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Trading Fish, Saving Fish

The Interaction between Regimes in
International Law



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Trading Fish, Saving Fish

Numerous international legal regimes now seek to address the global depletion of fish stocks, and increasingly their activities overlap. The relevant laws were developed at different times by different groups of states. They are motivated by divergent economic approaches, influenced by disparate non-state actors, and implemented by separate institutions such as the World Trade Organization and the United Nations Food and Agriculture Organization. Margaret A. Young shows how these and other factors affect the interaction between regimes. Her empirical and doctrinal analysis moves beyond the discussion of conflicting norms that has dominated the fragmentation debate. Case studies include the negotiation of new rules on fisheries subsidies, the restriction of trade in endangered marine species and the adjudication of fisheries import bans. She explores how regimes should interact, in fisheries governance and beyond, to offer insights into the practice and legitimacy of regime interaction in international law.

MARGARET A. YOUNG is Senior Lecturer at Melbourne Law School, Australia, and has previous professional experience at the World Trade Organization and the United Nations. She was the inaugural Research Fellow of Public International Law at the Lauterpacht Centre for International Law and Pembroke College, Cambridge.

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Foreword

A list of the achievements of international environmental law would undoubtedly include the survival and recovery of the great whales (a process of recovery that has taken place, ironically, under a treaty designed to guarantee the continued exploitability of whales). A list of the failures of international environmental law would likely include the increasingly fragile state of most other pelagic stocks (a process of decline and mismanagement that has taken place under the auspices of regional treaties designed to maintain the sustainability of covered species). As with northern cod in 1991, the road to stock collapse has been paved with good projections.¹

This record may suggest to the unconverted that the only applicable law in regard to fisheries is the law of unintended consequences. But that would be a mistake. In the more than fifty years since the adoption of the Third Geneva Convention of 1958, international law and international institutions have been a significant force, for good or ill – and this even though the number of contentious cases concerning the merits of fishery conservation measures can be counted on the fingers of one hand.

Instead, the world's pelagic fisheries are managed through some thirty regional fisheries organizations (RFOs) under the general auspices of the Fish Stocks Agreement and Articles 116–120 of UNCLOS. Margaret Young's splendid study is based on the premiss – surely correct – that

¹ Cf. *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan), *Provisional Measures*, oral argument, ITLOS/PV.99/21/Rev.2, 18 August 1999, p.13; and see M Kurlansky, *Cod: A Biography of the Fish that Changed the World* (Vintage, 1999).

there is 'greater scope for international lawyers to contribute understanding and ideas about collaboration and cohesion within these [fishery] regimes, rather than focussing on *ex post* rules determining priority in later disputes'. This shift enables her to take into account other factors – such as 'soft-law instruments' like the FAO Code of Conduct – and to be soft *ratione personae* as well, given the involvement of 'a multitude of stakeholders on whom fisheries enforcement and monitoring depends, including non-state actors'.

A key notion in her work is that of 'regime', a term used to describe 'a set of laws, processes and institutions that have evolved by addressing a particular problem or function'. In that sense some, but by no means all, current RFOs constitute regimes. Treaties can be concluded with more or less preparation, whereas regimes need time to grow.

But the use of the term 'regimes' does not require exclusivity, or the 'self-contained regime' posited by international law theory. As Dr Young remarks, 'the more pressing concern is to ascertain how CITES, UNCLOS, the Fish Stocks Agreement and the FAO instruments coexist in an effective way'. This story of the struggle for regime interaction she tells clearly and well, ranging across the various fields of practice and the different legal instruments with assurance. Particular highlights include her account of the Memorandum of Understanding between the CITES Secretariat and the FAO, and the work of the WTO, both on fisheries subsidies and dispute settlement (concluding, as to the latter, on the need for greater transparency).

Dr Young draws both practical and theoretical lessons from her case studies. In practical terms she stresses 'the need for national policy coordination in international trade and environmental governance', the need in that context for inter-agency collaboration, the desirability of avoiding *a priori* determinations of competence of international organisations (typified by the decision of the ICJ in *Use of Nuclear Weapons*), and the clear need to assess the credibility of NGOs.

At the level of theory there are conclusions both particular and general. Among the former is her conclusion that regime interaction 'does not depend on the agreement of all participating states, whether express or implied', and (as a corollary) a rejection of the 'perceived requirement of parallel membership for regime interaction'. Among the latter is the idea that 'the need for representation in governance' is less important than 'the practical need for diverse perspectives'.

Overall this is a major contribution to our understanding of ‘the progressive development of international law in the context of fragmentation’ as well as ‘an attempt to improve the way fisheries governance adapts to complexity and pluralism’. May it be as successful in its particular as in its general aims!

James Crawford
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Useful professional experience in international organisations has included research assistance at the United Nations International Law Commission in 2003 (for which I thank Václav Mikulka), attendance at the UN Food and Agriculture Organization's Sub-Committee on Fish Trade in 2004 and an internship at the Appellate Body Secretariat of the World Trade Organization in 2005. Consultations with WTO Secretariat staff and trade delegates in Geneva – particularly Doaa Abdel Motaal, Clarisse Morgan, Ana Novik and Werner Zdouc – were invariably useful, as were discussions at the Food and Agriculture Organization, Rome, for which I thank Kevern Cochrane and William Emerson in particular. I also acknowledge the support of King's College, Cambridge, the Cambridge Gates Trust, the Cambridge Faculty of Law, the *Modern Law Review*, the Commonwealth Scholarship and Columbia Law School.

In 2007, I was appointed inaugural research fellow in public international law at Pembroke College and the Lauterpacht Centre for International Law, Cambridge, and I am grateful for the stimulating and collegial academic environment afforded by these institutions. In 2009, I commenced my present role as Senior Lecturer at Melbourne Law School, University of Melbourne, and the thought-provoking discussions and exacting questions from my current colleagues and students continue to shape my ideas.

Parts of the book use materials published earlier: Chapter 5 develops some sections that were first published as 'The WTO's Use of Relevant Rules of International Law: An Analysis of the Biotech Case' (2007) 56:4 *International and Comparative Law Quarterly* 907. Chapter 3 contains research that was first published as 'Fragmentation or Interaction: The WTO, Fisheries Subsidies, and International Law' (2009) 8:4 *World Trade Review* 477. Chapter 4 contains material published as 'Protecting Endangered Marine Species: Collaboration between the Food and Agriculture Organization and the CITES Regime' (2010) 11:2 *Melbourne Journal of International Law* 441.

Margaret Young
Melbourne, 2010

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<i>Canada – Herring and Salmon</i>	GATT Panel Report, <i>Canada – Measures Affecting Exports of Unprocessed Herring and Salmon</i> , adopted 22 March 1988, BISD 35S/98
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<i>Thai-Cigarettes</i>	GATT Panel Report, <i>Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes</i> , DS10/R – 37S/200, adopted 7 November 1990

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US – Tuna I	GATT Panel Report, <i>United States – Restrictions on Imports of Tuna</i> (1991) GATT Doc. DS21/R (Mexico)
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<i>Military and Paramilitary Activities in Nicaragua (Merits)</i> [1986] ICJ Rep 16	<i>Military and Paramilitary Activities in Nicaragua (Merits)</i> [1986] ICJ Reports 16
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