

THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE IN A CONTEXT OF FRAGMENTATION

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Abstract Over a decade ago, an important debate began concerning the proper role of the International Court of Justice (ICJ) in an international legal universe characterized by a large and rapidly increasing number of specialized courts and tribunals. What functions can and should the Court perform in response to the fragmentation of international law, and the proliferation of international tribunals? Initial proposals, especially those emerging in the late 1990s, were hierarchical and centralist in their orientation, and have justifiably fallen out of favour. This article uses the current international legal disputes about Australia's plain packaging tobacco legislation as the basis for an exploration of the possibilities for an alternative, non-centralist vision for the ICJ, which is sensitive both to the institutional limits of the international judiciary, and to the benefits of a fundamentally pluralist international legal order.

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An important debate has been taking place since roughly the end of the 1990s, concerning the proper role of the International Court of Justice in an international legal universe characterized by a large and rapidly increasing number of specialized courts and tribunals. What functions, international lawyers have asked themselves, could and should the Court perform in response to this proliferation of international tribunals, as the 'principal judicial organ' of the United Nations? What role could it play, which was simultaneously appropriate to its stature, true to its mandate, and adequate to the demands of the international legal system and its various constituencies?

This debate has engaged a number of the Court's current and former judges, some of its leading advocates, as well as very prominent international legal scholars. Some have argued for a greater role for the ICJ in ensuring the unity and coherence of international law. In this regard, a variety of institutional proposals surfaced (or resurfaced¹) which sought to place the ICJ more clearly

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¹ As has been chronicled by Treves, a number of proposals to expand the advisory jurisdiction of the ICJ already had a long pedigree in international legal scholarship well before they were mentioned again in the context of the recent fragmentation literature: T Treves, 'Advisory Opinions

at the apex of a hierarchy of international tribunals, from creating a system of referrals to the ICJ from specialized tribunals, to increasing the range of actors empowered, to request an advisory opinion from the ICJ, or even to granting the ICJ generalized appellate jurisdiction.² Another kind of response was to call for bolder intellectual leadership from the ICJ in the development of international law, as the *primus inter partes* of all international tribunals, without necessarily supporting such hierarchical, centralist and integrationist institutional proposals.³ Others downplayed the dangers of the fragmentation, and expressed the view that changing the role or institutional position of the ICJ was unnecessary, and may jeopardize its effectiveness as an organ of international dispute settlement.⁴

While this debate has not entirely left the pages of international legal journals, for the moment it has a somewhat passé air about it. To contemporary ears, some of the grander institutional proposals sound so unrealistic as to be

of the International Court of Justice on Questions Raised by Other International Tribunals' (2000) MaxPlanckYrbkUNL 215, 217–20. See, eg, SM Schwebel, 'Widening the Advisory Jurisdiction of the International Court of Justice without Amending Its Statute' (1984) 33 CathULRev 355; SM Schwebel, 'Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice' (1984) 78(4) AJIL 869; SM Schwebel, 'Preliminary Rulings by the International Court of Justice at the Instance of National Courts' (1988) 28 VaJIntL 495; R Jennings, 'The Role and Functioning of the Court' (1991) 46 International Court of Justice Yearbook 205; R Jennings, 'The Role and Functioning of the Court' (1992) 47 International Court of Justice Yearbook 249; LB Sohn, 'Broadening the Advisory Jurisdiction of the International Court of Justice' (1983) 77(1) AJIL 124; L Gross, 'The International Court of Justice: Consideration of Requirements for Enhancing Its Role in the International Legal Order' (1971) 65(2) AJIL 253; P Szasz, 'Enhancing the Advisory Competence of the World Court' in *The Future of the International Court of Justice* (1976) 499; MCW Pinto, 'The Court and Other International Tribunals: Presentation by Mr M.C.W. Pinto' in *Increasing the Effectiveness of the International Court of Justice* (Martinus Nijhoff 1997) 281, 294; CW Jenks, *The Prospects of International Adjudication* (Stevens 1964).

² See, eg, Report of SM Schwebel, President of the International Court of Justice, UN GAOR, 54th Sess., Agenda Item 13, at 3–4, UN Doc A/54/PV.39 (1999); Report of G Guillaume, President of the International Court of Justice, UN GAOR, 55th Sess., Agenda Item 13, at 7, UN Doc A/55/PV.42 (2000); SM Schwebel, 'Fifty Years of the World Court: A Critical Appraisal' (1996) 90 ASILPROC 339; G Guillaume, 'The Future of International Judicial Institutions' (1995) 44(4) ICLQ 848; see also P-M Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1999) 31 NYUJIntL&Pol 791, 798–801.

³ G Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1998) 31 NYU J Int'l L & Pol 919; Dupuy (n 2) eg 804; P-M Dupuy, 'The Unity of Application of International Law at the Global Level and the Responsibility of Judges' (2007) 1(2) European Journal of Legal Studies, online: <<http://www.ejls.eu/2/21UK.htm>>; JI Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1999) 31 NYUJIntL&Pol 697, 707–8; B Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20(2) EJIL 265.

⁴ WM Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Duke University Press 1992); R Higgins, 'The ICJ, the ECJ, and the Integrity of International Law' (2003) 52(1) ICLQ 1; R Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55(4) ICLQ 791; R Higgins, 'Respecting Sovereign States and Running a Tight Courtroom' (2001) 50(1) ICLQ 121; K. Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction: Problems and Possible Solutions' (2001) 5 MaxPlanckYrbkUNL 67.

hardly worth discussing. Certainly there is a sense that anything requiring a change in the Court's Statute has little if any support amongst the relevant political constituencies. By many accounts, there is little appetite on the Court's current bench for an expanded or more active role for the Court in this context. Furthermore, the International Law Commission's landmark 2006 report on the Fragmentation of International Law has to a significant extent presaged a shift in the terms of the conversation, away from questions of institutional reform, towards the substantive matter of the normative and doctrinal tools available to international lawyers to address conflicts arising from fragmentation.⁵

For all that, the question of the role of the ICJ (and indeed of international courts and tribunals more generally) in the context of fragmentation remains very significant, and will for the foreseeable future never be too far from the forefront of international legal thought. As Maduro has reminded us in another context, the reality of an international legal order characterized by multiple international tribunals with overlapping jurisdictions, is likely to require a new set of legal tools, new forms of legal reasoning, new understandings of the judicial function—new ways, in short, of being an adjudicator—which we are only beginning to develop and identify.⁶ The purpose of this paper is to move us a little further down that path.

In common with many others, I argue that the ICJ has a responsibility to define a new institutional role for itself in response to problems of fragmentation. In contrast with much of the prior literature, however, I argue that this ought to be understood primarily as a *reflexivity enhancing*, rather than a *centralizing*, role. Centralizing proposals tend to conceive of the ICJ as the apex of an institutional hierarchy of international courts, tasked with resolving normative conflicts and clarifying divergent jurisprudence. Reflexivity-enhancing proposals, on the other hand, imagine the primary task of the ICJ in conditions of fragmentation as promoting a greater degree of reflexivity on the part of specialized judicial tribunals—and on the part of the international legal order more generally. This focus on reflexivity puts questions of institutional hierarchy and the allocation of decision-making authority to one side, and instead emphasizes the importance of relations of mutual scrutiny between international judicial tribunals.

Furthermore, I argue that an opportunity exists to give the ICJ a chance to define such a role for itself. Specifically, I argue that the World Health Organization (WHO) could, and should, ask the ICJ for an Advisory Opinion on certain legal questions relating to ongoing international legal disputes about

⁵ Report of the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 13 April 2006, A/CN.4/L.682, para 13.

⁶ MP Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1(2) European Journal of Legal Studies online at <<http://www.ejls.eu/2/25UK.htm>>.

plain packaging legislation recently introduced in Australia. In my view, these disputes provide remarkably favourable conditions for such an intervention by the ICJ. As I will show, the WHO has both the clear legal authority, as well as a strong institutional interest, in making such a request to the ICJ. In addition, it is my view that, perhaps unusually, the risk of the WHO damaging its relations with other international institutions (such as the WTO) by making this request are minimal. Furthermore, I argue that the ICJ would face no legal impediment to acceding to this request, and in fact would have a strong institutional imperative to welcome it. The plain packaging disputes therefore represent a rare opportunity for the ICJ to be given the chance to re-imagine its proper institutional role in the context of a fragmenting international legal order.

The paper is organized in six sections. Section I sets out the background to the plain packaging dispute, and the challenges which have been mounted to Australia's plain packaging legislation, both in the WTO and through investor-state arbitral proceedings. This is done briefly, as this background is already widely available and well known. Section II makes the claim that—should any of these challenges be successful—the World Health Organization has both the institutional authority to request, and a strong pragmatic interest in requesting, an advisory opinion from the ICJ on certain specific legal questions. In Section III, I argue that the WHO should not be concerned about damaging its relations with the World Trade Organization (WTO) by making such a request, as it would also be in the interests of the WTO and its Members for the ICJ to be engaged in this way. Section IV argues that there would be no legal impediment to the ICJ responding to such a request, and indeed that it would have a duty to do so. Section V returns to the larger questions set out above, to offer some thoughts about the likely consequences and the normative desirability of such an intervention by the ICJ, and to suggest some ways that the ICJ might most productively approach the task. It also suggests that this argument could in principle be generalized to other instances of fragmentation, and seeks to open a debate on whether this would be desirable.

I. THE INTERNATIONALIZED POLITICS OF PLAIN PACKAGING LEGISLATION

After decades in which the primary focus of tobacco control regulation has been on measures such as advertising restrictions, graphic health warnings and restrictive smoking policies, there is now a major push underway within the tobacco control community for the enactment of so-called 'plain packaging' legislation. Although it may take many forms, the term 'plain packaging' legislation typically refers to rules requiring the use of standardized packages for all cigarette brands, prohibiting the use of trademarks and logos on packaging, or requiring that the product's brand name be included on the package only in a standard font, size and colour. At the time of writing, only Australia has passed plain packaging legislation, which came into effect in

December 2012.⁷ Other countries, including Canada and the United Kingdom, have previously considered or are currently discussing similar proposals, while Ireland has recently announced its intention to adopt plain packaging legislation early in 2014.

Unsurprisingly, plain packaging legislation has been the subject of considerable political dispute. On one side, advocates of plain packaging laws argue that plain packaging legislation restricts the branding and marketing opportunities available to tobacco companies, and therefore limits their potential to attract new consumers. More specifically, it is suggested that standardized packaging will remove the potential for misleading messages to be communicated via packaging—the most common example given is that the colour, shape and visual appeal of certain packages can often give the false impression to consumers that the products they contain are lighter or less harmful to health than other products. In addition, it is said that plain packaging may increase the effectiveness of graphic warnings, by reducing the potential for other aspects of the package to detract attention from such warnings. On the other side, a number of counter-arguments have been made: that plain packaging laws are unlikely to achieve their objectives in practice; that they will impose significant costs on retailers of cigarettes; that they unjustifiably interfere with the ability of tobacco producers to distinguish their products from those of their competitors; that they destroy much of the economic value of the brands that producers have generated; and that they violate constitutionally protected economic rights of intellectual property exploitation.⁸

Furthermore, almost from its inception, tobacco packaging legislation has been subject to actual and threatened challenge under international law. In 1994, for example, it was reported that RJ Reynolds threatened to bring a claim under the investment protection provisions of the North American Free Trade Agreement (NAFTA) in response to Canada's then-proposed plain packaging legislation.⁹ In 2010, Philip Morris initiated International Centre for Settlement of Investment Disputes (ICSID) proceedings in respect of Uruguayan packaging regulations limiting the use of trademarks and brand names on cigarette packets, alleging violations of various provisions of the Switzerland–Uruguay Bilateral Investment Treaty (BIT).¹⁰ More recently, in

⁷ See Australian Government, *Tobacco Plain Packaging Act 2011*, available at <<http://www.comlaw.gov.au/Details/C2011A00148>>.

⁸ For a helpful summary of the arguments and evidence, see Cancer Council Victoria, *Plain Packaging of Tobacco Products: A Review of the Evidence* (2011) available at <http://www.cancervic.org.au/downloads/mini_sites/Plain-facts/TCUCCVEvOverview_FINALAUG122011.pdf> and the materials cited therein.

⁹ See, eg, R. J. Reynolds Tobacco Company, Submission to House of Commons Standing Committee on Health Re: Plain Packaging of Tobacco Products 2, 18 (1994) available at <<http://www.smoke-free.ca/plain-packaging/documents/1994/industryresponse-1994-canada/Smm97c00-Hills.pdf>>; also Physicians for Smoke-Free Canada, *The Plot Against Plain Packaging* (2008) available at <http://www.smoke-free.ca/pdf_1/plotagainstplainpackaging-apr1'.pdf>.

¹⁰ See *Philip Morris Brand Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, see <<http://icsid.worldbank.org/>>

June 2011, Philip Morris also famously initiated investor-state arbitral proceedings against the Australian government under the Hong Kong–Australia BIT in respect of Australia’s plain packaging legislation, on the grounds of unlawful expropriation, as well as violation of the fair and equitable treatment standard.¹¹ Furthermore, in addition to these investment disputes, a number of disputes have also arisen under the law of the World Trade Organization. A formal complaint was lodged against the Australian plain packaging measures by the Ukraine in March 2012, as well as a further complaint by Honduras a month later, a third by the Dominican Republic in July, and a fourth by Cuba in May 2013.¹² These complaints allege violations of, among other provisions Article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights which protects the unencumbered use of trademarks in the course of trade, and Article 2.2 of the Agreement on Technical Barriers to Trade, which requires WTO Members to ensure that labelling and packaging regulations ‘are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade’. At the time of writing, all of these disputes are still in their early stages.

Even as international trade and investment law has been used to challenge plain packaging legislation, tobacco control advocates have for their part sought to use *other* bodies of international law to encourage states to adopt such legislation. The most significant international legal initiative is the World Health Organization’s Framework Convention on Tobacco Control (FCTC).¹³ Adopted by the World Health Assembly in 2003, and coming into force in 2005, the FCTC has 176 parties at the time of writing, relevantly including Australia, China, Honduras and the Ukraine.¹⁴ The FCTC itself contains a number of generally worded provisions which potentially impose obligations relating to plain packaging legislation. Article 11, for example, requires parties to adopt and implement 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

[ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending](#)>. Of course, this legislation is not plain packaging legislation strictly speaking—I cite it to illustrate the trend of legal claims against tobacco packaging legislation generally.

¹¹ See Notice of Claim, 27 June 2011, and Notice of Arbitration, 21 November 2011, available at <http://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobaccoplainpackaging.aspx>.

¹² See *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434, 13 March 2012; WT/DS435, 4 April 2012; WT/DS441, 18 July 2012; WT/DS458, 3 May 2013, Requests for Consultations available at <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>.

¹³ The text of the treaty can be found here: <<http://whqlibdoc.who.int/publications/2003/9241591013.pdf>>. For an interesting account of the origins of the Framework Convention, see R Roemer, A Taylor and J Larivière, ‘Origins of the WHO Framework Convention on Tobacco Control’ (2005) 95 *American Journal of Public Health* 936.

¹⁴ For an up-to-date list of parties, see <http://www.who.int/fctc/signatories_parties/en/index.html>.

about its characteristics, health effects, hazards or emissions'. Article 13 further requires each Party 'in accordance with its constitution or constitutional principles, to undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship', including prohibition of 'all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive' and restriction of 'the use of direct or indirect incentives that encourage the purchase of tobacco products by the public'. Article 2 addresses certain aspects of the relationship between the FCTC and other international agreements.

In addition to these generally worded treaty provisions, a number of more specific guidelines and recommendations have been adopted which mention plain packaging legislation explicitly. In November 2008, for example, parties to the FCTC adopted Guidelines for the Implementation of Article 11, including the following:

Plain packaging

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.¹⁵

At the same time, guidelines were also adopted on Article 13, containing the following 'recommendation':

Packaging and product design are important elements of advertising and promotion. Parties should consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging. Packaging, individual cigarettes or other tobacco products should carry no advertising or promotion, including design features that make products attractive.¹⁶

While both guidelines use hortatory language ('should consider'), and are often referred to as non-binding, their precise international legal significance is debated, and according to some may be considerable.¹⁷ What is clear is that the

¹⁵ See, Guidelines for the Implementation of Article 11 of the WHO Framework Convention on Tobacco Control, Packaging and Labelling of Tobacco Products, Third Session, decision FCTC/COP3(10), 22 November 2008, para 46, available at <http://www.who.int/fctc/guidelines/article_11.pdf>.

¹⁶ See, Guidelines for the Implementation of Article 13 of the WHO Framework Convention on Tobacco Control, Conference of the Parties, Third Session, decision FCTC/COP3(12), 22 November 2008, para 17, available at <http://www.who.int/fctc/guidelines/article_13.pdf>.

¹⁷ Liberman, for example, notes that '[w]hile guidelines are often described as non-legally binding, in contrast to the provisions of the treaty itself, in truth the position is somewhat more complex, with differences in legal implications between sets of guidelines and between elements of each set of guidelines according to the precise language used and its relationship with the text of the treaty. Some elements of the FCTC's guidelines may, for example, be more than simply

Conference of the Parties intended that plain packaging measures be formally encouraged as means of giving effect to Article 11, and signalled that such measures are considered a desirable, potentially effective and legally permitted form of tobacco control legislation.

The stage is set, then, for a potential normative conflict between international trade and investment law on the one hand, and international health law on the other. It is important, however, to stress the word 'potential': it is perfectly possible that the trade and investment tribunals hearing the cases against the Australian legislation will find in Australia's favour. Indeed, my own view of the merits of these cases is that such an outcome is quite likely. Thus, although the remainder of this article proceeds as if a normative conflict of some sort *does* exist, this should be seen for what it is: a useful thought experiment, rather than a prejudgment of the merits of the international legal claims against Australia. For the purposes of my argument, then, I want to proceed on the speculative basis that at least one of the international legal challenges against Australia's plain packaging laws succeeds, and does so in such a fundamental way as to call into question Australia's ability to adopt plain packaging legislation in a recognizable or effective form. In such a case, the Australian government would find itself in a difficult position: faced on one side with its obligations under the FCTC and its related instruments, and on the other side with its apparently conflicting obligations under trade and investment law, what exactly is it obliged to do?

It is important to realize that certain important legal questions would necessarily remain unanswered at the conclusion of the trade and investment disputes—either because trade and investment tribunals do not have the authority to address them at all, or because in practice they cannot resolve them in an authoritative manner.

The most significant limitation on trade and investment tribunals in this context relates to the law they are permitted to apply to disputes that come before them. On the WTO side, although the position is perhaps not entirely free from doubt,¹⁸ most agree that the law applicable in WTO proceedings consists solely of the 'covered agreements' of the WTO itself.¹⁹ The Appellate Body has made it quite clear that other international agreements cannot override the clear wording of WTO covered agreements for the purposes of

'recommendations' that Parties adopt measures beyond those that they are legally obliged by the FCTC to implement, but rather constitute 'subsequent agreement(s) between the parties regarding the interpretation of the treaty or the application of its provisions'; see J Liberman, 'Four COPs and Counting: Achievements, Under-Achievements and Looming Challenges in the Early Life of the WHO FCTC Conference of the Parties' (2011) 21 *Tobacco Control* 215.

¹⁸ See in particular Pauwelyn's ground-breaking work in this area J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003).

¹⁹ See WTO Dispute Settlement Understanding, especially Articles 3.2, 11, available at <http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm>.

WTO dispute settlement.²⁰ It has also made clear that it will not pursue lines of argument which would ‘entail a determination whether [a WTO Member] has acted consistently or inconsistently with its [non-WTO] obligations’. To find otherwise, it has said, would incorrectly ‘imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreements’.²¹ It follows that the FCTC (and its Guidelines) are not part of the applicable law in WTO proceedings, and that a WTO panel is not permitted to address the question whether a relevant conflict exists between the provisions of the FCTC and those of the WTO covered agreements, and if so, which provisions take priority in the relations between the disputing parties. More precisely, a WTO Panel hearing the plain packaging case would not be permitted to rule on: (a) the applicability and application of the provisions of the Vienna Convention on the Law of Treaties (VCLT) and customary international law having to do with the relations between the FCTC and the WTO covered agreements, including especially Articles 30 and 41 of the VCLT and the *lex specialis* principle; and (b) the meaning of Article 2 of FCTC and its effects (if any) on the relationship between the FCTC and the WTO covered agreements.

The situation is less clear on the investment side. The Hong Kong–Australia BIT provides in Article 10 for investment disputes to be submitted to arbitration under the United Nations Commission on International Trade Law (UNCITRAL) rules, and such rules provide in Article 35 that, failing contrary agreement by the parties, ‘the arbitral tribunal shall apply the law which it determines to be appropriate’. Given such flexibility and given that the Hong Kong–Australia BIT contains no provision specifically regarding the applicable law, it is impossible to say for sure whether or not the FCTC will be considered part of the applicable law in these proceedings.²² For the purposes of the thought experiment I am pursuing in this article, I will assume that it will not be, and that therefore the investment tribunal will not be able to address the question whether or not a relevant normative conflict exists between the FCTC and the Hong Kong–Australia BIT, and if so which treaty takes priority in the circumstances.

Quite separate from the issue of applicable law is the issue of the so-called ‘principle of systemic integration’, as set out in Article 31(3)(c) of the VCLT. Should trade and investment tribunals apply this principle in the context of plain packaging disputes, they would interpret the WTO agreements and the relevant BIT in light of the provisions of the FCTC, resolving interpretative

²⁰ Appellate Body Report, *EC—Measures Concerning Meat and Meat Products* (adopted 13 February 1998) WT/DS26/AB/R and WT/DS48/AB/R, paras 120–125; Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* (21 November 2006) WT/DS291–3/R, paras 7.88–7.89.

²¹ Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and other Beverages* (adopted 24 March 2006) WT/DS308/AB/R, para 56.

²² One issue that may arise is whether the FCTC (to which China became a party in 2005) applies in the context of a dispute brought under a treaty signed by pre-integration Hong Kong.

ambiguities in ways which ensure maximum compatibility. As has often been noted, this may in practice be the most significant means by which multilateral treaties such as the FCTC can meaningfully influence the application of international trade and investment law. However, existing WTO jurisprudence on Article 31(3)(c) is unclear and inconsistent, and it is perfectly conceivable that a WTO Panel will refuse to apply the principle in the plain packaging cases on the basis that the parties to the FCTC are not identical to the Members of the WTO.²³ It is equally conceivable that the UNCITRAL tribunal hearing the investment case will refuse to apply the principle on the basis that the relevant party to the BIT in question (pre-integration Hong Kong) and the relevant party to the FCTC (China) are not the same juridical entity. The result would be that not only the proper application, but even the applicability, of the principle in the plain packaging context, would remain a matter of dispute.

It is probably fair to say, then, that decisions against Australia in the relevant trade and investment disputes, would raise at least as many questions as answers. Australia's international legal position would remain unclear in certain fundamental ways: not just in terms of the exact extent and nature of any conflict between its various international legal obligations, but the way in which such conflicts are to be resolved. The same difficulty would of course also face other states looking to enact plain packaging legislation, which are simultaneously parties to the FCTC, WTO Members, and parties to investment treaties in a similar form to the Hong Kong-Australia BIT. Furthermore, and as a consequence, the WHO's efforts to promote plain packaging legislation globally would be seriously impaired. What might be done to address these problems?

II. THE WHO COULD, AND SHOULD, REQUEST AN ICJ ADVISORY OPINION ON CERTAIN SYSTEMIC INTERNATIONAL LEGAL QUESTIONS

One obvious possibility presents itself immediately: the WHO could simply ask the ICJ for an advisory opinion on the questions just

²³ The Panel in *EC—Biotech* famously stated that: 'it makes sense to interpret [VCLT] Article 31(3)(c) as requiring consideration of those rules of international law which are applicable in the relations between *all parties to the treaty which is being interpreted*', thus significantly narrowing the operation of the principle of harmonious interpretation in WTO dispute settlement: Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* (21 November 2006) WT/DS291–3/R, para 7.70. However, the Appellate Body subsequently took a different line, noting that while one must always 'exercise caution' in using a treaty to which not all WTO Members are parties as an aid to the interpretation of WTO law, nevertheless it may sometimes be appropriate to do so in order to give effect to the principle of harmonious interpretation: *European Communities—Measures Affecting Large Civil Aircraft* (18 May 2011), WT/DS316/AB/R, para 845. Interestingly, there is in my view a strong case to be made that the FCTC fits within the narrow parameters set out by the Appellate Body in *EC—Aircraft*, given the very large number of parties to the FCTC, the high degree of overlap between Members of the WTO and the parties to the FCTC, the fact that both states which have so far brought complaints against Australia's plain packaging laws are parties to the FCTC, and ample textual support for a 'harmonious' interpretation of the TRIPS and TBT agreements vis-à-vis the FCTC.

set out.²⁴ The precise formulation would have to be carefully worked out, but the substance is clear: is there a normative conflict between Australia's obligations under the FCTC and its obligations under the relevant trade and investment agreements? If so, what is their relative priority, according to the principles set out in the VCLT and customary international law? Does the principle of systemic integration require that the relevant trade and investment agreements be interpreted in light of the FCTC, and what precisely does this entail? What is the meaning and significance of Article 2 of the FCTC in this respect?

At first glance, the WHO would seem to have a very clear and obvious interest in posing such questions to the ICJ. This is for at least three reasons. One reason is that any successful international legal challenge to Australia's plain packaging laws would deal a very serious blow to the WHO's efforts to promote tobacco control legislation globally. For many countries, the risk of international legal litigation—including the prospect of very significant awards for damages in investment proceedings—would be an insurmountable obstacle to the adoption of legislation of this kind. Faced with such consequences, the WHO would have to take seriously any opportunity to continue the legal contest in different forums, including the ICJ, if only as a way of diluting the chilling effect of the initial decision. After all, part of the purpose of negotiating the FCTC, at least for some of its advocates, was precisely to provide a legal counterweight to what some saw as the deregulatory tendencies of international economic law.²⁵ A second reason is that a successful challenge to plain packaging legislation would significantly undermine the object and purpose of the FCTC, a treaty which is a WHO initiative, and which the WHO seeks to promote. It is arguable that the WHO would not be adequately fulfilling its responsibilities in respect of that treaty were it not to give proper consideration to this possibility. The third reason is simply that WHO itself will wish to ensure that its tobacco control efforts are fully in accordance with relevant international law, and that posing these questions to the ICJ may be the best way of doing so.

A number of counter-arguments can immediately be anticipated. One is simply that it would not be in the interests of the WHO to ask the ICJ for an advisory opinion, because the ICJ is unlikely to give it the answer it wishes to hear. Another is that such a request may endanger what are currently very good inter-institutional relations between the WHO and the WTO.²⁶ I address both

²⁴ It is important to note that the WHO *could* in principle formulate its questions in much broader terms. In particular, it could in fact ask the ICJ to address precisely the same legal questions as addressed by the trade and investment tribunals, having to do with the substantive interpretation of various aspects of trade and investment law. There is an interesting debate to be had as to whether that would be desirable, but I have deliberately refrained from considering this possibility because in my view such a broadening of the question would raise much more difficult questions as regards the proper scope of the Court's advisory jurisdiction, and its discretion not to exercise that jurisdiction.

²⁵ See Roemer, Taylor and Lariviere (n 13) 936.

²⁶ I am indebted to various members of the WHO Secretariat for this point.

of these arguments in later sections. It may also be argued that, whatever the institutional interests of the WHO, what really matters are the interests of member states of the WHO, who would be much more reluctant to involve the ICJ. After all it is the member states, through the World Health Assembly, who would need to pass a resolution requesting an advisory opinion—and that resolution would probably require the affirmative votes of a two-thirds majority of that part of the 193 members of the WHO present and voting.²⁷ States, on this argument, simply do not want the ICJ involved in trade and investment disputes: they intentionally created specialized tribunals to deal with such disputes, and they are very wary of taking any steps which would undermine the effectiveness and smooth running of such specialized tribunals.²⁸ Historically, proposals to increase the use of the Court's advisory jurisdiction have foundered on the rocks of two interrelated fears:

that the Court in rendering advisory opinions might in effect resolve disputes without the voluntary participation of all the parties . . . and that the Court may in effect create international law without the political safeguards of the normal legislative process.²⁹

While I acknowledge that many states would no doubt initially strongly resist engaging the ICJ, it is not clear to me that the merits of the issue are so clear-cut. As I shall argue below, engaging the ICJ need not—and almost certainly would not—seriously undermine the work of trade and investment tribunals, but would in fact significantly assist them in their work. The ICJ has historically shown itself to be a cautious body, which is tremendously sensitive to its institutional limitations, and the boundaries of its legitimacy. Besides, the question posed to the Court could be carefully crafted so as to limit the Court to those aspects of the law of lesser political sensitivity. Furthermore, states have other interests which push in the opposite direction. It is possible, for example, that a significant number of members of the WHO will see decisions by WTO panels and investment tribunals prohibiting plain packaging legislation as a potential encroachment on their regulatory autonomy, and may therefore be more open to the ICJ's advisory jurisdiction as a defensive legal strategy. Some may see an advisory opinion as a welcome step towards greater legal certainty.³⁰ In any case, the likelihood of strong resistance from some states

²⁷ Rules of Procedure of the World Health Assembly, Rules 70 and 71, available at <http://www.who.int/governance/rules_of_procedure_of_the_wha_en.pdf>. To the author's knowledge, no formal decision has been made whether or not a request for an advisory opinion 'important question' subject to the two-thirds majority requirement of Rule 70. In the absence of such a decision, it seems safer to assume that supermajority requirement does apply. As regards the same issue in the UNGA, see Szasz (n 1) 504; F Blaine Sloan, 'Advisory Jurisdiction of the International Court of Justice' (1950) 38(5) *CalLRev* 830, 838.

²⁸ See, for one example of this common argument, Oellers-Frahm (n 4) 92 ff.

²⁹ Szasz (n 1) 522.

³⁰ I acknowledge that I make the argument below that the ICJ is unlikely in practice to deliver on this promise of greater legal certainty—but, of course, not all will agree with this assessment.

should not stop us from reflecting on the potential systemic benefits of engaging the ICJ.

Finally, even if it is accepted that the WHO (and its members) would have an *interest* in requesting an advisory opinion, it may still be argued that it does not have the authority to do so, in light of the prior decision of the ICJ in the *Nuclear Weapons* case.³¹ As is well known, in that case the ICJ determined that the WHO did not have the authority to request an advisory opinion on the legality of the use of nuclear weapons. Although a full analysis is not possible in the context of this article, let me offer five brief reasons why the opposite conclusion would be reached in the plain packaging context.

First, unlike the legality of the use of nuclear weapons, the general question of the international legality of plain packaging arises naturally and inevitably as the WHO carries out its constitutional mandate. There is no question that the WHO's competence extends to addressing the health effects of tobacco products. Under Article 2 of its Constitution, it is equally clear that the WHO can pursue this objective by making recommendations to governments as regards appropriate tobacco control legislation, and providing technical and other assistance to governments wishing to strengthen their domestic tobacco control regimes.³² It should immediately be obvious that in order to carry out these activities effectively, the WHO *must* have regard to the international legality of various different tobacco control policies—otherwise it could not possibly advise and assist governments properly.

³¹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996 (I)* ('*Legality of Nuclear Weapons (I)*').

³² The principal objective of the WHO, as set out in Article 1 of its Constitution 'shall be the attainment by all peoples of the highest possible levels of health'. Art 2 then sets out 22 'functions', which the WHO may undertake in order to achieve that objective. These include, most relevantly:

- (a) to act as the directing and co-ordinating authority on international health work;
- (b) to establish and maintain effective collaboration with the United Nations, specialised agencies, governmental health administrations, professional groups and such other organizations as may be deemed appropriate;
- (c) to assist Governments, upon request, in strengthening health services;
- (d) to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of Governments;
- ...
- (k) to propose conventions, agreements and regulations, and make recommendations with respect to international health matters and to perform such duties as may be assigned thereby to the Organization and are consistent with its objective;
- ...
- (u) to develop, establish and promote international standards with respect to food, biological, pharmaceutical and similar products;
- (v) generally to take all necessary action to attain the objective of the Organization.

In interpreting these provisions, it should be remembered that, while an international organization 'only has the functions bestowed upon it by [its Constitution] with a view to the fulfilment of [its given] purpose, . . . it has power to exercise those functions to their full extent, in so far as the Statute does not impose restrictions on it': *Jurisdiction of the European Commission of the Danube, Advisory Opinion, PCIJ, Ser. B. No. 14 at 64; Legality of Nuclear Weapons (I)* para 25.

Second, more specific questions relating to the precise legal relationship between the FCTC and various provisions of trade and investment law also arise very directly and inevitably from the WHO's constitutional mandate. The authority under Article 2(a) and (b) of the WHO Constitution to 'act as . . . the co-ordinating authority' on international tobacco control efforts, and to 'maintain effective collaboration' with other relevant organizations, necessarily implies an ability to address the relationship between the FCTC and treaties administered by other organizations. Given that a major part of the purpose of such collaboration is to attempt to ensure the mutual compatibility of the activities of different international organizations, it is clearly of direct concern to the WHO to understand how potential incompatibilities might be addressed under international law. Similarly, its authority under Article 2(k) and (u) of its Constitution to promote international conventions and standards also naturally gives rise to questions about the potential relationship between such conventions and other parts of international law. After all, an understanding of the nature of that relationship may fundamentally alter the manner in which the WHO 'develops' and 'promotes' it.

Third, legal questions regarding the interpretation of the FCTC are of particularly direct concern to the WHO, given its close institutional connection to that treaty. In its advisory opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court noted that the General Assembly's authority to request an interpretation of the Genocide Convention was fortified by the close involvement of that body in the preparation, negotiation and implementation of that convention:

[N]ot only did the General Assembly take the initiative in respect of the Genocide Convention, draw up its terms and open it for signature and accession by States, but [also] express provisions of the Convention (Articles XI and XVI) associate the General Assembly with the life of the Convention; and . . . the General Assembly actually associated itself with it by endeavouring to secure the adoption of the Convention by as great a number of States as possible. In these circumstances, there can be no doubt that the precise determination of the conditions for participation in the Convention constitutes a permanent interest of direct concern to the United Nations.³³

Precisely the same may be said of the relationship between the WHO and the FCTC. The FCTC was negotiated under the auspices of the WHO, and was adopted by the World Health Assembly. The WHO works towards expanding participation in the Convention, convenes the Conferences of the Parties, and hosts the Convention Secretariat.

Fourth, the present context is fundamentally different from the factual situation in the first *Nuclear Weapons* case. In that opinion, the Court noted that while the WHO was authorized to address the health effects of nuclear

³³ *Reservations to the Genocide Convention*, 19–20.

weapons, the question of the international legality of the use of nuclear weapons did not arise in the course of carrying out such duties. This was, according to the Court, because the legality or otherwise of nuclear weapons is irrelevant to both the mandate and the nature of the WHO's efforts to address the health effects of nuclear weapons. There are many causes of adverse health effects, the court noted, but the 'legal or illegal character of these causes is essentially immaterial' to the ability of the WHO to address them. Specifically, 'whether nuclear weapons are used legally or illegally, their effects on health would be the same'.³⁴ As a result, the question of the legality of the use of nuclear weapons did not arise 'within the scope of the activities' of the WHO, and the competence to address the legality of the use of nuclear weapons was not a necessary implication of WHO's constitutional mandate.

Whatever the merits of that reasoning,³⁵ it should be clear that the situation is quite different in the tobacco control context. What is at issue here is not the international legality of the *causes* of poor health (smoking), but the legality of measures which the WHO seeks to encourage as a *response*. The international legality or illegality of such measures is hardly 'immaterial' to the WHO's activities—quite the contrary, it may significantly impact whether or not the WHO chooses to pursue them, and encourage states to adopt them. The difference could hardly be more stark.

Fifth and finally, a request from the WHO in the plain packaging context does not risk undermining the 'principle of speciality' in the same way that the request in relation to nuclear weapons did. This was a very important consideration for the ICJ in the earlier case. Given the huge diversity of causes of adverse health effects, the Court argued, there was a real risk that permitting the WHO to request opinions about the legality of such causes could lead it very far from its traditional and originally envisaged scope of activities. To find otherwise, would be 'tantamount to disregarding the principle of speciality'.³⁶ Significantly, the Court noted in that case that the WHO's Constitution should not be interpreted solely on its own terms, but rather with regard to the larger scheme of which it is a part. The proper scope of activities of the WHO, in other words

can only be interpreted, as far as the powers conferred upon that Organization are concerned, by taking due account not only of the general principle of speciality, but also of the logic of the overall system contemplated by the Charter.³⁷

The 'overall system' referred to by the Court is the constellation of specialized agencies established under Articles 57, 58 and 63 of the UN Charter, along

³⁴ *Legality of Nuclear Weapons (I)* paras 21–22.

³⁵ For a persuasive and critical response to this part of the judgment, see D Akande, 'The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice' (1998) 9 *EurJIntL* 437–467 esp 443–52.

³⁶ *Legality of Nuclear Weapons (I)* para 25.

³⁷ *Legality of Nuclear Weapons (I)* para 26.

with the numerous agreements between the UN and these agencies, which coordinate the activities of these agencies and distribute authority between them. When considered in this context, the Court suggested, the Constitution's wide terms may need to be read more narrowly, in order to ensure that the WHO's activities 'are necessarily restricted to the sphere of public "health" and cannot encroach on the responsibilities of other parts of the United Nations system'.³⁸ 'There is no doubt', the Court went on, 'that questions concerning the use of force, the regulation of armaments and disarmament are within the competence of the United Nations and lie outside that of the specialized agencies... any other conclusion would render virtually meaningless the notion of a specialized agency'.³⁹

These considerations are not nearly as strong, however, in the plain packaging context. For one thing, neither the WTO nor investment tribunals are specialized agencies of the UN,⁴⁰ and are therefore not part of the 'overall system contemplated by the Charter' to which the Court was referring. Perhaps more importantly, the passage quote above derives from the Court's concern about the potential of encroachment by specialized agencies on the authority of the UN itself, and in particular the General Assembly and Security Council—the Court may well be less protective of the authority of one specialized international organization as against another, not least because in such cases it is rarely clear which organization would be 'encroaching' on the authority of the other. Indeed, to treat this as a potential 'encroachment' by the WHO on the proper terrain of the WTO or of investment tribunals would fundamentally misunderstand the nature of problems of fragmentation, and proceed from an incorrect sense that different specialized agencies necessarily have mutually exclusive domains of operation.⁴¹ Tobacco control measures clearly fall within the competence of *each of* the WTO and the WHO *and* investment tribunals—and, for that matter, many other international organizations. Plain packaging legislation is both a health issue and a trade issue, and is by nature not amenable to being objectively characterized as self-evidently one kind of issue or another. Both organizations clearly have a legitimate interest in understanding the application of international law as a whole to these measures, and it would be a mistake to use the principle of speciality to artificially limit the authority of one or the other. In any case, even if the Court were to accept an argument along these lines, it is clear that the WHO's authority to ask certain types of questions would still remain. Thus, it could still concern itself with legal questions relating to the application of the FCTC to plain packaging

³⁸ *Legality of Nuclear Weapons (I)* para 26 (emphasis added).

³⁹ *Legality of Nuclear Weapons (I)* para 26.

⁴⁰ See 'Arrangements for Effective Cooperation with Other Intergovernmental Organizations: Relations between the WTO and the United Nations', WTO document WT/GC/W/10, 15 November 1995, which attaches an exchange of letters between the WTO DG and the UNSG.

⁴¹ See the Dissenting Opinion of Judge Weeramantry in *Legality of Nuclear Weapons (I)* 149–151 for a clear statement of this position; also Akande (n 35) 449–50.

measures, as well as, crucially, legal questions concerning the relationship between the FCTC and trade or investment law at the systemic level, as set out above. It could also concern itself with legal questions relating to other bodies of international law, including customary international law, in respect of which there is no question of encroachment.

III. IT WOULD ALSO BE IN THE INSTITUTIONAL INTERESTS OF THE WTO FOR SUCH A
REQUEST TO BE MADE

I noted above the potential concern that a request for an ICJ advisory opinion could be seen to endanger relations with the WTO. At first glance, it certainly seems that engaging the ICJ in this way constitutes a threat to the authority, effectiveness and legitimacy of the WTO dispute settlement system. Does it not raise the spectre of the ICJ giving its opinions on questions of law which are presently within the sole competence of the WTO—and perhaps contradicting WTO tribunals in doing so? Might WTO Members not use this procedure to circumvent the WTO dispute settlement system or undermine its decisions? Isn't it the purpose of the WTO's dispute settlement system to provide finality to trade disputes, and certainty to the law, and wouldn't both these goals be undermined if the ICJ's jurisdiction were to be engaged?

It is certainly true that the WHO and the WTO have by now developed good institutional links through a history of collaboration on questions of health policy which cut across their respective mandates.⁴² These links are valued within the WHO, and there seems to be no desire within that institution to jeopardize them. It is also true that, by and large, WTO Members have been extremely reluctant to agree to any proposal which would diminish the authority of the WTO dispute settlement organs, and cede decision-making powers over trade matters to other international bodies.⁴³ But I shall argue in this section that concerns about such matters would be misplaced in the present context, where no question of any diminution of the WTO's authority arises. Furthermore, I will argue that, precisely because the question of authority does not arise, in fact the institutional interests of the WTO point in a similar direction to those of the WHO, and that the WTO's dispute settlement organs in particular would be likely to *welcome* the intervention of the ICJ.

The most obvious point to make in this respect is that ICJ advisory opinions are non-binding, and that therefore there is no threat at all to the formal authority of WTO tribunals. Even if the ICJ decided to give a contradictory

⁴² For a useful summary of the collaborative work which has occurred so far between the WTO and the WHO, see <http://www.wto.org/english/thewto_e/coher_e/wto_who_e.htm>, and the reports referred to therein.

⁴³ Young provides an interesting account of this dynamic in her discussion of fisheries subsidies negotiations in MA Young, 'Fragmentation or Interaction: The WTO, Fisheries Subsidies, and International Law' (2009) 8(4) *World Trade Review* 477. Any number of other illustrations could be offered.

opinion as to the meaning of WTO covered agreements (and I shall suggest in a moment that this is highly unlikely), it is abundantly clear that parties to WTO disputes remain bound by the decisions of WTO tribunals, and *not* by any ICJ advisory opinion, whether contradictory or not. Where the ICJ provides its opinion on a question of general international law which may also be considered by a WTO tribunal, such as the proper interpretation of VCLT Article 31(3)(c), it is equally clear that it is the WTO's Dispute Settlement Understanding which determines whether and how that opinion is to be taken into account by WTO tribunals. Where the ICJ considers questions of law which cannot be raised in the context of WTO dispute settlement proceedings, naturally the question of authority does not arise at all.

But quite apart from the question of authority, the reality is that this sort of contradictory jurisprudence is highly unlikely to occur in practice. All sorts of institutional pressures work against it. For one thing, for the reasons set out above, the WHO is likely to formulate the question in ways which direct the ICJ to issues of general international law, rather than asking directly for the ICJ's interpretation of WTO covered agreements. For another, as Simma, Kingsbury and others have reminded us, the ICJ has in the past gone out of its way not to tread on the toes of other international tribunals in the course of making its decisions, and there is every reason to expect this to continue.⁴⁴ This is no doubt partly out of judicial comity, and also no doubt partly as a consequence of a felt professional need to avoid where possible, anything which obviously undermines the integrity and coherence of international law. To be clear, I am not suggesting that the ICJ *should* always limit itself so as not to encroach upon the domain of other tribunals—sometimes this may be appropriate, but sometimes a robust judicial dialogue on important questions of law will be desirable, as I shall argue below. What I am suggesting is simply that, if history and institutional culture are any indication, we should not expect the ICJ to do much which destabilizes existing WTO jurisprudence as it relates to WTO covered agreements.

As regards the problem of circumvention, there is no question of WTO Members using the ICJ's advisory jurisdiction to circumvent their obligations under DSU Article 23 to use WTO dispute settlement as the sole and exclusive means of settling disputes under the WTO covered agreements.⁴⁵ Quite apart from the fact that an advisory opinion is not a means of settling a trade dispute, it is, of course, not the Members themselves but the WHO itself which

⁴⁴ B Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem' (1998) 31 NYUJIntlL&Pol 679; Simma (n 3); B Simma, 'Fragmentation in a Positive Light' (2004) 25 MichJIntlL 845; Dupuy (n 2).

⁴⁵ That Article states, most relevantly: 'When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding'; see <http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#23>.

approaches the ICJ in the scenario we are considering here. States have no authority to do so on their own behalf. Since the WHO requires at least half—and in all likelihood a two-thirds majority, of its members to make a request of the ICJ, it is simply not possible for anything other than a very substantial proportion of the international community to act in this way. The significant political checks on this process, in other words, ought to give comfort to even the most cautious WTO Member.

Third, as regards the issues of legitimacy and certainty, in my view, these point in the other direction. Imagine, unlikely as it may seem, what some might think of as the worst case scenario ('worst', that is, from the perspective of system coherence): an opinion from the ICJ which explicitly states that the FCTC requires Australia to implement plain packaging legislation which has been found to violate both the WTO covered agreements and the Hong Kong–Australia BIT, and that in this context Australia's FCTC obligations take priority. Is it fair to say that such an outcome will undermine the legitimacy of the decisions of the trade and investment tribunals, and undermine legal certainty for the parties? In my view, not at all. The reality is that, whatever the ICJ says or doesn't say, a decision by a trade or investment tribunal against Australia's plain packaging laws is likely to attract very considerable public criticism. Furthermore, whether or not the ICJ gives an advisory opinion on the matter, arguments will still certainly be made that these decisions are contrary to Australia's obligations under the FCTC, and therefore should not be complied with. In other words, serious problems of legitimacy and legal uncertainty will be present in this dispute whether or not the ICJ becomes involved. If anything, an ICJ decision may take some of the focus of public attention off the trade and investment tribunals, and perhaps help to facilitate some form of potentially productive political attention to the issue.

So much for the claims that an advisory opinion would potentially be damaging to the WTO and to relations between the WTO and the WHO. But is it also the case, more positively, that such an advisory opinion would be in the interests of WTO tribunals? Here, the evidence suggests quite clearly that WTO panels and the Appellate Body will indeed welcome—and happily take into account—the views of other international bodies on matters that they perceived to be outside the boundaries of their specialized expertise and mandate. On questions of general international law, WTO panels and the Appellate Body not uncommonly refer to ICJ decisions, and in fact for good institutional reasons show great reluctance to depart from them. They have, for example, referred to ICJ decisions on various questions relating to state responsibility, the precautionary principle, the principle of good faith, and other matters.⁴⁶ Furthermore, even those cases which are typically cited as

⁴⁶ See, eg. Appellate Body Report, *EC Measures Concerning Meat and Meat Products* (16 January 1998, adopted 13 February 1998) WT/DS26/AB/R and WT/DS48/AB/R, para 123,

examples of the WTO's isolation from general international law, in fact provide support for the opposite, in a very specific sense. For example, while the *Biotech* panel's restrictive interpretation of Article 31(3)(c) of the VCLT, for example, had the effect of seriously restricting the circumstances in which WTO Panels are *required* to take into account 'non-WTO' law in the interpretation of WTO agreements, the same Panel was perfectly willing to accept that Panels *could* take such material into account if they were minded to do so under Article 31(1)(a), and in fact itself liberally took into account the views of other international organizations in the same case.⁴⁷ The lesson from that case is not that WTO Panels are always and necessarily reluctant to take into account the views of other international tribunals, but that they wish to be in control of the circumstances in which they do so. To take another example, the historical reluctance of the WTO Panels and the Appellate Body substantively to consider arguments of parties based on the precautionary principle is in my view best understood as a reluctance to get *ahead* of other international tribunals on matters not within their specialized domain, and says nothing about the extent to which such bodies are likely to take into account clear, considered and well reasoned opinions of other international tribunals which state the law on matters of general international law.⁴⁸

In the present case, it is clear that numerous questions are likely to arise on which WTO panels have no specialized expertise. There is every reason to think that these panels would welcome some authoritative guidance on such questions, and indeed would wish to avoid addressing them in the absence of such guidance. For example, WTO panels would almost certainly like to have some guidance on the controversial question of the precise meaning of the FCTC and its Guidelines as they apply in the plain packaging context—a matter entirely outside their domain of specialized knowledge. Similarly, the question of the applicability of Article 31(3)(c) in the context of two multilateral treaties with overlapping but non-identical memberships, has become so sensitive and difficult within WTO law, that one can imagine the WTO Appellate Body would like to have some words from the ICJ on which to base its own approach, even if it did not follow the ICJ's approach to the letter.⁴⁹ This may well be one of those legal questions for which a process of ongoing judicial dialogue (including judicial contestation) amongst many

n 93 (on the precautionary principle); Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* (29 September 2006, adopted 21 November 2006) WT/DS291–3/R, nn261, 262 (on the precautionary principle); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998, adopted 6 November 1998) WT/DS58/AB/R, para 158, n 156 (on principle of good faith); Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products* (31 May 1999, adopted 19 November 1999) WT/DS34/R, 9.42, n 275 (on state responsibility).

⁴⁷ See generally MA Young, 'The WTO's Use of Relevant Rules of International Law: An Analysis of the Biotech Case' (2007) 56 ICLQ 907.

⁴⁸ See, for an elaboration of this argument, A Lang, *World Trade after Neoliberalism* (OUP 2011) especially ch 10.

⁴⁹ See (n 23).

tribunals may be the most effective process of achieving a modestly legitimate approach which commands relatively widespread assent. Certainly such a process would be preferable—especially from the perspective of the WTO—to WTO tribunals having to address the question solely on their own, with all the questions of legitimacy that this would entail.

IV. THE ICJ FACES NO LEGAL IMPEDIMENTS TO EXERCISING ITS ADVISORY JURISDICTION

As is well known, there are three preconditions to the Court's exercise of its advisory jurisdiction: the request must come from an organ duly authorized to do so under the Charter; the request must be in respect of a 'legal question'; and at least where the requesting organ is a specialized agency, the question must be one arising within the scope of activities of that organ.⁵⁰ The first two of these give rise to no legal issues in the present context,⁵¹ and the third has been addressed in Section II above. However, should those three elements be satisfied, the Court still has to consider whether there are good reasons to exercise its discretionary power to decline to give an advisory opinion.⁵²

The Court's discretion whether or not to give an advisory opinion exists to 'protect the integrity of the Court's judicial function',⁵³ and in exercising that jurisdiction, the 'Court has to have regard to its character, both as a principal organ of the United Nations and as a judicial body'.⁵⁴ It must not give an opinion where to do so would be inconsistent with its judicial character. Such a refusal, however, is rare: the ICJ has never exercised this discretion in any of the 26 requests which have been made of it, and its predecessor the Permanent Court of International Justice (PCIJ) famously did so only once, in its *Status of Eastern Carelia* opinion. It is the consistent practice of the ICJ to reaffirm that exercising its advisory jurisdiction 'represents its participation in the activities of the [UN], and, in principle, should not be refused';⁵⁵ and that a request

⁵⁰ See, eg, Application for Review of Judgement No 273 of the United Nations Administrative Tribunal, Advisory Opinion, ICJ Reports 1982, para.21; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996 (I), para 10; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, para 14; Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, ICJ Reports 2010, para 19.

⁵¹ For the WHO's authority to request an advisory opinion of the ICJ, see Article 76 of Constitution of the World Health Organization, available at <<http://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf>>, in combination with Article X:2 of the Agreement of 10 July 1948 between the UN and the World Health Organization.

⁵² See, eg, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, ICJ Reports 1950, 72; *Nuclear Weapons I*, para 14; *Wall*, para 44; *Kosovo*, para 29.

⁵³ *Status of Eastern Carelia*, Advisory Opinion, 1923, P.C.I.J., Series B, No 5, at 29; *UNAT 1973*, para 24; *UNAT 1982*, para 22; *Wall*, para 45; *Kosovo*, para 29.

⁵⁴ Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, ICJ Advisory Opinion, 1 February 2012, para 33.

⁵⁵ *Interpretation of Peace Treaties*, 71; *Wall* para 44; *Kosovo*, para 30.

should be refused only for ‘compelling reasons’.⁵⁶ It may also be relevant that the General Assembly has itself called for the Court’s advisory jurisdiction to be used more frequently.⁵⁷ As a result we may fairly expect that those arguing that the Court should *not* give an opinion will always face a high bar. In the following, I consider and reject the two most likely arguments for the Court to refuse to give an opinion in this case.

A. Lack of Consent of a State Party to an Underlying Contentious Dispute

In the only case in which the Court’s predecessor—the Permanent Court of International Justice—refused to exercise *its* advisory jurisdiction, it did so on the basis that ‘the question concerned an already existing dispute, one of the States parties to which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way’.⁵⁸ The Court determined that it could not answer these questions posed to it without addressing the underlying dispute, and that to do so would undermine the principles governing the exercise of its contentious jurisdiction:

It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement . . . The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia, and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties.⁵⁹

In a number of cases since then, the same argument has been aired that to give an advisory opinion would in effect be adjudicating a dispute between parties without the consent of at least one of those parties, thus ‘circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent’,⁶⁰ and that in such circumstances it would be improper for the court to exercise its advisory jurisdiction.⁶¹

In the plain packaging context, assuming that the ICJ is asked for its opinions on the specific legal questions set out in Section II above, should it decline to exercise its jurisdiction on similar grounds? In my view, the answer is clearly no. As noted above, in the plain packaging context, there are four underlying contentious disputes. Three of them—with Australia on one side,

⁵⁶ Judgments of the Administrative Tribunal of the ILO upon Complaints Made against the UNESCO, Advisory Opinion, ICJ Reports 1956, 86; *Wall*, para 44; *Kosovo* para 30.

⁵⁷ See, eg, General Assembly Resolution 43/51, Annex para 15 (5 December 1988).

⁵⁸ This summary of the core elements of the *Eastern Carelia* case as they have been understood in ICJ judgments is taken from *Legality of Nuclear Weapons (II)* para 14.

⁵⁹ *Eastern Carelia*, 27, 28–29.

⁶⁰ *Western Sahara*, para 33.

⁶¹ Some instances in which this argument has been run include the *Wall*, *Interpretation of Peace Treaties*, and *Western Sahara* opinions.

and Honduras, the Dominican Republic and the Ukraine on the other respectively—are disputes concerning the application of the WTO covered agreements. The fourth, between Australia and Philip Morris, concerns the application of the Hong Kong–Australia BIT. Of these five parties, it can safely be assumed that Australia is unlikely to object to the proceedings, and Philip Morris, being a corporation, can neither consent nor object to the proceedings.

That leaves three states, all of whom have brought WTO proceedings against Australia. However, an ICJ advisory opinion on the questions set out in Section II above *cannot* affect the legal position of these parties in their WTO disputes. This is partly because the advisory opinion is non-binding. More importantly, it is because the ICJ can perfectly easily answer these systemic questions (having primarily to do with the proper interpretation of the FCTC and the VCLT) without taking any position on the merits of the underlying WTO disputes (which only concern the interpretation and application of WTO covered agreements). This is, in fact, the position which the ICJ has consistently taken in previous cases in which this argument has been run. In *Interpretation of Peace Treaties*, for example, the Court recalled that its advisory opinions are not binding on the parties to the dispute, and observed that the precise question before it (having to do with the applicability of the dispute settlement provisions of the relevant treaties) could be addressed without determining the merits of the underlying dispute.⁶² It followed that ‘the legal position of the parties to these disputes [could not] be in any way compromised by the answers that the Court may give to the Questions put to it’.⁶³ In *Western Sahara*, also, the Court found it relevant that its opinion could ‘not affect the rights of Spain today as the administering Power’ of the territory in question.⁶⁴ And in the *Mazilu* case, the Court drew a distinction between the ‘applicability of the [UN Convention on the Privileges and Immunities of the United Nations 1946] to Mr Dumitru Mazilu and ‘the dispute between the United Nations and Romania with respect to the *application* of the General Convention in the case of Mr Mazilu’.⁶⁵

But there is a second, crucial reason why the lack of consent of these three states should not matter. It is simply this: that the WHO has a direct interest in the answers to the questions it poses to the Court, quite independent of the specific disputes between Australia, Honduras, the Dominican Republic and the Ukraine. This is so, recall, because the WHO’s efforts to promote tobacco control policies globally may be seriously impaired by any decisions against Australia’s legislation. The WHO would therefore be requesting an advisory opinion *not* as part of a process of resolving the underlying bilateral disputes, but rather as part of carrying out its own independent mandate to promote

⁶² *Interpretation of Peace Treaties*, 71–2.

⁶³ *Interpretation of Peace Treaties*, 72.

⁶⁴ *Western Sahara*, para 42.

⁶⁵ Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations (‘Mazilu’), Advisory Opinion, ICJ Reports para 38.

tobacco control policies. This kind of consideration has been decisive in at least three previous cases, in all of which the Court decided to exercise its advisory jurisdiction. In *Western Sahara*, the legal question of the status of the territory of Western Sahara arose in the context of General Assembly discussions around the process of decolonization, and the request was made of the Court so as to help the UN guide the process of decolonization in that area appropriately. Thus, the Court noted, the legal disagreement which gave rise to the request did not arise independently in bilateral relations but rather ‘during the proceedings of the General Assembly, and in relation to matters with which it was dealing’. The legal questions posed to the Court were thus ‘located in a broader frame of reference than the settlement of a particular dispute, and embrace[d] other elements . . . directed to the present and the future’, and the request was not made in order to settle the bilateral dispute directly.⁶⁶ In its 1971 *South-West Africa* opinion, the Court also noted that,

It is not the purpose of the request to obtain the assistance of the Court in the exercise of the Security Council’s functions relating to the pacific settlement of a dispute pending before it between two or more States. The request is put forward by a United Nations organ with reference to *its own decisions* and it seeks legal advice from the Court on the consequences and implications of these decisions.⁶⁷

More recently, in the Court’s *Wall* advisory opinion, the Court noted that question of the legality of Israel’s conduct was not just a bilateral matter between Israel and Palestine, but rather directly concerned the UN itself, given the threat that the construction of the wall posed to international peace and security, and given the ‘permanent responsibility’ the General Assembly has to work towards a peaceful resolution of the ‘question of Palestine’.⁶⁸ The purpose of the request, the Court noted, was not to settle a dispute without the consent of the parties, but ‘to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of *its* functions’.⁶⁹ In my view, the position of the WHO in the present context is analogous to that of the General Assembly in the *Wall* case—and if the Court was willing to exercise its advisory jurisdiction in that case despite the potentially negative impact on Israel’s position, it could hardly refuse to do so in the plain packaging context. The Court has available to it a variety of procedural mechanisms to ensure that potentially affected states can have meaningful input into the Court’s deliberations.⁷⁰

⁶⁶ *Western Sahara*, paras 34, 38 (emphasis added).

⁶⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, para 32.

⁶⁸ *Wall*, para 49.

⁶⁹ *Wall*, para 50 (emphasis added).

⁷⁰ See below (nn 94–98) and accompanying text.

B. Non-Interference with Existing Treaty-Based Dispute Settlement Mechanisms

In a number of prior advisory proceedings, it has been argued that the Court ought not to accede to a request to interpret a treaty, because the treaty itself specifies a procedure by which disputes about its interpretation are to be resolved. Thus, for example, in the *Interpretation of Peace Treaties* case, it was argued that the giving of an advisory opinion by the Court would ‘take the place of the procedure instituted by the Peace Treaties for the settlement of disputes’.⁷¹ In *Reservations to the Genocide Convention*, it was argued that Article IX of the Genocide Convention—providing for disputes about the interpretation of the Convention to be submitted to the ICJ with the consent of the disputing parties—had the effect of excluding the advisory jurisdiction of the Court about such matters.⁷² In the *Mazilu* case, Romania argued that because of its explicit reservation to Article 30 of the Convention on the Privileges and Immunities of the United Nations (consenting to ICJ jurisdiction over disputes about the interpretation of the agreement), the ICJ should not accede to a UN request for an advisory opinion on matters in dispute between Romania and the UN.⁷³ In none of these cases has this argument succeeded.

Nevertheless, the same argument may be put forward in the plain packaging context. Article 27 of the FCTC sets out a procedure for the resolution of disputes concerning the interpretation and application of that Convention. The Hong Kong–Australia BIT envisages UNCITRAL arbitration as the preferred mode of dispute settlement. Most importantly, Article 23 of the WTO’s Dispute Settlement Understanding makes clear that the WTO’s dispute settlement system represents the *sole and exclusive* forum for WTO Members to bring claims concerning a violation of WTO obligations.⁷⁴ Can it be argued that the Court ought to respect the apparent intention of WTO Members that only WTO tribunals be granted interpretive authority over WTO agreements, and therefore refuse to give an advisory opinion touching such matters? Should it decline the request on the basis that to accede to it would turn the Court into an instrument by which the spirit and intention of architects of the WTO dispute settlement system are undermined? Or, relatedly, could it be argued that the Court should not give an advisory opinion for fear of the interpretation of WTO agreements being illegitimately influenced by non-Members of the WTO?

⁷¹ *Interpretation of Peace Treaties*, 71.

⁷² *Reservations to the Genocide Convention*, 20.

⁷³ *Mazilu*, para 38.

⁷⁴ Art 23 of the WTO’s Dispute Settlement Understanding (n 45). Of course, it is not at all clear that this Article precludes (or even could preclude) the involvement by WTO Members in a request for an advisory opinion from the ICJ on questions of WTO law: Art 23 is addressed to complaining parties only, and it expressly prohibits only ‘unilateral’ determinations of non-compliance with WTO law. Nevertheless, the intent of the drafters that WTO dispute settlement be the exclusive forum for the bringing of complaints under WTO law is clear.

Although such arguments will have intuitive appeal for some, they do not provide ‘compelling reasons’ for the ICJ to decline to give an opinion. First, all WTO member states are also parties to the UN Charter, and have therefore accepted the advisory jurisdiction of the ICJ as set out in the Charter. Second, it is not clear from the terms of Article 23 of the DSU that WTO Members intended to exclude the possibility of ICJ advisory opinions on matters relating to WTO law. That provision makes the WTO’s dispute settlement mechanism an exclusive venue for seeking redress of violations of WTO obligations, but an advisory opinion is not a mechanism for redress. Third, Article 23 is addressed to WTO Members: it is concerned with what Members may do in relation to their disputes about WTO law, and has nothing to say about the conduct of specialized agencies such as the WHO nor about the behaviour of WTO Members in the context of such agencies. Fourth, it is not clear that the DSU *could* affect the exercise of the ICJ’s advisory jurisdiction even if it purported to do so: it would be strange if members of the WHO which are *not* Members of the WTO could have their collective ability to request an advisory opinion of the Court through the WHO effectively impaired by a treaty to which they are not a party.⁷⁵ Fifth and finally, it is worth noting again that an advisory opinion does not in fact undermine the exclusive authority of WTO tribunals to settle WTO disputes and interpret WTO law. Advisory opinions neither determine the rights and obligations of WTO Members under WTO law, nor can they alter the ability of WTO dispute settlement panels to hear and resolve the dispute on their own terms. The ICJ merely represents a ‘parallel’ interpretive venue, without the formal enforcement machinery of the WTO dispute settlement system.⁷⁶

V. THE BENEFITS OF ENGAGING THE ICJ’S ADVISORY JURISDICTION

So far, I have argued that a request for an ICJ advisory opinion on certain questions relating to plain packaging disputes is a realistic possibility: the WHO has a strong interest in making such a request; other international bodies have little real reason to object; and there are no legal impediments to the ICJ exercising its jurisdiction. The question remains, however, what the benefits of this would be. Why, precisely, might we want the ICJ to get involved in this way? What is the most productive role it can play in this context?

The first point I wish to make is that we should not assume that engaging the ICJ is necessarily a centralizing or hierarchical move. This is a very important

⁷⁵ For a similar argument see Sloan (n 27) 834. See also generally UN Charter Article 103 (and less relevantly Article XXI(c) of the General Agreement on Tariffs and Trade 1947), which together accord normative priority to Charter arrangements over WTO law to the extent of a conflict.

⁷⁶ See *Reservations to the Genocide Convention*, 20. As an aside, we may note the irony which would be involved in the ICJ refusing to trespass on the exclusive territory of the WTO dispute settlement system, based on an interpretation of a treaty to which *ex hypothesi* WTO tribunals have exclusive jurisdiction authoritatively to interpret.

point, and one which is liable to be misunderstood. It is true that when Presidents Guillaume and Schwebel (and others) first proposed a role for the ICJ in response to problems of fragmentation, they *did* imagine that the ICJ would play something of a centralizing role. The ICJ, in their view would help to adjudicate differences of opinion between other international tribunals, decide points of law referred to them by specialized tribunals, and resolve normative conflicts between different parts of international law.⁷⁷ They imagined the ICJ as something close to an apex constitutional court, bringing unity and coherence and certainty to the presently fragmented international legal order. However, since then, other international legal scholars have overwhelmingly responded that this centralizing vision is not only unrealistic, but also ultimately undesirable. The arguments they have raised are persuasive, and it is worth briefly recalling them.

At least three reasons have been offered as to why it is unrealistic to imagine that the ICJ could unify international law through the exercise of its advisory jurisdiction. First, as Oellers-Frahm and others have argued, the ICJ's advisory jurisdiction is by nature ill-suited to this role.⁷⁸ The exercise of advisory jurisdiction will depend in the first instance on there being a relevant specialized agency with the authority, and the inclination, to make a request. Sometimes such an agency will exist, sometimes it will not. Even where it does, the nature and scope of the Court's opinion will be controlled by the terms of the question asked, not by the Court itself. Moreover, advisory opinions are non-binding, even for the bodies which request them. The degree to which the opinions of the Court are taken into account in the decision-making of other international judicial tribunals will therefore depend entirely on the rules, procedures and judicial cultures of those other tribunals. In most contexts, the formal juridical 'bite' of the Court's advisory opinions in other judicial contexts will be very limited, and their practical impact is likely to be felt through relatively 'soft' means. It is not at all clear, then, that the ICJ could effectively exercise a unifying function solely through its advisory jurisdiction, even if it were minded to.

Second, many of the Court's most perceptive observers have noted that the culture of the Court works strongly against the Court taking up a centralizing, quasi-constitutional role. The Court has traditionally been a relatively cautious body, particularly as regards its relations with other international tribunals. As both Dupuy and Simma have argued, the Court's tendency to avoid difficult and sensitive issues of law, as well as the care it usually takes to avoid conflicts of any sort with other tribunals, act as a major and enduring obstacle for those who wish to see it take a more robust approach to ensuring international legal coherence.⁷⁹ It seems reasonable to expect that in many cases, particularly those involving politically and normatively sensitive issues, the Court would

⁷⁷ See eg Schwebel (n 2); and Guillaume (n 2).

⁷⁸ Oellers-Frahm (n 4).

⁷⁹ See (n 44).

adopt a cautious and incremental approach to problems of fragmentation—avoiding fraught questions of high principle, formulating responses in deliberately general terms, framing opinions in ways which minimize their precedential impact, and so on, just as it has done in certain previous cases.⁸⁰

Third, and perhaps most importantly, any attempt by the Court to produce unity and coherence is likely to be swamped by the powerful logics and social forces working in the direction of fragmentation. Koskenniemi and Leino, for example, make the simple but crucial point that the fragmentation of international law is not the result of technical mistakes but of political contestation.⁸¹ As long as these underlying political differences exist, then, and as long as there are incentives for participants to engage in a strategy of ‘regime-shifting’⁸², the active production of fragmentation will continue, and no single hierarchy is reasonably available. Teubner’s and Fischer-Lescano’s argument that fragmentation is the inevitable result of the multiplication and collision of relatively self-contained social systems also points to the futility of seeking a coherent and unified international legal order.⁸³ Indeed, Craven takes the point one step further, persuasively arguing that fragmentation is a necessary feature of any body of legal practice attempting to overcome problems of difference and diversity. Any act of purported unification, he argues, is also always productive of difference.⁸⁴

Similarly, a number of reasons have been offered as to why it might be normatively undesirable for the ICJ to adopt a quasi-constitutional role in response to fragmentation. Most of these are very familiar. For example, some have rightly argued that certain fundamental problems of international legal fragmentation are simply not amenable to final resolution through judicial means. This is partly because the underlying issues are highly sensitive and politically charged, such that any attempt to address them directly and finally by judicial means must raise serious questions of legitimacy.⁸⁵ The normative conflicts associated with fragmentation, to echo the ILC Fragmentation Report, ‘require a legislative, not a legal-technical response’ and are not amenable to final resolution by judicial means in any simple sense.⁸⁶ It is also partly the

⁸⁰ The classic examples of this kind of approach would be the *Kosovo* and *Legality of Nuclear Weapons (II)* advisory opinions. Relatedly, see Separate Opinion of Judge Petřín in the *Nuclear Tests* cases, ICJ Reports 1974, 303–6; and the discussion in Koskenniemi (n 86) 615 ff.

⁸¹ M Koskenniemi and P Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15(3) LJIL 553.

⁸² LR Helfer, ‘Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking’ (2004) 29 YaleJIntL 1.

⁸³ A Fischer-Lescano and G Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2003) 25 MichJIntL 999.

⁸⁴ M Craven, ‘Unity, Diversity and Fragmentation of International Law’ (2003) 14 FinnishYBIL 3.

⁸⁵ See eg Oellers-Frahm (n 4).
⁸⁶ Report of the Study Group of the International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, 13 April 2006, A/CN.4/L.682, para 484, available at <http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf>. See also generally M Koskenniemi, ‘Advisory

result of the structure of the international legal system, which contains too few effective institutional checks and balances on the exercise of international judicial power. In addition, many others argue that there is considerable value in a fragmented and pluralistic international legal order, regardless of its costs in terms of certainty and predictability. In this vein, Koch, Burke-White, Abi-Saab, Charney and others have all advocated their various visions of a pluralist dialogue amongst various international judicial tribunals, against a constitutionalizing, hierarchical vision of the ICJ's role in addressing problems of fragmentation.⁸⁷

All of these arguments are persuasive, and have considerable force in the specific context of plain packaging disputes. We should therefore not imagine that engaging the ICJ's advisory jurisdiction in the way described in this article would, or even could, be a way of addressing in some final, substantive way the underlying values conflict at the heart of disputes over plain packaging. We should not ask, or expect, the ICJ to provide a final answer as to the international legality of plain packaging legislation (of one sort or another), nor should we expect it to resolve once and for all any substantive inconsistencies between the FCTC and various texts of international economic law. But if the ICJ ought not be asked to do these things, what *can* it do to productively intervene into international legal debates around plain packaging?

One answer is simply that an ICJ advisory opinion could contribute to the development of the 'toolbox' available to international lawyers to address problems of fragmentation in a reasoned and principled way.⁸⁸ One of the most significant and most welcome contributions of the ILC Fragmentation Report was the way in which it moved the conversation about fragmentation from institutional to substantive questions. That is to say, what began largely as a debate about whether and how to build an institutional hierarchy to solve problems of international legal fragmentation, has come now primarily to be about how to understand and develop the doctrinal and normative tools that international law offers to resolve conflicts when they arise. The ILC Report thus identified and discussed seven such tools: the *lex specialis* principle; Articles 30 of the VCLT having to do with the relationship between successive treaties; Article 41 of the VCLT having to do with the modification of multilateral treaties through *inter se* agreements; treaty-based conflicts clauses; the concepts of *jus cogens* and obligations *erga omnes*; Article 103 of the UN

Opinions of the International Court of Justice as an Instrument of Preventive Diplomacy' in N Al-Nauimi and R Meese (eds), *International Legal Issues Arising under the United Nations Decade of International Law* (Springer 1995) 599, 612–19.

⁸⁷ Abi-Saab (n 3); Charney (n 3); CH Koch, 'Judicial Dialogue for Legal Multiculturalism' (2004) 25 *MichJIntL* 879; W Burke-White, 'International Legal Pluralism' (2004) 25 *MichJIntL* 963.

⁸⁸ The term 'toolbox' is taken from Report of the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 13 April 2006, A/CN.4/L.682, para 20, also 250.

Charter; and the principle of systemic integration as contained in Article 31(3)(c) of the VCLT. On one hand, it expressed some optimism that such tools enabled international lawyers to ‘respond in a flexible way to most substantive fragmentation problems’, and to ‘give expression to concerns . . . that are legitimate and strongly felt’.⁸⁹ At the same time, the report also noted some aspects of these tools which were either underdeveloped or unsatisfactory.⁹⁰ The simple point here, then, is that requesting an advisory opinion from the ICJ in the plain packaging context would give the World Court a perfect opportunity to take the lead in this effort. In particular, it would provide the Court with an opportunity to discuss and develop the principle of systemic integration, interpret the particular conflicts clause found in the FCTC, and possibly also to address certain issues around the application of VCLT Article 41 on *inter se* agreements.

This role seems to me to be particularly well suited to the stature and institutional position of the Court, as well as to its particular institutional culture. As the principal judicial organ of the UN, and as the only international court with plenary subject matter jurisdiction and responsibility for the international legal order as a whole, it is well placed to address such questions—better placed, it would seem, than specialized tribunals which speak with less intrinsic authority on questions of general international law. At the same time, the task of developing in general terms the normative ‘toolbox’ set out in the VCLT is one which is clearly productive, but at the same time pragmatically permits the Court both to avoid any appearance of undermining the authority of other international tribunals, and to sidestep those aspects of fragmentation disputes which it feels are inappropriate for resolution by any judicial tribunal.

A second benefit of ICJ advisory proceedings in the plain packaging context is that ICJ procedures could in principle provide a space for a greater diversity of actors to have their voices heard within international legal debates around plain packaging legislation. Unlike trade and investment tribunals, ICJ proceedings are routinely open to the public, and written submissions are typically publicly available. Importantly, in exercising its advisory jurisdiction, the ICJ is able to receive input from a much greater diversity of stakeholders than specialized tribunals. In accordance with Article 66 of its Statute, all states and all interested international organizations are routinely given an opportunity to furnish information to the Court in the course of the exercise of its advisory jurisdiction. Directly interested international organizations may also be given the opportunity to appoint ‘assessors’ under Article 30(2) of the Court’s Statute.⁹¹ Where the question asked of the Court directly affects a dispute to

⁸⁹ Report of the Study Group of the International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, 13 April 2006, A/CN.4/L.682, 250.

⁹⁰ *ibid.*, especially 251.

⁹¹ See also Rules of the Court, art 9; and see generally Szasz (n 1) 531.

which an individual is a party, the Court has in the past required that such individuals are given the opportunity to have written submissions made available to the Court in accordance with the principle of equality of parties before the law.⁹² In the plain packaging context, this procedure could in principle be used to permit individual investors to be granted similar procedural rights. Although the ICJ has so far been very reluctant to extend such rights to non-governmental organizations,⁹³ its predecessor the PCIJ was considerably more flexible in this regard and there is arguably room for the ICJ to be so under its Statute.⁹⁴ The point here is not to idealize the scope of participation rights in the ICJ—after all the ICJ itself has considerable limitations in this regard, and indeed in some respects trade and investment tribunals are actually more progressive on this front.⁹⁵ However, it is fair to say that the engagement of the ICJ's advisory jurisdiction may help to ensure that legal issues are considered from a different set of perspectives than is typical in specialized tribunals, and that stakeholders currently under-represented in other venues may have a greater chance to have their voices heard in the context of ICJ proceedings.

The third, and probably the most important, answer is that an ICJ advisory opinion may help to instil a greater degree of reflexivity on the part of decision-makers in specialist tribunals. It is the defining characteristic of problems of fragmentation that they simultaneously implicate the interests of many different international legal regimes, such that the decisions made by one regime have the potential significantly to impact on the activities of others. In this context, the adoption of a 'reflexive' decision-making posture by individual international regimes means a number of things. Reflexivity means, for example, taking seriously the cross-cutting nature of the problem requiring decision, recognizing the inability of any one specialized institution to address it, and modifying the nature, scope and style of one's decision in response. It requires, accordingly, a heightened awareness of the impact of one's decision on domains and spheres of activity which are commonly considered 'external' to

⁹² See, eg, the responses that the Court has had in the context of the principle of equality of parties in Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO, Advisory Opinion, ICJ Reports 1956; Application for Review of Judgement No 158 of the United Nations Administrative Tribunal, Advisory Opinion, ICJ Reports 1973; Application for Review of Judgement No 273 of the United Nations Administrative Tribunal, Advisory Opinion, ICJ Reports 1982; Application for Review of Judgement No 333 of the United Nations Administrative Tribunal, Advisory Opinion, ICJ Reports 1987; Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, ICJ Advisory Opinion, 1 February 2012.

⁹³ See eg C Chinkin, 'Increasing the Use and Appeal of the Court: Presentation by Professor Christine Chinkin' in *Increasing the Effectiveness of the International Court of Justice* (Martinus Nijhoff 1997) 43.

⁹⁴ On the practice of the PCIJ in this regard see Szasz (n 1) 507 and the material referred to therein. As regards the ICJ, the flexibility to follow something close to this practice is available under arts 34, 50, and 66 of its Statute.

⁹⁵ The obvious example is the inability of the ICJ to accept amicus curiae briefs from non-governmental organizations, in contrast to both trade and investment tribunals.

the regime. It also necessitates an awareness of the decision-makers own perspective: an awareness that each regime frames problems in its own way, and that these framings bring with them their own substantive biases and blindness. It therefore implies a decision-maker who is open to learning, including an openness to the revision (or at least reinterpretation) of institutional goals and values in light of the 'external' impacts of decisions.

Young has done the most to describe instances of reflexivity of this type in the context of international law, particularly in relation to the WTO.⁹⁶ In the context of a study of negotiations over fisheries subsidies, she has demonstrated how certain forms of 'regime interaction' can—though only as one among several possibilities—lead to learning on the part of negotiators, through processes of information exchange, periodic review, normative borrowings and mutual scrutiny between regimes.⁹⁷ Engaging the ICJ in the manner described here could, I would argue, have a similar effect on international judicial tribunals. For a variety of reasons having to do with their institutional mandates and the actors to whom they are directly accountable, it can sometimes be difficult for specialist tribunals to fully understand the significance of their decisions for international law as a whole, and equally difficult to comprehend the way in which their decisions might be perceived outside the regime of which they are a part.⁹⁸ At times, this can mean that such tribunals address in only a cursory or inadequate way arguments which draw on sources of law which are perceived as external or marginal to the regime of which they are part. In my view, the anticipation of a subsequent ICJ opinion on these issues—with all the reputational and accountability issues that this implicitly accompanies such a process—is likely to generate greater care on the part of specialist tribunals on questions likely to be scrutinized by the ICJ, and may even prompt the reflexive imaginative leap required to consider the issues before them not only from within the mindset of their particular regime, but also from an external frame of reference. Subsequent judicial dialogue may have the same effect.

Of course, neither the mere act of issuing an advisory opinion, nor the mere commencement of a judicial dialogue, is likely to lead to reflexivity on its own. Much depends, for example, on the attitudes and decision-making styles adopted by participants in the conversation. On the one hand, enhancing reflexivity would require the ICJ to depart from the rather cautious and conflict-avoiding attitude it has tended to adopt until now. The task of promoting reflexivity relies on the ICJ becoming something like a 'friendly thorn' in its

⁹⁶ See Young (n 43) and MA Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (CUP 2011).

⁹⁷ *ibid.*
⁹⁸ See generally on the limits of the perspectives of specialized tribunals, Report of the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 13 April 2006, A/CN.4/L.682, ILC 254–6; Dupuy (n 3); Y Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press 2003).

relations with other international tribunals—that is, adopting an attribute of respectful but critical scrutiny, highlighting (rather than minimizing) the ‘externalities’ of decisions of specialist tribunals, and robustly assessing the adequacy of these tribunals’ attempts to address them. In the context of the plain packaging dispute, this may mean, for example, carefully evaluating the way in which these tribunals respond to parties’ arguments based on general international law, and rigorously scrutinizing the techniques that specialist tribunals tend to use to minimize the possibility of inter-regime conflict. On the other hand, specialist tribunals themselves ought to adopt an attitude of openness to scrutiny. While it is hard to imagine that such tribunals would voluntarily agree to be bound by ICJ advisory opinions, it would be desirable for such tribunals to develop a practice of careful, explicit, and reasoned consideration of such opinions, particularly where they choose to depart from them. At the same time, as Young rightly notes, openness must go hand in hand with contestability: reflexivity is a two-way street, and part of the process must involve equally careful scrutiny of ICJ opinions by other tribunals, including as regards its processes of decision-making.⁹⁹ Furthermore, we should not imagine that reflexivity leads, necessarily or even normally, to substantive convergence, but rather a process of continual self-critical reflection which is ideally entirely open-ended in its subsequent direction. The dynamic imagined here is something close to the relations of ‘mutual observation’ between international tribunals advocated by Teubner and Fischer-Lescano.¹⁰⁰

It will be immediately clear to the reader this model of reflexive engagement is potentially relevant far beyond the plain packaging context. There are many problems of fragmentation and potential normative conflict in international law which could in principle give rise to the same procedure. The recent European implementation of its emission trading scheme to the aviation sector, to take one high-profile example, has given rise to questions about its international legality not only under WTO law but also the Chicago Convention on International Civil Aviation, the Kyoto Protocol, customary international law and the Open Skies Agreement. Should the International Civil Aviation Organization request an advisory opinion of the ICJ about the relationship between these agreements, and/or about the international legality of the EU emissions trading scheme more generally? It is certainly authorized to do so. Other examples can easily be imagined with only a little creativity. Could the International Labour Organization (ILO), for example, request an advisory opinion of the ICJ as to the international legality of ILO-authorized trade sanctions imposed on by WTO Members on another WTO Member in respect

⁹⁹ See generally, Young (n 43) noting in particular the importance of scrutiny of the degree of participation, the transparency of the decision, as well as the quality of its reasoning.

¹⁰⁰ Fischer-Lescano and Teubner (n 83).

of labour rights abuses?¹⁰¹ Could the Food and Agricultural Organization request an advisory opinion in respect of the relationship between the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures and the Biosafety Protocol to the Convention on Biological Diversity? Could the same institution request an advisory opinion about the relationship between the diversity of international instruments relating to fisheries subsidies?¹⁰² Might it be useful for the International Maritime Organization to request an advisory opinion concerning the international law governing forceful responses to Somali piracy, or the relationship between the range of treaties and customary international law relating to marine pollution and the safety of shipping?¹⁰³

The argument presented here does not imply that the advisory jurisdiction of the ICJ should be used in all of these contexts. The consequences of doing so would potentially be very significant, and require careful thought. Three things make the plain packaging case somewhat unusual in this respect. For one thing, the problems of fragmentation are particularly acute, in the sense that the 'external' impacts of decisions by trade or investment tribunals are particularly strong and clear. Any adverse decision by one such tribunal, at least one which significantly impairs the ability of states to adopt plain packaging legislation, will fundamentally affect not only the work of the WHO but also that of public health authorities generally, in countries around the world. That this could happen on the basis of a decision of a tribunal which, by design, applies only a subsection of the applicable international legal rules, would necessarily lead to further confusion and difficulty. For another, these problems have already crystallized to a sufficient degree that the contours of the issue have come into focus, and a set of reasonably clear questions can be posed to the ICJ. The relevant legislation is in force, international legal challenges have already been initiated (indeed, in our imagined scenario, completed), and the usual political avenues for avoiding conflict have largely failed. Finally, the prospects that an ICJ opinion will have a beneficial impact are in my view good. Relations between the WHO and the WTO are strong enough that both institutions may well view this as an opportunity for learning. The interests of states are ambiguous enough that, perhaps, neither trade nor investment tribunals will feel under irresistible pressure from these constituencies, merely to resist and ignore pressure from the ICJ. On the contrary, both may feel that their legitimacy is at stake in the context of such a sensitive dispute, and be more willing to engage meaningfully in a dialogue with the ICJ. Where most or all of these conditions are missing—where, for example, externalities are unclear or

¹⁰¹ This recalls earlier discussions around the WTO legality of potential labour-related trade sanctions against Myanmar.

¹⁰² See generally MA Young, 'Fragmentation or Interaction: The WTO, Fisheries Subsidies, and International Law' (2009) 8(4) *World Trade Review* 477.

¹⁰³ See the Dissenting Opinion of Judge Weeramantry in *Legality of Nuclear Weapons (I)* at 150–151 for another useful list of factual situations which may fall at once within the competence of multiple specialized agencies.

less significant, where normative conflicts are hypothetical only, where political avenues for their redress remain viable or untested, and where the prospects of enhanced reflexivity are very weak—the wisdom of engaging this procedure may rightly be questioned.

VI. CONCLUSION

Not all will agree, of course, that an ICJ advisory opinion would be useful in the context of the current plain packaging disputes. But whatever we think about the merits of the ICJ as a forum for addressing this particular problem, what is undeniably exciting is that a clear chance exists for the ICJ to define a role for itself in the context of international legal fragmentation, should the specialized agencies wish to give it the opportunity to do so. What is attractive about the mechanism described in this article is that it requires no amendment to the provisions of either the Charter or the ICJ Statute governing access to the Court's advisory jurisdiction, and that it is unequivocally (and in practice virtually irrevocably¹⁰⁴) available to a wide range of specialized agencies now. Its activation requires no significant departure from recent practice as regards the use of the Court's advisory jurisdiction. There is little if anything formally new here: it is simply a matter of beginning to use mechanisms which are clearly already in place to address new legal questions arising from the phenomenon of international legal fragmentation. It is the argument of this article that an excellent opportunity exists right now to do just that.

In carving out this role, I have argued, the Court will need to find a way to navigate between at least two conflicting imperatives. On one hand, the Court will have to face the reality that fragmentation and consequent normative conflicts are an unavoidable and durable aspect of the international legal landscape, and that traditional legislative means of addressing them are likely to be dysfunctional for the foreseeable future. As a consequence, there is some kind of imperative for international courts and tribunals to take the lead on such issues as far as it is necessary to do so—and the ICJ is probably the best placed of all such tribunals.¹⁰⁵ On the other hand, the Court must find a way of addressing such issues which is appropriate for a judicial rather than political institution, which acknowledges that the underlying normative conflicts which give rise to legal problems of fragmentation are never finally resolvable, certainly not by judicial means, which recognizes that the law is only one language in which to address such conflicts and not always the best one, and

¹⁰⁴ There is a discussion of the degree to which it is or is not possible for the grant of authority to a Specialised Agency to request advisory opinions to be revoked in Sloan (n 27) 834.

¹⁰⁵ On the need for such judicial leadership in the context of fragmentation, see MP Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism' in JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009); Maduro (n 6); Abi-Saab (n 3); Dupuy (n 3).

which does not close down but rather encourages productive and principled political debate over the fundamental issues at stake. There will be important disagreements about how the balance between such imperatives ought to be struck, and even disagreements about the criteria according to which we might identify more or less productive contributions that the ICJ might make. I have argued for a reflexivity-enhancing role for the ICJ, but, at a more general level, one of the claims of the present article is simply to emphasize that a clear path is available for the ICJ to begin to address such issues, and that the question of what role it chooses to carve out for itself along the way is for the moment an entirely open one.