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### **SYSTEMIC INTEGRATION AND MULTILATERAL REGIMES**

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## SYSTEMIC INTEGRATION AND MULTILATERAL REGIMES

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My task today is to engage with Campbell McLachlan’s illuminating manuscript<sup>1</sup> by considering the principle of systemic integration in the context of multilateral regimes. While multilateral treaties and institutions that seek near-universal membership, such as the United Nations Charter, the GATT, and the Paris Agreement, seem the preeminent mode of collective decision-making, there is much restraint on any amalgamating forces from the rest of public international law. By contrast, interpreting a primary treaty text by integrating customary international law is relatively straightforward.<sup>2</sup> So too is interpreting a primary bilateral or regional treaty text by integrating treaties with the same membership. For the purpose of this discussion, I adopt the definition of ‘regimes’ developed in earlier work from public international law and international relations scholarship:

regimes are sets of norms, decision-making procedures and organisations coalescing around functional issue-areas and dominated by particular modes of behaviour, assumptions and biases.<sup>3</sup>

I wish to make three points: in turn, doctrinal, normative and analytical. First, systemic integration that takes into account multilateral regimes is circumscribed, rather than facilitated,

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<sup>1</sup> SI Ch 1 Draft 25.05.20; SI Ch 8 Rev Draft 25.05.20. See also Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *ICLQ* 279

<sup>2</sup> This extends to general principles: see *Arbitration Regarding the Iron Rhine (“Izjeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Award, 24 May 2005, para 58-61; 222-226; see also *In the Matter of the Indus Waters Kishenganga Arbitration between the Islamic Republic of Pakistan and the Republic of India*, Partial Award, 18 February 2013, para 451 et seq.

<sup>3</sup> Margaret A. Young, ‘Introduction: The Productive Friction between Regimes’ in Margaret A. Young (ed) *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 11.

by VCLT Article 31(3)(c). Instead, alternative processes of treaty interpretation must be sought. Secondly, within alternative processes of treaty interpretation, such as VCLT Article 31(1) and 31(3)(a) and (b), there is scope to draw on the practice and activities of international organizations, non-state organizations, subnational entities and other actors. This can be done with rigour and constraint. Thirdly, even with this broader permissible ‘context’, the principle of systemic integration is skewed away from the material realities of the 21st century, especially in the environmental sphere. Treaties protecting public goods are rarely the primary text to which the principle is applied, due to the uneven provision for compulsory dispute settlement and the lack of willingness of states to submit disputes to forums of general jurisdiction such as the International Court of Justice. Although certain protections have flourished in public international law, including through the establishment of multilateral regimes, the principle of systemic integration is integrative of only part of public international law.

## **I. CIRCUMSCRIBED NATURE OF VCLT ART 31(3)(C)**

By requiring a treaty interpreter to take into account ‘any relevant rules of international law applicable in the relations between the parties’, VCLT Article 31(3)(c) rules out multilateral regimes that do not enjoy parallel or overlapping membership with the primary text.<sup>4</sup> This was apparent in the *EC-Biotech* dispute and the panel’s interpretation of the SPS Agreement. The complaining states, the United States, Argentina and Canada, were not parties to the Biosafety Protocol and the panel ruled that it could not be taken into account.<sup>5</sup> This allowed a minority

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<sup>4</sup> During the Zoom presentation, an infographic demonstrating a situation of non-uniform membership visually demonstrates this issue. The infographic was developed by M. Young and coded by C. Smith to show the group of states receiving funding for ‘reducing emissions from deforestation and forest degradation’ under the UNFCCC: <http://cobismith.github.io/forestlaws/>. A ‘click’ on the relevant treaties and agreements demonstrates that out of this group of countries, there is parallel membership of the Convention on Biological Diversity, yet South Sudan and Sri Lanka are not parties to the Convention on International Trade in Endangered Species. In theory, this means that those two countries can veto systemic integration. Conceptual issues of overlap relate to the priority given to biological diversity over carbon-rich forest monocultures or the use of trade restrictions on certain species of trees and other forest flora. See further Maureen Tehan, Lee Godden, Margaret Young and Kirsty Gover, *The Impact of Climate Change Mitigation on Indigenous and Forest Communities* (CUP, 2017) 49-54.

<sup>5</sup> Argentina and Canada had both signed the Protocol, and all states had participated in the negotiations. Margaret Young, ‘The WTO’s use of relevant rules of international law: an analysis of the Biotech case’ (2007) 56 *ICLQ* 907-929. In addition to the limitation imposed by the use of ‘the parties’, Danae Azaria in her comments at the symposium points to the relevance of the terms “relevant” and “take into account” in VCLT Article 31.

of states – in this case, three states – to veto the evolution of law in the context of newly developing technologies, a near-universal domestic implementation<sup>6</sup> and a 172-strong state membership. It might be argued that this veto is appropriate given the underlying principle of sovereignty and consent in public international law. Such an argument does not stand up, however, when the lens is turned to the sovereignty and consent of the respondent (the European Commission), the EU member states, and the 150-odd other states implementing biosafety measures.

McLachlan recognises this limitation when he states that ‘[t]he operation of the principle of systemic integration is not limited to Article 31(3)(c)’.<sup>7</sup> Indeed, in the Appellate Body decision in *US-Shrimp*, VCLT Article 31(1) is the most likely source for interpretative steps, although this was not express.<sup>8</sup> In that case, the AB was comfortable in taking into account relevant rules even where the disputing parties had not apparently consented to them.<sup>9</sup>

The circumscribed nature of VCLT Article 31(3)(c) takes on a special significance in the context of the current malaise in multilateralism and the withdrawal by states from regimes.<sup>10</sup> For the interpretation of treaties to allow for evolution and integration, alternative conceptions are needed.

## II. PRACTICE AND ACTIVITIES OF OTHER ACTORS

Let me now turn to a more open process of treaty interpretation. This draws on my normative arguments for a ‘legal framework for regime interaction’,<sup>11</sup> as well as insights from domestic and local processes of regime interaction.<sup>12</sup> I argue that interpretation may continue to cleave

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<sup>6</sup> Argentina, Canada and the United States all participated as domestic focal points in the Biosafety Clearing House.

<sup>7</sup> SI Ch 8, para 8.190.

<sup>8</sup> Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP, 2003) 256; see also Margaret A. Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (CUP 2011) 189-240.

<sup>9</sup> The AB did not identify whether the disputing parties or the WTO membership as a whole had ratified the relevant treaties upon which it drew, except for the Resolution on Assistance to Developing Countries adopted in junction with the Convention on Migratory Species, upon which the AB partly relied in its interpretation of ‘natural resources’ in GATT Art XX. See further Young, *ibid*, 199.

<sup>10</sup> James Crawford, ‘The Current Political Discourse Concerning International Law’ (2018) 81 *Modern Law Review* 1.

<sup>11</sup> Young, above n 8, 267-287.

<sup>12</sup> Tehan et al, above n 4, 330-1.

to the consent of states but also allow influence from multilateral regimes, under certain conditions.<sup>13</sup>

Alternative concepts rely upon substantive and procedural assessments of the multilateral regime to which account is taken. For example, a WTO panel would have discretion to determine the relevance of the Biosafety Protocol by reference to the history and integrity of its institutional development as well as its substantive goals. The good faith interpretation of Article 31(1) could lead to a consideration of the collaboration between relevant stakeholders in the negotiation of the Biosafety Protocol; whether it was open to all WTO members and had been endorsed by a majority of them; and so on.<sup>14</sup> Such ideas are also apparent in studies of informal international law-making, where a ‘thick stakeholder consensus’ can provide legitimacy.<sup>15</sup>

VCLT Article 31(3)(a) and (b) allow for subsequent agreement and subsequent practice to be taken into account. This is a tighter set of conditions, to be sure, but will be increasingly important as multilateral regimes adopt regular decisions of conferences of the parties (COPs).<sup>16</sup> COP decisions may acknowledge the need for actions of states parties to be consistent with relevant international law without requiring that law to be ‘applicable between the parties’.<sup>17</sup>

Such ideas require greater assessment of the powers of international organizations (for whom it is functionally necessary to take account of multiple interests and institutions).<sup>18</sup> Openness

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<sup>13</sup> This discussion demonstrates the link between all stages of law-making, implementation and adjudication – which for McLachlan relates to judicial integration and legislative integration (see SI Ch 1, para 1.69).

<sup>14</sup> Young, above n 8, 296.

<sup>15</sup> Joost Pauwelyn, Ramses Wessel and Jan Wouters, ‘When structures become shackles: Stagnation and dynamics in international lawmaking’ (2014) 25(3) *European Journal of International Law* 733.

<sup>16</sup> International Law Commission, *Fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties by Georg Nolte, Special Rapporteur* (2018) (A/CN.4/715). Draft conclusion 11 [10] – Decisions adopted within the framework of a Conference of States Parties.

<sup>17</sup> In the United Nations Framework Convention on Climate Change (UNFCCC), for example, a COP decision on ‘reducing emissions from deforestation and forest degradation’ set out ‘safeguards’ so that country recipients of funding ensured ‘[their] actions complement or are consistent with the objectives of national forest programmes and relevant international conventions and agreements’: UN Doc FCCC/CP/2010/7/Add.1 (14 March 2011) Decision 1/CP.16., Appendix I, para 2. See further Tehan et al, above n 4, 25-31.

<sup>18</sup> Young, above n 8, 275. Memoranda of understandings between international organizations is a ripe area of study: see ‘Protecting Endangered Marine Species: Collaboration between the Food and Agriculture Organization and the CITES Regime’ (2010) 11 *Melbourne Journal of International Law* 441.

to non-state organizations is, at times, necessary to shore up deliberative rather than representative credentials. Subnational entities may also be relevant to the way in which laws are implemented.<sup>19</sup> These issues are relevant not just to treaty interpretation, but to other ways in which multilateral regimes may be integrated through an assessment of facts, consultation with international organisations and other bodies, and the development of doctrine such as ‘due regard’ by the International Court of Justice.<sup>20</sup>

### III. PRIORITIES ABOUT PUBLIC GOODS

I wish now to make a broader analytical assessment of public international law as a whole, and argue that the principle of systemic integration is far from systemic in its operation. The principle is applied in a minority of situations, commonly involving the interpretation of primary treaty texts agreed by states to facilitate the extraction, exploitation or trade of goods and services. As such, the process of discursive reasoning which McLachlan explores arises in highly circumscribed contexts, of which international economic law plays the major role.

McLachlan argues that the application of the principle ‘demonstrates the capacity of international law to accommodate sometimes radically competing priorities about public goods in their application to specific cases and to respond to change’.<sup>21</sup> He might include the sea turtles that featured in *US-Shrimp* here, although WTO case was brought on the basis of alleged discrimination by the US with respect to shrimp imports. Other ‘public goods’ subject to adjudication by international courts include whales, southern bluefin tuna and freedom from the threat of nuclear weapons.<sup>22</sup> I would argue that it is rare for disputes to turn on the interpretation of a primary text guaranteeing public goods. Instead, the interpretation may well be of a primary text with a functional orientation that does not prioritise the protection of public goods, and that contains exceptions narrowly construed and interpreted.

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<sup>19</sup> This may even extend to local-level actors and indigenous peoples: Tehan et al, above n 4. Increasingly, domestic courts will have relevance too: see Margaret A. Young, ‘Legal Responses to Climate Change: The Audacity of International Adjudication’, inaugural lecture at the European University Institute, 19 September 2019.

<sup>20</sup> Margaret A Young and Sebastian Rioseco Sullivan, ‘Evolution through the Duty to Cooperate: Implications of the Whaling Case at the International Court of Justice’ (2015) 16 *Melbourne Journal of International Law* 311.

<sup>21</sup> SI Ch 1, para 1.26.

<sup>22</sup> Margaret A. Young, ‘International Adjudication and the Commons’ (2019) 41 *University of Hawai’i Law Review* 353 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3495340](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3495340)

Issues of collective concern are entrenched in international law mainly through negotiation rather than adjudication.<sup>23</sup> Multilateral environmental agreements are mostly outside of the purview of international courts, as McLachlan recognises.<sup>24</sup> This ‘blind spot’ of international courts has long been discussed,<sup>25</sup> but it is particularly important to recognise its impact on any optimistic promise of ‘systemic integration’. There have been attempts to create binding rights in the form of a proposed Global Pact for the Environment,<sup>26</sup> which could provide much needed integration. Yet at the present time, the prospect of integration that is responsive to the urgent need to respect and protect the natural environment is weak.<sup>27</sup> Integration that seeks recognition as ‘systemic’ needs to acknowledge this fundamental limitation.

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<sup>23</sup> Jutta Brunnée, ‘Common Areas, Common Heritage, and Common Concern’, in Daniel Bodansky et al (eds) *The Oxford Handbook of International Environmental Law* (2008) 550, 572.

<sup>24</sup> SI Ch 1, para 1.103.

<sup>25</sup> Oren Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (Hart, 2004).

<sup>26</sup> UNGA Resolution 72/277 of 10 May 2018 entitled ‘Towards a Global Pact for the Environment’. See further <https://globalpactenvironment.org/en/>; see also Y. Aguila and J. E. Viñuales (eds.), *A Global Pact for the Environment: Legal Foundations* (Cambridge: C-EENRG, 2019).

<sup>27</sup> Margaret A. Young, ‘Fragmentation’ in Lavanya Rajamani and Jacqueline Peel (eds), *Oxford Handbook of International Environmental Law* (2nd edn, forthcoming) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3441535](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441535).