

*Journal of*  
WORLD TRADE

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*Published by:*

Kluwer Law International  
PO Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
Website: [www.kluwerlaw.com](http://www.kluwerlaw.com)

*Sold and distributed in North, Central and South America by:*

Aspen Publishers,  
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Turpin Distribution Services Ltd.  
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Bedfordshire SG18 8TQ  
United Kingdom  
Email: [kluwerlaw@turpin-distribution.com](mailto:kluwerlaw@turpin-distribution.com)

*Journal of World Trade is published six times per year.*

Print subscription prices, including postage (2015): EUR 1119/USD 1492/GBP 822.

Online subscription prices (2015): EUR 1036/USD 1382/GBP 762.

*Journal of World Trade is indexed/abstracted in the European Legal Journals Index.*

*Printed on acid-free paper.*

ISSN 1011-6702

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ISSN 1011-6702  
Mode of citation: 49:1 J.W.T.

# Domestic Tobacco Regulation and International Law: The Interaction of Trade Agreements and the Framework Convention on Tobacco Control

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*For the most part, conflict between domestic tobacco regulation/international tobacco control instruments and international trade obligations is more imaginary than real. In practice, domestic regulation can be carried out consistently with trade obligations. Nevertheless, there is at least a small chance of actual conflict between international tobacco rules and trade obligations. Where such conflict arises, this paper argues that proper treaty interpretation requires that trade obligations, as the 'harder' version of law, would take precedence over conflicting tobacco rules. For public health advocates who have concerns about this, the solution is not to exclude tobacco from trade agreements, but to refine existing trade obligations.*

## 1 INTRODUCTION

In recent years, there has been a perception of conflict between domestic tobacco regulation and international economic agreements, in two ways. First, there has been some litigation related to tobacco measures at the WTO, and also under investment agreements. These legal challenges have caused concern among health advocates. And second, in trade negotiations, the issue of how tobacco should be addressed has led to tension, particularly in the Trans Pacific Partnership (TPP) talks. In this regard, many public health groups worry that TPP rules will constrain domestic efforts to regulate tobacco, and have argued for a 'carve out' of tobacco from these proposed trade obligations.

The conflict extends beyond trade litigation and negotiations, and into the fragmented world of international law. With the completion of an international tobacco treaty, the WHO's Framework Convention on Tobacco Control (FCTC), there are questions about which treaty takes precedence: the WTO and other international economic agreements, or the FCTC. If a trade treaty says one thing, and a tobacco treaty says another, which one controls?

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The full picture of how domestic tobacco regulation, the FCTC, and trade rules relate is much less exciting than the trade versus tobacco hype. In reality, there is very little conflict here. For the most part, the two international regimes get along quite well. The real story is not about conflict, but rather about peaceful interaction. In most situations, the agreements do not overlap at all. Generally speaking, actions called for under the FCTC do not violate trade rules, and trade rules do not inhibit domestic tobacco regulation.

One of the reasons for the mistaken perception of conflict is a tendency to examine issues in the abstract, without attention to specific details. For example, it might be suggested that the FCTC envisions plain packaging of cigarettes, while Australia's plain packaging measures have been challenged at the WTO; thus, there is conflict. The reality is more nuanced, however. The FCTC does not endorse any and all measures referred to as 'plain packaging'; and there has been no finding that Australia's measures violate WTO rules.<sup>1</sup> We need to look at actual measures and results before concluding that a conflict exists.

Nonetheless, there is the potential, albeit limited, for some conflict. What if trade rules prohibit actions that are required under the FCTC? How would and should such conflict be handled?

This article addresses these issues as follows. In section 2, it examines how FCTC obligations affect trade, and then considers the impact of trade obligations on tobacco control measures. Combining these two, the paper evaluates how measures encouraged by the FCTC might come into conflict with WTO rules.

Moving beyond the hypothetical conflict, section 3 then reviews actual trade disputes related to tobacco, in order to determine the extent of any conflict. It also looks at the role of cooperation between the two regimes.

Finally, in section 4, the article explains that, in the rare event of actual conflict, the strong enforcement mechanisms in the trade regime give trade treaties the upper hand over tobacco treaties. It argues that this result was anticipated by the drafters, and there is no need to alter it. While there may be problems with certain aspects of trade agreements, any changes that are needed are general ones that go beyond the narrow issue of tobacco regulation.

## 2 THE RELATIONSHIP BETWEEN THE FCTC AND TRADE RULES

Much of the discussion of how international tobacco and trade rules interact seems to be based on speculation rather than on a detailed legal analysis. This

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<sup>1</sup> A WTO panel was composed on 5 May 2014, see Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS434/13, WT/DS435/18, WT/DS441/17, WT/DS458/16, WT/DS467/17.

section considers FCTC obligations, WTO obligations, and how the two actually relate.<sup>2</sup>

## 2.1 THE IMPACT OF FCTC OBLIGATIONS ON TRADE

At the outset, it is useful to examine how exactly obligations under the FCTC might lead to domestic tobacco control measures that affect trade, and thus, potentially, interfere with trade obligations. FCTC rules are about public health. How does pursuing this goal lead to trade conflict?

The best place to start is Part III of the FCTC, which covers ‘measures related to the reduction of demand for tobacco.’ If demand is reduced, sales of all tobacco products, foreign and domestic, should fall, and it is these obligations that are the primary concern of health advocates who worry about trade rules. (There are also FCTC rules on supply reduction, including provisions on ‘illicit trade,’ but these rules have caused less of a concern). In particular, the following four categories of measures are likely to have a trade impact: tax measures; regulation of tobacco ingredients; packaging and labelling; and advertising restrictions.

With regard to *tax measures*, the relevant portions of Article 6, paragraphs 1 and 2 call for ‘price and tax measures’ aimed at ‘reducing tobacco consumption.’ Although it is not stated explicitly, this provision implies that setting high taxes is a good way to reduce demand for tobacco. Higher taxes would reduce sales, including sales of foreign products. But note that the obligation is formulated as a fairly weak one, using words such as ‘should’ and ‘may’. And it does not say anything specific about what the tax rate should be. Foreshadowing later issues, nothing in this obligation suggests that taxes should be discriminatory, that is, taxing foreign products more than domestic products. It is assumed that taxes will be neutrally applied.

Next, Article 9 governs the ‘contents’ of tobacco products, that is, their *ingredients*, such as flavouring. Article 9 has no detailed obligation of its own, but merely calls for the parties to propose guidelines. Partial guidelines were adopted in 2010 and amended in 2012. Paragraph 3.1.2.2 refers to ‘Ingredients used to increase palatability,’ explaining that ‘[t]he harsh and irritating character of tobacco smoke provides a significant barrier to experimentation and initial use.’ This harshness can be reduced in a variety of ways, including the addition of ‘sugars and sweeteners’ such as glucose, molasses, honey and sorbitol; flavours such as menthol;

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<sup>2</sup> For a more in-depth treatment of similar issues, see Benn McGrady, *Trade and Public Health: the WTO, Tobacco, Alcohol, and Diet*, Cambridge University Press, 2011, 80–213.

and ‘spices and herbs,’ such as cinnamon, ginger and mint. It recommends that governments prohibit or restrict ‘ingredients that may be used to increase palatability in tobacco products.’ Measures taken pursuant to these provisions have the potential to affect trade by prohibiting the sales of particular products; as will be discussed later, menthol flavouring is very common. As with Article 6, note that this provision uses the hortatory ‘should.’

Article 11 covers ‘*packaging and labelling*’ of tobacco products. Paragraph 1 calls for ‘health warnings describing the harmful effects of tobacco use, and may include other appropriate messages.’ Sub-paragraph (iv) states that these warnings and messages ‘should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas.’ Subsequent guidelines elaborating this provision discuss the controversial policy of ‘plain packaging.’ In this regard, paragraph 46 states:

Parties should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging). This may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others.

This provision is weakly stated, as it provides only that the parties ‘should consider’ such measures. In terms of how this policy affects trade, the theory is that by making it hard to promote products through branding, trade will be restricted.<sup>3</sup> As will be discussed later, trade and investment complaints have already been brought against Australia’s plain packaging law.

Finally, Article 13 governs *advertising*. Paragraph 2 of this provision states that governments ‘shall . . . undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship.’ As with packaging and labelling rules, a ban on ads can make it difficult for new products to enter the market. In that sense, such obligations could affect trade.

In the view of supporters of the FCTC and tobacco control, the danger is that domestic measures taken consistently with these provisions will affect trade in a way that violates trade rules, and thus trade rules could obstruct efforts to regulate tobacco. To evaluate this concern, it makes sense now to examine some of the trade obligations that might come into play.

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<sup>3</sup> See, e.g., Howard Schneider, ‘Australia’s “plain packaging” stubs out cigarette branding, prompting backlash,’ *Washington Post*, 29 Oct. 2013.

## 2.2 THE IMPACT OF TRADE OBLIGATIONS ON TOBACCO CONTROL

There are three main WTO agreements that could put constraints on the ability of governments to regulate tobacco: the GATT, the TBT Agreement, and the TRIPS Agreement.

### 2.2[a] *GATT*

With regard to the GATT, there are four interrelated provisions that establish basic principles for how trade rules discipline domestic regulation. Articles I and III require that regulatory and tax measures must not be discriminatory. Article I prohibits discrimination among trading partners (MFN); and Article III prohibits discrimination against foreign products in favour of domestic products (National Treatment). In essence, these obligations mean that governments can regulate tobacco however they want, as long as the measures do not discriminate.

Article XI deals with border measures such as quotas and similar restrictions. Note that where border measures are used in conjunction with domestic regulation for local products, Article III will apply to the exclusion of Article XI.<sup>4</sup>

These obligations should not be considered on their own, however, especially when tobacco control is at issue. GATT Article XX contains exceptions for various policy goals, one of which, sub-paragraph (b), is human health. Thus, even if a domestic tobacco control measure were to violate one of the three provisions described above, it would also have to be examined under Article XX(b) and its introductory clauses. In essence, this would involve a consideration of whether the measure was 'necessary' for human health, and also whether it satisfied the additional non-discrimination requirement of the introductory clauses.

### 2.2[b] *TBT Agreement*

The TBT Agreement deals with categories of measures referred to as 'technical barriers to trade', 'standards,' and 'conformity assessment procedures.' It contains provisions that are similar to the GATT, with some variations. Article 2.1 of the TBT agreement is a combined non-discrimination obligation dealing with both national treatment and MFN together. Unlike with the GATT, however, there is no equivalent of Article XX as an exception. Instead, Article 2.2 takes concepts from the Article XX exception, and turns them into an obligation. In this regard, Article 2.2 requires that measures falling under this agreement not be 'more trade restrictive than necessary' to accomplish their purpose, in this case public health.

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<sup>4</sup> Pursuant to a Note to Art. III.

Also of potential relevance for FCTC issues, Article 2.4 of the TBT agreement requires that measures be based on international standards. If it were found that the FCTC constitutes an international standard for tobacco regulation, it would have a direct role in the application of this provision.

### 2.2[c] *TRIPS Agreement*

Beyond regulations that govern products directly, intellectual property protections are also important for tobacco products. In this regard, branding and trademarks are thought by many to be crucial for promoting sales of these products. As a result, trade rules that impose obligations in this area may be relevant to domestic tobacco regulation. There are a number of provisions in the TRIPS agreement that establish minimum trademark protections that WTO member governments must follow. While there is a provision in the TRIPS agreement that refers to the policy goal of public health, it does not serve as a formal exception,<sup>5</sup> and thus it is not clear it can offer a real defence to claims under the trademark provisions.

### 2.3 THE INTERACTION OF TRADE RULES AND THE FCTC

We have now seen how FCTC obligations might affect trade, and how trade rules might affect domestic tobacco regulation. There is concern from both sides that conflicts might arise. At this stage, we look in more detail at the relationship between the two sets of international obligations, to evaluate the potential scope for conflict here.

### 2.3[a] *Tax Measures*

With regard to tax measures, the relevant WTO provision is GATT Article III:2. The only obligation here is not to discriminate against foreign products through tax measures. It is not clear why such nationality-based discrimination would make sense as a tobacco control policy, so there does not appear to be a trade and tobacco conflict. Any government wishing to use tax measures to discourage tobacco consumption could and should tax all products, both foreign and domestic. If it does so, there will be no violation of Article III, as long as the measure is designed and structured to treat foreign and domestic products equally.

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<sup>5</sup> Paragraph 1 of Art. 8 provides: 'Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.'

It is true that there are several GATT cases finding a violation based on discriminatory taxation of tobacco, but again, there is no conflict with health. Protecting domestic tobacco producers is not credibly a part of a tobacco control policy. Furthermore, if by some strange set of circumstances discrimination against foreign tobacco producers is legitimately part of a tobacco control policy, the government could invoke Article XX(b) as a defence.

### 2.3[b] *Ingredients*

In recent years, disputes about flavouring of tobacco have heated up. One has made it through a first round of WTO dispute settlement. In the *U.S. – Clove Cigarettes* case, Indonesia complained about a United States (US) measure which prohibited certain flavourings of cigarettes. In particular, the measure banned various sweet flavoured cigarettes, as well as clove flavoured cigarettes. However, it did not ban menthol flavoured cigarettes.<sup>6</sup> On the basis that most clove cigarettes came from Indonesia, and most menthols came from the US, the panel and Appellate body found a violation of WTO rules.<sup>7</sup>

Supporters of strong domestic tobacco controls may point to this case as evidence of conflict between trade rules and tobacco rules. As we have seen, the FCTC explicitly calls for restrictions on flavoured cigarettes which make them more palatable. But it must be noted that the problem with the US measure was not the flavour ban. Rather, it was that the particular flavours chosen seem to have been selected so as to favour US producers. A total ban on added flavours would have been looked at differently, and there are strong arguments that it would not violate the rules. This case is considered in more detail below.

### 2.3[c] *Packaging and Labelling*

As with the flavouring issue, some tobacco control supporters might argue that there is a conflict between FCTC obligations related to plain packaging and certain trade (and investment) obligations. In support, they can point to a series of WTO complaints<sup>8</sup> (and an investment complaint)<sup>9</sup> against Australia's plain packaging laws.

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<sup>6</sup> See Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 Apr. 2012, as modified by Appellate Body Report WT/DS406/AB/R, paras 2.1–2.32.

<sup>7</sup> *Ibid.*

<sup>8</sup> Five separate complaints were filed at the WTO, by Ukraine (WT/DS434/11), Honduras (WT/DS435/16), the Dominican Republic (WT/DS441/15), Cuba (WT/DS458/14), and Indonesia (WT/DS467/15). These complaints have been merged into a single panel proceeding.

<sup>9</sup> Key documents related to this case are available on the Australian Attorney General's web site: <http://www.ag.gov.au/internationalrelations/internationallaw/pages/tobaccoplainpackaging.aspx>.

On this issue, it is worth noting that the complaints are in their early stages. It is not clear any violation will be found. Furthermore, the claims under the trade (as opposed to the intellectual property) obligations are arguably quite weak. With regard to trademark issues, the issue is somewhat obscure, and there is not a lot of guidance on how a WTO dispute body should rule. (As to the investment claims, uncertainty about the scope of these obligations suggests some possibility of a violation here, but the precise chances are unclear.)<sup>10</sup> As a result, we should not assume any conflict, although the possibility does exist. This case is discussed in more detail below.

### 2.3[d] *Advertising*

A ban on cigarette advertising might reduce demand for cigarettes. Cigarette producers may consider such a ban a trade problem because it affects their ability to break into a new market, such as one recently opened to foreign competition that has been dominated previously by a state-monopoly. On the other side, health campaigners worry that advertising would stimulate overall demand.

The chance of trade conflict here is limited, though. Companies may be concerned, but they probably do not have a great trade complaint. Such bans are common, and are not usually challenged. In fact, such a ban seems to have been endorsed by the GATT *Thailand – Cigarettes* panel, which explicitly mentioned an advertising ban as a measure that might be consistent with the GATT (or justified by an exception).<sup>11</sup>

## 3 TRADE AND TOBACCO CONFLICT: CAN'T WE ALL JUST GET ALONG?

There are suggestions of conflict, but how do trade rules and tobacco rules interact in practice? This section first looks at the history of tobacco measures and trade disputes. A review of these cases indicates that, for the most part, international tobacco control obligations are not at issue in tobacco-related trade disputes. Instead, the measures at issue tend to relate to protection for the domestic tobacco

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<sup>10</sup> Another investment claim that affects packaging and labelling has been brought against Uruguay's tobacco control measures. One aspect of this claim was the requirement that 80% of a cigarette package be devoted to public health warnings. On this issue, a spokesman for Philip Morris International, the claimant, said: 'The large size of these warnings prevents us from effectively displaying our trademarks and goes beyond what could reasonably be considered appropriate to inform consumers of the well-established health risks of smoking.' Luke Eric Peterson, 'Philip Morris Files First-Known Investment Treaty Claim against Tobacco Regulations,' *Investment Arbitration Reporter*, 3 Mar. 2010.

<sup>11</sup> GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, adopted 7 Nov. 1990, BISD 37S/200, para. 78.

industry. In such cases, there is no real conflict between trade and health. It then explores how the two regimes cooperate under international law, pursuant to treaty interpretation rules and through special mechanisms that allow consultation between trade and health authorities.

### 3.1 TOBACCO MEASURES IN TRADE COMPLAINTS

The overall lesson to be drawn from the previous section is that the FCTC obligations that have the biggest impact on trade cause little trade conflict, suggesting that much of the concern here is overblown. The concern of health advocates who criticize the trade regime is that trade obligations will get in the way of public health. They point to a few high profile trade disputes as evidence. But the full history of trade disputes related to tobacco is much less nefarious. The vast majority of such disputes are about classic protectionism: High tariffs and discriminatory taxes and regulations. The only real conflict comes from plain packaging laws. However, no violation has been found yet, so any such conflict is speculative.

Reviewing all of the claims made against tobacco measures under the GATT/WTO, most such claims are solely about protectionism, in the sense of governments taking action to favour domestic producers over foreign competitors.<sup>12</sup> Of the thirty-two total claims brought against measures related to tobacco, twenty-five were clearly about protectionism. There are also four claims – in two separate complaints – for which a strong argument could be made that the measure was protectionist and not about public health; and there are three claims – all part of the same complaint – about a measure that is clearly related to public health.

We look now in more detail at the three complaints where the role of public health is at least debatable. In *Thailand – Cigarettes*, Thailand contended that its prohibition on imports of cigarettes ‘was justified by the objective of public health

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<sup>12</sup> The GATT/WTO complaints relating to tobacco and tobacco products are as follows: Japan – Restraints on Imports of Manufactured Tobacco, L/4871; United States – Reclassification of Machine-Threshold Tobacco, L/5541; Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, DS10; United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco, DS44; Peru – Taxes on Cigarettes, WT/DS227; Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302; Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines, WT/DS371; United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406; Armenia – Measures Affecting the Importation and Internal Sale of Cigarettes and Alcoholic Beverages, WT/DS411; Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS434, WT/DS435, WT/DS441, WT/DS458, WT/DS467. Many of these complaints have multiple claims. The figures in the text are based on an evaluation of each individual claim in every complaint.

policy which it was pursuing, namely to reduce the consumption of tobacco which was harmful to health,' and was therefore covered by Article XX(b). In this regard, it explained, '[c]igarette production in Thailand was a state-monopoly under the Tobacco Act, because the government felt the need to have total control over such a product which, even though legal, could be extremely harmful to health.' A main objective of this policy 'was to ensure that cigarettes were produced in a quantity just sufficient to satisfy domestic demand, without increasing such demand.'<sup>13</sup> Thailand argued that while competition had desirable effects on international trade in goods in general, for tobacco the effects would be negative because competition 'would lead to the use of better marketing techniques (including advertising), a wider availability of cigarettes, a possible reduction of their prices, and perhaps improvements in their quality,' and possibly increase total consumption. Once a market was opened, Thailand asserted, 'the United States cigarette industry would exert great efforts to force governments to accept terms and conditions which undermined public health and governments were left with no effective tool to carry out public health policies.'<sup>14</sup> Thailand also argued that cigarettes manufactured in the US 'may be more harmful than Thai cigarettes because of unknown chemicals placed by the United States cigarette companies in their cigarettes, partly to compensate for lower tar and nicotine levels.'<sup>15</sup>

The GATT panel hearing this case was very sceptical of these arguments. At the outset, it noted that the principal health objectives put forward by Thailand were 'to protect the public from harmful ingredients in imported cigarettes, and to reduce the consumption of cigarettes in Thailand.' Thus, the measures could be seen as 'intended to ensure the quality and reduce the quantity of cigarettes sold in Thailand.'<sup>16</sup>

With regard to quality, the panel said that '[a] non-discriminatory regulation implemented on a national treatment basis in accordance with Article III:4 requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the General Agreement.'<sup>17</sup>

As to quantity, the panel noted the view expressed by the WHO 'that the demand for cigarettes, in particular the initial demand for cigarettes by the young, was influenced by cigarette advertisements and that bans on advertisement could therefore curb such demand.' It then said that '[a] ban on the advertisement of cigarettes of both domestic and foreign origin would normally meet the requirements of Article III:4.' While it might be argued that such a general ban on

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<sup>13</sup> *Ibid.*, para. 21.

<sup>14</sup> *Ibid.*, para. 27.

<sup>15</sup> *Ibid.*, para. 28.

<sup>16</sup> *Ibid.*, para. 76.

<sup>17</sup> *Ibid.*, para. 77.

all cigarette advertising would violate Article III:4, nevertheless ‘such an inconsistency would have to be regarded as unavoidable and therefore necessary within the meaning of Article XX(b) because additional advertising rights would risk stimulating demand for cigarettes.’<sup>18</sup>

The Panel then examined how Thailand might restrict the supply of cigarettes consistently with the GATT. The Panel noted that the Thai Government may use its tobacco monopoly ‘to regulate the overall supply of cigarettes, their prices and their retail availability provided it thereby does not accord imported cigarettes less favourable treatment than domestic cigarettes or act inconsistently with any commitments assumed under its Schedule of Concessions.’<sup>19</sup> It then examined further the resolutions of the WHO on smoking, all of which were ‘non-discriminatory and concerned all, not just imported, cigarettes.’<sup>20</sup>

On this basis, the Panel considered that:

there were various measures consistent with the General Agreement which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which, taken together, could achieve the health policy goals that the Thai government pursues by restricting the importation of cigarettes inconsistently with Article XI:1.<sup>21</sup>

There are different ways to read this panel’s findings. Some health advocates may take the view that the panel was insufficiently sensitive to the difficulties that developing countries face in regulating tobacco when US tobacco companies enter the market. On the other hand, it is clear that the panel went out of its way to show how governments could regulate tobacco consistently with GATT rules, setting out a roadmap for doing so. At best, there is a very weak case here for any real conflict between tobacco control and trade rules. The GATT panel was really just saying, you cannot have a blanket import ban in the absence of good evidence that this is required. In the absence of such evidence, such a measure will be deemed to be about protectionism, not public health.

Another case where there is a debate over the purpose of the measure at issue is *U.S. – Clove Cigarettes*, discussed above. There, the US adopted a ban on some flavoured cigarettes. The rationale provided was that flavoured cigarettes mask the harsh taste of cigarettes, thus encouraging people, in particular children, to begin smoking. The problem, however, was that not all flavours were banned. The most commonly used flavour, menthol, which is very popular in the US, was not

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<sup>18</sup> *Ibid.*, para. 78.

<sup>19</sup> *Ibid.*, para. 79.

<sup>20</sup> *Ibid.*, para. 80.

<sup>21</sup> *Ibid.*, para. 81.

banned (although further review of its health impact was called for by the measure).<sup>22</sup>

The question, then, was whether this measure, in particular its selective ban on flavours, could credibly be called a health measure. The Appellate Body was sceptical of the US rationale for its approach, and ultimately found the measure in violation.<sup>23</sup>

This decision has upset health advocates, who claim it prevents incremental regulation of tobacco, which is the most that can be achieved sometimes.<sup>24</sup> This position is not completely without merit, but on balance a better view of the ruling here is that there was a finding that the measure was protectionist. The measure could have been changed to make it more effective and consistent with WTO rules by banning all flavours. Thus, at best this is a very weak case for trade and tobacco conflict. In fact, the FCTC obligations single out menthol as a problematic flavour, but the US chose not to ban it. Thus, here it would seem that following the FCTC could actually support WTO obligations.

The final case is about Australia's laws requiring plain packaging of cigarettes, which, as noted, have been challenged at the WTO by five different WTO members. One aspect of the claims relates to traditional trade issues. In this regard, there is a claim that the measures violate TBT Agreement Article 2.1<sup>25</sup> and Article 2.2.<sup>26</sup> Another aspect is related to the protection of trademarks, pursuant to the TRIPS Agreement. This dispute is at an early stage, so it is difficult to say too much about whether a real conflict exists. It could certainly be argued that the trade aspects of the case, as opposed to the intellectual property parts, are a bit of a

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<sup>22</sup> Panel Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, paras 2.1–2.32.

<sup>23</sup> Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes., para. 225.

<sup>24</sup> See Lawrence Gostin, *Global Health Law*, Harvard University Press, 2014, 238; Simon Lester, 'Todd Tucker on the Clove Cigarettes Ruling,' International Economic Law and Policy Blog, 8 Sep. 2011, comment by Todd Tucker: <http://worldtradelaw.typepad.com/ielpblog/2011/09/todd-tucker-on-clove-cigarettes.html#comment-6a00d8341c90a753ef0153916ed85c970b>.

<sup>25</sup> As stated in Ukraine's claim: 'Articles I and III:4 of the GATT 1994, Article 3.1 of the TRIPS Agreement, and Article 2.1 of the TBT Agreement because the measures fail to respect the non-discrimination requirements set out in these provisions by according less favourable treatment to products imported from certain countries than that accorded to like products of Australian origin and to like products originating in other countries, and thereby not providing equal competitive opportunities to all imported tobacco products alike, and to all foreign trademark right holders alike, as compared to like domestic and imported tobacco products and trademark right holders.' Request for the Establishment of a Panel by Ukraine, Australia – Certain Measures concerning Trademarks and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS434/11, 17 Aug. 2012.

<sup>26</sup> Ukraine's claim was that: 'Article 2.2 of the TBT Agreement because the measures are a technical regulation that was prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade by being more trade-restrictive than necessary to fulfil the stated health objectives.' *Ibid.*

stretch, but we will not know for sure until there is a ruling. While some have questioned the effectiveness of such measures for public health, it is fairly clear that health is the main goal of such measures, and in that sense trade rules may be in conflict with domestic tobacco regulation and international tobacco treaties.

### 3.2 TRADE AND TOBACCO COOPERATION: HOLISTIC INTERPRETATION UNDER INTERNATIONAL LAW

In addition to there not being much conflict, there is also a lot of room for cooperation between the FCTC and the trade regime. One way this cooperation occurs is through international law, which may be, and has been, examined as part of the treaty interpretation process. Pursuant to DSU Article 3.2, the ‘customary rules of interpretation of public international law’ provide the foundation for interpretation under the DSU. In practice, this has meant Articles 31 through 33 of the Vienna Convention on the Law of Treaties (VCLT). Thus, international law is explicitly part of the interpretive process for WTO obligations, and guides the whole process of interpretation in WTO dispute settlement.<sup>27</sup>

In part through this interpretive guidance, substantive international law has played a role in WTO disputes. To take some examples:

- in the *EC – Seal Products* dispute, in the context of examining a TBT Agreement Article 2.1 claim, the panel stated:

In taking into account the recognition given by international instruments in the context of the United Nations and the ILO to the interests of Inuit and indigenous communities, the Panel is mindful that these instruments are not WTO instruments and they do not set out WTO obligations per se. We are considering the content of these instruments as part of the evidence submitted by the European Union to support its position concerning the interests of Inuit and indigenous communities, not as legal obligations of Members.<sup>28</sup>

- in the *Canada/U.S. – Hormones Suspension* cases, the panel, in the context of interpreting the term ‘deliberation’ in DSU Article 14.1, noted that its interpretation ‘conforms to the use of that term in the statutes of other international judicial bodies,’ referring to rules of the International Court of Justice, the International Tribunal for the Law of the Sea and the International Criminal Tribunal for the Former Yugoslavia;<sup>29</sup>

<sup>27</sup> For a more detailed discussion of these issues, see McGrady, 42–72.

<sup>28</sup> Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400,401/R, circulated 25 Nov. 2013, fn. 475.

<sup>29</sup> Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R, adopted 14 Nov. 2008, as modified by Appellate Body Report

- in *U.S. – Cotton Yarn*, the Appellate Body, in support of its conclusion that a comparative analysis of serious damage must be carried out for each relevant Member individually, noted that ‘[o]ur view is supported further by the rules of general international law on state responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered.’<sup>30</sup>

In all of these cases, the basis for the citation to international law was not made clear. Clearly, panels and the Appellate Body are very comfortable citing to international law. But on what basis?

Article 31 of the VCLT explicitly mentions international law as part of its interpretive approach, noting that ‘[t]here shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties.’ Thus, Article 31(3)(c) is one source of support for the use of other international law in treaty interpretation. But does every use of international law flow from Article 31(3)(c)? Is a more general use of international law as ‘applicable law’ permitted?<sup>31</sup> Can international law serve as a means of determining ordinary meaning under Article 31(1)? Opinions seem to vary on these questions. As a result, the potential for the use of international law in WTO disputes remains controversial and uncertain.

Article 31(3)(c) is the clearest basis for looking to international law,<sup>32</sup> and also the most constrained in certain respects. It refers to ‘relevant rules of international law applicable in the relations between the parties.’ Thus, the international law at issue must constitute ‘relevant rules’ and be ‘applicable in the relations between the

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WT/DS321/AB/R, DSR 2008:XV, 5757–DSR 2008:XVII, 6717, para. 7.47; Panel Report, United States – Continued Suspension of Obligations in the EC – Hormones Dispute, WT/DS320/R, adopted 14 Nov. 2008, as modified by Appellate Body Report, WT/DS320/AB/R, DSR 2008:XI, 3891–DSR 2008:XIII, 4913, para. 7.49.

<sup>30</sup> Appellate Body Report, United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, WT/DS192/AB/R, adopted 5 Nov. 2001, DSR 2001:XII, 6027, para. 120.

<sup>31</sup> Lorand Bartels has argued that ‘international law from all sources is potentially applicable as WTO law,’ and has suggested three different uses of international law under the DSU: (1) to help interpret the covered agreements; (2) as evidence of compliance with WTO obligations; and (3) law in the chain of legal reasoning or argument. Lorand Bartels, ‘Applicable Law in WTO Dispute Settlement Proceedings,’ 35 *Journal of World Trade* 3 (2001), 499, 510–512.

<sup>32</sup> As the *China – Raw Materials* WTO panel recently put it, citing to Art. 31(3)(c), it ‘must take into account in interpreting Article XX(g) principles of general international law applicable to WTO Members.’ Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R / WT/DS395/R / WT/DS398/R / and Corr.1, adopted 22 Feb. 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, para. 7.377. See also Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R / WT/DS292/R / WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 Nov. 2006, DSR 2006:III–VIII, 847, paras 7.67–71.

parties.’ If the international law in question meets these criteria, it must be ‘taken into account.’

This language sets up arguments about whether particular international law qualifies, with treaties facing certain constraints. While general principles of international law apply to all nations, treaties apply only to those who have agreed to them. But the membership of treaties varies widely: Most treaties do not have the same parties. When the issue is how to interpret the WTO treaty, it is not automatic that another treaty applies ‘in the relations between the parties.’ At the least, the Members involved in the WTO dispute must also be parties to the other treaty. Thus, if the WTO membership concluded a subsequent agreement, it would be applicable in the relations between the parties, and relevant under Article 31(3)(c). But a treaty involving a different set of governments might not be.<sup>33</sup>

The impact of varying treaty membership can lead to problems in interpretation. Could the WTO treaty have different meanings depending on which Members were involved in the dispute, based on whether they had signed on to another treaty? Taking two countries who have been subject to WTO tobacco complaints, Australia and the United States, as examples, the former has ratified the FCTC while the latter has not. Would that mean identical measures taken by each would be treated differently in WTO dispute settlement? We should be wary of such a result in terms of the credibility and legitimacy of the WTO system. It may also undermine efforts to adopt tobacco treaties, as countries will be reluctant to sign on due to the impact on trade obligations.

In terms of the impact of international law that falls under Article 31(3)(c), there is conflict over how strong a role it will be play. The provision uses the compulsory ‘shall,’ so the international law cannot be ignored. However, it need only be ‘taken into account,’ which perhaps suggests a weak role for it.

Beyond Article 31(3)(c), perhaps international law can play a more general role in interpreting the meaning of WTO terms, through Article 31(1). Thus, when examining the meaning of specialized trade terms, international law instruments can, like dictionaries, help.<sup>34</sup>

While the VCLT interpretive rules are important, it may be that we overemphasize their role in legal reasoning, and they are, in fact, not the only source of international law in WTO disputes. Lorand Bartels has noted that international law can also be used as evidence of compliance with WTO obligations, and as part of the chain of legal reasoning or argument (applicable law).<sup>35</sup>

<sup>33</sup> See paras 7.65–72 of EC – Biotech Products for a discussion of these issues.

<sup>34</sup> *Ibid.*, paras 7.90–96.

<sup>35</sup> Lorand Bartels, ‘Applicable Law in WTO Dispute Settlement Proceedings,’ 35 *Journal of World Trade* 3 (2001). Joost Pauwelyn also talks about international law used as ‘factual circumstances’ to

Summing up, at this stage of the evolution of WTO law, there is nothing controversial about a role for international law in WTO disputes.<sup>36</sup> The fact that the legal basis for such a proposition is uncertain does not undermine this point, although it does raise questions. When and why should international legal instruments be relevant for interpreting the WTO agreements? This issue has not been answered clearly by the Appellate Body.

Ultimately, the key question is not whether international law is relevant in WTO disputes. It clearly is. Instead, the issue is the degree to which it may influence WTO law. Giving panels and the Appellate Body the discretion to look at international law for questions of meaning and applications of law to the facts in particular cases is probably not controversial. On the other hand, we should be wary of taking things too far, and limits may be in order.

The following hypothetical examples show how international tobacco law may play a role in WTO disputes. If a country invokes Article XX(b) as a defence, arguing that its tobacco control measures are necessary for human health, it may cite to international legal instruments as evidence that its measures contribute to this goal. The degree of contribution of a measure to its goals is one element of the necessity test,<sup>37</sup> and consistency with the FCTC would provide some evidence of the effectiveness of a measure. If the FCTC has endorsed a particular policy, that policy has some credibility. Note, however, that the analysis has to be a careful and thorough one. The argument cannot, for example, be that the FCTC says tobacco taxes are good, and the measure involves tobacco taxes, so therefore the measure must be accepted. The specific details of the taxes must be evaluated. For example, taxes that discriminate based on nationality would not be permitted.

Similarly, for a claim under TBT agreement Article 2.1, in the context of whether a detrimental impact under a measure 'stems from a legitimate regulatory distinction,' an inquiry into the legitimacy of the distinction could take into account a basis for the measure in international law. Thus, a distinction between

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help determine whether there is a WTO violation. Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We go?,' 95 *American Journal of International Law* 572 (2002) [hereinafter Pauwelyn, 'Role of Public International Law']. The relationship of interpreting law to determining the applicable law can be difficult to discern. In a sense, all claims are based on specific legal obligations (terms), which must be given meaning. Based on this meaning, the law is then applied to the facts. But at a certain point in the process, legal reasoning can be infused with other elements, such as other law, other facts, general logic, etc.

<sup>36</sup> As Richard Gardiner puts it: 'Courts and tribunals, national and international, appear to have no hesitation over using provisions in treaties other than the one being applied as aids to interpretation where the same, similar or different term sheds light on the meaning under consideration. This is such an accepted and established practice that it is hard to find any situation in which justification in terms of the Vienna rules has been presented.' Richard Gardiner, *Treaty Interpretation*, Oxford University Press, 2008, 281–282.

<sup>37</sup> See, e.g., Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, adopted 17 Dec. 2007, DSR 2007:IV, 1527, paras 134–155.

flavoured and unflavoured cigarettes could find support in the FCTC provisions on ingredients.

Turning to the TRIPS Agreement, if the issue is whether an ‘encumbrance’ created for a trademark by plain packaging is ‘unjustifiable,’ under Article 20, the FCTC could help with the issue of justifiability. All WTO obligations involve, to some extent, a balancing of competing policy goals, and guidance from the FCTC can help treaty interpreters make sure that balance is achieved.

All of these interactions of the FCTC and WTO rules would be a routine use of international law in WTO dispute settlement. International law does not dictate the outcome, but it may help the panel or Appellate Body reason through an issue.

In this regard, in the *Clove Cigarettes* case, the WTO panel followed this approach of looking to international law. It explicitly referenced the WHO partial guidelines for implementation of Articles 9 and 10 of the FCTC, stating that ‘[t]he WHO Partial Guidelines reinforce our understanding.’<sup>38</sup> This looks like cooperation, not conflict. A WTO panel, in trying to interpret and apply WTO law, looks to the FCTC for guidance on a particular aspect of the WTO claim.

It has also been suggested that international law can serve more broadly as a ‘defence’ to a violation of WTO obligations.<sup>39</sup> However, there is no support in the WTO jurisprudence for such a use of international law. Panels and the Appellate Body reference international law frequently, but never refer to it as a ‘defence.’ Furthermore, the WTO agreements themselves were structured in a way that establishes a limited number of clearly defined defences. In doing so, it could be argued that WTO rules effectively ‘contract out’<sup>40</sup> of other international law defences. Making WTO obligations subject to a nearly unlimited number of defences that might be pulled from various parts of international law runs counter to the focus of DSU rules on the ‘covered agreements’ as the basis for complaints and defences. WTO rules set out all the obligations and exceptions that are relevant.<sup>41</sup> At the time these agreements were negotiated, governments were well aware that trade could come into conflict with other principles, and set out a number of broad, but well-defined, defences based on other policy goals. Finding

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<sup>38</sup> Panel Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, para. 7.414 and paras 7.229–230.

<sup>39</sup> Pauwelyn, ‘Role of Public International Law,’ 564–565, 577. This view has been criticized by Joel Trachtman. Joel Trachtman, ‘Book Review: Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law by Joost Pauwelyn’ 98 *American Journal of International Law* (2004), 855–861. For example, in reaction to a claim of violation of TBT Agreement Art. 2.1, a Member might invoke the FCTC as a defence.

<sup>40</sup> Joost Pauwelyn has argued that WTO law has contracted out of some international law obligations, but not others. Pauwelyn, ‘Role of Public International Law,’ 539 and 537. See also, Joost Pauwelyn, *Conflict of Norms in Public International Law*, Cambridge University Press, 2003, 217–220 [hereinafter Pauwelyn, *Conflict of Norms*].

<sup>41</sup> Lorand Bartels, ‘Applicable Law in WTO Dispute Settlement Proceedings,’ 35 *Journal of World Trade* 3 (2001), 499–519.

new obligations and exceptions outside the WTO is not anticipated under the DSU.<sup>42</sup>

Early on its history, the Appellate Body stated that WTO law cannot be looked at in ‘clinical isolation’ from international law.<sup>43</sup> That is certainly true, and, as noted, extensive interaction between the two is to be expected. At the same time, however, WTO law is not and cannot be made subservient to other international law by allowing the use of international law as an additional, unneeded ‘defence.’

### 3.3 TRADE AND TOBACCO COOPERATION: SEEKING GUIDANCE FROM HEALTH AUTHORITIES

In addition to the formal interaction of the FCTC and trade treaties, DSU Article 13 provides wide latitude to WTO panels to seek information from outside bodies. In this way, international health organizations such as the WHO can play a direct role in WTO disputes. Panels have done this in a number of cases, for various international organizations, including the WHO.<sup>44</sup> If there is a need for input and guidance from health authorities, a WTO panel may ask.

## 4 TRADE AND TOBACCO VIE FOR SUPREMACY

When international trade and tobacco law conflict, how should that conflict be resolved? This section considers traditional international law rules on treaty conflicts, as well as the impact of ‘soft’ and ‘hard’ law obligations on this issue. It also examines policy considerations related to which set of rules should take precedence.

### 4.1 DOES TRADE TRUMP TOBACCO, OR DOES TOBACCO TRUMP TRADE?

Putting aside all of the cooperation, though, it is true that one could imagine a conflict.<sup>45</sup> In this regard, there are degrees of conflict that might exist. At one extreme, two treaties could be in direct opposition. For example, one treaty might

<sup>42</sup> Lorand Bartels argues that DSU Arts 3.2 and 19.2 prohibit the use of international law in this way, as it would ‘add to or diminish’ the rights and obligations of Members. *Ibid.*, 499 and 507. For a counter argument, see Pauwelyn, *Conflict of Norms*, 352–355.

<sup>43</sup> Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, 17.

<sup>44</sup> See, e.g., EC – Biotech Products, para. 7.31.

<sup>45</sup> The existence of treaty conflict may seem odd, but Klabbers explains it as follows: ‘Treaty conflicts have many practical sources: states might willingly ignore existing commitments; or they might intentionally aim to override existing obligations; or the existence of commitments may be

prohibit an action, while another requires it. But a conflict may also be of a lesser degree, such as where one treaty authorizes an action and the other prohibits it. As Pauwelyn puts it in general terms, ‘two norms are . . . in a relationship of conflict if one constitutes, or has led to, a breach of the other.’<sup>46</sup>

In the case of plain packaging, let’s imagine the FCTC were to *require* a very specific plain packaging measure and the WTO *prohibits* this same measure (most likely under a provision of the TRIPS Agreement). In this situation, regardless of any uncertainty as to what it means to have a treaty conflict,<sup>47</sup> there would be a conflict here. And it would be a clear conflict, one that could not be interpreted away. In that sense, it may not be realistic as something likely to occur in the real world, but it serves the purpose of setting up the issue in a way that it has to be addressed, as the usual avoidance techniques will not work.

There are two points to consider in this regard. First, what do traditional rules on treaty conflict say about this issue? And second, can the nature of the legal obligations – in particular, the hard law versus soft law distinction – be of help here?

#### 4.1[a] *Resolving Treaty Conflicts*

International law has a hard time dealing with the issue of treaty conflicts. As Chris Borgen has noted, there is a ‘lack of useful, principled, methods to resolve conflicts between’ treaties.<sup>48</sup>

One place people have looked is Article 30 of the VCLT, which is titled, ‘Application of successive treaties relating to the same subject-matter.’ Paragraph 2 of this Article states: ‘When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.’ This provision emphasizes formal hierarchies created between the treaties. Where those do not exist, and for our purpose let’s assume they do not, the problem is more difficult.

Paragraph 3 then states: ‘When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in

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unknown to current negotiators; or current negotiators may interpret existing commitments wrongly.’ Jan Klabbers, *Treaty Conflict and the European Union*, Cambridge University Press, 2009, 33.

<sup>46</sup> Pauwelyn, *Conflict of Norms*, 176–188; Pauwelyn, ‘Role of Public International Law?’, 551.

<sup>47</sup> Christopher Borgen, ‘Resolving Treaty Conflicts,’ 37 *George Washington International Law Review* 573, 579–583 (2005).

<sup>48</sup> *Ibid.*, 574. Ghouri argues for resolving conflicts through a hierarchy of values, but establishing a ranking of values presents challenges. Ahmad Ali Ghouri, ‘Determining Hierarchy between Conflicting Treaties: Are There Vertical Rules in the Horizontal System?’, 2 *Asian Journal of International Law* 2 (2012). Pauwelyn also discusses possible approaches to resolving conflicts. Pauwelyn, *Conflict of Norms*, 94–109. See also Klabbers, 49–103.

operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.<sup>49</sup> A major limitation here is that the parties to treaties are not always the same. Paragraph 4 provides:

When the parties to the later treaty do not include all the parties to the earlier one:

- (a) as between States parties to both treaties the same rule applies as in paragraph 3;
- (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

Thus, if the US has not ratified the FCTC (which it has not), offering up the FCTC as a conflicting treaty in a trade case involving the US may be problematic.

Beyond the issue of parties, there are other problems as well, including that of subject-matter. In general, it is not at all clear that a tobacco treaty and a trade treaty relate to the same subject-matter.<sup>50</sup> Furthermore, as Benn McGrady points out, the principle that a more specific treaty might take precedence should also be taken into account. Tobacco and trade have some overlap, but cover different topics. If there is an allegation that a tobacco regulation discriminates against imports, the trade treaty is likely to be more specific.<sup>51</sup>

Some have argued that the FCTC takes precedence over the WTO, as the later in time treaty.<sup>52</sup> However, many new trade and investment agreements have been signed, and continue to be signed, which would mean that the FCTC would lose its priority under an argument based on the timing of the treaty. Even if it were true that the FCTC took precedence over the WTO, there are many recent trade and investment agreements that would, using this logic, prevail over the FCTC.<sup>53</sup>

In addition, it is not clear whether assigning treaties a static date makes sense. Some treaties are signed, and then either followed or ignored, without much further input. Other treaties, including the WTO (and to a lesser extent the FCTC), have a functioning organization that administers the treaty, amends the treaty, makes decisions under the treaty, and interprets the treaty. Saying that the WTO treaty has a date of 1 January 1995 ignores all of the significant work that has occurred since that time. It may be better to call this category of treaties

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<sup>49</sup> Borgen notes that this provision 'codifies a default *lex posterior* canon of construction.' Christopher Borgen, 'Treaty Conflicts and Normative Fragmentation,' in Duncan Hollis, *The Oxford Guide to Treaties*, Oxford University Press, 2012, 462–464.

<sup>50</sup> *Ibid.*, 466–467.

<sup>51</sup> McGrady, 18.

<sup>52</sup> E R Shaffer et al., 'International Trade Agreements: A Threat to Tobacco Control Policy,' *Tobacco Control* (2005), 24. 'However, under standard rules for treaty interpretation, the most recent treaty prevails in conflict negotiations.'

<sup>53</sup> McGrady, 18.

‘current treaties,’ in the sense that they are living organisms that evolve over time.<sup>54</sup>

Overall, there is nothing in these general treaty conflict rules that is particularly helpful in determining the FCTC/trade agreement relationship in the context of the hypothetical conflict over plain packaging described above. The ‘lack of useful, principled, methods to resolve conflicts’ is apparent.

Beyond these general conflicts rules, it may also be argued the DSU has specific rules that are relevant here. Lorand Bartels has suggested that, as a practical matter, DSU Articles 3.2 and 19.2, which state that recommendations and rulings of the DSB and panel and Appellate Body findings and recommendations ‘cannot add to or diminish the rights and obligations provided in the covered agreements,’ mean that, ‘in the event of a conflict between the provisions of the covered agreements and any other applicable law, the covered agreements shall prevail.’<sup>55</sup> Within WTO dispute settlement, where the issues are likely to be litigated, this argument might carry a good deal of weight.

#### 4.1[b] *Hard Law v. Soft Law*

For further guidance, the nature of the law at issue may also be a relevant consideration when examining treaty conflicts. ‘Hard’ and ‘soft’ law are terms used to describe different forms of international governance. One group of scholars distinguishes the two using the following elements: ‘*Obligation* means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. . . . *Precision* means that rules unambiguously define the conduct they require, authorize, or proscribe. *Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.’<sup>56</sup> International legal instruments with more in relation to each of these elements are ‘harder’; those with less are ‘softer.’

A conflict between soft and hard law – or any international law for that matter – may seem strange. Why would governments create this conflict between legal instruments? Isn’t it easy enough to avoid? Shaffer and Pollack examine this question and offer some possible answers. In the case of soft law and hard law, they suggest that, where international law conflicts rather than complements, ‘some states or other actors, unhappy with existing legal agreements, may promote the adoption of new legal provisions designed to obfuscate and undermine those

<sup>54</sup> Pauwelyn, *Conflict of Norms*, 378–380; Pauwelyn, ‘Role of Public International Law,’ 546.

<sup>55</sup> Bartels, 507. See also 519. This suggestion has been criticized by Joost Pauwelyn. Pauwelyn, *Conflict of Norms*, 352–355.

<sup>56</sup> Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, ‘The Concept of Legalization,’ 54 *International Organization* (2000), 401–419. (emphasis added).

arrangements.<sup>57</sup> In essence, their goal is to soften the hard law regime. Soft law will not win the battle, but it could affect the nature of the hard law obligation. As Shaffer and Pollack note, 'states may prefer to soften the other legal regime indirectly, such as through affecting the interpretation and application of its existing hard law.'<sup>58</sup>

Applied to the legal instruments at issue here, it is clear that the FCTC is relatively soft and the WTO and other trade agreements are relatively hard. Many FCTC rules use the hortatory 'should,' and FCTC dispute settlement is not designed to provide effective third-party authority. By contrast, WTO rules are binding, and the judicial system is among the most advanced in the international arena.

As a result, there is a practical reality for our hypothetical. If a country does not adopt a plain packaging measure, the FCTC cannot do anything about it. There is no effective way for other FCTC parties to coerce a party to adopt the measure pursuant to FCTC rules. The FCTC dispute settlement provisions are set out in three paragraphs in Article 27. The first one states:

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.

This is simply a call for parties to work out their differences. In addition, the second paragraph provides:

When ratifying, accepting, approving, formally confirming or acceding to the Convention, or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 of this Article, it accepts, as compulsory, ad hoc arbitration in accordance with procedures to be adopted by consensus by the Conference of the Parties.<sup>59</sup>

However, without an enforcement mechanism, backed by penalties of some sort, the obligation remains weak. No matter what the FCTC says on paper, compliance cannot be enforced.

<sup>57</sup> Gregory Shaffer and Mark Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance,' 94 *Minnesota Law Review* (2009), 706–799, 709. See also 712, 744.

<sup>58</sup> *Ibid.*, 790. Pauwelyn notes that he is not addressing the impact of soft law, which he describes as 'not legally binding in and of itself,' when considering conflicts between international norms. It is not clear how he would view degrees of softness, and the Abbott et al. framework. Pauwelyn, *Conflict of Norms*, 6.

<sup>59</sup> To date, only Azerbaijan, Belgium and Viet Nam have taken this step. Declarations of WHO Framework Convention on Tobacco Control [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IX-4&chapter=9&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&lang=en). No procedures have been developed by the Conference of the Parties.

By contrast, if a country does adopt the plain packaging measure, the WTO can find a violation, and authorize sanctions to have the measure withdrawn or modified. There are detailed provisions in the DSU that provide for compulsory jurisdiction, panel procedures, appellate review, compliance assessment, and penalties for non-compliance. And there are hundreds of WTO disputes to illustrate the procedures, showing that they generally do work. What this means is, governments can always bring a WTO claim and have it adjudicated and enforced, and the FCTC cannot stop that from happening. In that sense, WTO law takes precedence over the FCTC.<sup>60</sup>

The practical effect of all this is that FCTC soft law can influence WTO law, but only within narrow limits. This is consistent with the treaty interpretation rules described above, under which international law can affect the interpretation of WTO law but it cannot take precedence over it.<sup>61</sup>

A related point is that if the other treaty regime (such as the FCTC) does not have an effective judicial system, there is no way to know whether the measure actually does meet the terms of that treaty. A government might assert that its measure is compelled by the treaty, and it may seem likely that it is. But in the absence of a third-party dispute mechanism to evaluate this, how can we be sure? By contrast, you can always go to the WTO and get a ruling on a particular plain packaging measure.

I have focused on the situation where the FCTC requires an action, while the WTO prohibits it. But the same conclusion applies where the FCTC merely authorizes the action. This could be described as a 'right' to use plain packaging, if written strongly enough. A 'soft right' would be subordinated to a 'hard' prohibition.

This state of affairs was no accident. It was a choice made by governments.<sup>62</sup> If they wanted the FCTC to take precedence over WTO rules, they could have made it do so, but they did not. A choice of soft law might seem surprising, but

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<sup>60</sup> McGrady, 18.

<sup>61</sup> For a different conclusion, see McGrady, who states that: 'The operation of the law of treaties is such that the FCTC has a high degree of protection from the WTO Agreement in the event of a conflict between the two treaties.' McGrady, 245. However, he also notes: 'There is also likely to be an underlying institutional reluctance on the part of WTO panels to conclude that an extraneous treaty prevails over the WTO Agreement.' 246. This supports the point made earlier that the practical impact of making WTO rules enforceable will give them priority.

<sup>62</sup> Joost Pauwelyn has written that the 'intention' of the parties is 'paramount' in deciding which rules should prevail, that is, have they 'expresse[d] a preference for either rule.' Making one rule enforceable, and one not, suggests a preference for the enforceable one. Pauwelyn, 'Role of Public International Law,' 545. He also speaks of a 'two-class society' between rules that can be 'judicially enforced' and those that cannot. 560. Joel Trachtman, in critiquing Pauwelyn's call for international law to be a defence, notes that: 'Most other international law – both treaty and customs – was not entered into with formal dispute settlement in mind.' Trachtman, 860. This could be taken as supporting a hierarchy of international law based on the degree of enforceability.

there are good reasons for it, including the absence of enforceability. As Abbott and Snidal put it, 'international actors often deliberately choose softer forms of legalization as superior institutional arrangements.' They note that soft law 'offers many of the advantages of hard law, avoids some of the costs of hard law, and has certain independent advantages of its own, [especially] when the actors are states that are jealous of their autonomy and when the issues at hand challenge state sovereignty.'<sup>63</sup> Thus, the soft law status of the FCTC is not a flaw that needs to be corrected, but rather a design choice of the drafters. Governments meant to give trade law priority. WTO panels and the Appellate Body should not overrule governments' choices in this regard, by making tobacco law 'harder' than the governments intended. Re-ordering the intended hierarchy of trade and tobacco treaties undermines their goals.<sup>64</sup>

As further support for the idea that the tobacco versus trade allocation of power was intended, the drafters of the FCTC were clearly aware of the potential for conflict and concerns about which treaty had priority. Draft language in this regard, proposed during the FCTC talks, stated:

Priority should be given to measures taken to protect public health when tobacco control measures contained in this Convention and its protocols are examined for compatibility with other international agreements.<sup>65</sup>

Such language is probably too vague, and insufficient as a legal matter to accomplish its goals. In a situation where the WTO is enforceable, and the FCTC is not, WTO rules would prevail even if this language were included in the FCTC, for the reasons stated above. Yet even this weak language was not included in the final text, further undermining any claim for FCTC priority.

To some extent, the different choices governments make when creating treaties can be analogized to how governments act when they pursue domestic policy goals. In a domestic system, governments may take varying approaches. They might require behaviour that they want to see in their citizens. Or they may simply encourage it, by providing incentives.<sup>66</sup> As an example, in the US, the FDA has long pushed what it considers to be healthier foods through informational materials it provides to the public. In doing so, it tries to nudge them into healthier

<sup>63</sup> Kenneth Abbott and Duncan Snidal, 'Hard and soft law in international governance,' 54 *International Organization* 3 (2000), 421–456, 423.

<sup>64</sup> As Abbott and Snidal note, '[g]reater sovereignty costs emerge when states accept external authority over significant decisions.' *Ibid.*, 437. Why governments chose this approach is not made clear, but perhaps they had concerns about sovereignty in matters of tobacco control.

<sup>65</sup> R. Weisman, 'International trade agreements and tobacco control: threats to public health and the case for excluding tobacco from trade agreements,' *Essential Action*, Washington DC (2003), 26 [www.essentialaction.org/tobacco](http://www.essentialaction.org/tobacco).

<sup>66</sup> The latter approach has been described by Sunstein and Thaler as 'nudging' people in the right direction. Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, Penguin Books, 2009.

behaviour. By contrast, regulators also prohibit certain foods, such as the hormone ban in beef in the EU. This latter approach makes particular behaviour compulsory (no one may consume hormone-treated beef). To take an example of how conflict between these two kinds of domestic action would be resolved, if the US 'food pyramid' recommends eating margarine (which it used to),<sup>67</sup> and the FDA then bans trans fats, which it has proposed doing,<sup>68</sup> the binding regulation takes precedence over the nudging.

In a nutshell, strong obligations take priority over weak obligations. 'Hard' domestic law triumphs over 'soft' domestic law.

Different types of treaties can be thought of in the same way. When treaties prohibit certain actions clearly, and have an enforcement mechanism to ensure compliance, they can be thought of as compulsory. By contrast, when treaties simply outline ideal behaviour, without requiring it or offering enforcement possibilities, they are more like nudges. In domestic systems, compulsory laws take precedence over nudging policies. No matter what is on a 'food pyramid' equivalent in the EU, people still cannot buy hormone-treated beef. The same is true of treaties. The compulsory ones will trump the nudge ones.<sup>69</sup>

Such a view conflicts, of course, with the conventional idea that there is no hierarchy of treaty norms, and that all treaties are created equal.<sup>70</sup> As a formal matter, it may be possible to say that one treaty norm is 'as legally binding as any other.'<sup>71</sup> But the reality is that enforceability varies widely. Some international law proponents might want to ignore this, but governments who make international law do not. The choice of whether to give international law an enforcement

<sup>67</sup> NC EATS, 'Eat Your Vegetables: Nutrition & The Nc Extension Service' [history.ncsu.edu/projects/ncsuhistory/nceats/exhibits/show/nutrition/scarcity/basic-seven](http://history.ncsu.edu/projects/ncsuhistory/nceats/exhibits/show/nutrition/scarcity/basic-seven).

<sup>68</sup> Sabrina Tavernise, 'F.D.A. Ruling Would All but Eliminate Trans Fats,' NY Times, 7 Nov. 2013. <http://www.nytimes.com/2013/11/08/health/fda-trans-fats.html>.

<sup>69</sup> There is one exceptional, and potentially complicating, situation here: the non-violation remedy (in the GATT context, the provision is found in Art. XXIII:1(b)). When the issue of conflict between treaties is raised, the normal sequence is that there is an allegation that trade rules were violated, and in response it is suggested that the FCTC is in conflict, and should take precedence. But what if the allegation is of nullification or impairment, not of a violation? Can it be said there is a conflict between WTO law and international law here? What if the measure required by the FCTC nullifies or impairs benefits, such as a tariff concession? Note that WTO rules do not prohibit the measure in question. If nullification or impairment can be proved, they simply call for a 'mutually satisfactory adjustment.' See DSU Art. 26. This might mean, for example, that tariffs are lowered for another product. It is certainly possible that a Member faced with such a ruling might withdraw the measure as a way to remove the nullification or impairment. But the DSU explicitly states that it does not have to. In this situation, the best characterization is that there is no conflict between tobacco and trade rules. Tobacco control policies are, at most, only marginally inhibited, as they might lead to the difficult political decision to lower tariffs on products. In a sense, for non-violation, the enforceability of WTO rules has been reduced to FCTC levels.

<sup>70</sup> Pauwelyn, 'Role of Public International Law,' 538.

<sup>71</sup> *Ibid.*

mechanism is a conscious decision, based on policy considerations. Whether or not it matters formally, it matters in practice.

#### 4.2 EVALUATING THE CURRENT SYSTEM

Should the status quo be changed? If governments want to give the FCTC priority, they could do it, and some have argued for this. For the FCTC to actually take precedence, it would need to be enforceable, and language of the kind noted above, giving priority to the FCTC, would have to be inserted into both agreements. At the FCTC, the Philippines has pushed for a change in the existing FCTC/trade law relationship, as follows:

Mr PADILLA (Philippines) proposed the addition of a new operative paragraph, which would read along the following lines: ‘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; (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, to explicitly exclude tobacco and tobacco-related products from coverage of the same’.<sup>72</sup>

The first argument is that FCTC dispute settlement rules should apply first, before going to dispute settlement under trade agreements. One point to note here is that most trade disputes have nothing to do with tobacco control. It is only on rare occasions that FCTC rules will even be relevant. Furthermore, in those cases where FCTC rules have some applicability, it is not clear why disputes should go the FCTC first. There is a mechanism within the WTO for dispute panels to receive guidance from the WHO. That has happened before, and is sure to happen in any future dispute. The FCTC will not be ignored in these cases, even if trade dispute procedures are used first.

As to the suggestion that health rules have ‘primacy,’ this view of the relationship is perhaps misguided. The better solution is to establish boundaries between the two regimes that avoid conflict. As explained above, there is not much conflict anyway. But to the extent there is, efforts should be made to clarify the relationships. What does the FCTC recommend with regard to plain packaging? What does the WTO allow with regard to plain packaging? Positive efforts to solve this potential conflict before it arises would be useful.

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<sup>72</sup> Conference of the Parties to the WHO Framework Convention on Tobacco Control, Fifth session, Seoul, Korea, 12–17 Nov. 2012, FCTC/COP/5/REC/2, 156.

Finally, the proposal to ‘exclude’ tobacco from trade agreements is an overly simplistic approach to a complex problem. When people talk of ‘carve-outs’ of tobacco or other products from trade rules, it is worth taking a step back to ask: A carve-out from what?

Trade law is based on a number of general principles and goals, such as: non-discrimination (including the reduction of tariffs and quotas, and a prohibition on discriminatory domestic laws); balancing trade impact with other policies, through obligations such as TBT Agreement Article 2.2; protection of intellectual property, including trademarks; or, more recently, expropriation and ‘fair and equitable treatment’ in the context of investment provisions. Concerns have been expressed that these principles get in the way of legitimate regulation of certain products.

One response has been to ask for a ‘carve-out’ of these products,<sup>73</sup> which has led to a good deal of controversy in the TPP talks. At first, the US Trade Representative’s office (USTR) seemed willing to support a mildly strong proposal in this regard, which would have included exceptions language for tobacco that would be easier to meet than the standard trade law provisions.<sup>74</sup> Recently, however, USTR abandoned this approach. Instead, it adopted a much weaker set of provisions that simply clarify that existing exceptions apply to tobacco, and call for an additional set of consultations before tobacco-related trade disputes proceed.<sup>75</sup> It seems fairly clear that the new proposals are unlikely to have much impact on the application of existing rules. Subsequently, Malaysia entered the fray, with a proposal to completely carve-out tobacco from all TPP rules.<sup>76</sup> This issue has not yet been resolved.

A carve-out means that these principles would not apply to a particular product. Before carving-out the product, though, perhaps a close examination of

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<sup>73</sup> See Simon Lester, ‘Free Trade and Tobacco: Thank You for Not Smoking (Foreign) Cigarettes’, 3 <http://www.cato.org/publications/free-trade-bulletin/free-trade-tobacco-thank-you-not-smoking-for-eign-cigarettes>; See also, National Association of Attorneys General Letter to U.S. Trade Representative Michael Froman, 27 Jan. 2014 <http://www.naag.org/assets/files/pdf/signons/TPP%20Final%20Letter.pdf>.

<sup>74</sup> See Simon Lester, ‘U.S. Policy on Trade and Tobacco’, 18 May 2012 <http://worldtradelaw.typepad.com/ielpblog/2012/05/us-policy-on-trade-and-tobacco.html> and Benn McGrady, ‘US Proposal on Tobacco in Trans-Pacific Partnership’, 18 May 2012 <http://www.oneillinstitutetradeblog.org/us-proposal-on-tobacco-in-trans-pacific-partnership/>.

<sup>75</sup> USTR, ‘New U.S. Proposal on Tobacco Regulation in the Trans-Pacific Partnership’ <http://www.ustr.gov/about-us/press-office/fact-sheets/2013/august/fact-sheet-tobacco-and-tpp>.

<sup>76</sup> World Trade Online, ‘Malaysia Poised To Table Complete Carveout From TPP For Tobacco Measures’, 25 August 2013 <http://insidetrade.com/201308252444936/WTO-Daily-News/Daily-News/malaysia-poised-to-table-complete-carveout-from-tpp-for-tobacco-measures/menu-id-948.html>. The actual scope of the Malaysian carve-out, in terms of how ‘complete’ it is, was unclear. McGrady offers a sceptical view of proposals for a complete carve-out that is along the lines of ‘nothing in this Agreement shall be construed to apply in any way to tobacco products.’ McGrady, 223–225.

the principles is warranted. Do we have the right principles? Perhaps not, and maybe that is the real problem. If some of the principles are a problem, 'carve-outs' are not a solution. The key, then, is to look closely at the principles.

With regard to tariff reductions and non-discrimination, it is not clear how a carve-out from such rules makes sense. Does anyone believe we would be better off with protectionist and discriminatory measures on tobacco? An argument has been made by health advocates that in the case of developing countries, multinational tobacco companies are worse for public health than a domestically-owned monopoly, because of their marketing skills. Whether or not that was true in the past, it is hard to imagine it is the case now. In today's globalized world, the idea of a purely national domestic monopoly seems increasingly antiquated, and the notion that such entities would be more likely to accept health regulation may be far-fetched.

Other principles, by contrast, may be a problem. For example, under the TBT agreement, Article 2.1 contains the non-discrimination principle, while Article 2.2 has a stricter obligation that balances a measure's impact on trade with other policy goals. Article 2.1 probably does not interfere with domestic tobacco regulation; by contrast, Article 2.2 might. But this is not a tobacco problem, it is a general problem. If Article 2.2 interferes too much with tobacco regulation, it interferes too much with all regulation. Thus, the focus should be on reforming Article 2.2, not on exempting tobacco. In the investment context, this re-thinking of principles is exactly what is happening. Many critics have argued that investment treaty rules on fair and equitable treatment are a problem. In response, governments are responding with modifications.<sup>77</sup> Rethinking bad principles is better than carving-out specific products and leaving bad principles to apply to all other products.

And finally, there is a slippery slope problem here. Tobacco critics like to argue that tobacco is 'unique,' in terms of its health impact. However, in recent years it has become clear that efforts to promote public health go far beyond tobacco. Former New York Mayor Michael Bloomberg famously proposed limits on the

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<sup>77</sup> For example, the European Commission has explained that it 'is working to bring improvements on two fronts: (1) Clarifying and improving investment protection rules . . . [and] (2) Improving how the dispute settlement system operates. . . . Such improvements will address concerns raised that investment protection rules may have a negative effect on states' right to regulate. They should, amongst other things, ensure that legitimate government public policy decisions cannot be successfully challenged.' European Commission, 'Investment Protection and Investor-to-State Dispute Settlement in EU Agreements', November 2013 [http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151916.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf). Along the same lines, the recently signed Australia - Korea FTA includes general exceptions to investment obligations. See Simon Lester, 'Improving Investment Treaties through General Exceptions Provisions: The Australian Example,' *Investment Treaty News*, 14 May 2014.

size of soda cups;<sup>78</sup> and the US Food and Drug Administration has indicated that it will ban trans fats in foods.<sup>79</sup> Clearly, tobacco is not the only product leading to health concerns, and if tobacco is excluded from trade agreements, proposals to exclude many other products might soon follow. The trade world would then find itself in a contentious debate over defining which products are acceptable for public use.

## 5 CONCLUSION

Summing up the issue of trade and tobacco conflict, I argue that where there is conflict, trade rules will control, based on the structure of these agreements as drafted by governments. Trade rules have relatively strong enforcement provisions, whereas the FCTC does not. For practical purposes, this means that the adjudication of any disputes will be carried out in a way that favours trade obligations. In addition, as an interpretive matter, the creation of strong enforcement mechanism for trade suggests that the governments meant to give precedence to trade.

That does not mean that the FCTC is irrelevant in trade disputes. The FCTC may be used as an element to help interpret trade treaties. For example, the FCTC can offer an explanation of a measure's reasonableness in the context of a specific provision. If the measure is based on the FCTC, that suggests the objective is legitimate. However, the FCTC cannot be a 'defence' to a violation of trade rules.

Ultimately, rather than worry about trade and tobacco conflicts, or try to push for tobacco rules to have priority over trade rules, public health groups should emphasize how trade rules do not prohibit the demand reduction measures encouraged by the FCTC, and should focus on developing tobacco regulation that does not violate trade rules. The two regimes can and should work together to achieve their separate goals in a way that does not cause tension. It is not clear that there is much constraint at all on tobacco control from trade rules. After all, there is not much dispute that governments could ban tobacco completely in a way that is consistent with trade agreements.

More generally, the fragmentation of international law calls out for a solution. Governments continue to sign treaties which overlap and may conflict. What is the relationship they see for such treaties? For now, they have told us very little. As a result, the focus of treaty interpreters must be on an objective analysis of the texts. The tobacco and trade treaty texts make clear that the drafters gave priority to trade by making it enforceable. International courts cannot and should not attempt to undo this.

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<sup>78</sup> See Wikipedia, *New York City soft drink size limit* [http://en.wikipedia.org/wiki/New\\_York\\_City\\_soft\\_drink\\_size\\_limit](http://en.wikipedia.org/wiki/New_York_City_soft_drink_size_limit).

<sup>79</sup> See Sabrina Tavernise, 'F.D.A. Ruling Would All but Eliminate Trans Fats,' NY Times, 7 Nov. 2013.



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