

MANAGING FRAGMENTATION BETWEEN INTERNATIONAL TRADE AND INVESTMENT LAW AND GLOBAL PRIORITIES FOR NONCOMMUNICABLE DISEASE PREVENTION IN FOOD AND ALCOHOL

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This article examines three ways in which instruments developed by international health organizations might be used to manage fragmentation between health and international trade and investment law in the context of regulating food and alcohol as noncommunicable disease risk factors. These are: by modifying or overriding trade and investment obligations, affecting interpretation and fact finding, and establishing cooperative inter-institutional processes. The article assesses the advantages and disadvantages of each of these approaches for managing fragmentation under the rules of treaty interpretation and dispute settlement. It argues that while much of the discussion of fragmentation between trade and health focuses on treaty interactions, many of the actual uses of health instruments are not necessarily dependent on their formal legal status. It then proposes several features of international instruments that might strengthen or support these uses, whether through binding or through non-binding instruments.

I INTRODUCTION

The prospect of ‘fragmentation’ or ‘policy incoherence’ between trade and investment law and health objectives has been an acute concern in noncommunicable diseases (‘NCD’) prevention over the last decade. Much of this has been driven by high profile disputes about tobacco control in the World Trade Organization (‘WTO’) and under the investor–state dispute settlement mechanisms of bilateral investment treaties, including investor–state disputes brought by Philip Morris companies against Uruguay and Australia’s tobacco packaging and labelling laws, and a series of cases brought by four WTO member states against Australia’s plain packaging laws.¹ Although all three cases have since been resolved (or reportedly

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¹ *Philip Morris Brands Sàrl v Oriental Republic of Uruguay (Award)*, ICSID Case No ARB/10/7 (8 July 2016); *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia (Award on Jurisdiction and Admissibility)*, PCA Case No 2012-12 (17 December 2015); *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Cuba)*, WT/DS458; *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Dominican Republic)*, WT DS441; *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Honduras)*, WT/DS435; *Australia — Certain Measures Concerning Trademarks, Geographical*



resolved) in favour of host states, they have generated significant concern and study about the interaction of international trade and investment law with health commitments for tobacco control, including obligations under the World Health Organization ('WHO') Framework Convention on Tobacco Control ('FCTC').²

The discussions that took place for tobacco control are now being echoed in relation to other risk factors for NCDs, in particular to measures to combat the harmful use of alcohol and to address the consumption of unhealthy foods. Food and alcohol labelling measures in Thailand, Chile, and Peru have been discussed as Specific Trade Concerns in the WTO's technical barriers to trade committee,³ while the adoption of taxes on sugar-sweetened beverages has generated resistance from industry, including the threat of litigation.⁴ In many ways, the anxieties about fragmentation between health and trade and investment law are even more acute in relation to food and alcohol because, unlike tobacco control, food and alcohol policy are not governed at the international level by binding instruments. This article explores the extent to which this difference matters for the ability of health instruments to influence the risk and outcomes of trade and investment disputes about food and alcohol regulation. Broadly, it considers the potential uses of health instruments in trade and investment law and dispute settlement in terms of three categories:

1. Conflict or hierarchy-based uses: using a 'stronger' health instrument, usually a binding treaty, to *prevail over* or *modify* trade and investment instruments, or to *opt-out* of trade and investment dispute settlement;⁵

Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Indonesia), WT/DS467. Previously, Ukraine was also party to the disputes, but discontinued its case in May 2016: *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Ukraine)*, WT/DS434.

² WHO Framework Convention on Tobacco Control, adopted 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) ('WHO FCTC'). For an overview of legal issues relating to the WHO FCTC and international trade and investment law, see Andrew D Mitchell and Tania Voon, *The Global Tobacco Epidemic and the Law* (Edward Elgar, 2014); Tania Voon, Andrew D Mitchell and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012); Symposium, 'The Future of Global Tobacco Control: Current Constitutional and Treaty Based Challenges' (2013) 38 *American Journal of Law and Medicine* 1; Ernst Ulrich Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods: Methodology Problems in International Law* (Hart Publishing, 2017) 264; Harold H Koh, 'Tobacco Control as a Global Health and Human Rights Imperative' (2016) 57 *Harvard Journal of International Law* 434.

³ See, eg, Committee on Technical Barriers to Trade, *Minutes of the Meeting of 17–18 June 2015*, G/TBT/M/66 (17 September 2015) 24, 28, 37.

⁴ For examples, see Anita George, 'Not So Sweet Refrain: Sugar-Sweetened Beverage Taxes, Industry Opposition and Harnessing the Lessons Learned from Tobacco Control Legal Challenges' (2018) 13 *Health Economics, Policy and Law* (forthcoming).

⁵ In the context of the WHO FCTC, see, eg, Intergovernmental Negotiating Body on the WHO Framework Convention on Tobacco Control, *Summary Records*, 4th sess, Working Group 2, 3rd meeting, A/FCTC/INB4/SR (18–23 March 2002) 142–3; Conference of the Parties to the WHO Framework Convention on Tobacco Control, *Report of the sixth session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control*, 6th sess (Moscow, Russian Federation, 13–18 October 2014) 23–5. See also Intergovernmental Negotiating Body on the WHO Framework Convention on Tobacco Control, *Co-chair's Working Papers: Final Revisions — Working Group 2*, 4th session, Provisional Agenda Item 4, A/FCTC/INB4/2(a), para 5, discussed in Benn McGrady, *Trade and Public Health: The WTO, Tobacco, Alcohol and Diet* (Cambridge University Press, 2011) 245.

2. Interpretative uses: use of health instruments in *interpretation, fact-finding and benchmarking* by trade and investment adjudicators;⁶
3. Procedural approaches: use of *inter-institutional processes* to sensitise trade and investment adjudicators to health concerns, as well as encourage more dialogue between different actors within states.⁷

There are a number of detailed existing studies examining fragmentation and coherence between health, trade and investment instruments in terms of the law governing conflicts between treaties.⁸ However, the ways in which the WHO FCTC and other non-trade/investment treaties have influenced the deliberations of trade and investment tribunals are much broader than formal legal interactions between treaties. Many of the ways in which health instruments have been used as sources of factual, normative, and institutional authority are formally indifferent to the legal status of the instrument being used, and could also be relevant to non-binding instruments. Nevertheless, binding multilateral treaties embody other qualities that have also proven to be important to the resolution of trade and investment disputes, including political visibility, institutional support, and international consensus. It is worth considering to what extent these features can be replicated or more strongly emphasised for food and alcohol governance, whether through legally binding instruments or otherwise.

This article assumes that for the near future there will be no relevant amendments of the WTO agreements, and that a significant number of states will still be bound by at least one investment treaty without explicit protection of public health regulation, although it should be noted that several states are in the process of renegotiating investment agreements to provide such protection.⁹ As such, its scope is limited to the evolution of trade and investment regimes through case law rather than renegotiation of treaties.¹⁰ It also does not consider the role of health instruments in any respect other than managing the risk of trade and investment disputes. Broader debates about the merits of binding versus non-binding instruments in food and alcohol are, of course, about significantly more than this, and this article does not address other reasons that health bodies might want to adopt new binding instruments.

II DEFINING THE PROBLEM OF FRAGMENTATION AND POLICY COHERENCE FOR FOOD AND ALCOHOL REGULATION FOR NCD PREVENTION

A *Fragmentation in International Law and Global Health Governance*

In 2006, the UN International Law Commission noted that despite the anxiety occasioned by the ‘fragmentation’ of international law, or the splitting of international law into distinct and

⁶ United Nations Conference on Trade and Development (‘UNCTAD’), ‘Taking Stock of IIA Reform’ in *World Investment Report 2017: Investment and the Digital Economy* (2017) 138.

⁷ See, eg, Jonathan Liberman and Andrew Mitchell, ‘In Search of Coherence between Trade and Health: Inter-institutional Opportunities’ (2010) 25 *Maryland Journal of International Law* 143; Raphael Lencucha and Jeffrey Drope, ‘Plain Packaging: An Opportunity for Improved Policy Coherence?’ (2013) 30 *Health Promotion International* 281.

⁸ See, eg, McGrady, above n 5, 34–79, 228–49; Henning Grosse Ruse-Khan, ‘A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging Between Intellectual Property, Trade, Investment and Health’ (2013) 9 *Journal of Private International Law* 309.

⁹ For an overview of these trends, see UNCTAD, ‘Taking Stock of IIA Reform’, above n 6, 119–25.

¹⁰ For an overview of issues in treaty negotiation and reform, see UNCTAD, ‘Reforming the International Investment Regime: An Action Menu’ in *World Investment Report 2015: Reforming International Investment Governance* (2015) 120–73.

potentially uncoordinated and conflicting subfields, the phenomenon was in fact a sign of international law's vitality. Fragmentation was caused in part by a great increase in the number of areas of international cooperation and the greater use of legal instruments to achieve the goals of such cooperation. The resulting study by the Commission was subtitled 'Difficulties Arising from the Diversification and Expansion of International Law' to reflect both the challenges but also the opportunities presented by an increasingly diverse and complex international legal universe.¹¹

Among the challenges of fragmentation identified by the Commission were the possibility of conflicting interpretations between different specialised areas of international law, as well as the possibility of states picking and choosing between substantive interpretations and institutional mandates at the risk of coherence to the whole. As international law expanded, governing the relations between its different branches thus became more complex, although the Commission emphasised that the law of treaties and dispute settlement provided many tools for international lawyers to address this complexity.¹² Examples of overlaps between norms and techniques to resolve them were widespread across many subject areas of international law, with the Commission citing examples from interactions between environmental law and trade law; international human rights and humanitarian law; regional and bilateral environmental agreements; and different tribunals interpreting the same rules.¹³

This diversification and expansion has also occurred in global health, which has in recent years transformed from a discipline 'primarily focused on technical, medical and professional problems and solutions' to one that also focuses on social, political, and commercial determinants of health.¹⁴ In the NCDs context, for example, such expansion is reflected by the UN's Political Declaration that NCDs are a 'whole of government and whole of society challenge',¹⁵ in the focus on multisectoral coordination and cooperation in the WHO FCTC¹⁶ and in the WHO's Global Action Plan for the Prevention and Control of Noncommunicable Diseases,¹⁷ and in academic work on the commercial and political determinants of health.¹⁸

As global health has expanded, so have the legal frameworks governing it. Much of 'global health law' sits outside global health institutions, and is regulated not by treaties specifically pertaining to health, but by human rights law,¹⁹ trade, investment, and intellectual property

¹¹ UN International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th sess, UN GAOR, UN Doc A/CN.4/L.682 (13 April 2006) ('*Fragmentation Report*').

¹² *Ibid* [14]–[20].

¹³ See generally *ibid*.

¹⁴ Ilona Kickbusch and Martina M C Szabo, 'A New Governance Space for Health' (2014) 7 *Global Health Action* 23507.

¹⁵ UN General Assembly, Political Declaration of the High-Level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases, 66th sess, UN GAOR, Agenda Item 117, UN Doc A/RES/66/2 (24 January 2012).

¹⁶ WHO FCTC, arts 4.2, 4.4, 5.1, 5.2.

¹⁷ World Health Organization, *Global Action Plan for the Prevention and Control of Noncommunicable Diseases 2013–2020* (2013) 23 ('*Global Action Plan*').

¹⁸ See, eg, Ilona Kickbusch, Luke Allen, Christian Franz, 'The Commercial Determinants of Health' (2016) 4 *Lancet Global Health* 895. Lancet–University of Oslo Commission on Global Governance for Health, 'The Political Origins of Health Inequity: Prospects for Change' (2014) 383 *Lancet* 630.

¹⁹ See, eg, *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'), opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12; Committee on Economic, Social and Cultural Rights, *General Comment No 14 (2000): The Right to the Highest Attainable Standard of Health (Article*

law,²⁰ environmental law,²¹ labour law,²² the law of the UN Security Council,²³ or drug control law.²⁴ Many of these branches of international law can add to and enrich the practice of global health cooperation, by ensuring that health challenges are not borne by the health sector alone, and that the health sector takes into account broader policymaking frameworks and determinants of health. However, they are also decentralised and lack a systemic coordinator, leading to the potential for multiple and overlapping obligations, with the possibility that one set of obligations might constrain or undermine what is done under the other.

In NCD prevention, this has been starkly illustrated by the use of trade and investment law by the tobacco industry to bring legal challenges against measures implementing the WHO FCTC.²⁵ These legal challenges, although proven to have no legal merit, have tied up significant government resources and sought to dissuade other states from adopting similar regulations.²⁶ They have led to a number of calls to increase policy coherence between trade and investment and health for NCD prevention more generally, as states consider how the lessons of tobacco control apply to food and alcohol regulation.²⁷ Many of these concerns are driven by the fact that trade and investment law are significantly more enforceable than health commitments because they are made up of ‘harder’ treaties with more developed dispute settlement systems, raising questions about who should have the power to make decisions that affect the implementation and legitimacy of health measures.²⁸

B *Fragmentation Between Health Instruments for Food and Alcohol, and Trade and Investment: Scope of Issues and Instruments Considered in This Article*

As the chair of the International Law Commission’s study on fragmentation has noted elsewhere, much of the concern about fragmentation is not so much about coherence per se,

12 of the International Covenant on Economic, Social and Cultural Rights), 22nd sess, Agenda Item 3, UN Doc E/C.12/2000/4 (11 August 2000).

²⁰ See, eg, World Health Organization, *Confronting the Tobacco Epidemic in a New Era of Trade and Investment Liberalization* (2012); World Health Organization, World Intellectual Property Organization and World Trade Organization, *Promoting Access to Medical Technologies and Innovation: Intersections between Public Health, Intellectual Property and Trade* (2013).

²¹ See, eg, Stockholm Convention on Persistent Organic Pollutants, open for signature 22 May 2001, 2256 UNTS 119 (entered into force 17 May 2004), whose objective is to ‘protect human health and the environment from persistent organic pollutants’: art 1.

²² See, eg *International Labour Organization Convention (No 155) Concerning Occupational Safety and Health and the Working Environment*, opened for signature 22 June 1981, 1331 UNTS 279 (entered into force 11 August 1983).

²³ See, eg, UN Security Council, Resolution 2177 (2014), 7268th mtg, UN SCOR, UN Doc S/RES/2177 (18 September 2014), on the West African Ebola epidemic of 2014.

²⁴ See, eg, *Single Convention on Narcotic Drugs*, opened for signature 30 March 1961, 520 UNTS 151 (entered into force 13 December 1964).

²⁵ For an overview, see McCabe Centre for Law and Cancer, *Knowledge Hub on Legal Challenges to WHO FCTC Implementation*, < www.untobaccocontrol.org/kh/legal-challenges>.

²⁶ See, eg, WHO FCTC Secretariat, *Global Progress in Implementation of the WHO FCTC — A Summary: Report by the Convention Secretariat*, Conference of the Parties to the WHO Framework Convention on Tobacco Control, 6th sess, Provisional Agenda Item 3, FCTC/COP/6/5 (25 June 2014).

²⁷ See, eg, the theme of the WHO Global Conference on NCDs: World Health Organization, *Global Conference on Noncommunicable Diseases: Enhancing Policy Coherence Between Different Spheres of Policy Making That Have a Bearing on Attaining SDG Target 3.4 on NCDs by 2030* (Montevideo, Uruguay, 18–20 October 2017) <<http://www.who.int/nmh/events/2017/montevideo/about/en/>>.

²⁸ See, eg, McGrady, above n 5, 218–19.

but about the relative power and authority of bodies with different mandates.²⁹ As such, one of the background assumptions for this article is that ‘policy coherence’ is largely about whether or not sufficient consideration is given to health in trade and investment adjudication, because there is a significant disparity in enforceability between the two sets of commitments, and thus the legitimacy concerns about their interaction have largely centred around the adjudication of health measures by trade and investment bodies rather than the reverse.

Another background assumption in this article is that fragmentation is a question of politics as much as law — it is a by-product of states (and different organs of states) seeking to advance different interests in different fora. The multiplicity of fora addressing a specific issue can arise both from lack of coordination and from deliberate attempts by states to ‘forum shift’, including attempts to advance different interests by strategically creating conflicting or overlapping obligations between different regimes.³⁰ Addressing fragmentation therefore requires normative and political contestation, not just regulation and coordination, and a certain amount of fragmentation is inevitable as long as states continue to have differing political preferences.³¹

Nevertheless, *how* fragmentation should be addressed involves a number of technical considerations, and it is these considerations that are the subject of this article. In the context of tobacco, this has largely focused on the interactions between the WHO FCTC and international trade and investment law under the law of treaties and dispute settlement.³² Unlike tobacco however, there are no central treaties with detailed policy implementation obligations for food and alcohol. Instead, food and alcohol are governed at the international level primarily by non-binding instruments and by general obligations to protect and promote health in human rights law. Such instruments include:

- *Human rights treaties*, which contain binding obligations to promote health, but are generally not prescriptive as to how those obligations should be met. Under the International Covenant on Economic, Social and Cultural Rights, for example, states have a general obligation to prevent and control disease, which includes the underlying determinants of health (such as adequate nutrition), control of substances harmful to health (such as tobacco or alcohol), and access to health information (such as dietary information or consumer warnings).³³ States also have an obligation to ensure freedom from malnutrition, which encompasses access to nutritionally adequate and safe foods.³⁴ Article 24 of the Convention on the Rights of the Child requires states to

²⁹ Martti Koskenniemi and Päivi Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15 *Leiden Journal of International Law* 553. See also Tomer Broude, ‘Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law’ (2013) 27 *Temple International and Comparative Law Journal* 279; Martti Koskenniemi, ‘Hegemonic Regimes’ in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012) 305.

³⁰ For examples of such forum shifting in other contexts, see: Laurence Helfer, ‘Regime Shifting: the TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking’ (2004) 29 *Yale Journal of International Law* 2; Surabhi Ranganathan, *Strategically-Created Treaty Conflicts and the Politics of International Law* (Cambridge University Press, 2014).

³¹ See, eg, Andrew T F Lang, ‘Legal Regimes and Professional Knowledges: The Internal Politics of Regime Definition’ in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press: 2012) 113, 113; Koskenniemi, ‘Hegemonic Regimes’, above n 29.

³² McGrady, above n 5, 34–79, 228–49.

³³ ICESCR art 12(c); General Comment 14, above n 19 [4], [11], [35], [51].

³⁴ ICESCR art 11.2; Committee on Economic, Social and Cultural Rights, *General Comment 12: The Right to Adequate Food (Art 11)*, 20th sess, Agenda Item 7, UN Doc E/C.12/1999/5 (12 May 1999) [14].

‘combat disease and malnutrition, including within the framework of primary health care, through, inter alia, ... the provision of adequate nutritious foods’.³⁵ General Comment 15 by the Committee on the Rights of the Child defines malnutrition to include both undernutrition and obesity, and recommends that states implement certain WHO instruments to address childhood obesity.³⁶ Although the status of such General Comments in the interpretation of obligations remains controversial,³⁷ it has been recognised by the International Court of Justice that they should be given significant weight.³⁸ As such, it can be considered that the right to health supports states taking measures to address NCD risk factors, including alcohol and food, and in particular that the Convention on the Rights of the Child supports action on childhood obesity. However, most human rights instruments are not prescriptive as to the specific regulatory measures states should take, in line with their nature as broad, universally applicable instruments.

- *Normative non-binding instruments*, which aim to provide an agreed agenda for action or a set of recommendations to member states in a particular subject area. Such instruments include those adopted by states through the World Health Assembly (WHA) such as the Global Strategy to Reduce the Harmful Use of Alcohol,³⁹ the International Code of Marketing of Breast Milk Substitutes,⁴⁰ and the Set of Recommendations on the Marketing of Food to Children.⁴¹ They may also include those developed by experts and then endorsed by states, such as the Final Report of the Ending Childhood Obesity Commission,⁴² or politically negotiated instruments which call for a more targeted set of actions, such as WHA resolutions.⁴³ While not binding, these instruments often represent policy commitments by states toward a certain course of action. They tend to recommend a number of concrete measures states can take toward achieving such goals (see, for example, Appendix 3 to the WHO Global Action Plan on NCDs, which outlines a ‘menu of policy options’ for NCD prevention⁴⁴).
- *Technical non-binding instruments*, which set out the scientific evidence in relation to a measure, or provide resources for states in implementing commitments under normative instruments. Examples of such instruments include reports and studies,⁴⁵ as

³⁵ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 24(c).

³⁶ Committee on the Rights of the Child, General Comment No 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art 24), 62nd sess, UN Doc CRC/C/GC/15 (17 April 2013) [47].

³⁷ See UN International Law Commission, *Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, 68th sess, UN Doc A/CN.4/694 (7 March 2016) [17]–[57].

³⁸ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2007] ICJ Rep 582 [66].

³⁹ World Health Organization, *Global Strategy to Reduce the Harmful Use of Alcohol*, adopted in WHA resolution 63.13 (21 May 2010).

⁴⁰ World Health Organization, *International Code of Marketing of Breast-Milk Substitutes*, adopted in WHA resolution 34.22 (21 May 1981).

⁴¹ World Health Organization, *Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children*, adopted in WHA resolution 63.14 (21 May 2010).

⁴² Commission on Ending Childhood Obesity, *Report of the Commission on Ending Childhood Obesity* (WHO, 2016).

⁴³ See, eg, World Health Assembly, Resolution WHA 70.12, *Cancer Prevention and Control in the Context of an Integrated Approach*, 70th sess, Agenda Item 15.6 (31 May 2017).

⁴⁴ World Health Organization, *Global Action Plan*, above n 17, app III.

⁴⁵ See, eg, technical meeting reports such as World Health Organization, *Fiscal Policies for Diet and the Prevention of Noncommunicable Diseases* (2016).

well as technical packages, such as the SHAKE package for salt reduction.⁴⁶ These may make recommendations but are primarily intended to build capacity or serve as a resource rather than as commitments to certain courses of action.

As such, this article looks not only at treaty interactions, but also the role of other international health instruments in the resolution of trade and investment disputes. It considers in particular how much we can apply lessons from the WHO FCTC, a binding treaty with 181 parties, to the very different normative frameworks that govern food and alcohol policy.

Of course, tobacco is significantly different from food and alcohol in other respects, in that it is a uniquely and fairly homogeneously dangerous product.⁴⁷ By contrast, food is characterised by a diversity of products, some of which we want to encourage people to eat more of (fruits and vegetables) and some of which we want to encourage people to eat less of (junk foods).⁴⁸ Meanwhile, alcohol is a product which is generally accepted to be harmful to health overall, but where the risks vary based on dose and manner of consumption.⁴⁹ These differences are explored elsewhere in this special issue, which addresses what aspects of the substantive law on tobacco and international trade and investment can apply to food and alcohol regulation, given the more complex nature of regulating alcohol and food for public health purposes. They will not be addressed in significant detail here.

III POTENTIAL FUNCTIONS OF HEALTH INSTRUMENTS IN MANAGING FRAGMENTATION BETWEEN HEALTH, TRADE AND INVESTMENT

A *Treaty Conflict and Treaty Hierarchy*

As can be seen from the above, instruments for NCD governance are generally ‘softer’ than the treaties which regulate international trade and investment law. The ‘harder’ instruments in trade and investment law and the more developed dispute settlement systems in such regimes, as compared to the picture sketched above, have often created anxieties within the health sector, and led to calls for stronger instruments in health to compete with trade and investment agreements.

Such proposals have been common in the tobacco control context. For example, the negotiation of the WHO FCTC included proposals and draft text for a clause that would specifically allow the WHO FCTC to take precedence over trade agreements, although such a clause was not ultimately included.⁵⁰ Similarly, at its most recent session, the WHO FCTC Conference of the Parties considered proposals for a dispute settlement procedure under article 27.2 of the WHO FCTC, in part animated by concerns about trade and investment agreements.⁵¹ More recently, organisations working on other areas of health have considered the need to develop binding legal instruments for food and alcohol, which, although at this stage are not so specific as to include proposals for regulating conflict across other treaties, are often conceptualised as a

⁴⁶ See, eg. World Health Organization, *SHAKE the Salt Habit: The SHAKE Technical Package for Salt Reduction* (2016).

⁴⁷ See, eg. World Health Organization and National Cancer Institute (United States), *The Economics of Tobacco and Tobacco Control* (NCI/WHO Monograph 21, 2016) 28, 60–1.

⁴⁸ See, eg. World Health Organization, *Global Strategy on Diet, Physical Activity and Health* (2004) 4.

⁴⁹ See, eg. World Health Organization, *Global Status Report on Alcohol and Health* (2014) 4–5.

⁵⁰ See, eg. Intergovernmental Negotiating Body on the WHO FCTC, *Summary Records*, above n 5.

⁵¹ Conference of the Parties to WHO FCTC, *Report of the Sixth Session*, above n 5, 23–5.

normative counterweight to address the health impacts of increased trade in unhealthy foods and alcohol.⁵²

As such, the first potential use of health instruments to consider is their use to *prevail over* trade and investment instruments. There are various ways in which a health treaty might be made hierarchically superior to trade and investment agreements, for example by:

- Removing disputes about health from the scope of dispute settlement in trade and investment treaties — for example, by barring the jurisdiction or admissibility of a dispute, waiving the right to bring a dispute under trade or investment instruments, revoking consent to arbitrate where this is a condition of accessing investor–state dispute settlement, and instruments purporting to terminate or amend the agreement providing jurisdiction;
- Removing health-related measures from the scope of the substantive obligations — terminating or amending the treaty, rendering the obligation inapplicable or unopposable for a class of disputes, reading in exceptions, or generally stating that obligations in a health treaty are to take precedence over any conflicting obligations in trade or investment treaties;
- Requiring formal deference by trade and investment tribunals to decisions of health bodies, for example, by requiring them to adopt the same findings of fact as health bodies.

At first glance, this seems to be the simplest way of addressing potential health, trade and investment interfaces. However, whether a health treaty can remove or nullify the risk of trade and investment dispute settlement in the absence of corresponding amendments to trade and investment agreements is in fact a fairly complex question. Most of the rules concerning treaty conflict as well as the jurisdiction of specialised tribunals such as trade and investment bodies have arisen in the context of a decentralised, largely ‘contractual’ system between theoretically equal sovereign states. They depend in large part on political coordination by states to address potential overlaps. For overlaps between multilateral, ‘law-making’ treaties that set out comprehensive regimes of both rights and obligations,⁵³ there are numerous open questions as to what the adoption of an instrument in another forum can do. These include questions about how they interact with the jurisdiction and rules of trade and investment tribunals under the applicable law, what happens if not all parties to trade and investment agreements are party to a new health treaty, and whether general conflict clauses will capture all forms of conflict that are of concern to health actors.

1 *Jurisdiction and Applicable Law Rules of Trade and Investment Tribunals*

The first issue is the extent to which trade and investment tribunals have jurisdiction to consider ‘other’ instruments that purport to override or contract out of obligations under trade and investment treaties. Specialised tribunals take their jurisdiction from the instrument that creates

⁵² See, eg, Robin Room, ‘International Control of Alcohol: Alternative Paths Forward’ (2006) 25 *Drug and Alcohol Review* 581, 586, 589; Asbjørn Eide, Sabrina Ionata Granheim and Ann Louise Lie, ‘Does the World Need a Human Rights Based Convention on Healthy Diets? Exploring the Role of Food Corporations Towards the Rights to Adequate Food and Health’ (Report from the Parallel Side Event, 3rd United Nations Forum on Business and Human Rights, Geneva, 2 December 2014) 5.

⁵³ On the difference between reciprocal and law-making treaties, see Wilfred Jenks, ‘Conflict of Law-Making Treaties’ (1953) 30 *British Yearbook of International Law* 401.

them, which typically is limited to the interpretation or application of that instrument. The limits to this jurisdiction can sometimes also be reinforced by provisions that specify the law that the tribunals are to apply. For example, WTO panels only have jurisdiction to hear disputes about the interpretation or application of the ‘covered agreements’, and rulings under the WTO dispute settlement system ‘cannot add to or diminish the rights and obligations provided in the covered agreements’.⁵⁴ Although the provisions of the WTO are not to be interpreted in ‘clinical isolation’ from the rest of public international law,⁵⁵ so far, panels and the Appellate Body have been relatively unconvinced by arguments that other instruments modify the WTO agreements or remove the jurisdiction of its panels.

In *Mexico — Soft Drinks*, the Appellate Body found that WTO panels did not have the discretion to decline jurisdiction on the grounds that the dispute should be heard under NAFTA, because to do so would be to ‘diminish the rights and obligations’ under articles 23 and 3.3 of the Dispute Settlement Understanding.⁵⁶ The Appellate Body emphasised that there was so far no actual pending dispute under NAFTA, that the NAFTA investor–state dispute was distinct from the state–state WTO dispute, and that Mexico was arguing that the Tribunal should exercise discretion to decline jurisdiction rather than arguing that there was a ‘legal impediment’ to its jurisdiction.⁵⁷ Nevertheless, the Appellate Body emphasised that access to WTO dispute settlement is a legal entitlement under the DSU and that it did not see a ‘legal impediment’ applicable to this case.⁵⁸ The approach in *Mexico — Soft Drinks* suggests that the presence of another treaty or dispute settlement system with jurisdiction over the same dispute is not necessarily grounds for WTO panels to decline to hear a dispute.

Similarly, in *Brazil — Tyres*, the Appellate Body considered the effect of a Mercosur arbitral panel decision requiring Brazil to exempt Mercosur members from its import ban on retreaded tyres. The panel, after finding that the import ban otherwise fell within the health exception in the *General Agreement on Tariffs and Trade* (‘GATT’) XX(b), found that the exception for Mercosur members meant that the ban was applied in an arbitrary manner. The fact that the Mercosur ruling was mutually incompatible with Brazil’s WTO obligations was not considered to affect how the WTO case should be resolved.⁵⁹

Investment tribunals have likewise outlined that their jurisdiction is given by the bilateral investment treaty (BIT), and to the extent that they can consider other instruments, it is through the lens of their primary treaty. For example, investment tribunals constituted under intra-European Union (EU) BITs have considered objections to their jurisdiction on the grounds that they are inconsistent with EU treaties, which are hierarchically superior to other agreements between EU member states. Such tribunals have generally considered that their jurisdiction is granted by the BIT, and therefore affected only to the extent that EU agreements terminate,

⁵⁴ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2, *Dispute Settlement Understanding*, art 3.2.

⁵⁵ Report of the Appellate Body, *United States — Standards for Reformulated and Conventional Gasoline*, AB-1996-1, WT/DS2/AB/R (29 April 1996) 17.

⁵⁶ Report of the Appellate Body, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, AB-2005-10 WT/DS308/AB/R (6 March 2006) [52]–[53] (‘*Mexico — Soft Drinks*’).

⁵⁷ *Ibid* [44], [54].

⁵⁸ *Ibid* [52]–[54].

⁵⁹ Report of the Appellate Body, *Brazil — Measures Affecting Imports of Retreaded Tyres*, AB-2007-4, WT/DS332/AB/R (3 December 2007) [217]–[234].

amend, or render inapplicable the BIT.⁶⁰ They have generally required that states relying on EU-based jurisdictional objections show a fairly explicit intention to terminate, amend, or displace rights under the BIT upon accession to the EU, notwithstanding consistent interventions by the European Commission that such BITs are, per se, inconsistent with the EU treaties.⁶¹

2 *Incongruent Parties/Inter Se Agreements*

A further complication in the WTO context is that, given that the WTO has 164 members, it is highly likely that other treaties will not cover all WTO members, even if it has a very wide ratification. For example, WTO members not party to the WHO FCTC include the US, Indonesia, the Dominican Republic, and Cuba, which have all been party to tobacco-related WTO disputes.⁶² This can also be an issue in the investment context if not all investment treaty parties are parties to another agreement, and it raises the question of how conflicts between treaties should be interpreted if not all parties to one treaty are party to the other. Do the parties to both treaties have a modified set of obligations as opposed to parties to only one of the agreements, thus creating different sets of obligations within the same regime? Or does the other agreement affect the interpretation for all parties, including those who have not formally consented to both treaties?⁶³

The WTO Appellate Body has so far been relatively unwilling to recognise that members can contract out of WTO obligations on an inter se basis. In *Peru — Agricultural Products*, the Appellate Body, found that, at least for conflicting regional or bilateral trade agreements, parties could only modify agreements as between themselves in line with WTO provisions that allow them to do so.⁶⁴ Although the judgment does not address non-WTO agreements that are not regional or bilateral free trade agreements, it does seem to suggest that parties can only contract out of WTO obligations to the extent that the WTO rules themselves provide for doing so.

There is some scope to the use of other international instruments to *interpret* WTO obligations, although the extent of overlap required to do so is not fully resolved. Article 31(3)(c) of the Vienna Convention on the Law of Treaties provides that ‘there shall be taken into account ... any rules of international law in force between the parties’.⁶⁵ The Convention does not specify whether this means all parties to a treaty, or only the parties to the dispute. In the WTO context, this has led to some uncertainty over how other treaties affect the interpretation of the WTO covered agreements if the membership of the treaties does not fully overlap. Panels have

⁶⁰ See, eg, *Eureko BV v Slovak Republic (Award on Jurisdiction, Arbitrability and Suspension)*, PCA Case No. 2008-13 (26 October 2010) [217]–[292].

⁶¹ *Ibid.*

⁶² A list of WTO members is available from: World Trade Organization, *Members and Observers* <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>. A list of WHO FCTC parties is available from United Nations, ‘WHO Framework Convention on Tobacco Control’, *United Nations Treaty Collection*, <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&clang=_en>.

⁶³ See, eg, Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *International and Comparative Law Quarterly* 279; McGrady, above n 5, 45–79.

⁶⁴ Report of the Appellate Body, *Peru — Additional Duty on Imports of Certain Agricultural Products*, AB-2015-3, WT/DS457/AB/R (20 July 2015) (*Peru — Agricultural Products*) [5.112]–[5.114].

⁶⁵ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (*Vienna Convention*) art 31(3)(c).

previously interpreted that ‘parties’ means all of the parties to the WTO agreements.⁶⁶ However, the Appellate Body has since determined that the relevant question is the extent to which an interpretation taking into account the existence of the other agreement reflects the common intention of the WTO membership as a whole.⁶⁷ Potentially, this may not require all members, although it does appear to require enough members to affect the understanding of the WTO agreements on a multilateral basis.⁶⁸ Additionally, it can only be used to the extent that the two treaty obligations can be read together — article 31(3)(c) of the Vienna Convention cannot be used to create an interpretation that contradicts the text of a WTO provision.⁶⁹

3 Defining What a ‘Conflict’ Is

A final issue, particularly for ‘conflict clause’ proposals, is that in order for a treaty to prevail in the event of conflict, a tribunal needs to find a conflict in the first place. This can be a more complex question than it first appears — not every instance where the implementation of one treaty is in tension with the implementation of another is necessarily a conflict in the legal sense of the term.

The way in which treaty conflicts should be understood and resolved has been a long-running and difficult problem across a number of areas of international law,⁷⁰ and it is not the intention of this article to cover the topic comprehensively. However, even a relatively brief review of examples shows that a tribunal with a mandate under one regime can be adverse to finding that it conflicts with another, and can sometimes consider the obligations to accumulate rather than conflict, even if, in practice, states would be faced with a choice as to which to prioritise. For example, a tribunal might find that it is technically possible to comply with both treaties by

⁶⁶ Reports of the Panel, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R (29 September 2006) [7.68]–[7.72] (‘*EC — Biotech*’). For critiques of this decision, see Margaret Young, ‘The WTO’s Use of Relevant Rules of International Law: An Analysis of the *Biotech* Case’ (2007) 56 *International and Comparative Law Quarterly* 907; Caroline Henckels, ‘GMOs in the WTO: A Critique of the Panel’s Legal Reasoning in *EC — Biotech*’ (2006) 7 *Melbourne Journal of International Law* 278. More broadly, this approach can be critiqued on the basis that it gives a minority of treaty parties (potentially even a single treaty party) that are not party to one treaty the power to veto the use of norms that apply simultaneously to the vast majority of treaty parties: see Margaret Young, ‘Regime Interaction in Creating, Implementing and Enforcing International Law’ in Margaret Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012) 85, 95–6. Note that the Special Rapporteur for International Law Commission’s project on subsequent agreements and subsequent practice has similarly defined ‘parties’ for the purposes of ‘subsequent agreements’ under article 31(3)(a) of the Vienna Convention as all of the parties to the treaty: United Nations International Law Commission, *First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation*, 65th sess, A/CN.4/660 (19 March 2013) [79]–[83].

⁶⁷ Report of the Appellate Body, *European Communities — Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, AB-2010-1 (18 May 2011) [845] (‘*EC — Aircraft*’); Appellate Body Report, *Peru — Agricultural Products*, WT/DS457/AB/R [5.93]–[5.95], [5.106].

⁶⁸ Appellate Body Report, *EC — Aircraft*, WT/DS316/AB/R [845]; see also Geraldo Vidigal, ‘From Bilateral to Multilateral Law-Making: Legislation, Practice, Evolution and the Future of Inter Se Agreements in the WTO’ (2013) 24 *European Journal of International Law* 1027.

⁶⁹ Appellate Body Report, *Peru — Agricultural Products*, WT/DS457/AB/R [5.94].

⁷⁰ See, eg, Jenks, above n 53; Gabrielle Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties’ (2001) 35 *Journal of World Trade* 1081; Jan Klabbers, ‘Beyond the Vienna Convention: Conflicting Treaty Provisions’ in Enzo Cannizzaro, *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011); Ranganathan, above n 30, 53–94; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003).

adopting a different measure. This can be the case if one treaty imposes an obligation of result, and another imposes an obligation of means. For example, in some cases concerning the intersection between the right to water and international investment law, tribunals have found that the obligation to fulfil the right to water did not conflict with obligations towards foreign investors, because there were other means open to the state that allowed it to comply with both treaties.⁷¹ As such, most investment versus right to water jurisprudence only takes the right to water into account to a very limited extent.⁷²

It can also be the case where alternatives, even relatively onerous ones, are open to the state, allowing it to comply with both obligations. For example, the UN Security Council targeted sanctions regime is formally hierarchically superior to the European Convention on Human Rights, by virtue of UN Charter article 103. However, European Court of Human Rights jurisprudence on the interaction of the European Convention on Human Rights with UN Security Council resolutions has generally required a state to take quite extensive steps to try to resolve the conflict before it can invoke article 103. In *Nada v Switzerland*, for example, the ECHR considered a conflict between Switzerland's obligation to respect Convention rights and its obligation to implement targeted sanctions restricting the claimant's freedom of movement and thus his enjoyment of the right to private and family life. It found that, despite the very limited discretion it had to do so, Switzerland should have done more to ensure that its implementation of the sanctions regime was adapted to the particular personal and medical needs of the applicant, and that it could have done more to ensure that he was removed from the UN sanctions list in a timely manner after he was found to no longer present a security risk — essentially it had to try to reduce or remove the conflict before it could rely on the conflict clause.⁷³ Although this approach is a technique of human rights bodies arising from the special character of human rights obligations (as well as the particular accountability problems arising from the lack of review of Security Council actions), it does demonstrate that a clause establishing a hierarchy does not, per se, exempt a state from considering the requirements of the hierarchically lower treaty.

More broadly, two instruments may not be considered to interact at all, because they do not have the same subject matter. For investment law, the parties to an investor–state dispute will not necessarily be the same as the parties to a state–state treaty.⁷⁴ For example, one of the reasons the Appellate Body rejected Mexico's argument that the panel should not have exercised jurisdiction, pending a related NAFTA dispute in *Mexico — Soft Drinks*, was because the dispute under NAFTA and the dispute under the WTO were not identical, and involved both different parties and different issues.⁷⁵ Similarly, tribunals established under intra-EU BITs have rejected jurisdictional objections based on the Court of Justice of the European

⁷¹ See, eg, *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic (Decision on Liability)*, ICSID Case No. ARB/03/19 (30 July 2010) [260], [262]; *SAUR International SA v Argentine Republic (Decision on Jurisdiction and Liability)*, ICSID Case No ARB/04/4 (6 June 2012) [331].

⁷² See generally Tamar Meshel, 'Human Rights in Investor–State Arbitration: The Human Right to Water and Beyond' (2015) 6 *Journal of International Dispute Settlement* 277. An exception is *Urbaser SA v Argentine Republic (Award)*, ICSID Case No ARB/07/26 (8 December 2016).

⁷³ *Nada v Switzerland* (European Court of Human Rights, Grand Chamber, Application No 10593/08, 12 September 2012).

⁷⁴ Vienna Convention, art 30, which states that conflicts between treaties are to be resolved in favour of the later treaty, requires that successive treaties be on the same subject matter, and arts 30 and 41, which regulate modification of treaties by subsequent treaties, together require that either both treaties have the same parties, or that the treaty being modified allows for the modification of obligations between some but not all of the parties.

⁷⁵ Appellate Body Report, *Mexico — Soft Drinks*, WT/DS308/AB/R [54].

Union's (ECJ's) interpretive monopoly over questions of EU law, because the questions considered by EU and investment tribunals are different.⁷⁶

The cases outlined above do not necessarily represent the only or 'correct' approaches to identifying and resolving conflict. The approach adopted in many of the right to water and investment law cases, for example, seems to assume that a conflict only occurs when it is impossible to comply with both norms — an approach that has been criticised in other contexts for always resolving conflict in favour of the most prohibitive norm, and for obscuring how a conflict is *resolved* by framing it as how the conflict is *defined*.⁷⁷ Broader definitions of conflict note that it can arise not only where obligations are mutually exclusive, but also where obligations contradict provisions providing for rights.⁷⁸

However, even these broader approaches may not capture the kinds of 'conflict' that many 'trade and health' or 'investment and health' proposals aim to address. For example, a legal definition of conflict that includes both rights and obligations still requires that a right can be mapped onto a particular obligation and the overlaps identified. By contrast, many 'trade and' or 'investment and' conflicts also concern conflicts of objectives, such as conflicts between provisions which require the attainment of an objective while not being prescriptive as to the means of doing so; or conflicts between provisions whose requirements are themselves the subject of dispute. In such cases, when the relevant course of action is undertaken to fulfil a treaty obligation but is not specifically identified under the treaty or its subsidiary instruments, the conflict (and conflict clauses) can equally be avoided by downplaying the extent to which the treaties overlap, potentially generating unhelpful jurisprudence that diminishes the importance of the 'other' treaty. This is not necessarily a reason not to adopt such a clause — tribunals could of course resolve the conflict in many other ways — but it does demonstrate the need to consider what it means for one treaty to prevail over another in quite precise and detailed terms.

4 Conclusion — Treaty Conflict and Treaty Hierarchy

These questions of jurisdiction, applicable law, interpreting conflicts between incongruous parties, and defining what kinds of conflicts matter suggest that designing a health treaty regime that will effectively exclude the risk of trade and investment dispute settlement is a matter of some complexity, potentially requiring coordinated changes across multiple regimes. A simple statement that one treaty prevails over another is not necessarily a guarantee that a case cannot be heard under the hierarchically inferior treaty.

Of course, establishing a hierarchically superior treaty can be important in other ways, including by affecting how states treat the relative importance of such obligations. Ultimately, it is states that are responsible for managing conflicting obligations. As such, explicit regulation of conflicts can be useful for setting priorities within states, and for empowering civil society advocacy to hold states accountable for legal obligations as well as political commitments to health. Conflict clauses may well be important expressions of state priorities and political commitments, or have important consequences in domestic law. And treaties can obviously be

⁷⁶ See, eg, *Electrabel SA v Republic of Hungary (Decision on Jurisdiction, Applicable Law and Liability)*, ICSID Case No ARB/07/19 (30 November 2012) [4.111]–[4.199].

⁷⁷ Pauwelyn, above n 70, 169–72.

⁷⁸ Pauwelyn, above n 70, 178–200; McGrady, above n 5, 236–42; *Fragmentation Report*, above n 11 [25].

valuable for a variety of reasons other than their effect on trade and investment adjudication.⁷⁹ But their impact on the risk of disputes is uncertain in the abstract, and requires careful identification of the potential conflicts and the legal mechanism for resolving them, phrased in a way that can be assimilated into the considerations of the trade and investment tribunals hearing challenges to their jurisdiction or arguments that their instruments have been overridden.

B *Treaty Interpretation, Fact Finding, and Benchmarking*

A second way in which trade and investment tribunals take into account ‘other’ law is through using them to interpret and apply concepts in trade and investment law. There are several ways in which ‘non-trade’ instruments have been considered in the jurisprudence of trade and investment tribunals, including to inform the ordinary meaning of words, as evidence of good faith regulatory purposes by states, to benchmark standards of reasonableness or proportionality, and as sources of fact.⁸⁰

1 *Ordinary Meaning*

Although the formal use of article 31(3) of the Vienna Convention has been relatively circumscribed in the WTO context, an interesting parallel development has been the use of other instruments to interpret the ordinary meaning of words. For example, in *US — Shrimp*, the Appellate Body used the *Convention on Biological Diversity* to interpret the meaning of ‘exhaustible natural resources’ in the exception to include living resources in GATT article XX(g),⁸¹ while in *EC — Biotech*, after finding that the parties were not congruous and article 31(3) did not apply, the panel continued to consider a range of outside resources in terms of the light they shed on the ‘ordinary meaning’ of the words in article 31(1), considering it to ‘provide evidence of the ordinary meaning of terms in the same way that dictionaries do’.⁸² The use of other instruments to interpret ordinary meaning appears to be one that is not prescriptive about the kind of instruments that can be used, although unlike article 31(3)(c), it is not mandatory.⁸³

2 *Evidence of Regulatory Purpose*

A related use of ‘other’ international instruments is to determine what the purpose of a measure is, for the purposes of determining how public health exceptions should be *applied*. The fact that a measure implements a commitment in health or is in line with a consensus position of a health institution is generally treated as strong evidence of a bona fide public health purpose. In *Philip Morris v Uruguay*, for example, the tribunal took into account the fact that Uruguay’s measures implemented the FCTC in its determination of whether they fell within Uruguay’s

⁷⁹ For instance, the WHO FCTC has had a significant range of impacts on the adoption and implementation of new measures and the mobilisation of support and resources for tobacco control: see WHO FCTC Conference of the Parties, *Impact Assessment of the WHO FCTC: Report of the Expert Group*, 7th session, Provisional Agenda Item 5.2, FCTC/COP/7/6 (27 July 2016).

⁸⁰ For discussion on the impact of the WHO FCTC specifically (including challenges in other fora), see Suzanne Y Zhou, Jonathan D Liberman, and Evita Ricafort, ‘The Impact of the WHO Framework Convention on Tobacco Control in Defending Legal Challenges to Tobacco Control Measures’ (2018) *Tobacco Control* (forthcoming).

⁸¹ Report of the Appellate Body, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, WT/DS58/AB/R (12 October 1998) [127]–[134].

⁸² Panel Report, *EC — Biotech*, WT/DS291/R, WT/DS292/R, WT/DS293/R [7.92]–[7.96].

⁸³ *Ibid* [7.95]–[7.96].

police powers and provided fair and equitable treatment.⁸⁴ In *US — Clove Cigarettes*, the panel accepted that a ban on flavoured cigarettes made a material contribution to the legitimate objective of protecting public health, because it was a measure recommended in the WHO FCTC partial guidelines for articles 9 and 10 of the FCTC.⁸⁵

3 *Measures of Reasonableness*

Non-trade or non-investment international instruments may also be used to benchmark reasonableness standards. There are many points in both trade and investment law where open-textured terms such as reasonableness, proportionality, legitimacy, justifiability and so forth must be interpreted. In trade law, these include:

- Whether a measure is ‘necessary’ to protect public health under the GATT XX(b) exception,⁸⁶
- Whether a measure is ‘necessary’ for a ‘legitimate objective’ under article 2.2 of the *Agreement on Technical Barriers to Trade* (‘TBT’);⁸⁷
- Whether a measure is based on a ‘legitimate regulatory distinction’ under TBT article 2.1;⁸⁸
- Whether a measure is an ‘unjustifiable encumbrance’ by special requirements on the use of trademarks in the course of trade under the *Agreement on Trade Related Aspects of Intellectual Property* (‘TRIPS’) article 20.⁸⁹

In investment law, they include:

- Whether or not a measure is a valid exercise of police powers;⁹⁰
- Whether or not a measure is ‘reasonable’ or ‘arbitrary’ under the fair and equitable treatment standard;⁹¹
- What an investor can ‘legitimately expect’ as a component of the fair and equitable treatment standard.⁹²

⁸⁴ *Philip Morris Brands Sàrl v Oriental Republic of Uruguay (Award)*, ICSID Case No ARB/10/7 (8 July 2016) [304], [306], [393]–[396].

⁸⁵ Report of the Panel, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R (2 September 2011) [7.413]–[7.414] (‘*US — Clove Cigarettes*’).

⁸⁶ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (‘GATT’) art XX(b).

⁸⁷ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (‘TBT’) art 2.2.

⁸⁸ *Ibid* art 2.1.

⁸⁹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C (‘TRIPS’) art 20.

⁹⁰ See, eg, *Methanex Corporation v United States of America (Final Award of the Tribunal on Jurisdiction and Merits)* (NAFTA Chapter 11 Tribunal, 3 August 2005) pt IV.D [7]; *Chemtura Corporation v Government of Canada (Award)* (NAFTA Chapter 11 Tribunal, 2 November 2010) [266]; *Philip Morris Brands Sàrl v Oriental Republic of Uruguay (Award)*, ICSID Case No ARB/10/7 (8 July 2016) [288]–[301].

⁹¹ See, eg, *SD Myers Inc v Canada (Partial Award)* (NAFTA Chapter 11 Tribunal, 13 November 2000) [263]; *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)* [1989] ICJ Rep 15 [128].

⁹² See, eg, *Metalclad v Mexico (Award)* (NAFTA Chapter 11 Tribunal, 30 August 2000) [89]; *Urbaser SA v Argentine Republic (Award)*, ICSID Case No. ARB/07/26 (8 December 2016) [618]–[625].

Normative instruments in many areas of international law have been used to benchmark such concepts. Examples include:

- The affirmation in *Philip Morris v Uruguay* that the FCTC is a ‘point of reference’ for determining whether or not a tobacco control measure is ‘reasonable’, and its finding that the guidelines supported the reasonableness of Uruguay’s large graphic health warnings on cigarette packages;⁹³
- The use of the right to water to frame the ‘legitimate expectations’ of the investor in *Urbaser v Argentina*;⁹⁴
- The use of environmental treaties to interpret the concept of fair and equitable treatment in *Chemtura v Canada* and *Glamis Gold v United States*;⁹⁵
- The consideration of a range of materials from health and environmental law to assess whether or not Brazil’s import ban on retreaded tyres was ‘necessary’ to protect human health under GATT article XX(b) in *Brazil — Tyres*;⁹⁶
- The use of the FCTC Partial Guidelines on articles 9 and 10 to determine whether or not a US ban on clove cigarettes was more trade-restrictive than necessary for the legitimate objective of protecting public health in *US — Clove Cigarettes*.⁹⁷

4 *Factual authority*

Additionally, normative instruments are often used as evidence or sources of factual authority in trade and investment disputes. For example, in *Philip Morris v Uruguay*, the tribunal found that the WHO FCTC guidelines on article 11 provided evidentiary support for Uruguay’s graphic health warnings and single presentation requirement in relation to whether the measure was ‘arbitrary’ under the fair and equitable treatment standard. It considered that Uruguay was entitled to rely on evidence based and cooperative international processes under the WHO FCTC rather than conducting local studies on the likely impact of its measures.⁹⁸ In *US — Clove Cigarettes*, the Partial Guidelines on articles 9 and 10 were used to reinforce scientific evidence that flavoured cigarettes were attractive to youth, and to support the evidence in favour of the US’s ban on characterizing flavours in cigarettes.⁹⁹

5 *Conclusion — Use of International Instruments in Interpretive Processes*

Across all of these uses, a key feature is that the other instrument is not treated as one that conflicts or modifies the trade/investment agreement, but rather, one that sheds light on how it should be interpreted or applied. Non-trade or non-investment instruments therefore must be assimilated to an equivalent concept in trade and investment law, and they cannot override the treaty text itself.

⁹³ *Philip Morris Brands Sàrl v Oriental Republic of Uruguay (Award)*, ICSID Case No ARB/10/7 (8 July 2016) [401].

⁹⁴ *Urbaser SA v Argentine Republic (Award)*, ICSID Case No ARB/07/26 (8 December 2016) [618]–[625].

⁹⁵ *Chemtura Corporation v Government of Canada (Award)* (NAFTA Chapter 11 Tribunal, 2 November 2010) [135]; *Glamis Gold Ltd v United States of America (Award)* (NAFTA Chapter 11 Tribunal, 8 June 2009) [84].

⁹⁶ Report of the Panel, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (12 June 2007) [7.59], [7.81].

⁹⁷ Panel Report, *US — Clove Cigarettes*, WT/DS406/R [7.413]–[7.414].

⁹⁸ *Philip Morris Brands Sàrl v Oriental Republic of Uruguay (Award)*, ICSID Case No ARB/10/7 (8 July 2016) [393].

⁹⁹ Panel Report, *US — Clove Cigarettes*, WT/DS406/R [7.414].

However, as the above discussion shows, provided there is an entry point in the treaty to do so, there are many ways in which other international instruments can influence the interpretation of a trade and investment agreement. As detailed above, there are several such entry points in the substantive standards of trade and investment treaties, and many of the trade and investment provisions which are relevant to NCD prevention measures have fairly malleable meanings. International health instruments will therefore be important in the outcomes of trade and investment and health cases on the merits. On the other hand, there are fewer such entry points at the jurisdictional stage, which means that interpretive approaches cannot easily remove the jurisdiction of trade and investment tribunals altogether.

C *Processes and Institutional Governance*

The final way in which instruments are taken into account is through the various procedures they establish. Instruments often come with institutions, actors and processes, such as Conferences of the Parties (COPs), Secretariats, or implementation conferences. Such institutions can be fairly active in supporting states facing trade and investment dispute settlement, whether by observation and monitoring, information sharing, providing capacity building and other support, assisting in internal coordination, issuing statements in support of members, or acting as third party interveners in cases.¹⁰⁰

Many of these activities have had a significant influence in tobacco litigation. For example, WHO, the WHO FCTC Secretariat, and the Pan American Health Organization ('PAHO') filed amicus curiae briefs in support of Uruguay in the *Philip Morris v Uruguay* arbitration, outlining how Uruguay's measures were supported by the WHO FCTC and scientific evidence.¹⁰¹ These amicus briefs were an important source of evidence considered by the Tribunal — the panel majority largely accepted WHO, the Convention Secretariat, and PAHO's conclusions on whether Uruguay's single presentation requirement was a reasonable measure to implement the WHO FCTC.¹⁰² Similarly, in 2010, the WHO FCTC COP adopted the Punta del Este Declaration, which affirms the sovereign right to regulate for public health, to express support for Uruguay shortly after the commencement of the Philip Morris arbitration.¹⁰³ The Court of Appeal of England and Wales has cited the Punta del Este Declaration in relation to the UK's plain packaging litigation, to confirm that provisions providing for flexibility in the application of the TRIPS Agreement apply to tobacco control as well as in their original context of access to medicines.¹⁰⁴

Additionally, institutions can be highly influential in internal priority setting, and in shaping how states participate in other regimes. For example, after a number of investment tribunals

¹⁰⁰ See, eg, WHO FCTC Conference of the Parties, *Trade and Investment Issues Relevant to Implementation of the WHO FCTC: Report by the Convention Secretariat*, 6th sess, Provisional Agenda Item 5.4, FCTC/COP/6/20 (23 June 2014).

¹⁰¹ *Philip Morris Brands Sàrl v Oriental Republic of Uruguay (Written Submission (Amicus Curiae Brief) by the World Health Organization and the WHO Framework Convention on Tobacco Control Secretariat)*, ICSID Case No ARB/10/7 (28 January 2015); *Philip Morris Brands Sàrl v Oriental Republic of Uruguay (Written Submission (Amicus Curiae Brief) by the Pan American Health Organization)*, ICSID Case No ARB/10/7 (6 March 2015).

¹⁰² *Philip Morris Brands Sàrl v Oriental Republic of Uruguay (Award)*, ICSID Case No ARB/10/7 (8 July 2016) [407].

¹⁰³ WHO FCTC Conference of the Parties, Decision FCTC/COP4(5), *Punta del Este Declaration on the Implementation of the WHO Framework Convention on Tobacco Control*, 4th session, FCTC/COP/4/DIV/6 (18 November 2010).

¹⁰⁴ *R (British American Tobacco) v Secretary of State for Health* [2016] EWCA Civ 1182 [144]–[145].

decided to exercise jurisdiction in cases involving intra-EU BITs, the European Commission began infringement proceedings against EU members that were party to intra-EU BITs, resulting in the mutual termination of several such BITs.¹⁰⁵ Less drastically, the FCTC COP has adopted a number of decisions calling on parties to improve internal coordination with respect to tobacco control and trade and investment law.¹⁰⁶

Institutions may also themselves participate in other regimes, providing input and information based on their areas of specialised expertise, and potentially shaping other institutions' understandings of relevant factual matters or shared legal concepts. Such processes are important because they can shape how the relationship between different regimes are understood in the day-to-day business of implementing, enforcing, and developing norms, and can play a role in such understandings beyond those relatively rare occasions where a formal dispute arises.¹⁰⁷

IV FEATURES STRENGTHENING THE POTENTIAL USES OF HEALTH INSTRUMENTS

As such, there are many ways in which international instruments outside trade and investment might affect the way in which trade and investment tribunals make decisions with implications across regimes. How many of these might also apply to non-binding as well as binding instruments?

For obvious reasons, only binding instruments are relevant to formal conflict or hierarchy between treaties — a non-binding instrument cannot prevail over a binding one as a matter of formal law. Under either an interpretive or a process-based paradigm, however, the scope of instruments that can be considered is wide, and does not appear to be limited to instruments that are binding on both parties. For example, in *US — Clove Cigarettes*, the panel cited the WHO FCTC partial guidelines on articles 9 and 10 even though neither the US nor Indonesia was party to the WHO FCTC.¹⁰⁸ In *Philip Morris v Uruguay*, where only Uruguay and not Switzerland was party to the treaty, the panel specifically noted that where a source was used to determine the reasonableness of a measure, as opposed to excusing responsibility under the treaty, it was not necessary for both BIT members to be party to the treaty.¹⁰⁹ In *Brazil — Tyres*, the panel took into account the non-binding WHO World Malaria Report and WHO list of malaria endemic countries along with technical guidelines under the Basel Convention on the Movement of Transboundary Wastes,¹¹⁰ while in a pre-FCTC and pre-WTO GATT dispute, the panel in *Thailand — Cigarettes* took into account the non-binding 1986 WHA resolution on 'Tobacco or Health'.¹¹¹ Other non-binding instruments which have been taken into account

¹⁰⁵ European Commission, 'Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties' (Press Release, 18 June 2015) <http://europa.eu/rapid/press-release_IP-15-5198_en.htm>; Tania S L Voon and Andrew D Mitchell, 'Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law' (2016) 31 *ICSID Review* 413.

¹⁰⁶ Most recently, in WHO FCTC Conference of the Parties, Decision FCTC/COP7(21), *Trade and Investment Issues, Including Agreements, and Legal Challenges in Relation to the Implementation of the WHO FCTC*, 7th sess (12 November 2016).

¹⁰⁷ See Young, 'Regime Interaction in Creating, Implementing, Enforcing', above n 66.

¹⁰⁸ Panel Report, *US — Clove Cigarettes*, WT/DS406/R [7.413]–[7.414].

¹⁰⁹ *Philip Morris Brands Sàrl v Oriental Republic of Uruguay (Award)*, ICSID Case No ARB/10/7 (8 July 2016) [401].

¹¹⁰ Panel Report, *Brazil — Tyres*, WT/DS332/R [7.59], [7.81].

¹¹¹ Report of the Panel, *Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R - 37S/200 (5 October 1990) [78]–[81].

in WTO dispute settlement include the Havana Charter (which never entered into force), soft law from the Organization for Economic Cooperation and Development, and accounting standards.¹¹²

That said, there are many features of treaties, deriving from their status as multilaterally negotiated instruments, which make them more likely to be used by trade and investment tribunals. As detailed below, features of the WHO FCTC which have proven useful in legal challenges against tobacco control measures include the fact that it is high profile and clearly the authoritative instrument in its field, the fact that it is clear and specific about what parties must do to protect public health, the fact that it is evidence based and encompasses processes for scientific exchange and cooperation, and the fact that it is supported by a range of institutions and processes.

A *Political Visibility*

A key achievement of the WHO FCTC has been to raise the profile of the importance of global tobacco control. As an instrument with 181 parties, which has a governing body and secretariat which are dedicated to advancing its goals, has legally binding implementation requirements, and feeds into other processes such as human rights bodies and the Sustainable Development Goals,¹¹³ the WHO FCTC is a highly visible commitment to tobacco control. This is a key advantage of legally binding instruments — they are difficult to ignore, and they require tribunals in other areas to at least turn their minds to whether or not they should take into account coherence across both institutional mandates and international law as a whole. Binding instruments often also require more internal processes, encouraging greater multisectoral coordination within states, and it can often be easier to convince non-health sectors of government of the need to implement them, given their binding nature. Finally, visible expressions of commitment send signals to other actors, and can therefore be important to concepts in investment law such as whether or not investors have ‘legitimate expectations’ about certain forms of regulation.¹¹⁴

B *Normative Specificity*

Another key advantage of some legally binding instruments is that they need to be implemented, and thus generally specify what states need to do. Thus, they tend to provide more normative specificity as to whether a measure is needed, making it relatively easy to link the objectives of a measure to the instrument that it implements. This can often be important both for establishing whether or not a measure is a health measure, as well as in establishing the necessity and proportionality of a measure, particularly in the context of standards that ask tribunals to consider what alternative measures could be taken. The fact that the WHO FCTC

¹¹² See James Flett, ‘Importing Other International Regimes into World Trade Organization Litigation’ in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012).

¹¹³ For an overview of the WHO FCTC’s incorporation into other regimes, see Suzanne Zhou and Jonathan Liberman, ‘The Global Tobacco Epidemic and the WHO Framework Convention on Tobacco Control — The Contributions of the World Health Organization’s First Convention to Global Health Law and Governance’ in Gian Luca Burci and Brigit C A Toebe, *Research Handbook on Global Health Law* (Edward Elgar, forthcoming 2018).

¹¹⁴ See, eg, *Philip Morris Brands Sàrl v Oriental Republic of Uruguay (Award)*, ICSID Case No. ARB/10/7 (8 July 2016) [429]–[432]; UNCTAD, ‘Taking Stock of IIA Reform’, above n 6, 140.

and its guidelines specifically recommend the implementation of large graphic health warnings, for example, was a key part of the *Philip Morris v Uruguay* tribunal's finding that Uruguay's graphic health warnings covering 80 per cent of the front and back of the principal display areas of tobacco packs was 'reasonable'. The WHO FCTC has also been important in a number of domestic cases for countering industry arguments that there are 'alternatives' to particular tobacco control measures.¹¹⁵ Conversely, some binding obligations, such as the human right to water, have proven quite difficult to invoke in other fora, because complainants have been able to point to other measures states could have taken instead.¹¹⁶

C *Scientific Authority and International Consensus*

As international instruments are often used as a source of evidence, the scientific authority of such instruments is important to their use in other regimes. The relevance of the WHO FCTC guidelines as reflecting 'the best available scientific evidence and the experiences of the parties' and the WHO FCTC COP as a forum for scientific and technical cooperation have both been cited in tobacco litigation to support the evidence base behind a measure.¹¹⁷ Additionally, international instruments can embody a shared international consensus on certain factual questions, which can support both their factual authority and their role as benchmarks in standards of reasonableness or proportionality.

D *Institutional Support*

Finally, processes for managing fragmentation are important, whether they take the form of amicus curiae briefs, capacity building, cooperative processes, or otherwise. Legally binding instruments often provide for such processes explicitly, setting up institutions that are then able to advance the goals of a treaty.¹¹⁸ Treaty implementation also frequently involves domestic level review at the ratification stage, as well as ongoing processes for implementation, which can help establish systems to ensure policy coherence at the domestic level. Non-binding instruments do not set up such institutions by default. However, many non-binding instruments do include extensive processes to support implementation, and are managed by existing international institutions with the capacity to cooperate with other institutions.¹¹⁹ Relevant programmes of work and/or further cooperative arrangements could be developed through resolutions of the WHA and/or the UN General Assembly.¹²⁰

V CONCLUSION

Overall, the relationship between health instruments and trade and investment dispute settlement is complex. It is difficult for health bodies alone to fully address intersections with trade and investment regimes, because in a decentralised system of obligations and

¹¹⁵ *R (British American Tobacco) v Secretary of State for Health* [2016] EWHC 1169 (Admin) [243].

¹¹⁶ See generally Meshel, above n 72. Compare *Philip Morris Brands Sàrl v Oriental Republic of Uruguay (Award)*, ICSID Case No ARB/10/7 (8 July 2016), particularly the use of the WHO FCTC to flesh out domestic and international obligations to protect and promote health: [304].

¹¹⁷ *Philip Morris Brands Sàrl v Oriental Republic of Uruguay (Award)*, ICSID Case No ARB/10/7 (8 July 2016) [394]; *Philip Morris Brands SARL v Secretary of State for Health*, ECJ Case C-547/14 (4 May 2016) [111]–[113].

¹¹⁸ WHO FCTC arts 23, 24.

¹¹⁹ For discussion of the legal basis of such capacity, see Young, 'Regime Interaction in Creating, Implementing, Enforcing', above n 66, 99–103.

¹²⁰ See, eg, implementation of the WHO *Global Action Plan*, above n 17, is coordinated by the WHO Global Coordination Mechanism on the Prevention and Control of NCDs: World Health Organization, *Global Coordination Mechanism on NCDs* <<http://www.who.int/ncds/gcm/en/>>.

adjudicators, much of how overlapping obligations should be considered and prioritised has been left to states to coordinate internally. Managing fragmentation is not simply a case of writing that health should prevail over trade and investment law into a new health treaty and declaring the task finished.

Nevertheless, health instruments can exert significant influence on the development of trade and investment law through interpretive and supportive processes, and this does not necessarily require instruments to take a specific form. Treaties, such as the WHO FCTC, combine legal authority, specificity, political commitment, scientific evidence, and institutional support in ways that have proven powerful in managing cross-regime conflict. But it is also the case that these features are present in varying combinations across non-binding instruments with application to food and alcohol. For example, the right to health in the *Universal Declaration of Human Rights*¹²¹ and the targets of the 2030 Sustainable Development Agenda¹²² are highly visible instruments that support action on nutrition and alcohol policy, though less specifically. Many WHO documents, including codes such as the *WHO International Code of Marketing of Breast Milk Substitutes*,¹²³ WHO guidelines,¹²⁴ and the ‘menu of policy options’ in Appendix III of the *WHO Global Action Plan on NCDs 2013–2020*,¹²⁵ are both normatively specific and evidence based. And of course, the scientific authority of instruments does not depend on their legal status — non-binding instruments can be more authoritative in this respect because they can be updated more easily as study or exchange of information takes place (although of course, the ‘hardness’ of an instrument can often reflect that there is a strong consensus in the first place). International food and alcohol policy are likewise supported by processes, whether through the WHA or the WHO Secretariat, which may have a role to play in supporting policy coherence across health, trade and investment law. As important as it may be to develop stronger instruments around food and alcohol, it is also important not to underestimate (or to allow industry actors to diminish) what we can do with what we have.

To conclude, using health instruments to promote greater coherence across health, trade, and investment is not just a question of their formal status, but also the functions we want them to serve. As states take further action to address the growing burden of NCDs, it will therefore be important to consider how international instruments can best be used to support coherence across trade and investment law, where the gaps might be, and what might be the best way of filling them.

¹²¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 25.

¹²² UN General Assembly, Resolution 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, 70th sess, Agenda Items 15 and 116, UN Doc A/70/RES/1 (21 October 2015) targets 2.2, 3.4, 3.5.

¹²³ World Health Organization, *International Code of Marketing of Breast-Milk Substitutes*, above n 40.

¹²⁴ See, eg, World Health Organization, *Guideline: Sugars Intake for Adults and Children* (WHO Guideline, 2015).

¹²⁵ *Global Action Plan*, above n 17, App III.