

# Reciprocity and the Making of International Environmental Law

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## Introduction

Consider the following assertions: (1) International law is only political rhetoric; (2) International law controls and constrains the behavior of states. Notwithstanding the sophistication of modern scholarship in international law and international relations, these simple assertions remain disturbingly familiar. They concern a question that arises in every introductory course in international law and international relations disciplines, that dominates interdisciplinary enquiries, and that - despite the multiple effects of globalization - remains prominent in the public psyche: Is international law really law?

Boiled down to their bare bones, most academic writings at the interface between international law and international relations address this age-old question. To what degree - and how - do norms, rules and institutions constitute tools used by international decision-makers to encourage other decision-makers to adopt policies and take actions that cannot entirely be explained on the traditional realist bases of interest and power? Regardless of whether we call it law (and I am greatly encouraged by the new-found willingness of some IR scholars use the “L-word”) there is a growing sense that obligation / normativity does contribute to the shaping of international decision-making in ways that cannot adequately be explained solely on the basis of more traditional theoretical approaches (such as game theory). Regime theory, institutionalism and constructivism represent an ongoing evolution of thought that - from my perspective at least - goes a long way to explaining how norms and rules “matter”.

Nevertheless, much of the work engaged in by those of us who seek to explain the role of international law in international politics suffers somewhat from being either: (a) too general and theoretical to discuss any real life examples (e.g. any of Friedrich Kratochwil’s work), or to be anything more than anecdotal in so doing; or (b) too specific, or sectoral, in its approach to lead to significantly greater understanding of how the international legal system operates *across the board*. Although there are exceptions (including, to some degree, Anne-Marie Slaughter’s work on transnational networks), and though I admire and am learning from much of this scholarship, I take the view that more attention should be given to a cross-cutting slice of the international legal system that is neither overly general nor overly sectoral, and of considerable overarching importance: i.e. the various ways in which international law is made. More specifically, my current work, and the examples set out later in this paper, focus upon how decision-makers use existing rules and principles of international law as they seek to influence other decision-makers in the making of new rules and principles. And as will become apparent, I consider international environmental law to be an integral part of international law more generally.

The tendency of IR scholars and international lawyers to juxtapose international law and international politics overlooks two simple facts about *every* legal system: (1) Law-making is a political process; (2) The politics of law-making always occurs within a framework that includes pre-existing rules and institutions, accepted processes of law-making, and perhaps a constitutional instrument of some kind.

In domestic democracies, legal frameworks clearly condition and qualify the political processes through which laws are made. Sometimes the limitations are obvious, such as the common requirement that legislation be adopted by a fifty-percent vote of a parliament or congress. Sometimes the limitations concern the allocation of power between different law-making organs. Domestic constitutions, even unwritten ones, assign different law-making roles to the executive, legislative and judicial branches of government. Similarly, the constitutions of many states allocate legislative powers between federal and regional organs. In more subtle but equally important ways, rules concerning the relationship between different kinds of law, and rules concerning the interpretation of legal texts, are not only standard to any domestic legal system; they constrain those who seek to make new rules, or change old ones.

Domestic law-makers - and political lobbyists - are aware of these constraints and actively seek to exploit them to their own advantage. They understand that in the hands of an adept politician, any given part of the legal framework can serve either to protect an existing position, or to facilitate a change. Indeed, were law-making simply a question of counting votes in a legislative body, domestic politics would lose much of its fascination. In addition to negotiating policy choices, law-makers promote their goals by linking or de-linking issues to existing laws, by exploiting procedural limitations, by negotiating tradeoffs between new initiatives and old rules, by seeking to engage, or distance themselves from, other branches of government, including the courts - in short, by using the existing legal system much like a golf player uses the slope of the green to negotiate his ball around hazards. Nor do domestic law-makers operate solely by instinct, or in a short term, tactical ways. They also think about such approaches in a strategic manner - as they seek to exploit the legal system to their political advantage, not only in the short-term, but also over time.

One would expect a similar situation to prevail in international politics. The international legal system has its own pre-existing rules and institutions, its own accepted processes of law-making, and its own constitutional instruments - both formal and informal. It also has highly sophisticated law-makers, dominated by the large bureaucracies of developed states, as well as powerful lobbyists in the form of transnational corporations and non-governmental organizations. All of these actors can reasonably be expected to think about the making of international law in strategic terms. Indeed, the fact that many of these international actors are also important actors in domestic systems, and think strategically about law-making there, makes it almost inevitable that strategic thinking about law-making occurs in the international context as well.

One can therefore hypothesize that for many international actors, the following questions are everyday concerns: How can law-making goals be linked or de-linked to existing international rules, principles and institutions, how can procedural limitations of various kinds be exploited, how can tradeoffs be

negotiated between new issues and old rules, and how can other parts of the international system - or domestic systems - be engaged or avoided, so as to increase the likelihood of success in achieving legal goals?

This paper explains how strategic thinking about law-making already occurs in international affairs.<sup>1</sup> The examples - which happen to involve issues of considerable environmental consequence - enable us to consider how strategic thinking informs the making of customary international law, i.e. those rules formed by the combination of state practice (what states say and do) and *opinio juris* (a subjective belief in the legal relevance of state practice). They also encourage us to think about the advantages offered by strategic thinking in the negotiation and implementation of treaties, for treaties are often closely intertwined with existing or developing rules of customary international law. It is hoped that these examples, and the brief discussion that follows, will demonstrate the need for greater scholarly attention to strategic thinking in the making of international law, and thus international environmental law.

### **Reciprocity and Coastal State Jurisdiction in the Law of the Sea**

In the absence of an overarching sovereign in international society, international law has frequently been understood as involving a multitude of bilateral relationships between those entities which have international legal personality, i.e. predominantly states.<sup>2</sup> Since there is no overarching sovereign at least some parts of this law do not necessarily need to apply to any one state, nor does this law have to apply in the same way to all states, that is, it does not need to be generalized. Instead, the application of rules of international law to a state is usually regarded as being dependent on that state's consent, which may be accorded either to specific rules, or to legal processes more generally.<sup>3</sup> This consent operates bilaterally, as can be seen in the requirement of consent by state parties to reservations to

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<sup>1</sup> The examples in this paper are drawn from my book *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999) (hereinafter "*Custom, Power and the Power of Rules*").

<sup>2</sup> See, e.g., Zdenek Sloufka, *International Custom and the Continental Shelf* (The Hague: Martinus Nijhoff, 1968); and Vaughan Lowe, "Do General Rules of International Law Exist?" (1983) 9 *Review of International Studies* 207.

<sup>3</sup> See *Custom Power and the Power of Rules*, 142-6.

multilateral treaties,<sup>4</sup> and in the existence of special customary international law.<sup>5</sup>

The concept of reciprocity is fundamental to bilateralism. The concept of reciprocity involves the idea that bilateral relationships between at least formally equal social partners are not unidirectional, but necessarily involve at least some element of *quid pro quo*.<sup>6</sup> This broad social concept of reciprocity, which states apply on the basis of either short- or long-term considerations of self-interest, may be responsible for a great deal of inter-state co-operation or exchange, outside or in addition to any international legal obligations.<sup>7</sup> However, this general concept also finds expression in a principle of international law: thus, in the context of general customary international law any state claiming a *right* under that law has to accord all other states the same right.<sup>8</sup>

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<sup>4</sup>See Art. 20 of the Vienna Convention on the Law of Treaties, 1155 *United Nations Treaty Series* 331, reproduced in (1969) 8 *International Legal Materials* 679. This requirement is also part of customary international law. See Arnold McNair, *Law of Treaties* (Oxford: Oxford University Press, 1961) 158-77.

<sup>5</sup>See Gérard Cohen-Jonathan, “La coutume locale,” (1961) 7 *Annuaire français de droit international* 119; Paul Guggenheim, “Lokales Gewohnheitsrecht,” (1961) 11 *Österreichische Zeitschrift für öffentliches Recht* 327; Anthony D’Amato, “The Concept of Special Custom in International Law,” (1969) 63 *American Journal of International Law* 211; Michael Akehurst “Custom as a Source of International Law,” (1974-75) 47 *British Yearbook of International Law* 28-31; and Serge Sur, *La coutume internationale* (Paris: Librairies Techniques, 1990) 2e cahier, 3 & 12-13. Lowe, *supra*, note 2, 209 (emphasis in original) has described international law as a “network of obligations” in which:

[A] rule may only be said to be general in the *descriptive* sense that it is a rule to which states in general subscribe, but this does not imply that it is general in any *prescriptive* sense, applying in principle to all states.

<sup>6</sup>In some instances, however, such as with respect to some unequal treaties, the *quid* might be considerably smaller than the *quo*. In addition, it may frequently be the case that reciprocity does not occur in the same discrete situation, but is provided at another time, in another “transaction”. Robert Keohane, “Reciprocity in International Relations,” (1986) 40 *International Organization* 1, has referred to the latter form of reciprocity as “diffuse reciprocity”.

<sup>7</sup>See generally Keohane, *ibid*.

<sup>8</sup>This distinction between the general, social concept and the legal principle of reciprocity is similar to that made by Michel Virally between “la réciprocité formelle” and “la réciprocité réelle” (i.e., between formal and real reciprocity). See Virally, “Le principe de réciprocité dans le droit international contemporain,” (1967-III) 122 *Recueil des cours* 29-34. See also Bruno Simma, “Reciprocity,” in

If the principle of reciprocity ensures that any state claiming a right under general customary international law accords that same right to every other state, states will only claim rights which they are prepared to see generalized. This is because a generalized right subjects the state to corresponding obligations *vis-à-vis* all other states.

However, the principle of reciprocity may do more than just limit what states are prepared to claim. It may also be a tool which individual states use to their own advantage, in some circumstances, to influence the development, maintenance or change of particular customary rules. The following two examples demonstrate different ways in which the principle of reciprocity may be used for this specific purpose. A third example then demonstrates how the principle of reciprocity may have been used in a purported attempt to develop or change a customary rule, in order to apply pressure in the negotiation of a treaty concerning the same issue.

### *The Truman Proclamation*

In 1945 President Harry S. Truman of the United States issued a Proclamation with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf.<sup>9</sup> Commonly known as the “Truman Proclamation”, it stated, *inter alia*:

[T]he Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.<sup>10</sup>

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Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam: North-Holland, 1984) vol. 7, 400. For an explanation of the general concept of reciprocity from the perspective of general legal theory, as the source of most obligations, see Lon Fuller, *The Morality of Law* (rev. ed.) (New Haven: Yale University Press, 1969) 19-27.

<sup>9</sup>Reproduced in (1946) 40 *American Journal of International Law Supplement* 45. He also, simultaneously, issued a Proclamation with Respect to Coastal Fisheries in Certain Areas of the High Seas. Reproduced in (1946) 40 *American Journal of International Law Supplement* 46. On the effects of the Truman Proclamation and its effects on customary international law, see generally: Sloufka, *supra*, note 2; and James Crawford & Thomas Viles, “International Law on a Given Day,” in *Völkerrecht zwischen normativem Anspruch und politischer Realität: Festschrift für Karl Zemanek* (Berlin: Duncker and Humblot, 1994) 45.

<sup>10</sup>*Ibid.*

At the time it was made, the claim was inconsistent with pre-existing international law.<sup>11</sup> No state had ever made a general claim to control over all of the seabed resources of its continental shelf beyond twelve nautical miles, nor had anything approaching such a claim appeared in any treaty. Yet notwithstanding the initial inconsistency between the United States' claim and pre-existing international law, the claim rapidly acquired the status of customary international law as other states followed the lead of the United States and made similar claims to jurisdiction over their own continental shelves.<sup>12</sup> By 1951 the International Law Commission had included coastal state rights over the continental shelf in a set of Draft Articles,<sup>13</sup> and in 1958 the customary status of this rule was confirmed by its inclusion in various provisions of the Geneva Convention on the Continental Shelf.<sup>14</sup>

Why was the Truman Proclamation so successful in promoting the development of a rule of customary international law? One important factor was undoubtedly the position of the United States. In 1945 the United States was by far the world's most powerful state, having emerged victorious and relatively unscathed from the Second World War. However, a more important factor seems to have been the character of the Proclamation's claim, which promoted general acceptance and acquiescence in three ways. First, it conceded the right of all coastal states to make similar claims. At one point it stated that

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<sup>11</sup>See Cecil Hurst, "Whose is the Bed of the Sea?", (1923-4) 4 *British Yearbook of International Law* 34; and Crawford & Viles, *supra*, note 9.

<sup>12</sup>These states included Mexico (1945), Argentina (1946), Panama (1946), Nicaragua (1947), Chile (1947), Peru (1947), Costa Rica (1948), the United Kingdom for Bahamas and Jamaica (1948), Guatemala (1949), Brazil (1950), El Salvador (1950), Honduras (1950), the United Kingdom for British Honduras and the Falkland Islands (1950), and Australia (1953). See Richard Young, "Recent Developments with Respect to the Continental Shelf," (1948) 42 *American Journal of International Law* 851-4; *idem*, "The Continental Shelf in the Practice of the American States," (1950-I) *Inter-American Juridical Yearbook* 27-33; and D.P. O'Connell, *The International Law of the Sea* (Oxford: Clarendon, 1982) vol. 1, 474. For contemporaneous practice in the Persian Gulf, see Richard Young, "Further Claims to Areas Beneath the High Seas," (1949) 43 *American Journal of International Law* 790. On the United Kingdom's reaction, see Geoffrey Marston, "The Incorporation of Continental Shelf Rights into United Kingdom Law," (1996) 45 *International and Comparative Law Quarterly* 15-19.

<sup>13</sup>Draft Articles on the Continental Shelf and Related Subjects, in *Report of the ILC Covering the Work of its 3<sup>rd</sup> Session* (1951) 2 *Yearbook of the International Law Commission* 123, 141.

<sup>14</sup>499 *United Nations Treaty Series* 311. The only element of the Truman Proclamation which was not adopted in the 1958 Convention was its approach to the delimitation of shared continental shelves, and it was precisely this aspect of the Convention which was held by the International Court of Justice in the 1969 *North Sea Continental Shelf Cases* (1969) *ICJ Reports* 3 *not* to accord with customary international law.

“the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just”.<sup>15</sup> In terms of rights under international law, the United States was claiming something both for itself *and* for all other coastal states.

Secondly, the rights claimed by the Proclamation did not depend for their validity on actual occupation or prescriptive use of the areas concerned. This meant that these rights could be held by all coastal states regardless of their size, strength or level of economic and technological development.

Thirdly, many other states stood to benefit from the claimed right because virtually all coastal states have continental shelves. Had these states denied the validity of the United States claim, they would have been denying potentially substantial benefits to themselves. The idea of coastal state jurisdiction was thus, in the words of one scholar, a “marketable concept in the marts of international law”.<sup>16</sup> For all of these reasons the Truman Proclamation is a classic example of a successful effort to develop a new customary rule.<sup>17</sup>

#### *The Arctic Waters Pollution Prevention Act*

In 1970 the Parliament of Canada approved the Arctic Waters Pollution Prevention Act.<sup>18</sup> The Act, which was not presented as a claim to sovereignty, gave the Canadian government wide powers to regulate shipping within 100 nautical miles of Canada’s Arctic coast.<sup>19</sup> It prescribed

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<sup>15</sup>*Supra*, note 9.

<sup>16</sup>Young (1948), *supra*, note 12, 849.

<sup>17</sup>It was also a conscious effort. See Crawford & Viles, *supra*, note 9.

<sup>18</sup>*Revised Statutes of Canada* 1985, vol.1, c.A12; reproduced in (1970) 9 *International Legal Materials* 43. See generally Richard Bilder, “The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea,” (1970-1) 69 *Michigan Law Review* 1; Louis Henkin, “Arctic Anti-Pollution: Does Canada Make or Break International Laws?” (1971) 65 *American Journal of International Law* 131; Ronald St. J. Macdonald, G.L. Morris & D.M. Johnston, “The Canadian Initiative to Establish a Maritime Zone for Environmental Protection,” (1971) 21 *University of Toronto Law Journal* 247; and Alan Beesley, “The Canadian Approach to International Environmental Law,” (1973) 11 *Canadian Yearbook of International Law* 3.

<sup>19</sup>The Act applied to “Arctic waters”, which were described as frozen or liquid waters “adjacent to the mainland and islands of the Canadian Arctic within the area enclosed by the sixtieth parallel of north latitude, the one hundred and forty-first meridian of west longitude and a line measured seaward from the nearest Canadian land a distance of one hundred nautical miles”. *Ibid.*, s. 2.

offences and penalties for the pollution of Arctic waters by the deposit of waste, which was broadly defined so as to include *any* substance which would degrade the waters to an extent detrimental to their use by man or by wildlife and plants useful to man. It also provided regulatory powers with respect to, among other things, the creation of shipping safety control zones and the prescription of minimum standards for ships, and granted enforcement powers to government officials, including the authority to seize any ship anywhere within 100 miles of the Arctic coast on reasonable suspicion of its having committed an offence under the Act.

Canada claimed that the Arctic Waters Pollution Prevention Act was a balanced response to specific concerns about the dangers of marine-based pollution in the fragile Arctic environment.<sup>20</sup> These concerns had been greatly heightened by the voyage of the United States oil tanker SS Manhattan through the Northwest Passage in 1969.<sup>21</sup> Nevertheless, the Act was clearly inconsistent with pre-existing international law, a fact which was effectively admitted by Canada when it added a reservation concerning the subject matter of the Act to its declaration of acceptance of the compulsory jurisdiction of the International Court of Justice under Article 36(2) (the “optional clause”) of that Court’s Statute.<sup>22</sup>

The Act was subject to strong protests from the United States, which asserted:

The United States does not recognize any exercise of coastal state jurisdiction over our vessels in the high seas and thus does not recognize the right of any state unilaterally to establish a

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<sup>20</sup>See, e.g., Pierre Trudeau, “Remarks to the Press Following the Introduction of Legislation on Arctic Pollution, Territorial Sea and Fishing Zones in the Canadian House of Common on April 8, 1970,” (1970) 9 *International Legal Materials* 600.

<sup>21</sup>See (1969-70) *Keesing’s Record of World Events* 23759.

<sup>22</sup>See (1969-70) *International Court of Justice Yearbook* 55; reproduced in (1970) 9 *International Legal Materials* 598. The reservation excluded from the Court’s compulsory jurisdiction over Canada:

disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine areas adjacent to the coast of Canada.

In explaining the need for the reservation, Prime Minister Trudeau acknowledged that there was a “very grave risk that the World Court would find itself obliged to find that coastal states cannot take steps to prevent pollution. Such a legalistic decision would set back immeasurably the development of law in this critical area” (April 8, 1970, reproduced in Bilder, *supra*, note 18, 29).

territorial sea of more than three miles or exercise more limited jurisdiction in any area beyond 12 miles.<sup>23</sup>

An official note to Canada explained the reason for the United States' position:

We are concerned that this action by Canada if not opposed by us, would be taken as precedent in other parts of the world for other unilateral infringements of the freedom of the seas. If Canada had the right to claim and exercise exclusive pollution and resources jurisdiction on the high seas, other countries could assert the right to exercise jurisdiction for other purposes, some reasonable and some not, but all equally invalid according to international law.<sup>24</sup>

The United States suggested that Canada voluntarily submit the issue to the International Court,<sup>25</sup> but Canada refused to do so.<sup>26</sup>

The United States was the only state to protest publicly against the enactment of the Arctic Waters Pollution Prevention Act. Other states appeared to acquiesce in this new assertion of jurisdictional competence. Canada's unilateral claim may thus have been an important factor in changing the pre-existing customary international law with respect to the rights of coastal states to introduce and enforce pollution prevention measures beyond the territorial sea. This change is reflected in Article 234 of the 1982 United Nations Convention on the Law of the Sea, which accords coastal states pollution prevention powers in "ice-covered areas" extending to 200 nautical miles - which is in fact twice what Canada claimed.<sup>27</sup> Perhaps as importantly, under Article 220 of that Convention coastal states are

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<sup>23</sup>Statement of Robert McCloskey, Department of State, *New York Times*, 10 April 1970, 13, col. 3.

<sup>24</sup>Department of State statement of 15 April 1970, reproduced in (1970) 9 *International Legal Materials* 605 and (1971) 9 *Canadian Yearbook of International Law* 287.

<sup>25</sup>*Ibid.*, 606 and 289 respectively.

<sup>26</sup>See Summary of Canada's Note of April 16, 1970 to the United States, reproduced in (1970) 9 *International Legal Materials* 607 and (1971) 9 *Canadian Yearbook of International Law* 289.

<sup>27</sup>(1982) 21 *International Legal Materials* 1261, 1351. Art. 234 reads:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions

accorded pollution prevention powers within all waters - ice-covered or otherwise - within their exclusive economic zones, although the powers available in areas not covered by ice are less extensive than those in ice-covered areas.<sup>28</sup> In recognition of the success of its attempt to develop customary international law, parallel to these treaty provisions, Canada later rescinded the reservation to its acceptance of the compulsory jurisdiction of the International Court *without* having ratified the Law of the Sea Convention, which in any event by that time was not yet in force.<sup>29</sup>

As with the Truman Proclamation, one can ask why this unilateral claim was successful in changing customary international law. One possible explanation is that the claim was relatively limited and apparently reasonable. Canada did not claim pollution prevention jurisdiction along its Atlantic and Pacific coasts, only in the Arctic where climatic conditions made oil spills a particularly dangerous threat.

A similar geographically restricted development occurred in 1984, when the Federal Republic of Germany abandoned its claim to a three-mile territorial sea within the specific confines of the German Bight and created a new limit on the basis of a box defined by geographical coordinates. This box extended approximately sixteen miles off the German coastline.<sup>30</sup> The new claim, which was explicitly designed for the limited purpose of preventing oil spills in those busy waters, met with no protests from other states. This was perhaps because the balance of interests in this specific situation was different from that which existed more generally - different enough that other states were prepared to allow for

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and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

<sup>28</sup>For example, Art. 220(3) reads:

Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a state has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State confirming and giving effect to such rules and standards, that state may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information to establish whether a violation has occurred.

<sup>29</sup>See (1985-6) 40 *International Court of Justice Yearbook* 64. The Law of the Sea Convention came into force on 16 November 1994, still without Canada having ratified it.

<sup>30</sup>See Decree of November 12, 1984, reproduced in (1986) 7 *Law of the Sea Bulletin* 9-22.

the development of a prescriptive right as an exception to the general rule governing the breadth of the territorial sea. Yet the rule that developed in response to Canada's claim to pollution prevention jurisdiction up to 100 miles was - in some respects - a general rule not limited to Arctic waters.<sup>31</sup>

Although it may not have been Canada's intention, the development of this more general rule was perhaps an inevitable consequence of the way its claim was framed, i.e. in such a way as to extend fairly easily into a right which all coastal states could claim for themselves, and which most coastal states were probably interested in claiming. By 1970 states were becoming aware of the acute environmental threat posed by the increasing use of ships, especially supertankers, to transport oil and other dangerous products. The *Torrey Canyon* had broken up on the shores of Cornwall in 1967.<sup>32</sup> In 1968 an oil spill off Southern California had caused severe damage to forty miles of coastline.<sup>33</sup> All coastal states thus had interests identical, or at least very similar, to those of Canada when it came to the regulation of coastal shipping for the purposes of environmental protection. It may have been this factor which resulted, not only in the Canadian claim to pollution prevention jurisdiction up to 100 miles in the Arctic being accepted as a rule of customary international law, but also in that rule being double the breadth initially claimed by Canada, and in its extending, in a somewhat restricted form, to allow all coastal states to exercise similar powers within their own exclusive economic zones.

It is possible that Canada was in fact seeking to establish the somewhat restricted, more general rule, rather than simply the Arctic-specific rule it claimed. One of the most striking things about the Arctic Waters Pollution Prevention Act was that Canada could perhaps have achieved the immediate purpose of that legislation - the protection of the Arctic environment from oil pollution resulting from tanker traffic - without adopting a position which challenged existing international law. Canada already had the legal capacity to achieve that goal because the Northwest Passage is less than six nautical miles across at its narrowest point. Even on the most restrictive understanding of the breadth of the territorial sea, Canada could have imposed and enforced reasonable environmental protection measures against any state wishing to pass through that channel. Although states have a right of transit passage through the territorial seas of other states, the rights of coastal states to enforce reasonable regulations within that zone have long been recognized.<sup>34</sup>

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<sup>31</sup>See above, p. 9.

<sup>32</sup>See generally (1967-8) *Keesing's Record of World Events* 22002; and Ved Nanda, "The 'Torrey Canyon' Disaster: Some Legal Aspects," (1967) 44 *Denver Law Journal* 400.

<sup>33</sup>See generally "Continental Shelf Oil Disasters: Challenge to International Pollution Control," (1969) 55 *Cornell Law Review* 113 (note); and Malcolm Baldwin, "The Santa Barbara Oil Spill," (1970) 42 *University of Colorado Law Review* 33.

<sup>34</sup>See Art. 17 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, 516 *United Nations Treaty Series* 205; Art. 21 of the United Nations Convention on the Law of the

Canada's ability to impose and enforce such measures was strengthened by legislation, enacted simultaneously with the Arctic Waters Pollution Prevention Act, which extended its territorial sea to twelve nautical miles and thus extended the section of Northwest Passage falling within Canadian territory.<sup>35</sup> This move was not nearly as contentious as the making of the more geographically extensive 100-mile claim to pollution prevention jurisdiction, as similar twelve-mile claims had already been made by nearly sixty other states.<sup>36</sup>

Moreover, the decision to introduce the Arctic Waters Pollution Prevention Act would seem to reflect Canada's disillusionment with the failure of international law-making conferences to address the *general* issue of coastal state rights to prevent pollution, and in particular the failure of Canada's proposals at the 1958 and 1960 Geneva Law of the Sea Conferences, as well as at the 1969 Marine Pollution Conference in Brussels.<sup>37</sup>

This example suggests that a state wishing to develop or change a customary rule may, in some circumstances, restrict its claims to something which most states would find unobjectionable, but from which those states are themselves unable to benefit. A state taking such an approach then waits for the principle of reciprocity to transform its claims, and the responses of other states, into something from which most states could benefit, but to which they might not have agreed had it been made the direct subject of the initial claim. Such a strategic approach may not only facilitate the establishment of a customary rule, but also ensure that the rule had greater effect, or at least greater scope of application, than might otherwise be the case. And as the following example demonstrates, the principle of reciprocity may be applied in a similar, strategic manner, by extending it beyond the process of customary international law in order to exert pressure on other states in the negotiation of treaties.

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Sea, UN Doc. A/CONF. 62/122 (1982), reproduced in (1982) 21 *International Legal Materials* 1261; and Robin Churchill & Vaughan Lowe, *The Law of the Sea* (revised edition) (Manchester: Manchester University Press, 1988) 77-84. Note, as well, the differences between Art. 220(2) and Art. 220(3), (5), (6) of the Law of the Sea Convention (*ibid.*).

<sup>35</sup>*An Act to Amend the Territorial Sea and Fishing Zones Act*, 18-19 Eliz. 2, c. 68 (1970); reproduced in (1970) 9 *International Legal Materials* 553.

<sup>36</sup>Trudeau, *supra*, note 20. On the development of the twelve-mile territorial sea as a rule of customary international law, see *Custom, Power and the Power of Rules*, 114-20.

<sup>37</sup>See Bilder, *supra*, note 18, 23-4. It is also noteworthy that Canada's reservation to the compulsory jurisdiction of the International Court of Justice was *not* limited to measures taken solely with respect to Arctic waters, but was instead framed in more general terms. See note 23, above.

*An Act to Amend the Coastal Fisheries Protection Act*

On 10 May 1994, and in response to the depletion of straddling fish stocks - caused, in large part, by vessels based in other members states of the North Atlantic Fishing Organization, but flying flags of convenience - the Parliament of Canada approved An Act to Amend the Coastal Fisheries Protection Act.<sup>38</sup> This legislation allowed Canadian fisheries officers to arrest foreign vessels in international waters off Canada's east coast if they believed those vessels to be violating conservation measures agreed by the member states of the North Atlantic Fisheries Organization (NAFO), or established by Canada.<sup>39</sup> It was introduced in what Canada claimed was an attempt to create a rule of customary international law allowing coastal states to engage in such extraterritorial enforcement measures, and as such it was based explicitly on a number of precedents. The most important of these precedents were the Truman Proclamation and the Arctic Waters Pollution Prevention Act.<sup>40</sup> As it had done shortly before the enactment of the Arctic Waters Pollution Prevention Act, Canada again amended its declaration accepting the compulsory jurisdiction of the International Court of Justice so as to exclude any challenges before than Court to its new legislation.<sup>41</sup>

Canada's actions were met by strong protests from other states. The French Foreign Minister condemned the legislation in the French National Assembly and European Union fisheries ministers

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<sup>38</sup>SC 1994, c. 14, reproduced in (1994) 33 *International Legal Materials* 1383. For background and commentary, see Peter Davies, "The EC/Canadian Fisheries Dispute in the Northwest Atlantic," (1995) 44 *International and Comparative Law Quarterly* 927; and Peter Davies & Catherine Redgwell, "The International Legal Regulation of Straddling Fish Stocks," (1996) 67 *British Yearbook of International Law* 199.

<sup>39</sup>*Ibid.*, s. 2. NAFO was founded in 1978 and currently manages the harvest of ten species. See Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, *Canada Treaty Series* 1979, No. 11. Its member "states" are Bulgaria, Canada, Cuba, Denmark, Estonia, Russia, and the United States. Denmark, although an EU member, is an independent NAFO member because Greenland, although Danish territory, is not part of the EU.

<sup>40</sup>See "Tobin Moves on Fish 'Pirates'," *Globe and Mail* (Toronto), 11 May 1994, A1/A2; and pp. 5-7 and 7-12 above, respectively.

<sup>41</sup>See (1993-4) 48 *International Court of Justice Yearbook* 88; and *supra*, p. 7. The revised declaration excluded "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area ... and the enforcement of such measures".

agreed to inform Canada that the Act was illegal under international law.<sup>42</sup>

In August 1994 the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks began in New York. At that conference the United States ambassador and the chair of the conference both decried Canada's unilateral actions, while the European Union representatives said that they were "extremely worried".<sup>43</sup> Canada responded by pushing hard for a multilateral treaty which would allow coastal states to manage, to the outer edge of their continental shelves, fish stocks that straddle the 200-mile limit of the exclusive economic zone.<sup>44</sup> On the opening day of the conference Canada and Norway announced that they were working towards a bilateral treaty which would allow each state to police the other state's fishing vessels outside the 200-mile limit. They expressed the hope that the treaty would serve as a model to regulate fishing and conserve stocks on the high seas.<sup>45</sup>

On March 1995 Canada arrested a Spanish fishing vessel 245 miles off the Canadian coast and towed it to St John's, Newfoundland.<sup>46</sup> The European Union described the arrest as "an act of organised piracy",<sup>47</sup> while the Spanish government filed proceedings against Canada in the International Court of

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<sup>42</sup>"Putting Pirate Fishing Boats on the Spot," *Globe and Mail* (Toronto), 2 June 1994, A8; "EU Protests Fisheries Law," *Financial Post* (Toronto), 11 June 1994, 16. Yet the protesting states were reportedly less concerned about Canadian intentions to seize and prosecute vessels fishing in violation of NAFO conservation measures than they were about how Canada might use its new powers more broadly in the future to protect its other interests in international waters. They were also concerned that Canada's actions might set a precedent for other states to protect similar, or perhaps not so similar, national interests. See "All at Sea if Canada Takes the Law into its Own Hands," *Globe and Mail* (Toronto), 12 May 1994, A24.

<sup>43</sup>"Norway Sides with Canada on Fishing Deal," *Calgary Herald* (Canada), 16 August 1994, A7.

<sup>44</sup>"Tobin to speak at UN on Overfishing," *Globe and Mail* (Toronto), 15 August 1994, A3; and "Showdown Nears on High-Seas Fishing," *Financial Post* (Toronto), 13 August 1994, 8.

<sup>45</sup>"Norway Sides with Canada on Fishing Deal," *Calgary Herald* (Canada), 16 August 1994, A7.

<sup>46</sup>"EU Brands Seizure of Spanish Trawler an Act of Piracy," *Times* (London), 11 March 1995, 15; and *Keesing's Record of World Events* (March 1995) 40447-8.

<sup>47</sup>"EU Brands Seizure of Spanish Trawler an Act of Piracy," *Times* (London), 11 March 1995, 15; and *Keesing's Record of World Events* (March 1995) 40448.

Justice.<sup>48</sup>

Notwithstanding the widespread condemnation of its unilateral actions in apparent violation of customary international law, Canada's principal goal of providing effective protection in international law for straddling stocks was soon achieved. On 4 August 1995 the United Nations Conference adopted an Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.<sup>49</sup> Canada and the European Union also entered into a bilateral treaty concerning satellite tracking and the placing of fisheries inspectors on each other's vessels.<sup>50</sup> Although these instruments do not go as far as the 1994 Canadian legislation, they have much the same effect in terms of fisheries conservation. For instance, Article 21(1) of the Agreement allows any state party to board and inspect, in "any high seas area covered by a sub-regional or regional fisheries management organization or arrangement", fishing vessels flagged by other states parties "for the purpose of ensuring compliance with conservation and management measures for straddling fish stocks and highly migratory fish stocks established by that organization or arrangement".<sup>51</sup> Article 21(5) allows the inspecting state to secure evidence where "there are clear grounds for believing that a vessel has engaged in any activity contrary to" those measures, and, if a flag state fails to respond or take action once being notified of an apparent violation, Article 21(8) allows the inspecting state, "where appropriate", to bring the offending vessel to port.<sup>52</sup>

This third example of An Act to Amend the Coastal Fisheries Protection Act thus demonstrates another way in which claims - and the principle of reciprocity - can be used strategically in the making of international law, namely, to apply pressure in treaty negotiations through purported attempts to

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<sup>48</sup>ICJ Communiqué No. 95/8, 29 March 1995. On 4 December 1998, the International Court of Justice held that it did not have jurisdiction, as a result of Canada's reservation to its declaration under the "optional clause". See: *Fisheries Jurisdiction (Spain v. Canada)*, <<http://www.icj-cij.org/icjwww/idocket/iec/iecframe.htm>>, and discussion 13 above.

<sup>49</sup>UN Doc. A/CONF.164/33, reproduced in (1995) 34 *International Legal Materials* 1542, 1549. See generally R. Barston, "United Nations Conference on Straddling and Highly Migratory Fish Stocks," (1995) 19 *Marine Policy* 159.

<sup>50</sup>Agreed Minute on the Conservation and Management of Fish Stocks (April 20, 1995), reproduced in (1995) 34 *International Legal Materials* 1260.

<sup>51</sup>UN Doc. A/CONF.164/33, reproduced in (1995) 34 *International Legal Materials* 1542, 1549.

<sup>52</sup>UN Doc. A/CONF.164/33, reproduced in (1995) 34 *International Legal Materials* 1542, 1549.

develop or change customary rules. Although Canada claimed to be seeking to establish a new customary rule in this instance, this does not appear to be the real motive for its actions. It may be observed that, in its representations to the Second Tuna Panel established under the General Agreement on Tariffs and Trade and concurrent with its unilateral assertion of enforcement jurisdiction beyond 200 miles, Canada opposed unilateral trade measures on the part of the United States to protect dolphins outside the United States' exclusive economic zone.<sup>53</sup>

It may be possible to differentiate among these three attempts to use the principle of reciprocity strategically in the making of international law. First, there are instances, such as the case of the Truman Proclamation, where a claim concerning a rule of customary international law is made which offers an obvious advantage to every state, or at least most states, and where there is little or no associated disadvantage. In this type of situation the benefits offered to other states as a result of the principle of reciprocity ensure that they will acquiesce in the unilateral claim, thus permitting the relatively rapid development or change of a rule of customary international law.

Secondly, there are situations, such as that involving the Arctic Waters Pollution Prevention Act, where the claim which is made offers an advantage to every state, or most states, but where that advantage may not immediately be clear. In 1970 not all states would have seen the development of a customary right to exercise pollution prevention jurisdiction as far as 100 miles from the coast as an immediate necessity, whereas the United States was more concerned with preserving, as much as possible, the freedom of the seas. Canada's response was to claim a new, geographically limited and apparently reasonable right, while at the same time adopting a fairly non-contentious means - a twelve-mile territorial sea - to strengthen its existing legal capacity to deny the United States full freedom of transit through the Northwest Passage. Its claim to a pollution prevention jurisdiction that was restricted to Arctic waters effectively denied other states the right to benefit reciprocally from that claim, since most other states do not have Arctic coastlines. Yet other states were not prepared to be denied their reciprocal benefit and, on seeing the need for a similar rule with respect to their own coasts, soon generalized Canada's claim into the generally applicable, if somewhat more substantively restricted, right to exercise pollution prevention jurisdiction which is reflected in the Law of the Sea Convention. This, in the end, probably gave Canada what it wanted from the beginning, i.e. the right to exercise pollution prevention jurisdiction along all of its three coasts, and did so in a way which reduced the risk of international incidents by opening the way for United States participation in the development of that more general pollution prevention rule.

Thirdly, there are situations, such as that involving An Act to Amend the Coastal Fisheries Protection Act, where the claim in question fails to offer any benefit, in itself or by extension, to more than a few states. Apart from Canada, only a few states have continental shelves that extend beyond 200 miles. This meant that Canada was unlikely to achieve what it said it was seeking through its unilateral claim,

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<sup>53</sup>See (August-September 1994) 110 *GATT Focus* 6.

namely, the development of a customary rule allowing coastal states to exercise fisheries conservation jurisdiction on the continental shelf beyond 200 miles regardless of whether those states are acting in cooperation with other states and regional fishing organizations. Yet enough states have an interest in cooperating in the preservation and management of high seas fisheries for a majority of states to be prepared, when pushed, to agree to a treaty rule allowing coastal states to exercise fisheries conservation jurisdiction when, and only when, such measures are consistent with guidelines established through international or regional organizations such as NAFO. And from Canada's perspective, such a treaty may be sufficient to achieve its primary goal of conserving the North Atlantic fisheries, and does so in accordance with international law. Moreover, it is possible that this treaty might, in the future, develop into a general applicable rule of customary international law.<sup>54</sup>

In some ways, the process of customary international law is like a negotiating process in which States seek to maximize their interests by offering the same rights to others that they seek for themselves. And it is a negotiating process that may be manipulated, first, by denying other states reciprocity, and then by allowing the "pull" of that principle to take other states to positions they might not have been willing to consider, had the proposition been made to them directly.

## **Conclusion**

All of the examples discussed in this paper demonstrate - or at least strongly suggest - that states do think strategically about the making of international law, including international environmental law, and that existing law is an important persuasive tool in the processes through which new law is made. Thinking about strategies of law-making offers significant benefits to states. It may also benefit people like us. Among other things, it provides the opportunity for interdisciplinary work that goes far beyond the age-old question of whether international law really is law and to explore the consequences of institutionalist and constructivist thought for the ongoing development and operation of the international legal system, in all its breadth and intricacy. It may also enable us to pay more attention to the actual practice of states in a variety of fora, to move beyond abstract theories about the making of international law, and to take fuller advantage of the extensive academic work that has already been done on the relationship between politics and law within national systems. There would seem to be vast potential for new research here, with this short paper being but the humblest of beginnings. I look forward to discussing these ideas with you.

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<sup>54</sup>See *Custom, Power and the Power of Rules*, 166-80.