TOWARD A LEGAL FRAMEWORK FOR REGIME INTERACTION: LESSONS FROM FISHERIES, TRADE, AND ENVIRONMENTAL REGIMES

*By Margaret A. Young**

A range of international laws and institutions now seeks to address the impending global fisheries crisis. Responses include trade laws, fisheries management measures, the law of the sea, environmental treaties, and cross-border species protection.¹ Underlying this legal landscape is the potential for norms from the disparate “regimes” to conflict—a preoccupation of much of the current literature addressing international law’s fragmentation. More importantly for fisheries sustainability, there is uncertainty about how the relevant laws and institutions interact, and indeed how they *should* interact.

To be part of a panel on “Global Health, Trade and Common Resource Regimes” is a welcome opportunity to share legal and empirical accounts of overlapping norms and inter-institutional activity in fisheries governance, and to make a normative claim for a legal framework for such regime interaction. I do so with an awareness of the pitfalls inherent in

³² Model Scheme on Port Measures to Combat Illegal, Unreported and Unregulated Fishing, *available at* <<http://www.fao.org/docrep/010/a0985t/a0985t00.htm>>.

³³ FAO Fishstat Capture Production Database, <<http://www.fao.org/fishery/statistics/software/fishstat/en>>.

³⁴ Lack & Sant have discovered that only 20% of shark catch data reported to the FAO is on a species basis. The data that are available often simply indicate the gross shark catch in tonnages, which is of limited informational value in designing regulatory tools to conserve and manage individual species. See, for example, FAO YEARBOOK 2006, FISHERY AND AQUACULTURE STATISTICS, which reports under one category “sharks, rays and chimaeras.”

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¹ See generally MARGARET A. YOUNG, TRADING FISH, SAVING FISH: THE INTERACTION BETWEEN REGIMES IN INTERNATIONAL LAW 32–82 (2011).

the idea and terminology of “regimes.” As developed in international law jurisprudence, and restated in the ILC’s seminal 2006 fragmentation study, “special regimes” is a term used to describe semi-autonomous branches of international law (especially where primary rules are tied to secondary rules concerning the consequences of breach), as well as whole bodies of professional specialization and expertise.² The international relations scholarship similarly emphasizes the convergence of principles, norms, rules, and decisionmaking procedures in set issue-areas of international concern.³ Yet there are major problems in this conception of contained normativity.⁴ For one, focusing on regimes may obscure the general principles and overall system of international law. There is also a danger in reducing regimes to a single set of characteristics which may preclude a debate about those characteristics or their evolution. The danger is especially great if it forecloses the process of regime interaction. Indeed, the relevant interactions I have encountered in fisheries governance may be conceived as political wrangling between regimes, or as political contests about the definitions of regimes themselves.

What has also become clear in my research on regime interaction on global fisheries issues is that it occurs at different stages of a regime’s development and application. The paradigmatic example is when an international tribunal is called upon to adjudicate norms that span other regimes—such as the WTO Appellate Body’s reference to the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES) in the *U.S.-Shrimp* dispute. Yet regime interaction also occurs outside international dispute settlement. In *law-making*, existing institutions interact in the law’s formulation and future application. Efforts to negotiate new disciplines on fisheries subsidies at the WTO—which, it is hoped, will reduce global vessel capacity and which propose an innovative peer review function for the Food and Agriculture Organization (FAO)—illustrate the ambiguities and challenges of such interaction.⁵ In the *implementation of existing obligations*, seemingly innocuous arrangements like a memorandum of understanding between intergovernmental organizations can become key tools for entrenching regime hierarchy. This was borne out during efforts to protect endangered marine species, when the drafting of a memorandum of understanding between the FAO and the CITES secretariat was initially used by some states to promote “soft law” within one regime over harder obligations within another.⁶ Instances of regime interplay may well promote coherence—as Erika Techera argued today is necessary in shark management—but may alternatively seek to maintain the flexibility of approaches across multiple regimes.

Whenever and wherever regime interaction occurs, it potentially affects the rights and duties of states. For example, a state that has joined the WTO but not the FAO may find itself subject to FAO norms if the FAO has an active role as peer reviewer of the proposed WTO disciplines on fisheries subsidies. If that state is a party to CITES, its rights might be

² Rep. of the Int’l Law Comm’n, 58th sess, 1 May–9 June, 3 July–11 Aug., 2006, 65–101, U.N. Doc. A/CN.4/L.682 (2006).

³ Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* 1, 3 (Stephen Krasner ed., 1983), as well as recent literature on “regime complexes” in, e.g., Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 *PERSP. ON POL.* 7 (2011).

⁴ See Margaret A. Young, *Introduction: The Productive Friction Between Regimes*, in *REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION* (Margaret A. Young ed., forthcoming 2011), and associated chapters, especially James Crawford & Penelope Nevill, *Relations Between International Courts and Tribunals: The “Regime Problem”*; Jeffrey Dunoff, *A New Approach to Regime Interaction*; Andrew Lang, *Legal Regimes and Professional Knowledge: The Internal Politics of Regime Definition*; and Martti Koskenniemi, *Hegemonic Regimes. See also* Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 *MOD. L. REV.* 1 (2007).

⁵ YOUNG, *supra* note 1, at 113–24.

⁶ *Id.* at 134–54.

diminished by the application of FAO scientific principles to the listings of marine species on the CITES appendices. On the other hand, a state that is not a party to CITES may nonetheless find that its WTO rights are affected by a listing of species if such a listing is found to be determinative in a WTO dispute to which it is a party. Given the impact on sovereignty of such meetings of international regimes, it is imperative to locate the legal basis for regime interaction.

Examples from fragmented fisheries governance reveal that there are multiple legal bases for regime interaction, which fall into three broad categories.⁷ The first and strictest conception requires all member states of each regime to have adopted mutual norms before they can have influence. In practice, proponents of the idea that “parallel membership” must be a prerequisite to regime interaction are generally limited to entities that for practical or strategic reasons have not signed up to the relevant regimes (such as Taiwan, which as a customs territory enjoying full WTO membership but no UN status has objected to the FAO’s role in the proposed WTO subsidies disciplines) or tribunals that are overly cautious about the nature of the judicial function (as occurred in the interpretation by a WTO panel of Article 31(3)(c) of the Vienna Convention on the Law of Treaties in the *EU-Biotech* dispute).

A less extreme version of the requirement for consent from members of both regimes envisages that states can agree to allow normative and institutional interplay, notwithstanding that not all members have adopted the relevant regimes. This second category of “mutual agreement” to regime interaction is contained in relevant treaties (such as the provision in CITES that opens its regular conferences to qualified representatives from IGOs and non-governmental organizations), as well as stand-alone agreements (such as the FAO member resolution that provides for ongoing relations with IGOs), and still appears to guarantee legitimacy.

The third category focuses on formal or informal arrangements within and between the relevant international organizations themselves, and is therefore based on something other than state consent. Such arrangements may emerge because, in carrying out their functions, IGO secretariats and adjudicating bodies find it necessary to learn, share, and adopt information from external sources. Divorced from the direct consent or demands of member states, the possibility that such regime interaction has normative influence gives rise to questions of legitimacy. My claim today is that these questions are answered by a legal framework in which procedural safeguards for openness and accountability, legal capacities of IGOs, and the substance of the relevant intersecting norms provide for appropriate regime interaction.

In addressing fisheries depletion, itself a “wicked problem” with no definitive formulation or solution, it is functionally necessary for IGOs within one regime to take account of multiplicitous interests and institutions from another. The CITES secretariat, for example, is empowered to take into account external sources in the negotiation and implementation of fisheries matters where it has the express or implied capacity to do so. Like many global problems, this requires a new interpretation of the principle of implied powers in international institutional law. It also depends on the involvement of a range of non-governmental actors and thus draws on ideas of global administrative law, new governance, and democratic experimentalism.⁸ In contrast to David Gartner, I argue that NGO participation in regime interaction stems not from their representative functions, but from their deliberative credentials.

⁷ *Id.* at 267–71.

⁸ *Id.* at 278–84.

Giving greater latitude to IGO secretariats, technical experts, and NGOs in regime interaction may well signal a “technicalization” of international affairs, and an associated risk of managerialism.⁹ Already IGOs such as the United Nations Environment Programme (UNEP) have noted concern about the risk of bureaucratization in efforts to harmonize international environmental governance. I consider, however, that the legal framework for regime interaction confronts the risk of managerialism and expert-rule by endorsing the participation of those affected by rules. As well as a general principle of inclusion, there is a range of existing and emerging techniques to ensure that NGOs are subject to scrutiny and that their occupation of a finite public realm of regime interaction is appropriate.¹⁰ The potential for the mutual learning between regimes to be revised and critiqued is also enhanced if there is domestic stakeholder consultation in the development of countries’ positions at international forums, as well as provisions for information-sharing, observership rights, and periodic reporting between secretariats. I argue that such processes can affect the relative normativity of intersecting regimes—for example, a norm may be more persuasive if it has been developed according to principles of openness and transparency (and where membership is spread across developing and developed countries). Moreover, the accessibility to a range of participants of an IGO may be relevant to its later capacity to interact with others. If the FAO is to act as peer reviewer for the conduct of states in the proposed WTO subsidies disciplines, for example, the WTO should continually assess the FAO’s internal procedures.

The legal framework for regime interaction falls short of an argument for constitutionalism. Although the goals of a self-constituting international society are attractive in the context of globalizing social and political structures, the trade and environmental quandaries of fisheries governance manifest a strong resistance to hierarchical norms. In the interaction between regimes, arguments for exclusivity within regimes or trumping norms give way to a need continuously to engage and contest social and political solutions and governance structures. The legal framework builds on existing structures and processes to ensure ongoing and open contestation between a range of stakeholders rather than entrenched ideals.

These ideas to improve accountability as part of a legal framework for regime interaction are exploratory, and in some instances speculative. Yet they represent an effort to understand the progressive development of international law in the context of fragmentation and an attempt to improve the way fisheries governance adapts to complexity and pluralism. They lead to new conceptions about the capacities and duties of IGOs and the scrutiny of NGOs—and can in turn affect the norms within regimes and within general principles of international law. My argument for a legal framework for regime interaction has major implications for international law’s legitimacy and meaning, and is also based on the need to address the concerns, not just of states, but of the international community on important global problems such as fisheries depletion.

⁹ Koskenniemi, *The Fate of Public International Law*, *supra* note 4.

¹⁰ YOUNG, *supra* note 1, at 278–84.

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