

The Framework Convention on Tobacco Control and the World Trade Organization: A Conflict Analysis under International Law

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The Framework Convention on Tobacco Control (FCTC) seeks to promote global public health through tobacco control. Some perceive a conflict between the obligations imposed by the FCTC and those of international trade treaties, particularly the World Trade Organization (WTO) Agreements. They argue that the FCTC is more specialized and socially important, and thus should be given priority for tobacco-related issues. These proposals lack support, however, not only under the FCTC and WTO, but international law generally. The two treaties should be interpreted harmoniously. If that is not possible, international law requires that the WTO be given priority over the FCTC.

I INTRODUCTION

The World Health Organization ('WHO') Framework Convention on Tobacco Control ('FCTC' or 'Convention') entered into force in 2005 with the stated objective of promoting global public health through tobacco control. Because the FCTC focuses specifically on tobacco control as a public health concern, including on a cross-border basis, some perceive a conflict between the obligations that it imposes and those imposed on the same state-parties by international trade treaties, particularly the World Trade Organization ('WTO') Agreements. Although the precise contours of their arguments are vague, advocates of this position tend to consider the FCTC more specialized than the WTO, as well as more socially important. These proposals contend that international law should be interpreted to place priority on the FCTC over the WTO for purposes of considering issues related to tobacco control.

In fact, no basis exists either in the FCTC or WTO or in international law generally to support these proposals. As one of many rapidly proliferating treaty regimes, the FCTC does not enjoy any special status or priority under international law. Indeed, there is no reason to conclude that a normative conflict will necessarily arise between the FCTC and WTO. Accepted principles of treaty

interpretation and the law of treaty conflicts support interpreting the two treaties harmoniously. This conclusion is particularly compelling given that the FCTC was negotiated as only a 'framework convention' and imposes less specific obligations than the WTO. If there nevertheless is a conflict, an analysis of international conflict of law principles demonstrates that the WTO would have priority over the FCTC. Neither a Member of the WTO nor a dispute settlement panel could disregard WTO obligations in favour of the FCTC. A WTO panel would likely consider the FCTC, but find it of limited relevance in a WTO dispute.

2 INTERNATIONAL CONFLICT OF LAW PRINCIPLES

Those who advocate giving the FCTC priority over the WTO for tobacco-related issues tend to do so only in general and vague terms and without properly examining the issues under international conflict of law principles. To the extent they offer any legal analysis, they contend that the FCTC's focus on tobacco is more specialized than that of the WTO on trade regulation. Proponents of this position also attempt to analogize tobacco control under the FCTC to human rights law. Under this reasoning, the

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societal and moral value of promoting public health exceeds that of reducing trade restrictions.¹

A conflict of law analysis requires that this position be rejected. First, as demonstrated below, there appears little potential for meaningful normative conflict between the FCTC and the WTO. In the event that a conflict does arise in an actual tobacco-related dispute, no basis exists under the FCTC, the WTO, or international law generally to support giving priority to the obligations imposed by the FCTC over those of the WTO.

Article 30 of the Vienna Convention on the Law of Treaties ('VCLT') codifies certain conflict resolution techniques and is generally considered the starting point for this analysis under international law.² Article 30 has been legitimately criticized, however, for overemphasizing 'successive treaties relating to the same subject matter' and for not providing a clear rule in the absence of party unity.³ In particular, Article 30(3) of the VCLT invokes the rule of *lex posterior*, which gives priority to the latter of two treaties. However, the *lex posterior* rule has least application in situations involving conflicts across specialized treaty 'regimes'.⁴ Article 30's focus on treaties having the 'same subject-matter' further reduces its applicability to potential conflicts between specialized treaty regimes.⁵

A special Study Group of the UN International Law Commission ('ILC') considered Article 30 and other conflict resolution principles in an extensive 2006 study. The ILC Study Group concluded that countries bound by different treaty obligations 'should try to implement them as far as possible with the view of mutual accommodation and in accordance with the principle of harmonization'.⁶ Article 31 of the VCLT is of particular relevance in seeking to avoid treaty conflict. Article 31(3)(c) requires the treaty interpreter to take into account 'any relevant

rules of international law applicable in the relations between the parties'. This provision implies a contextual interpretation of each treaty, taking account of customary international law as well as other treaty rules, 'so as to give rise to a single set of compatible obligations'.⁷

Thus, in the event a potential conflict is perceived between two treaties, the first step is to seek a harmonious interpretation. This should be possible with respect to the FCTC and WTO, as explained below. To the extent a conflict cannot be resolved by interpretation, the rules of Article 30 and other provisions of the VCLT are to be considered, as well as customary canons of construction. As noted, the *lex posterior* canon is generally not applicable in situations involving specialized treaty regimes, such as here. But another interpretive rule, *lex specialis*, is more relevant to the present analysis.

In one sense, *lex specialis* focuses on the scope and precision of conflicting treaties by seeking to give effect to the more narrowly drawn or specialized of the two.⁸ This is not always possible, however, as illustrated by the example of tobacco control under the FCTC and the many specialized subject areas such as intellectual property rights under the various WTO Agreements. At the same time, a group of rules and principles concerned with a particular subject matter may form a 'self-contained' treaty regime, and be applicable as *lex specialis*. Such regimes normally have their own institutions to administer the relevant rules.⁹ The ILC addressed this issue in its 'Draft Articles on State Responsibility', of which Article 55 is entitled *lex specialis*. According to the ILC's commentary on Article 55, the WTO with its dispute settlement mechanism is an example of a self-contained treaty regime, which the ILC described as a 'strong form' of *lex specialis*.¹⁰ The FCTC lacks a meaningful dispute settlement mechanism, however. For this and other reasons, it cannot be considered a self-contained regime.

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¹ See, e.g., O. Cabrera & L. Gostin, *Human rights and the Framework Convention on Tobacco Control: mutually reinforcing systems*, 7 Int'l J. L. in Context 285 (2011). These commentators also argue that international trade law risks undermining the goal of tobacco control by significantly reducing tariff and non-tariff trade barriers, lowering the prices of tobacco products and thus causing an increase in cigarette smoking, particularly in low income countries. E R Shaffer, et al. *International trade agreements: a threat to tobacco control policy*, 14 Tobacco Control (Suppl. II) 19 (2005).

² 1155 U.N.T.S. 331 (23 May 1969).

³ Report of the International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Official Records of the General Assembly, 58th Session, A/CN.4/L.682, 253 (13 Apr. 2006) (hereinafter 'ILC Report'). The ILC summarized its conclusions separately. See ILC Study Group, *Conclusions on the Work of the Study Group on the Fragmentation of International Law*, included in ILC, Report on the Work of its 58th Session (1 May to 9 Jun. and 3 Jul. to 1 Aug. 2006), UN Doc. A/61/10, at 407 251 (hereinafter 'ILC Conclusions').

⁴ ILC Conclusions, *supra* n. 3, Nm. (26); ILC Report, 323.

⁵ See ILC Report, 255. 'It may not be possible to determine in an abstract way when two instruments deal with the "same subject-matter".... The way a WTO treaty links with a human rights treaty, for example, is not identical to the way a framework treaty on an environmental matter relates to a regional implementation instrument.' *Ibid.*

⁶ ILC Conclusions, Nms. (2), (17)-(19), (26).

⁷ *Ibid.*, Nm. (4).

⁸ See, e.g., C. Borgen, *Treaty Conflicts and Normative Fragmentation*, Oxford Guide to Treaties 448, 466 (D. Hollis, ed., 2012).

⁹ ILC Conclusions, *supra* n. 3, Nm. (11).

¹⁰ ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Yearbook of the ILC, UN Doc. A/56/10, at 1 (Vol. II, Part 2) (2001) (hereinafter 'ILC Draft Articles').

3 THE FCTC AND WTO: STRUCTURE AND DISPUTE SETTLEMENT

3.1 The FCTC

The FCTC represents the first time the WHO has used its constitutional mandate to facilitate adoption of an international treaty. The FCTC has been held out as a breakthrough in international public health law. However, the scope of Parties' obligations under the FCTC is limited. The FCTC also relies to a considerable extent on non-binding 'guidelines'. Factors such as these undermine any claim that the FCTC should be given priority over the WTO Agreements.

As its name states, the FCTC is a 'framework convention'. According to a WHO document prepared in conjunction with the FCTC, the term 'framework convention' is 'used to describe a variety of international agreements whose principal function is to establish a general system of governance for an issue area, and not detailed obligations'.¹¹ As explained by various commentators, the WHO adopted the framework convention structure 'due to the uncertain political viability of obtaining consensus on a conventional treaty structure...'.¹²

The FCTC clearly reflects this conclusion. In terms of structure, Article 2 explains the FCTC's relationship with other agreements and legal instruments. Part II next describes the FCTC's 'Objective, guiding principles and general obligations.' Part III sets out a number of 'Measures relating to the reduction of demand for tobacco.' Part IV addresses supply issues, focusing on illicit trade in tobacco products and sales to and by minors.

The demand reduction provisions of Part III, in particular, emphasize the general nature of the FCTC and Parties' hesitation to embrace detailed or specific obligations. For instance, Article 11 concerns 'effective measures to ensure that . . . tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions...'. But the FCTC does not define or further explain most of these key terms, including 'adopt and implement', 'effective measures', 'ensure that', 'promote', 'false, misleading, deceptive', 'erroneous impression', or 'in accordance with its national law'. Parties thus have broad discretion in interpreting these terms.

Similarly, Article 13 proposes a 'comprehensive ban on advertising, promotion and sponsorship'. Parties'

obligation to 'undertake' such a ban is expressly limited by their 'constitution or constitutional principles'. The scope of any ban is also 'subject to the legal environment and technical means available to that Party'. Once again, none of these terms are defined. Article 13(8) provides in conclusion that 'Parties shall consider the elaboration of a protocol setting out appropriate measures that require international collaboration for a comprehensive ban on cross-border advertising, promotion and sponsorship'. However, no such protocol has yet been proposed.

The FCTC's Conference of the Parties ('COP') has also adopted a number of 'guidelines' for implementing various FCTC provisions, including Articles 11 and 13. These guidelines do not purport to be binding, but rather 'are intended to help Parties to meet their obligations under the respective provisions of the Convention'. Regarding Article 11, the guidelines provide that Parties 'should consider adopting measures to restrict or prohibit' promotional information on tobacco packaging other than brand and product names 'displayed in a standard colour and font style (plain packaging)'.

The FCTC contains minimal procedures for resolving disputes, no mechanism for overseeing dispute settlement, no clear remedies, and no compulsory means to enforce compliance. According to Article 27(1): 'In the event of a dispute between two or more Parties concerning the interpretation or application' of the FCTC, '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'. Article 27(2) provides that 'a State or regional economic integration organization may declare in writing' that, for a dispute not resolved in accordance with Article 27(1), 'it accepts, as compulsory, ad hoc arbitration in accordance with procedures to be adopted by consensus by the [COP]'. No party has yet availed itself of the FCTC dispute settlement provisions. The COP has also not adopted the arbitration procedures called for in Article 27(2).

3.2 The WTO

In contrast to the FCTC, the WTO consists of approximately sixty agreements, annexes, decisions and understandings, which together regulate a broad array of trade in goods, services, and trade-related intellectual property rights. Each agreement creates enforceable rights and imposes binding obligations on WTO Members. Members thus have a reasonable expectation of these

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¹¹ D. Bodansky, *The Framework Convention/Protocol Approach*, WHO/NCD/TFI/99.1, at. 15 (1999) (hereinafter 'Bodansky'); see also N. Matz-Lück, *Framework Conventions as a Regulatory Tool*, 1 *Goettingen J. of Int'l L.* 439 (2009).

¹² See, e.g., V. Vadi, *Global Health Governance at a Crossroads: Trademark Protection v. Tobacco Control in International Investment Law*, 48 *Stan. J. Int'l L.* 93, 101 (Winter 2012) (quoting M. Crow, *Smokescreens and State Responsibility: Using Human Rights Strategies to Promote Global Tobacco Control*, 29 *Yale J. Int'l L.* 209, 213 (2004)).

rights and obligations being respected, and enforced in a predictable and consistent manner.

The WTO dispute settlement mechanism operates 'in an entirely independent and law-based fashion'.¹³ The WTO bases dispute settlement on clearly-defined rules, including jurisdictional procedures and timetables for completing proceedings, all of which are set out in detail in the WTO Dispute Settlement Understanding ('DSU'). The WTO also established a formal Dispute Settlement Body ('DSB') to administer the DSU, 'establish panels, adopt panel and Appellate Body reports, . . . and authorize suspension of concessions and other obligations under the covered agreements'.¹⁴

Initial rulings are issued by a three-member panel and must be adopted (or rejected) by the WTO's full membership. Members may appeal panel decisions to the WTO's standing Appellate Body. Prior to requesting the establishment of a panel, Members must hold consultations, which often result in the settlement of disputes. Article 22 of the DSU also provides for compensation and the suspension of concessions in the event the 'preferred' remedy, implementation of the panel's recommendations and the DSB's rulings, does not take place within a reasonable period of time.

The WTO limits the jurisdiction of panels and the Appellate Body to disputes involving a trade issue under one or more of the covered agreements.¹⁵ Moreover, according to Article 6(1) of the DSU, '[i]f the complaining party so requests, a panel *shall be established*. . .'. (Emphasis added.) Article 7(2) provides further that '[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute'. Nowhere does the DSU or any other WTO provision allow for a properly requested dispute settlement proceeding to be dismissed based on the existence of a non-WTO treaty or other principle of public international law.

'[T]he importance of the WTO judiciary's holding compulsory jurisdiction for all WTO claims cannot be overestimated'.¹⁶ To emphasize, WTO Members have an absolute right of recourse to dispute settlement proceedings under the DSU to contest any properly alleged violation of one or more of the WTO Agreements. Additionally, once a proceeding is commenced pursuant to the WTO dispute settlement procedures, it may not be dismissed until either the panel or any appeals process is complete, or the complaining Member withdraws its request for a panel.

4 THE FCTC AND WTO SHOULD BE INTERPRETED HARMONIOUSLY

An objective treaty interpreter should interpret the FCTC and WTO harmoniously. Doing so would eliminate the possibility of conflict arising between the two treaties and rebut any claim that the tobacco control provisions of the FCTC should somehow be given priority over the trade regulation provisions of the WTO.

First, as established above, the WTO is a 'self-contained' treaty regime – a strong form of *lex specialis*. The WTO contains a 'primary' group of rules setting forth strict, clearly defined obligations to govern the relevant trade relations among Members. These obligations are accompanied by an equally precise set of 'secondary' rules addressing violations and describing the remedies that complaining Members can expect to receive.¹⁷ Although the FCTC contains a group of primary rules, unlike the WTO, it does not rise to the level of a self-contained treaty regime. It is not enough that the FCTC can be described as 'specialized', in that it focuses solely on controlling tobacco for public health reasons. Consistent with its structure as a framework convention, the obligations imposed by the FCTC are limited in scope and permit Parties broad discretion to determine whether and how best to comply with its key provisions. The FCTC also lacks a meaningful dispute settlement mechanism and set of secondary rules concerning violations and available remedies. Of the two treaties, the FCTC appears much more likely to be interpreted as creating non-binding, unenforceable rules. In other words, the FCTC is actually *less specialized* than the WTO. Consequently, a treaty interpreter comparing the two treaties should be more inclined to defer to the provisions of the WTO, thus reducing the likelihood of identifying a genuine conflict. This would contribute to reaching a harmonious interpretation of both treaties.

Second, the WTO makes provision for consideration of outside legal principles in dispute settlement proceedings. The Appellate Body made clear early on that the WTO Agreements should not be read 'in clinical isolation from public international law'.¹⁸ Indeed, Article 3(2) of the DSU provides that the WTO's dispute settlement system is intended 'to clarify' the WTO Agreements in accordance with 'customary rules of interpretation of public international law.' The Appellate Body has interpreted this provision as requiring application of the

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¹³ J. Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?* 95 Am. J. Int'l L. 535, 553 (2001).

¹⁴ DSU, Art. 2(1).

¹⁵ See *ibid.*, Art. 23(1).

¹⁶ J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* 443 (Cambridge U. Press: 2003).

¹⁷ See ILC Draft Articles, *supra* n. 10, at 140; ILC Conclusions, *supra* n. 3, Nm. (12) (citing *Case concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, I.C.J. Reports 1980, at 40, 86).

¹⁸ Report of the Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, at 17 (29 Apr. 1996).

treaty interpretation principles of Articles 31 and 32 of the VCLT,¹⁹ and has frequently sought ‘additional interpretative guidance, as appropriate, from the general principles of international law’.²⁰

More recently, the panel in *U.S. – Measures Affecting the Production and Sale of Clove Cigarettes* acknowledged what it described as ‘the important international efforts to curb smoking within the context of the WHO FCTC’, as well as the guidelines for implementing Articles 9 and 10 of the FCTC.²¹ Although the FCTC was not raised directly in that proceeding, it likely will be in the course of future panel proceedings. As noted above, the guidelines provide that FCTC Parties ‘should consider’ adopting plain packaging rules for tobacco products, which Australia has done. The WTO has established a dispute settlement panel to consider challenges to Australia’s plain packaging rules pursuant to various WTO agreements. By way of defence, Australia seems certain to invoke the FCTC, given that a stated objective of the Australian legislation is ‘to give effect to certain obligations that Australia has as a party to the [FCTC]’.²² The WTO panel deciding this dispute may well find that the FCTC is of little relevance, given the limited scope of its obligations and non-binding status of the guidelines. But taking account of the FCTC in this manner would support a harmonious interpretation of the two treaties and further avoid the appearance of conflict.

For its part, the FCTC also recognizes the relevance of other international law sources, including trade agreements such as the WTO. Article 2(1) permits Parties to impose ‘stricter requirements’ provided they ‘are consistent with [the FCTC] and are in accordance with international law’. Article 5(5) requires Parties to ‘cooperate, as appropriate, with competent international and regional intergovernmental organizations and other bodies to achieve the objectives of the Convention and the protocols to which they are Parties’. And the scope of any ‘comprehensive ban on tobacco advertising, promotion and sponsorship’, as proposed by Article 13, is ‘subject to the legal environment . . . [of] that Party’. A Party’s ‘legal environment’ could reasonably be interpreted to include pre-existing WTO obligations. More specifically, following its Fourth Session in November 2010, the

FCTC’s COP issued the ‘Punta del Este Declaration’, which referred to the WTO Trade-Related Aspects of Intellectual Property Rights (‘TRIPS’) Agreement, and stated that FCTC Parties ‘may adopt measures to protect public health...provided that such measures are consistent with the TRIPS Agreement’. (Emphasis added.)

In addition, an earlier draft of the FCTC included two provisions directly addressing its relationship with international trade treaties. Article 2.3 provided: ‘Nothing in this Convention and its related protocols shall be interpreted as implying in any way a change in rights and obligations of a Party under any existing international treaty’. Article 4.5 then stated:

While recognizing that tobacco control and trade measures can be implemented in a mutually supportive manner, Parties agree that tobacco control measures shall be transparent, implemented in accordance with their existing international obligations, and shall not constitute a means of arbitrary or unjustifiable discrimination in international trade.²³

It has been argued that deleting these two provisions helped establish the FCTC’s priority over the WTO for resolving tobacco-related disputes.²⁴ However, the FCTC Chair of the Intergovernmental Negotiating Body disputed this contention at the time by explaining the decision to delete these provisions. According to the explanatory letter: ‘Although these paragraphs highlight an important issue, there is no need to include them as specific provisions in the framework convention since these matters are adequately addressed by the [VCLT].’²⁵ After citing previous conventions and protocols in which such language was also not included, and discussing the VCLT and several of the other conflict resolution principles described above, the Chair concluded:

In cases where there is potential conflict between two treaties, to which the vast majority of States are parties, States will normally have an interest in implementing both treaties rather than in emphasizing potential conflicts and in establishing a fixed rule of priority. It can therefore be seen as counterproductive to give precedence to one treaty over the other.

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¹⁹ *Ibid.*, at 16–17; Report of the Appellate Body, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, at 10 (4 Oct. 1996).

²⁰ Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 158 (12 Oct. 1998) (hereinafter ‘*US-Shrimp*’); see also Report of the Panel, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, 7.96 (1 May 2000) (‘the relationship of the WTO agreements to customary international law is broader than’ required by Art. 3(2) of the DSU).

²¹ Report of the Panel, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, 7.5 (2 Sep. 2011).

²² Tobacco Plain Packaging Act 2011 (Cth), § 3(1)(b) (Austl.).

²³ WHO Intergovernmental Negotiating Body on the WHO Framework Convention on Tobacco Control, *New Chair’s Text of a Framework Convention on Tobacco Control*, 5th Sess., at 5, WHO Doc. A/FCTC/INB5/2 (2002).

²⁴ J. Pauwelyn, *WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for ‘Conflict Diamonds’*, 24 Mich. J. Int’l L. 1177, 1201 (Summer 2003).

²⁵ FCTC: Letter from Ambassador Luiz Felipe de Seixas Corrêa, Chair, Intergovernmental Negotiating Body on the WHO FCTC, 6th Sess., Provisional Agenda Item 3, at 3, WHO Doc. A/FCTC/INB6/3 Rev.1 (2003).

With this in mind, and in view of the common interest in the mutual supportiveness of two treaties to which most States are parties, several recent treaty negotiating processes have opted not to include wording which indicates precedence in the body of the treaty.²⁶

Therefore, far from asserting priority over the WTO, the Chair's letter makes clear that the FCTC was viewed as having equal standing with other treaties, and that it would be 'counterproductive to give precedence to one treaty over the other'.²⁷ In other words, the FCTC should be interpreted harmoniously with other treaties, including the WTO.

5 IN THE EVENT OF CONFLICT, THE WTO WOULD BE GIVEN PRIORITY

To the extent proponents of the FCTC contend that no harmonious interpretation with the WTO is possible, the relevant conflict of law principles clearly dictate that the WTO be given priority over the FCTC. As discussed above, Article 30 of the VCLT provides little guidance in this situation, for one, because the two treaties do not concern the 'same subject matter'. The *lex posterior* rule, which is triggered by Article 30(3) of the VCLT, would likewise not apply, given that these are two entirely different treaty regimes.²⁸

Rather, the determining factor in favour of the WTO would primarily be the fact that it qualifies as a self-contained treaty regime, or *lex specialis*. The WTO sets out clear obligations and is structured to provide Members with a reasoned and predictable outcome. The FCTC is not a *lex specialis* and does not provide for a similar result. Without question, a WTO panel considering a properly filed complaint under one or more WTO Agreements would be precluded from dismissing that complaint based on arguments that the FCTC should be given priority with regard to any tobacco-related claims. The panel would also be required to base its determination entirely on the WTO Agreements, while seeking 'additional interpretative guidance, as appropriate, from the general principles of international law'.²⁹ This would include other treaties, and the panel would likely consider the FCTC's potential relevance, as noted above. In the end, however, the limited scope of the FCTC's key obligations, the non-binding nature of the guidelines, and the absence

of any meaningful dispute settlement mechanism or effective remedies under the FCTC would all only reinforce the WTO panel's conclusion that it is required to rely solely on the WTO Agreements in reaching its decision.

6 CONCLUSIONS

1. The FCTC is only one of many specialized treaty regimes. The fact that it concerns public health issues does not accord the FCTC any special status or priority under international law.
2. Accepted principles of international law, including rules on conflicts and treaty interpretation, support concluding that normative conflicts are unlikely to arise between the FCTC and WTO Agreements. Rather, the two treaty regimes should be interpreted harmoniously.
3. The WHO drafted the FCTC as a 'framework convention' to account for political uncertainty over achieving consensus. As such, the scope of Parties' obligations under the FCTC is limited. The FCTC also relies on non-binding guidelines. Parties thus have broad discretion to interpret the FCTC and decide how to implement its provisions. The FCTC also lacks a meaningful dispute settlement mechanism and provides for no clear remedies in the unlikely event a violation were to be determined.
4. The FCTC recognizes the relevance of other international law sources, including trade agreements such as the WTO. Indeed, every indication under the FCTC itself is that it was intended to be interpreted harmoniously with the WTO.
5. The WTO constitutes a self-contained treaty regime, or *lex specialis*. It contains a primary set of rules defining clear rights and obligations, and secondary rules establishing an independent and law-based dispute settlement system. Members have an absolute right of recourse to WTO dispute settlement proceedings. Because the FCTC is only a framework set of rules and non-mandatory guidelines, it cannot be considered a *lex specialis*.
6. If a conflict did arise between a measure to implement the FCTC and obligations under the WTO, conflict of

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²⁶ *Ibid.*, at 3–4.

²⁷ *Ibid.*, at 3.

²⁸ See ILC Conclusions, *supra* n. 3, Nm. (26) ('In case of conflicts or overlaps between treaties in different regimes, the question of which of them is later in time would not necessarily express any presumption of priority between them.')

²⁹ *US – Shrimp*, *supra* n. 20, 158.

law principles dictate that the WTO be given priority over the FCTC. The WTO dispute settlement mechanism would be the appropriate forum for resolving such a conflict. A WTO panel would be

required to base its decision on the relevant WTO Agreements and WTO Members would have to abide by that decision. A panel would likely consider the FCTC to be of limited relevance to a WTO dispute.