer the following questions: (i) what is the legal status of decisions made by the Conference of the Parties (COP) to the FCTC?; (ii) how does a COP decision (or any applicable provision of the FCTC) affect the mandate of WTO dispute settlement bodies to hear and decide WTO cases?; and (iii) to what extent can a COP decision (or any applicable provision of the Convention) require FCTC State-Parties to exclude tobacco and tobacco products from their future preferential trade agreements (PTAs). The article comes to the conclusion that COP decisions lack of any binding character, while provisions of the Convention do not affect the jurisdiction of WTO panels to hear complaints concerning potential violations of WTO law nor require carving out tobacco products from PTAs.

1. Introduction
Tobacco kills, there is no doubt about it. According to the World Health Organization smoking is a single most preventable cause of death and annually takes 6 million lives. It is also predicted that if the current trends persist, by the end of this century, it will result in 1 billion additional deaths.¹ As a response to this growing public health concern, in 2003 countries adopted the Framework Convention on Tobacco Control² (FCTC or the Convention), which aims at curbing tobacco use through various regulatory measures that affect both the supply of and demand for tobacco products. The adoption of the Convention was depicted as one of the biggest successes of the international community in the area of public health.

These developments coincided in time with the progressive liberalization of international trade. The World Trade Organization (WTO), created in 1994, has been equally successful in removing trade barriers. A number of regional economic integration projects have also been completed. Currently there are approximately 585 bilateral and regional free trade agreements, with new initiatives proposed every year. For example, the United States is currently negotiating a mega trade pact with the European Union (i.e. Transatlantic Trade and Investment

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In principle the process of trade liberalization encompasses all goods, including tobacco products. Some scholars claim that the improved access of foreign goods to some domestic markets has considerably contributed to the increase in tobacco consumption (e.g. through the lowering of prices and use of sophisticated marketing techniques by multinational companies which were previously unknown to local players).\(^3\) Recent experience has shown that trade rules may also affect (actually or potentially) the ability of governments to adopt tobacco control measures. In 2012, Indonesia successfully challenged the US ban on flavoured cigarettes, while Ukraine and four other countries are currently contesting, through the formal WTO dispute settlement mechanism, the legality of the Australian plain packaging law.\(^4\) As a consequence, some observers argue that trade rules undermine the efforts of the international community and domestic governments to reduce the use of tobacco products and improve the level of public health. Others scholars, however, disagree and argue that properly designed non-discriminatory tobacco control measures are perfectly legal under existing international trade rules.

One specific issue which remains particularly controversial in this debate is the relationship between trade rules and the FCTC regime. There are those who submit, referring either to the principle of *lex posterior derogat legi priori* or *lex specialis derogat legi generali*, that in the case of a normative conflict the FCTC prevails over any conflicting obligations of WTO law.\(^5\) Others reject the applicability of these principles in the context of the FCTC/WTO relationship. They particularly point out that there is neither a real conflict between those two sets of norms nor identity as to their subject matter, and therefore traditional international conflict-of-norms rules remain inapplicable.\(^6\) Some authors add that it is not clear which set is actually more specific (e.g. the FCTC may be regarded as being more specific if looked at through the health lens, but not necessarily from the perspective of protection of intellectual property).\(^7\) Finally, some scholars highlight that the mandate of the WTO panels and the Appellate Body prohibits them from reaching any conclusion that would add to or diminish the rights or obligations of Members arising under WTO agreements (i.e. deciding a trade dispute on the basis of FCTC provisions).\(^8\)

During the fifth meeting of the Conference of the Parties (COP) in 2012, the Philippines made an unsuccessful proposal for a COP decision that would highlight the priority of public health and the WHO’s FCTC over private intellectual property rights in the context of WTO trade rules.

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health in international trade and investment disputes, privileging the FCTC dispute settlement mechanism over other available alternatives, and called for carving-out tobacco products from future free trade agreements. A similar attempt was also made by Malaysia and Uruguay during the sixth meeting that took place in October 2014 in Moscow. Although the two proposals were eventually adopted by the COP6 in the form of decisions, their language was modified so greatly that they lost all strength. Considering that such postulates are frequently made by the international health community, one may expect that similar proposals will continue to be put forth in the future.

The above initiatives add an additional layer of complexity to the WTO/FCTC relationship. Can such decisions impose any legally-binding obligations on State-Parties? How do they affect the availability of the WTO dispute settlement mechanism? To what extent can a COP decision require State-Parties to exclude tobacco and tobacco-related products from their future free trade agreements? This article will attempt to answer those questions, contributing to the broader debate on the relationship between both regimes. Due to space limitations, the article does not address the relationship between the FCTC dispute settlement system and international investment arbitration, which was also covered by the initial proposals.

This article proceeds as follows. Part 2 summarizes the discussion that took place during the meetings of the COP5 and COP6. Part 3 offers a legal analysis of several issues that arose in the context of the Parties’ initiatives, assessing the legal status of COP decisions, the nature of the relationship between the FCTC and WTO dispute settlement mechanisms, and the existence of any obligations that would mandate the exclusion of tobacco products from future free trade agreements. Part 4 consists of conclusions.

2. Parties’ proposals on the relationship between the international trade/investment regimes and the FCTC

During the meeting of Committee B, which operated as a part of the COP5 and whose mandate concerned reporting, implementation assistance and international cooperation, Canada proposed an uncontroversial draft decision on cooperation between the FCTC Secretariat, the World Health Organization, the WTO and the United Nations Conference on Trade and Development. This proposal basically requested the FCTC Secretariat to continue its cooperation with other secretariats with the aim of ensuring a better flow of information among those entities. The FCTC Secretariat was also requested to monitor tobacco control-related trade issues. In the course of the discussion that followed, the Philippines proposed an addition to the draft decision in the form of a new operative paragraph, which would provide that:

‘[the COP] further advises the Convention Secretariat (a) to remind the member Parties that there is an existing mechanism under Article 9 of the WHO Framework Convention on Tobacco Control for dispute settlement, and that this should be first exhausted before resorting to other international bodies;⁹ (b) to affirm the primacy of public health over all existing disputes in other international bodies on matters where tobacco and tobacco-related products are concerned; (c) to advise member Parties that in the course of future free trade agreements and such other trade-related arrangements,

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⁹ Note that the Philippines referred to the wrong legal basis. The dispute settlement mechanism is provided in Art. 27 and not Art. 9 of the FCTC.
to explicitly exclude tobacco and tobacco-related products from coverage of the same.\footnote{Conference of the Parties to the WHO Framework Convention on Tobacco Control, Fifth session, Seoul, Republic of Korea, 12-17 November 2012, \textit{Summary Records of Committees}, FCTC/COP/5/REC/2, p. 156.}

Although the language used by the Philippines is far from clear, arguably its reference to “other international bodies” meant not only the WTO but also investment treaty tribunals as well as arbitration panels established on the basis of bilateral and regional preferential trade agreements (PTAs).

The other countries, albeit for various reasons, were not very sympathetic to the proposal. Canada, which initially proposed the draft decision, stressed that the amendment suggested by Philippines went beyond its spirit. The same concern was expressed by the European Union. Stronger language was used by Honduras, which stated that the FCTC Secretariat should not be requested to advise Parties on sovereign matters. On the other hand, India supported the Philippines’ proposal, although it suggested softer language (‘call attention of member Parties to the existing mechanism under the WHO Framework Convention on Tobacco Control for dispute settlement and request that this should be used first before resorting to other international bodies’). In the end, the Philippines’ amendment was not included in either the draft decision or in its final version. The Chair of the Committee B meeting suggested to the Philippines that it draft a new decision covering those issues, which could be considered at a later time.

Two similar proposals emerged two years later during the COP6 meeting, also during the session of Committee B. The first, tabled by Malaysia, requested the Parties to support the efforts of other Parties aimed at excluding tobacco products from future trade and investment agreements. It echoed the earlier proposal made by Malaysia in 2013 in the context of the TPPA talks.\footnote{Framework Convention Alliance, \textit{Will Malaysia’s tobacco ‘carve out’ be adopted in Pacific trade deal?}, available at \url{http://www.fctc.org/publications/fact-sheets/industry-interference/1096-will-malaysia-s-tobacco-carve-out-carry-in-pacific-trade-deal} (last visited 10 November 2014). Note that the text of the Malaysian proposal is not publicly available.} The second draft, put forward by Uruguay, aimed at improving the FCTC dispute settlement mechanisms. To this end it proposed the establishment of an expert group that could investigate the topic and suggest possible enhancement. Arguably, the idea behind this proposal was to make the FCTC a prime point of reference for any dispute concerning tobacco control measures and to limit the risk of challenges through other mechanisms (e.g. the WTO dispute settlement system).\footnote{Interview with one of the participants of the Committee B meeting (on file with the author). The minutes of the meeting are not yet available on the FCTC webpage so it is not possible to provide the exact wording that was proposed by Malaysia and Uruguay.}

Both initiatives were met with mixed reactions. While some Parties expressed their support, others were more sceptical and insisted on far-reaching amendments, or even on abandoning the proposals altogether.\footnote{Conference of the Parties to the WHO Framework Convention on Tobacco Control, 6th session (Moscow, 13-18 October 2014), \textit{Provisional report of the sixth session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control}, 18 October 2014, FCTC/COP/6/31, paras. 105-113.} Eventually the COP6 adopted two less controversial texts that simply remind the Parties ‘of the possibility to take into account their public health objectives in their negotiation of trade and investment agreements’\footnote{Conference of the Parties to the WHO Framework Convention on Tobacco Control, 6th session (Moscow, 13-18 October 2014), \textit{First Report of Committee B}, FCTC/COP/6/A/R/2, item 5.4 and 5.5.} and request the FCTC Secretariat to prepare a report on health-trade relations in the context of efforts undertaken by...
developing countries (the Malaysian proposal) and a report investigating possible procedures for settling disputes within the FCTC and their interaction with other mechanisms (the Uruguay proposal). No language that would suggest a carve out of tobacco products from trade and investment agreements was included in the decision. Similarly, no expert group was established.

In the context of the above proposals and surrounding events, it seems relevant to examine the following issues: (i) what is the legal status of FCTC COP decisions?; (ii) how does a COP decision (or Art. 27 of the FCTC if a decision is considered to be non-binding) affect the mandate of WTO dispute settlement bodies to hear and decide a case submitted by one of the Members?; and (iii) to what extent can a COP decision (or any relevant provision of the FCTC if a decision is considered to be non-binding) require State-Parties to exclude tobacco and tobacco products from their future PTAs? These three issues will be addressed in the subsequent section.

3. Relationship between trade and FCTC regimes: Legal analysis of the proposals

3.1. Legal status of FCTC COP decisions

The FCTC does not explicitly determine the legal status of COP decisions. It merely provides in Art. 23.5 that ‘[t]he Conference of the Parties shall keep under regular review the implementation of the Convention and take the decisions necessary to promote its effective implementation and may adopt protocols, annexes and amendments to the Convention, in accordance with Articles 28, 29 and 33.’ In addition, the COP Rules of Procedure provide, in relevant part (Rule 50), that:

2. For all other decisions [than on budgetary and financial matters], the Conference of the Parties shall make every effort to reach agreement by consensus.

3. If all efforts to reach consensus on decision referred to in paragraph 2 have been exhausted and no agreement has been reached, the Conference of the Parties shall proceed as a last resort as follows: (a) decision on substantive matters shall be taken by a three fourths majority vote of the Parties present and voting, unless otherwise provided by the Convention, or by these rules […].

Although there is no literature that discusses the legal status of FCTC COP decisions, considerable scholarship exists with respect to decisions taken by conferences of the parties of various international environmental agreements (MEAs). This scholarship seems directly relevant in the context of the discussion on FCTC COPs.

COPs are characterized as ‘hybrids between issue-specific diplomatic conferences and the permanent plenary bodies of international organizations; they exercise their functions at the interface of the law of treaties and the law of international organizations.’ Despite this mixed nature, most scholars believe that their law-making activities should be assessed against the requirements of the Vienna Convention on the Law of Treaties (VCLT) rather than

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international institutional law (where, for example, the doctrine of implied powers may be relevant).\(^{18}\) In particular, Art. 11 of the VCLT identifies the consent of a state as the basis for creating binding obligations, and provides that such consent may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by other means if so agreed. The clause ‘by any other means if so agreed’ is sufficiently broad to include a general consent of the parties to be bound by subsequent decisions taken by treaty bodies such as COPs (even if a State-Party does not agree with a particular decision).\(^{19}\) An emblematic example of such a situation is Art 2.9 of the Montreal Protocol,\(^{20}\) which explicitly provides its COP with the possibility to adopting specific decisions by a two-thirds majority vote, and further that such decisions are binding on all State-Parties, even those that voted against them. More controversial are situations where the underlying treaty does not explicitly provide a COP with such authority, or where it merely contains a clause that gives a COP a general power to undertake actions that are necessary to achieve the purpose of an agreement.\(^{21}\) For example, the COP of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)\(^{22}\) adopted, without an explicit power in the underlying treaty, various decisions that seem to be regarded as (and intended to be) legally binding (e.g. quota systems adopted for trade in various animal products).\(^{23}\) Similarly, the Meeting of the Parties of the Montreal Protocol, again without a basis in the treaty, adopted a decision establishing an interim financial mechanism which was supposed to operate until a formal amendment to the Protocol would enter into force.\(^{24}\) On the other hand, the COP to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal\(^{25}\) took a decision banning the export of hazardous waste from OECD countries to non-OECD countries, which was subsequently contested by some State-Parties as going beyond the authority of the COP, leading eventually to the adoption of an amendment to the Convention.\(^{26}\)

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20 Montreal Protocol on Substances that Deplete the Ozone Layer, opened for signature 16 September 1987 (entered into force 1 January 1989), 1522 UNTS 3, as subsequently adjusted and amended.

21 Churchill & Ulfstein, supra note 16, p. 639; Gehring, supra note 18.


23 See Gehring, supra note 19.

24 See, Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (London, 27-29 June 1990), UNEP/OzL.Pro.2/3m, Decision II/8 and Annex II.


The above examples show that the legal status of such COP decisions is not as clear at it might look at first sight. While some authors claim, on the basis of the existing practice, that COPs can perform legislative functions even without an explicit basis in a treaty, other authors are more sceptical. For example, Brunnée concludes that although ‘the decisions do contain terms that make conduct mandatory, and make access to certain benefits contingent on compliance with some of these mandatory terms, [...] they do not appear to be binding in a formal sense.’ Somewhere in the middle are Churchill and Ulfstein, who believe that ‘such decisions [which] have not been challenged [should be regarded] as agreements in simplified form between parties to the MEA, rather than as decisions based on implied powers.’ In other words, COPs are merely platforms where consent is expressed, while State-Parties remain in control over the extent of their obligations. Yet others have labelled COP decisions as having some kind of de facto binding force, with State-Parties simply following their prescriptions (for the sake of effective functioning of MEAs) without really determining (or contesting) their legal status.

Bearing in mind the above observations, let us now return to the FCTC. The language of Art. 23.5 of the FCTC clearly cannot be regarded as explicitly granting the power to an FCTC COP to adopt binding substantive rules. It merely states that the FCTC COP can take decisions necessary to promote effective implementation of the Convention. It does not provide, as is the case with Art. 2.9 of the Montreal Protocol, that such decisions impose any binding obligations on State-Parties. Can it however be read as implicitly giving the COP law-making power? I do not think that this is the case. First, as indicated above, the FCTC regime should be assessed against the requirements of the VCLT, under which the consent of State-Parties is central to the creation of binding international obligations. While such consent may be expressed in different forms, one cannot lightly assume that the general clause of Art. 23.5 (together with the corresponding rule in the COP Rules of Procedures, which specifies that a simple three-fourths majority is required and allows for taking decisions against the will of specific State-Parties) vests the COP with law-making authority and implies the consent of all Parties (including those which vote against a particular decision) to be bound by COP decisions. Considering the importance of consent in norm creation, such a power of a treaty body should be expressed explicitly, as in Art. 2.9 of the Montreal Convention, rather than implied in a general clause. I would therefore share the view of those authors who regard COP decisions which are not based on explicit language in a treaty as not creating any binding obligations. In this context, it is also worth recalling the example, referred to above, of the decision adopted by the COP of the Basel Convention. The general clause giving the COP authority to undertake actions which

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27 E.g., V. Röben, Institutional Developments under Modern International Environmental Agreements, 4 Max Planck Yearbook of United Nations Law 364 (2000), pp. 371-403 (claiming that COPs can take legislative actions in conformity with the policy approach underlying a MEA, but cannot impose substantial new obligations on State-Parties; Röben does not, however, explain how his claim fits to the traditional conception of international law, under which the consent of States is a prerequisite for creating any binding obligations; it is also not clear how to distinguish those two categories).


29 Churchill & Ulfstein, supra note 18, p. 640 (note however that it is not clear whether they argue that such agreements can create free standing obligations or rather that they should only be regarded as relevant in the process of interpretation as required by Art. 31.3(a) of the VCLT).

30 Gehring, supra note 19.

31 Note also that the majority voting rule is not even included in the Convention but merely in the COP Rules of Procedure which, contrary to the Convention itself, have never gone through a regular ratification process. This arguably limits their significance.
may be required for achievement of the purposes of the Convention\textsuperscript{32} (a language similar to that of Art. 23.5 of the FCTC) was considered to be an insufficient basis for imputing a general law-making power of the COP.

Second, one may also rely here on the textual argument. Art. 23.5 of the FCTC does not speak about ‘rules’ or ‘norms’ but merely about ‘decisions necessary to promote its [the Convention’s] effective implementation’. The lack of any terms which would denote the existence of binding legal obligations indicates that the State-Parties did not intend to give the COP’s decisions any normative character.\textsuperscript{33} Third, the FCTC contains specific provisions for adopting protocols, annexes and amendments to the Convention (Art. 28, 29 and 33), i.e. instruments which are traditionally used for creating international obligations. All of them, in order to become binding on the State-Parties, require their explicit consent. For example, Art. 28.4 of the FCTC provides that an amendment enters into force only for those Parties that accepted it (provided that a specific number of State-Parties that accepted it deposit the appropriate instruments of acceptance). A similar provision (Art. 33.5) applies to protocols, which are binding only on the parties that accept them. Given the emphasis placed on formal consent of State-Parties in other parts of the Convention, it is highly questionable that Art. 23.5 can be read as granting the FCTC COP with an implied general power of law-making.\textsuperscript{34} Fourth, guidelines to various provisions of the FCTC are adopted in the form of COP decisions, and they are universally regarded as a type of soft law.\textsuperscript{35} While protocols and annexes are also adopted in the form of COP decisions, the subsequent formal consent of State-Parties is required to give them legal force. All these elements clearly suggest that the FCTC does not provide any general power to the COP to adopt decisions that would create binding obligations on the State-Parties.

The above conclusion is reinforced by the language used in the proposals themselves, at least insofar as the Philippines’ initiative is concerned. The proposal was addressed to the FCTC Secretariat (note that COPs are generally entitled to give binding instructions to their secretariats\textsuperscript{36} and not the State-Parties. If there were to be any binding obligations (depending on the language of the decision), they would concern only the Secretariat, which obviously cannot give binding instructions to States. Second, the proposal uses, both with respect to the actions to be taken by the FCTC Secretariat as well as by State-Parties, very soft language. It speaks about ‘advising’, ‘reminding’, ‘affirming’ (the latter term being one that is normally found in the preambles) and uses ‘should’ rather than ‘shall’ or ‘obliged to’. This language can hardly be regarded as imposing any additional legal obligations beyond those which are found in the FCTC. Having said that, it also should be added that even if the language used in the Philippines’s proposal were stronger (and more direct as concerning State-Parties), for the

\textsuperscript{32} Article 15(5)(c) of the Basel Convention provides: ‘The Conference of the Parties shall: […] (c) consider and undertake any additional action that may be required for the achievement of the purposes of this Convention in the light of experience gained in its operation and in the operation of the agreements and arrangements envisaged in Article 11.’

\textsuperscript{33} Cf., Churchill & Ulfstein, supra note 18, p. 639 (arguing that the term ‘rules’ suggests that the relevant measures are intended to be legally binding); but see Brunnée, supra note 16, pp. 23-5 (noting that in any case this will be too narrow a ground to come to such a conclusion).


\textsuperscript{36} Churchill & Ulfstein, supra note 18, p. 634.
reasons stated above this would not change the character of the COP decision as a non-binding instrument. As correctly noted by Brunnée in the context of the UN Framework Convention on Climate Change,37 ‘the parties remain entirely in control – it is through their instruments of acceptance and not through the actions of the COP that new […] law is brought into effect. The COP is merely the forum in which the parties elaborate and adopt the protocol or amendment; its decisions as such do not alter the rights or obligations of the parties.’38

3.2. The relationship between the WTO and FCTC dispute settlement mechanisms

Since the decisions of the COP, as the previous section concludes, are non-binding, there is no need to analyse whether they can affect the mandate of the WTO dispute settlement bodies to hear and decide cases submitted by WTO Members. What, however, should be considered is the impact of Art. 27 FCTC – which is a binding obligation establishing the FCTC dispute-settlement mechanism – on the mandate of WTO panels. In this context, one may argue that there is a conflict of jurisdictions between the two regimes, i.e. 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.’39

The relevant article of the FCTC provides:

1. In the event of a dispute between two or more Parties concerning the interpretation or application of this Convention, the Parties concerned shall seek through diplomatic channels a settlement of the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation, or conciliation. Failure to reach agreement by good offices, mediation or conciliation shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it.

2. 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.40

Does the above provision remove the jurisdiction of WTO panels (or allow a panel to decline it) when it comes to disputes over tobacco control measures that in one way or another affect international trade? While there is no practice that would address the relationship between the FCTC and WTO dispute settlement mechanisms, there is some limited case law (and quite substantive scholarship) that discusses the problem of overlapping and conflicting jurisdictions between the WTO and PTAs. These materials are relevant in the context of the current discussion.

38 Brunnée, supra note 16, p. 18.
40 No such procedure has been adopted by the FCTC COP so far.
Before going into a detailed analysis, one should stress that overlapping and competing jurisdictions between different tribunals or dispute settlement mechanisms are a characteristic and probably inevitable feature of contemporary international law.41 Some authors are very critical of this development, arguing that the proliferation of international tribunals (as well as dispute settlement processes) increases the risk of forum-shopping and the rendering of conflicting decisions. This in turn may diminish legal certainty in international relations and undermine the legitimacy of the whole system.42 Others contend that due to the absence of a supreme court, disputes involving conflicting verdicts may remain unresolved.43 Even though these are valid points, the practice of different international tribunals shows that they are generally unwilling to decline their jurisdiction.44 One reason for this unwillingness may be the fact that international tribunals operate under the principle of parties’ consent. As noted by Pauwelyn and Salles, ‘if parties give an international tribunal explicit jurisdiction to decide a dispute, the tribunal often feels hard-pressed to fulfil its mandate and to decide the case, even if a second tribunal is competent or a parallel or sequential proceeding is, or can be, initiated.’45 In this context, they also add that ‘the jurisdiction of international tribunals is specific and depends […] on the treaty it is enforcing (e.g., WTO panels enforce WTO agreements, NAFTA panels enforce NAFTA). The treaty-based jurisdiction of international tribunals means that even where there is overlapping jurisdiction, each tribunal decides a different aspect of the dispute (e.g. the ICJ decides issues of territorial delimitation and the WTO decides issues of trade).’46

Art. 27 of the FCTC provides that any disputes over the interpretation and application of the Convention shall be decided (exclusively as indicated by the expression ‘shall’) through negotiation or any other peaceful means of dispute settlement of the Parties’ choice. In addition, Art. 27.2 envisages an exclusive and compulsory jurisdiction of an ad hoc arbitral panel (but only for those Parties that made a relevant declaration47). On the other hand, the WTO Dispute Settlement Understanding (DSU)48 contains several provisions which establish the exclusive and compulsory jurisdiction of panels over alleged violations of WTO law. For example, Art. 23.1 of the DSU stipulates that Members shall address the violation of WTO law only through

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44 But see Henckels, supra note 41, pp. 587-9 (pointing out, among the other things, the approach taken by the arbitral tribunal in the Mox Plant case and by the International Tribunal for the Law of the Sea in the Southern Bluefin Tuna case).

45 Pauwelyn & Salles, supra note 43, pp. 83.

46 Ibidem, p. 84.

47 According to information in the United Nations Treaty Series database, only two countries (i.e. Azerbaijan and Belgium) has declared their acceptance of compulsory ad hoc arbitration provided in Art. 27.2 of the FCTC (see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&lang=en, last visited 10 November 2014). This obviously limits legal risks resulting from the existence of competing jurisdictions (i.e. rendering conflicting decisions and leaving a dispute unresolved).

WTO dispute settlement system (and abide by the rules of the DSU in this context). Art. 6.1 of the DSU adds that ‘[i]f the complaining party so requests, a panel shall be established ...’. As a consequence, we have two regimes, each of them providing for exclusivity of its dispute settlement system (with respect to claims made under the respective agreement(s)).

It seems that the problem of competing jurisdictions, when it comes to the WTO/FCTC relationship, is more apparent than real. Note that, depending on one’s understanding of a conflict between jurisdictions, there might in the first place be no conflict at all. In order to speak about conflict there needs to be either a ‘same dispute’ or ‘related aspects of the same dispute’ which can be brought before two (or more) different dispute settlement mechanisms. While this might be an easy case for PTAs and WTO agreements, where the substance of specific obligations is in essence the same or similar, this sameness (or even similarity) is more questionable when it comes to the FCTC and WTO. The FCTC dispute settlement system is relevant for disputes concerning the application and interpretation of the FCTC provisions. On the other hand, the WTO dispute settlement system is available for violations of WTO provisions. Although there could perhaps be some overlaps between the two regimes (in term of facts underlying the dispute), both of them relate to different international obligations – not only in a formal sense, as is the case for PTAs (i.e. obligations arising from the WTO agreements are formally distinct from the obligations arising under a relevant PTA) – but also in terms of the substance of those obligations (lack of similarity of law to be applied). For example, the WTO is predominantly concerned with non-discrimination in international trade (i.e. the most favourite nation principle and national treatment). On the other hand, the FCTC only provides certain minimum standards for national tobacco control measures; it does not say anything about non-discrimination or other disciplines that are included in WTO law.

However, even if one assumes, for the sake of completeness of this analysis, that there are conflicting jurisdictions between the WTO and FCTC dispute settlement systems, it is clear that a WTO panel will not be entitled to refuse examination of a complaint relating to the violation of WTO law merely because some other dispute settlement mechanism is available to the parties, even if a defendant in a particular case is in favour of such other system. Note that apart from Art. 23.1 of the DSU, which gives Members the right to have recourse to the WTO dispute settlement system, Art. 7.2 states that “[p]anels shall address the relevant provisions in any covered [i.e. WTO] agreement or agreements cited by the parties to the dispute”, while Art. 3.3 adds that:

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49 It specifically provides: “When 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.”

50 An exclusive jurisdiction clause can be formulated in positive terms (e.g. any dispute concerning the interpretation and application of the provisions of the treaty shall be ...), or in negative terms (e.g. States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than ...). (L.E. Salles, Forum Shopping in International Adjudication: The Role of Preliminary Objections, Cambridge University Press, Cambridge: 2014, p. 228).

51 Note that the sameness of the subject matter was identified by the WTO panel in Mexico – Soft Drinks as a relevant element (Panel Report, Mexico – Tax Measures on Soft Drinks and Other Beverages, WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSU 2006:3, 43). The panel particularly observed that ‘neither the subject matter nor the respective positions of the parties are identical in the dispute under the NAFTA […] and the dispute before us. […] In the present case the United States is alleging discriminatory treatment against its products resulting from internal taxes and other internal measures imposed by Mexico. In the NAFTA case, instead, Mexico is arguing that the United States is violating its market access commitments under the NAFTA.’ (para. 7.14).
The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

As correctly noted by Layton and Lowe, the DSU does not envisage the possibility for a panel to decline its jurisdiction over a claim concerning an alleged violation of one of the WTO agreements (or to dismiss it in the course of a proceeding) because of the availability of some other dispute settlement mechanism. To the contrary, such a move would go against the explicit language of the DSU (i.e. to address a potential violation of relevant WTO provisions) and would undermine the principle of prompt settlement of disputes as required by Art. 3.3. Some authors even claim that WTO panels exercise an absolute jurisdiction, meaning that WTO adjudicating bodies always have the authority and the obligation to examine claims of violations of WTO law. The absolute nature of the WTO dispute settlement system means that a panel cannot decline its jurisdiction even if an alternative dispute settlement system excludes recourse to other systems.

The above observations are in principle confirmed by the existing WTO case law. In Mexico – Soft Drinks, the Appellate Body considered whether a panel had a right to decline the exercise of its jurisdiction if the same complaint could also be addressed in another dispute settlement mechanism (in this case NAFTA). It concluded, after referring to various provisions of the DSU, that the panel did not have such a choice and that it was obliged to exercise its jurisdiction (with a corresponding entitlement of a Member to have a ruling by a WTO panel). This view was also shared by all the third parties participating in the dispute. For example, China observed that:

[A] WTO panel does not have an implied power to refrain from performing its ‘statutory function’.... [I]f a panel that is ‘empowered and obligated’ to assist the DSB in the settlement of a dispute declines to exercise jurisdiction, such a decision would create legal uncertainty and be contrary to the aim of providing security and

52 Layton & Lowe, supra note 7, p. 249.

53 Kwak & Marceau, supra note 39, pp. 469-70. See also, G. Marceau & J. Wyatt, Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO, 1(1) Journal of International Dispute Settlement 67 (2010), pp. 70-2. But cf. Salles, supra note 50, pp. 240 et seq. (arguing that: (i) a panel may decline its jurisdiction on the basis of a preclusion clause in a PTA and through reliance on Art. 3.10 of the DSU (which constitutes an expression of the good faith principle in the WTO dispute settlement process); (ii) Art. XXIV of the GATT mandates recognition of both substantive and procedural norms (including any clauses on exclusive jurisdiction) in regional trade agreements; and (iii) Art. 23 of the DSU can be modified or revoked inter partes by the disputing parties. While these arguments definitively merit consideration, they are not relevant for the purpose of this article. The FCTC does not preclude a recourse to the WTO dispute settlement system, and it is not covered by Art. XXIV of the GATT nor does it modify or revoke Art. 23 of the DSU.


55 The Appellate Body referred to Arts. 3.2, 7.1, 7.2, 11, 19.2 and 23 of the DSU. For example, with respect to Art. 11, the Appellate Body noted that the panel is under an obligation to make an objective assessment of the matter before it and other findings that will assist the DSB in making recommendations. According to the Appellate Body, declining to exercise jurisdiction by a panel would be incompatible with these obligatory functions (Ibidem, para. 51).

56 Ibidem, para. 52.
predictability to the multilateral trading system as well as the prompt settlement of disputes as provided for in Article 3.3 of the DSU.\footnote{Ibidem, para. 34.} At the same time, the Appellate Body distinguished this situation from the one in which another international treaty would not only provide for an alternative dispute settlement mechanism but would also raise legal impediment to a panel’s jurisdiction (the question here is therefore not whether a panel \textit{may} decline its validly established jurisdiction, but rather whether there are certain situations in which a panel \textit{is obliged to} do so). The Appellate Body, after recalling Art. 2005.6 of the NAFTA, which provides that ‘once dispute settlement procedures have been initiated under [NAFTA] Article 2007 … the forum selected shall be used to the exclusion of the other [here the WTO],’\footnote{Ibidem, para.54 and accompanying footnotes.} nevertheless refused to make any decisive findings, as not being relevant in the context of this particular dispute. It thus left open the question whether a clause in another treaty explicitly granting jurisdiction to its dispute settlement mechanism, to the exclusion of a WTO counterpart, may indeed constitute a legal impediment to a WTO panel ruling on the merits of a particular case. In another dispute (\textit{Argentina – Poultry Anti-Dumping Duties}\footnote{Panel Report, \textit{Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil}, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727.}, the WTO panel decided that it could exercise its jurisdiction despite the fact that the very same measure had been already assessed in a proceeding before an \textit{ad hoc} MERCOSUR tribunal (under relevant MERCOSUR rules). The panel was not persuaded by the estoppel argument advanced by Argentina\footnote{Argentina argued that ‘bringing the dispute successively before different fora, first MERCOSUR and then the WTO, constitutes a legal approach that is contrary to the principle of good faith and which, in the case at issue, warrants invocation of the principle of estoppel’ (\textit{Ibidem}, para. 7.18).} and concluded that reliance on the principle of estoppel would require a showing that Brazil 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 system (the 2002 Protocol of Olivos, which potentially could have such an effect, was not yet in force at the time of the case).\footnote{\textit{Ibidem}, para. 7.38.} Thus the panel also left unanswered the question whether a clause in another treaty excluding recourse to the WTO dispute settlement system can make a claim inadmissible and remove the substantive jurisdiction of a panel.

The reservations expressed both by the panel and the Appellate Body seem however to be of secondary importance when it comes to assessment of the relationship between WTO/FCTC dispute settlement mechanisms. Note that the FCTC does not contain any clause that would prohibit its Parties from having recourse to the WTO system (of course with respect to violations of WTO law and not FCTC obligations). Since decisions of the COP are not binding (see the discussion in Section 3.1 above) they cannot impose any additional obligation on the FCTC State-Parties that would go beyond the language of the Convention. On the other hand, the WTO case law confirms that a panel is not entitled to decline its jurisdiction only because some other dispute settlement system is available.

\subsection*{3.3. Excluding tobacco and tobacco-related products from free trade agreements}

It is frequently argued that tobacco products should be excluded from PTAs. As it was already mentioned, proponents of this approach claim that such agreements improve market
access for tobacco products and may result in their lower prices, which in turn can translate into higher levels of consumption.\textsuperscript{62} Some also believe that various WTO-plus obligations of PTAs (e.g. more expansive market access commitments for services, additional intellectual property requirements, regulatory coherence and transparency obligations) may additionally constrain governments in this policy field.\textsuperscript{63} At the same time, those authors remain sceptical about the usefulness of any exception clauses that are normally included in PTAs, criticizing the complex conditions for applying such clauses and the lack of clearly defined standards, which leaves arbitrators with broad discretion and hence leads to uncertainty of outcomes. This, in turn, may create a chilling effect on regulatory efforts.\textsuperscript{64} As a consequence, the removal of tobacco products from PTAs is presented as a simple and attractive option.\textsuperscript{65}

On the other hand, there are those who argue that the removal (or reduction) of border barriers (i.e. tariffs or quantitative restrictions) can be counteracted by the development of non-discriminatory internal measures such as taxes and marketing restrictions.\textsuperscript{66} Carving out tobacco products also raises the slippery slope argument, whereby the exclusion of tobacco products may be only the first step in the removal from PTAs’ disciplines of a whole array of goods which possess some negative externalities (e.g. alcohol).\textsuperscript{67} Moreover, a carve-out can have negative consequences for other health areas by undermining the significance of the general health exception. As a consequence, the proponents of these arguments opt for properly drafted exceptions that are able to provide the governments with sufficient regulatory space to implement tobacco control measures, rather than the wholesale removal of tobacco products from PTAs.\textsuperscript{68}

While, as explained above, there is disagreement as to the potential advantages and disadvantages of carving out tobacco products from PTAs, it remains clear that the Convention

\textsuperscript{62} E.g., R. Stumberg, Safeguards for tobacco control: Options for the TPPA, 39 American Journal of Law & Medicine 382 (2013), p. 394. But cf., J. Drope & J.J. Chavez, Complexities at the intersection of tobacco control and trade liberalization: evidence from Southeast Asia, Tobacco Control, 5 February 2014, doi: 10.1136/tobaccocontrol-2013-051312 (claiming that there is no clear link in Southeast Asia between liberalisation of international trade and the level of consumption).


\textsuperscript{64} Stumberg, supra note 62, pp. 405-436; Fooks & Gilmore, supra note 63, pp. 5-6.


does not impose any such obligations on its State-Parties. In particular, Art. 2 of the FCTC merely provides that:

The provisions of the Convention and its protocols shall in no way affect the right of Parties to enter into bilateral or multilateral agreements, including regional or subregional agreements, on issues relevant or additional to the Convention and its protocols, provided that such agreements are compatible with their obligations under the Convention and its protocols.

In principle, Art. 2 does not restrict State-Parties from entering into PTAs. It only prohibits them from entering into those PTAs that are incompatible with the FCTC. However none of the provisions in the Convention restricts discretion of States with respect to elimination of trade barriers for tobacco products. Since the removal of tariffs is an essential element of any PTA (while this type of agreement is the most important category covered by Art. 2), one would expect that if such an arrangement is considered to be incompatible with the obligations of the FCTC, the latter would contain some kind of explicit reference to that effect. But the Convention is silent on this issue.

At least one source (i.e. SEATCA) refers in the above context to Art. 5.3 of the FCTC, which obliges the State-Parties to protect their tobacco control policies from commercial and other vested interests of the tobacco industry. It claims that promoting trade in tobacco products by giving the benefits envisaged by PTAs is incompatible with this provision.69 A close reading of Art. 5.3 and the accompanying guidelines70 demonstrates, however, that this is an incorrect interpretation. Art. 5.3. is concerned with the process of setting and implementing national tobacco control measures (and not other rules that may have some impact on tobacco products). It merely asks the State-Parties to insulate the formulation and implementation of public health policies in the area of tobacco control from the tobacco industry.71 Although it also prohibits preferential treatment of the tobacco industry (in the form of incentives, privileges or benefits),72 the guidelines suggest that these categories relate to economic, financial and fiscal policies such as subsidisation, tax exemptions or investment into a stated-owned tobacco industry.73 In any case the inclusion of tobacco products in PTAs cannot be regarded as a form of preferential treatment. It is rather an equal treatment as compared to other goods covered by a PTA. In addition, the interpretation proposed by the SEATCA is not confirmed by the practice of the State-Parties to the Convention. Since adoption of the FCTC, State-Parties have concluded a great number of PTAs and only a few of them provide for some form of exclusion of tobacco products.74 This shows that tobacco products are generally treated as any other product and the Parties do not see the Convention as constraining the liberalization of regional or bilateral trade in this sector.

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70 Guidelines for implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control on the protection of public Health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry, FCTC/COP3(7) (Durban, South Africa, 17–22 November 2008).

71 Ibidem, para. 13.

72 Ibidem, para. 17.

73 Ibidem, paras. 28–30.

74 For example, the South Asian Free Trade Area (SAFTA) Agreement includes tobacco on sensitive lists for which no tariff reduction is required. Similarly the Pacific Island Countries Trade Agreement (PICTA) excludes alcohol and tobacco products from tariff elimination.
4. Conclusions

The analysis presented above shows that FCTC COP decisions lack any binding effect. As a consequence, the various proposals submitted by the Parties to the FCTC, irrespective of their wording, cannot impose any additional obligation on State-Parties. Although the Convention as such creates binding obligations, its provisions do not affect the jurisdiction of WTO panels to hear complaints concerning potential violations of WTO law nor require carving out tobacco products from PTAs. First, under the DSU, a WTO panel cannot decline its jurisdiction just because some other alternative dispute settlement system is available. While the Appellate Body did not rule out (but neither did it confirm) that a specific clause in an extraneous treaty could create a legal impediment to a WTO panel exercising its jurisdiction, this seems to be of secondary importance in the context of the relationship between the FCTC and WTO dispute settlement system. As discussed above, the FCTC does not contain any clause that would prohibit its Parties from having recourse to the WTO system. Second, the Convention does not include any requirements that would prohibit State-Parties from liberalizing trade in tobacco products as part of their future PTAs. Contrary to position taken by some non-governmental organizations, Art. 5.3 of the FCTC does not establish such an obligation.

One may ask whether the above means that COP decisions, such as those proposed by the Philippines, Uruguay and Malaysia, are deprived of any importance. This is not necessarily the case. While they are not legally binding they nevertheless can have some de facto force (particularly if they are formulated in stronger language which resembles traditional obligatory clauses). As noted by Gehring, a decision by a COP may be regarded as reflecting ‘a promise of the supporters to honour their mutual commitment.’ Taking actions that would go against those promises (e.g. bringing a claim to the WTO in a situation when a COP decision asks for prior exhaustion of the FCTC dispute settlement system) may damage the reputation and undermine the credibility of an offender.75 Nevertheless, a determined State-Party would not be legally barred from taking such an action, even if it was incompatible with the instructions of a COP decision.

75 Gehring, supra note 19.