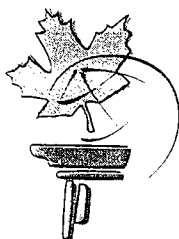


Compendium

The First Twenty-five Years
Les premiers vingt-cinq ans



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ISBN 0-920157-25-4

Acknowledgements

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New Approaches to International Law

Nouvelles approches au droit international

Craig Scott

Professor, Faculty of Law, University of Toronto

Canadian Nationalism Cavorts With Functionalism at the Founding Conference of the CCIL.

TWO discourses, those of nationalism and policy-science functionalism, dominated the paper presentations and transcribed discussions at the inaugural conference of the fledgling Canadian Council on International Law which took place in 1972. Together they combined to produce arguments for the legitimacy of Canada's assertiveness on the international diplomatic stage that had given pride of place to several unilateral initiatives undertaken in the law of the sea, notably the Arctic Waters Pollution Prevention Act.² Trudeau-era Canadian nationalism was identified as the main source of Canada's willingness to pursue its interests through "means formerly considered out of bounds — such as limiting Canada's acceptance [of] the compulsory jurisdiction of the World Court — and ... a greater readiness to pursue the route of unilateral action."³ However, a focus on functionalist justifications ensured that members of Canada's international legal community who gathered in Ottawa for the conference did not stray far from the prevailing self-image of Canada as the altruistic internationalist. That image had of course been forged in major part by the efforts of Lester Pearson and Canada's famed mini-legion of capable diplomats from the late 1940s through to the late 1960s.⁴ For, it was said, what Canada had done, most notably in its Arctic initiative, was to assert a national interest that was concordant with "a sense of international responsibility" *via-à-vis* protection of a borderless environment which was only just coming to be generally recognized on the eve of the Stockholm Conference as both precious and fragile.⁵

Bathed in its softest rhetorical light, Canada (or, in juridical terms, coastal state jurisdiction) served as the instrument for pursuing the international common good; neologistic concepts were advanced to help capture

this dynamic, most notably that of a state acting through a notional "delegation of powers" from the international community.⁶ As Legal Adviser Alan Beesley would argue before different audiences on several occasions, unilateralism as tactical method was acceptable if demonstrably part of an over-all good faith strategy of pursuing multilateral measures, both before and after such unilateral action.⁷ Furthermore, exclusion of the jurisdiction of the ICJ was justified not simply because Canada was unlikely to win (due to a combination of the clear state of the prevailing positive law and the perceived legalism of the paradigms within which the judges on the Court worked), but also because such exclusion allowed for a purer interaction between the national unilateral act and the multilateral response without the distortion caused by the legalistic mediating influence of the Court on interstate negotiations.⁸

This, then, was the background against which the CCIL's founding president Ronald St. John Macdonald (then-Dean of the Faculty of Law, University of Toronto) welcomed the assembled to Ottawa and opined that "the time was ripe to reflect a little on Canadian approaches to international law and on the changes, if any, in emphasis, style and technique of the present [Trudeau] administration in contrast to those of the previous [Pearson] administration."⁹ Marshalling his justly-famous skills as a grand convener, Macdonald had gathered together a veritable hall of fame (at least in the impressionable eyes of this younger-generation Canadian international lawyer) to address these new (at least, new-for-Canada) approaches.¹⁰ Following the presentation by Gotlieb of the conference's keynote paper and Beesley's own account of the reasoning animating Canada's "change in style" in its juridical foreign policy¹¹, the transcript of the discussions reveals a to-and-fro alternation between a focus on new Canadian approaches, in ways that included elements of self-inquiry into the Canadian national psyche, and a focus on new conceptual approaches to international law.

On the one hand, there was much obvious, as well as implicit, introspection about how Canada's national identity was instantiated in its foreign policy.¹² On the other hand, there was considerable attention paid to conceptual analysis of the broader normative questions at stake, most of which, in one way or another, dealt with the descriptive and prescriptive usefulness of Myres McDougal's account of international law as involving an interactive process of forging (and re-forging) expectations in which the fulcrum of argument is an analysis of whether positions and actions are being taken in the common interest.¹³ Indeed, one would be forgiven for thinking that a

result (perhaps even a premise) of the conference was the hitching of Canada's wagon to McDougal's horses, thereby rhetorically strengthening the Canadian case in the face of protest and challenge from the United States which had itself benefited on several occasions from McDougal rising to its defence.¹⁴ At several points, Canadian identity and normative theory blended in fascinating ways as when it was said on behalf of Secretary of State Sharp that Canada had adopted on the international stage "*une façon particulière d'aborder les problèmes faite d'une part de pragmatisme mais aussi teintée de pluralisme si l'on entend par là une extrême souplesse dans l'emploi et le choix des moyens d'action.*"¹⁵

Plus ça change... : From Cod Wars to Turbot Wars, and Beyond

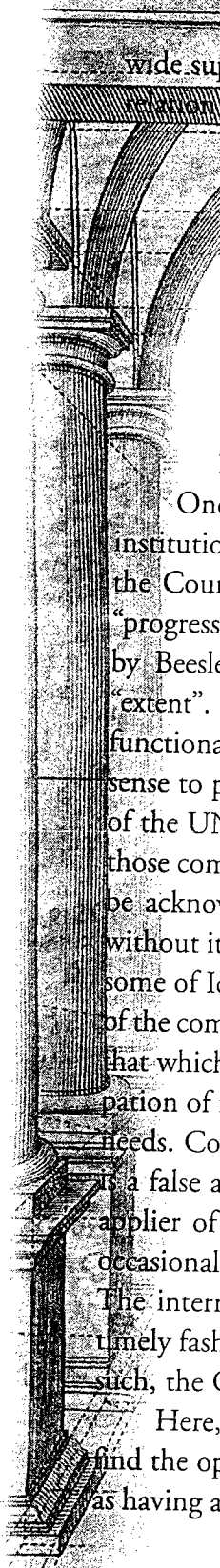
One purpose of this volume of comments is to inquire into the contemporary relevance of the subject-matter covered in the 25 years of CCIL conferences. Most readers will already have made the link to Canada's recent high seas initiatives, starting in 1994, which saw Canada extend Canadian jurisdiction to allow Canadian fisheries conservation measures to apply outside the EEZ, including by allowing enforcement of breaches of that law against foreign-flagged vessels (both via arrest on the high seas and prosecution in Canadian courts).¹⁶ As in the late 1960s and early 1970s, Canada assiduously pursued a multilateral treaty strategy on several fronts before deciding unilateral measures were justified, at which point Canada amended its laws and took enforcement action after first reserving against ICJ jurisdiction.¹⁷ Thereafter, Canada sought, as it had in the 1970s, not only to win in the court of public opinion, but also to use the initiative as a spur to multilateral agreement. Just as Article 234 of the 1982 UN Convention on the Law of the Sea resulted from the Arctic waters initiative, parts of the new Convention on Straddling and Highly Migratory Fish Stocks would seem to have resulted from the turbot initiative.¹⁸ Importantly, however, it must be noted that in each case, especially the latest initiative, Canada's approach was only partly, even if largely, vindicated.

Thus, it is evident that, questions of nationalistic assertiveness aside, the conceptual issues discussed at the 1972 CCIL conference evince a certain timelessness, especially in the field of law that lies at the interface of law of the sea and environmental law. We are, in 1997, faced with broadly similar dilemmas as those we faced in 1972, dilemmas bound up in normative

theories and institutional arrangements that are still deeply rooted in state-centred horizontalist paradigms. A certain structurally entrenched positivism leaves us with the same paradoxes of customary law formation according to which a state that takes the lead in departing from generally accepted practice without the prior consent of other interested states may be viewed as acting contrary to the law. On this approach, the only lawful way to change customary law would be by treaty-centred behaviour, either by gradually building up a network of opposable relations through a series of treaties with like-minded states or by leaving change to a universal law-making treaty; we are left with the positivistic aphorism that a state must break the law in order to spur the making of law.¹⁹ What, then, do we make of the techniques labelled “new approaches” in 1972 and more or less taken back off the shelf by Canada a quarter-century later in terms of how they fit into a theory of international law appropriate for the end of the century? In particular, is there a workable approach to what Alvaro de Soto called “enlightened unilateralism” which does not marginalize the ICJ?²⁰

Although there is no mention in CCIL 1972 of Iceland’s ongoing tussle with the United Kingdom and Germany over access to fisheries surrounding that island state, it is worth noting that the year of this inaugural CCIL meeting was also the year of Iceland’s own major unilateral initiative to extend its exclusive fisheries jurisdiction to 50 miles from its straight baselines. As with Canada and its 1994 initiative, this involved Iceland undertaking enforcement action against UK and German vessels which, unlike in 1994, escalated into a situation with elements of an interstate naval confrontation. Iceland was just as reluctant as Canada in both 1972 and 1994 to be held accountable to the ICJ, perhaps because the “acquisitive” dimensions (exclusive use) of their policy predominated over the “non-acquisitive” dimensions (rational conservation of declining fish stocks).²¹ However, the compromissory clause in 1961 agreements with the UK and Germany clearly gave the Court jurisdiction, and, in the 1974 *Fisheries Jurisdiction case*, the Court used the opportunity to express views on its role that show the limitations of its involvement in areas of unilateralism geared toward legal change.²² While willing to give its imprimatur to the fact that the law of the sea had evolved to allow 12 mile fisheries zones (although not yet 12 mile territorial seas) and to allow preferential fishing rights for especially dependent coastal states beyond 12 miles, it was not willing to anticipate the development of the process then under way at UNCLOS III at which the new concept of an EEZ was already on the table and beginning to attract

III. Reflections on the Annual Conferences Réflexions sur les congrès annuels



wide support. Instead, the Court had the following to say about its role in relation to the evolving UNCLOS discussions:

The Court is ... aware of present endeavours ... to achieve in a third Conference on the Law of the Sea the further codification and progressive development of this branch of the law, as it is of various proposals and preparatory documents produced in this framework, which must be regarded as manifestations of the views and opinions of individual States and vehicles of their aspirations, rather than as expressing principles of existing law... In the circumstances, the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down. ²³


One can sympathize with the position of the Court. In terms of its institutional location, there have to be outer limits to the extent to which the Court, as compared to politically accountable actors, may engage in "progressive development" of the kind involved in the approaches expressed by Beesley and McDougal. The key word in the preceding sentence is "extent". If there is any hope at all for some alignment between purposive or functional theories of international law (law attuned in some significant sense to promotion of common interests), then the primary judicial organ of the UN system must be a participant in the dialogical process in which those common interests are clarified and given provisional shape. It should be acknowledged that the 1974 Fisheries Jurisdiction judgment was not without its forward-looking elements because of the endorsement it gave to some of Iceland's special needs and to their connection to the conservation of the common fisheries; but, law must always involve an element of precisely that which the Court denied in the *Fisheries Jurisdiction* case, namely anticipation of future law in light of clearly apparent trends or emerging current needs. Coordination problems are such in the international system that it is a false analogy for the ICJ to rely on embedded imagery of itself as the applier of law legislated by states as a notional collective body and only occasionally as the creative interpreter or interstitial progressive developer. The international community does not have the same capacity to act in timely fashion in the environmental sphere as domestic legislatures, and, as such, the Court can legitimately play a constructive prodding role.

Here, the Court is substantially in control of its own future. It should find the opportunity to send the signal that it is willing to think of its role as having an overt law-development function. Here, it may well be that the

contribution of Thomas Franck at the 1972 conference demonstrated the greatest potential to bridge the gap between a full-blown legislative role and an anaemic law-determination role for the Court.²⁴ The key passages from Franck's comments are quite extensive but warrant replication in full in order to make them available to a wider audience:

[A]ny unilateral initiative that is taken now tends to be perceived in the form of an offer... And one of the characteristics of an offer is that it must have the offeree in mind — it can't be a pure and simple expression of the initiator's will. The decision of a foreign office to do something, or not to do it, is becoming an initiatory act in what is being self-perceived as a continuing transactional relationship with other states. This may not be normative law making, but it is, implicitly, reciprocal transactional bargaining, which may be seen as another, more realistic form of law-making between sovereign states... [T]wo things become incumbent upon you. One of them is that you ought to attempt, if possible, to indicate that what you are doing is in concurrence with whatever your potential opponent has been doing. That is important in that you are indicating you are not creating any self-serving departures from prior expectations, no radical surprises. The second is that you still try to act in a context that reassures other states that your action does not damage their interests, that it is not in their interests to deter you from going ahead. Thus, you will try to say, and say convincingly, that what you are doing is essentially what the other side has been doing, what they have been saying is permissible, and that your initiative is based on principles which — either in the instant case, or in the long run — will be of benefit to the other states of the arena. So we see emerging a kind of transactional strategy in the guise of unilateral initiatives of states, a transactional strategy, which *per force* takes account of reciprocal rights, duties and interests. This partakes of something familiar to lawyers, that is, an attempt to formulate new departures in policy in principled reciprocal terms buttressed by precedent... This is a rehabilitated version of unilateralism in which the international lawyer is inevitably going to play a major role.²⁵

Franck's account of "rehabilitated unilateralism" has the virtue of seeking to conceive of legal change in international law in terms of a rhetoric of moving to a new legal ground from old legal ground. At the same time, the Franck account eschews the fictional crutch of stating that the new legal ground was always the law. To that extent, his approach could



be labelled a theory of unilateralism as purposive re-presentation of law.²⁶ It seems to me that the 1974 *Fisheries Jurisdiction* case does provide some rhetorical material that could well allow a current ICJ bench, if it decided that it had jurisdiction over the current Spain-Canada litigation, to combine modern principles of sustainable development with prioritized coastal state interests in conservation outside its normal fisheries jurisdiction. Invoking the *Fisheries Jurisdiction* case as part of a re-presentation of the law of high seas conservation might well lead the Court to the conclusion not only that Spain and Portugal's failure adequately to regulate their national vessels in the interests of high seas conservation breached their substantive duties but also that, at a certain point, the duty of the coastal state to defer to flagstate jurisdiction and work only through purely cooperative frameworks was exhausted, or at least suspended, so as to permit, in these circumstances, unilateral enforcement of conservation measures on the high seas. Standard preclusionary defences of necessity and countermeasures, both invoked by Canada, could well be re-shaped to form a new nexus between substance and procedure where the imperative of conservation of the commons meets intransigent promoters of the tragedy of the commons.²⁷

Ex aequo et bono Decisions, Jurisdiction, and the ICJ's International Environmental Law Chamber

There remains something very unlikely about the above scenario and many would say something normatively suspect. The price of a decentralized legislative process in international relations may well have to be that states interested in acting unilaterally to safeguard environmental commons must continue to reserve against the Court's jurisdiction not simply so as to protect themselves but also so as not to queer the pitch of the transactional bargaining referred to by Franck. Also, whatever may be the arguments for or against the institutional legitimacy of the ICJ engaging the process of legal change through re-presenting the law, we are quite simply faced with the sheer unlikelihood of the majority of the current Court seeing this as an acceptable dimension of their judicial function. We might finally have reason to worry about the competence of many of members of the Court to venture far afield of the pastures of legalism.

It would seem then that we must either accept the reservations

approach taken by Canada or argue for the creation of a new institution. The function of such an institution would be to act as an institutional partner in the transactional bargaining process, thereby enhancing the normativity of that process by seeking to make sure that extant principles of soft law and more general teleological justifications are truly being directed to a pressing common interest by the initiating state(s). For purposes of this comment, I shall assume such a new institution is distinctly unlikely.²⁸ However, I would suggest that there still exists some possibility of involving the ICJ in a more future-oriented juridical role along the lines just described. The strategy I have in mind involves embracing the fact that Article 38 (2) of the Statute of the ICJ permits the ICJ to decide cases *ex aequo et bono* if the parties decide to ask it to do so by special agreement.²⁹ This would constitute a way in which the Court could play a less restricted role if states were willing to give it the chance to establish its credentials. Here, the recent decision of the Court to establish a specialized chamber for environmental disputes could be conducive to a richer role for the Court, especially if the Court were willing to allow the parties to a special agreement to play an active role in the constitution of the Chamber.³⁰ A state like Canada might deposit a reservation, but make known its willingness to argue an issue or aspects of an issue before such a chamber on an *ex aequo et bono* basis. Because the kind of case being envisaged by definition involves a matter of common interest more than is usually the case in regular contentious cases and because the function of the chamber is not to decide the case based only on the current positive law, it would seem desirable to stipulate in the special agreement that the judgment of the chamber is not binding *per se* but more in the nature of an advisory opinion. Tailored procedures could also be agreed upon in consultation with the Chamber judges in order to make sure the Chamber-centred process is expeditious, thereby making the Chamber's process relevant to the general normative process going on outside the Court.³¹

There can be no doubt that the above proposal has an air of naivety about it, not simply because of the possible benefits that are associated with the process but also because the proposal depends on a measure of litigational altruism on the part of states. There is furthermore an associated problem of expectations. While Canada might expect that it would lose where the standard of appraisal is the current law, Spain, conversely, might feel it would not come out favourably if the standard is generated by future-oriented argument based on broader considerations. For the state

with the stronger case based on current law to be willing to go the *ex aequo et bono* route. It may have to see a willingness on the part of the other state to be held accountable for breaches of the current law. The solution might well be that a reservation to ICJ jurisdiction can serve as a way for the two states to negotiate a special agreement which will embody a trade-off. One state (e.g. Spain) would agree that the *ex aequo et bono* process be started immediately while the other (e.g. Canada) would agree to be held accountable in law by having the Court, whether in plenary or as a chamber, hear the case after a certain time period has passed. One reason for the need for a certain period to pass before the 'hard law' case is heard would be to enable the *ex aequo et bono* process to take place and play a role in the direction legal change takes. A second reason is my assumption that, in customary international law, successful unilateral initiatives are retroactively validated to the extent of the success.

Such an assumption is of course a controversial one. Yet, something like this assumption would seem to be important to the potential viability of the above scheme. Therefore, it is proposed that Canada take the first step in laying the groundwork for the twin-track approach just suggested. Now that the verdict of the jury of states is largely in on the substance of the Canadian initiative, Canada should waive all jurisdictional objections and seek to meet most of Spain's case by asking the Court to recognize in international law a limited doctrine of retroactive validation. This doctrine would be available as a circumstance precluding wrongfulness to states which, in good faith, deploy unilateral measures that successfully spur multilateral change in areas of heightened common interest (especially in environmental areas rife with coordination and defection problems). In other words, the success of a state's campaign to change the law should bring relief from responsibility for acts that were initially unlawful but which prove to have been instrumental to fostering a new consensus. In its most basic sense, the state can be imagined as having acted in classic *dédoublement fonctionnel* fashion as a parliamentarian of the international order, putting forward a bill that results in legislative change. It should not be necessary for the state to argue that it viewed its actions already to be consistent with the law at the time, only that it has been instrumentally successful in stimulating a change in the law. It is important to note that success is not the unprincipled test it may at first appear to be because success testifies to the fact that the normative terrain was fertile and thus

receptive to the initiative taking root.

States should have incentives, not disincentives, for exercising good judgment. Equally, however, they should be sanctioned for misjudging receptivity. Normative risks must fall on the state initiating change through unilateralism as, otherwise, there would be incentives for unilateralism to undercut cooperation. On this score, then, a state must be found to be responsible for breach of that residuum of the law that is resistant to change. Thus, for example, to the extent that the provisions of the Convention on Straddling and Highly Migratory Stocks have not fully endorsed high seas arrest of foreign fishing vessels in the same circumstances as Canada's recent (now-repealed) legislation, then Spain should succeed before the Court. At some level, an analogy can appropriately be drawn to those philosophies of civil disobedience which insist that the person defying the current law must be willing to face (reasonable) legal sanctions if her arguments for defying the law fail to convince domestic law-makers (including juries and courts). Canada could do much to demonstrate a commitment to the rule of law in international relations by demonstrating its willingness to be held to account where its actions have not resulted in change of the law. In many ways, such a position could represent a productive compromise between realism and legalism, and between national self-interest and commitment to international legal order.

1. This chapter comments on Canadian Council on International Law, ed., *New Approaches to International Law*, Proceedings of the 1972 Inaugural Annual Conference of the Canadian Council on International Law (unpublished) [hereinafter CCIL 1972]. CCIL 1972 is produced in the unassuming, even rough, form of a typewritten mimeograph of some 262 letter-size pages. Judging by appearances, it seems unlikely that CCIL 1972 is widely available.

2. The Arctic Waters Pollution Prevention Act was one of two statutes enacted by Parliament in 1970 which attended to environmental concerns in relation to waters surrounding Canada. Collectively, the bills extended Canada's regulatory jurisdiction over Arctic space within 100 miles of Canada's shoreline for purposes of environmental protection (notably from ship-based pollution), extended Canada's territorial waters to 12 miles, and enclosed a number of bodies of waters such as the Gulf of St. Lawrence and Dixon Entrance, thereby treating them as Canadian internal waters. For an account of this legislation and ensuing debate, see Edgar Gold, "Pollution of the Sea and International Law: A Canadian

Perspective" (1971) 3 J. Mar. L. & Comm. 13 at 35-36.

responsibility. New Canadian Approaches to International Law" in CCIL 1972, supra note 1 at 18-91. At the time, Gotlieb was Deputy Minister of Communications in the Government of Canada, having moved on from the Department of External Affairs where he had been Legal Adviser. Dalfen was Professor of Law, University of Toronto. Their paper was the thematic centrepiece of CCIL 1972 and would later be published, under the same title and virtually unchanged, in the American Journal of International Law: see (1973) 67 AJIL 229, 258 [hereinafter Gotlieb and Dalfen]. As the AJIL version is both more accessible and more refined, all subsequent references are to it.

4. Gotlieb and Dalfen, supra note 3 at 230.

5. See Gotlieb and Dalfen, supra note 3 at 231:

"(While) under the current (Canadian) approach there is a new stress on national self-interest, there is also recognition of the absence of any fundamental incompatibility between the pursuit of national goals and international objectives, and between self-development and world order."

6. See Legal Adviser Alan Beesley's explanation of the concept of "delegation of powers" (as well as that of "custodianship") in CCIL 1972, supra note 1 at 106. The parallels with the Scellian notion of *dédoulement fonctionnel* are striking: see Georges Scelle, *Précis de droit des gens* (Paris: Centre National de la Recherche Scientifique, 1984). At the very outset of his classic broadside criticizing Canada's Arctic anti-pollution initiative, Louis Henkin alludes to "classic manifestations of Georges Scelle's *dédoulement fonctionnel*" in Canada's (and its supporters') justificatory rhetoric: see Louis Henkin, "Arctic Anti-Pollution: Does Canada Make a Break - International Law?" (1971) 65 AJIL 131 at note 1. For an excellent example of embedded ideas of *dédoulement fonctionnel* in a defence of Canada's position, see R. St. J. Macdonald, Gerald L. Morris, and Douglas M. Johnston, "The Canadian Initiative to Establish a Maritime Zone for Environmental Protection: Its Significance for Multilateral Development" (1971) 21 U.T.L.J. 223. Of course, in an article which is probably the classic exposition of international law as an interactive communicative process of unilateral offer and multilateral response, McDougal makes active reference, albeit through a secondary source, to this Scellian notion: Myres McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea" (1955) 49 AJIL 356 at note 5 [hereinafter McDougal, "Hydrogen Bomb Tests"].

7. Beesley, *ibid.* at 92-113, 183-186; J.A. Beesley, "Rights and

Responsibilities of Arctic Coastal States: The Canadian View" (1971) *Jl. Mar. L. & Comm.* 1; Statement of Canada to the First Committee of the U.N. General Assembly (made by J.A. Beesley on December 4, 1971), (1971) 9 *Can. Y.B. Int'l L.* 276. See also the description of this process in relation to Canada's establishment of fishing zones in Gotlieb and Dalfen, *supra* note 3 at 251.

8. Gotlieb and Dalfen, *ibid.* at 245-246. Particularly worthy of note is their provocatively Hegelian turn of phrase which describes this purity of interaction as "a new kind of dialectic... [in which] both the 'thesis' of international solutions and the 'antithesis' of national solutions can now be appropriately synthesized in effective and realistic solutions embodying both elements." *Ibid.* at 246.

9. CCIL 1972, *supra* note 1 at 13. To get some flavour of the moment, it may be noted that Dean Macdonald started the conference off by reading out a telegram sent to the gathering from Prime Minister Trudeau which expresses Trudeau's delight at the formation of the CCIL. Macdonald immediately thereafter gave the floor to the Associate Secretary of State for External Affairs, Paul Tremblay, to speak in the stead of the absent Secretary of State Mitchell Sharp: *ibid.* at 1-2.

10. The following list of the order of appearance should give a sense of the historically-resonant quality of the proceedings: Macdonald, Tremblay (for Sharp), Gerry Morris (marking the passing of Wolfgang Friedman), Gotlieb and Dalfen (with their aforementioned keynote paper), Beesley (with his keynote reply and later interventions), John Humphrey, Max Cohen, Donat Pharand, Myres McDougal (who, along with Gotlieb and Beesley, was at the centre of conceptual discussions of how Canada's unilateralism fit within a general theory of international law), Suzanne Bastid (the sole female member of this inaugural Pantheon), André Dufour, Charles Bourne, Leslie Green, Thomas Franck, Alvaro de Soto, Ted Lee, Gérard La Forest, John Read, Percy Corbett, and Arvid Pardo.

11. Beesley, *supra* note 1 at 94.

12. Some of the choicest passages are as follows: Beesley ("One reason the rhetoric has changed...is that we simply don't take kindly anymore to being lectured."); John Humphrey ("I don't like the image that Canada is creating abroad, and I think that what has been happening has some of the same traits that Team Canada showed in Moscow."); Beesley ("All I would say is that just to be a Canadian is to grow up with some sense of the complexity of life"); Gotlieb ("It is part of the adulthood of a nation that it often acts in accordance with its own interests in the international field..."); Max Cohen (with respect to the 1950-1958 period of Canadian diplomacy, "suddenly we redefined ourselves"); and Beesley

If you want me to personalize the way I see these things, it is that outwardly I am a Canadian nationalist. At another level, I'm very much a Canadian nationalist. But at a very deep level of consciousness, I'm a real internationalist." CCIL 1972, supra note 1 at 105, 114, 115, 117, 120, and 146, respectively.

13. See Myres McDougal's interventions in CCIL 1972, supra note 1 at 136, 153, and 171. See also Beesley, *ibid.* at 146 ("I really can say that Professor McDougal's system is probably more utilized than even he may realize."); Gérard Forest, *ibid.* at 189 (defending McDougal's theory and associating himself with it as an "employer" of it); and Percy Corbett, *ibid.* at 260

("The teacher or student of international law who turns a blind eye upon the [New Haven school] contextual approach and configurative analysis is simply rejecting enlightenment. And there are already signs, at least in Canada and the United States, that these teachings are beginning to have some repercussions among the legal advisers of decision-makers.")

And see Gotlieb and Dalfen, supra note 3 at 247.

14. See e.g. McDougal, "Hydrogen Bomb Tests", supra note 6.

15. Paul Tremblay (on behalf of Secretary of State Sharp) in CCIL 1972, supra note 1 at 4.

16. For description, debate, and citations to all relevant treaties, see: J. Alan Beesley and Malcolm Rowe, "Canada and Spain: A Conservation Disput" (August 1995) 22:1 CCIL Bulletin 5; G.G. Davies, "The EC/Canadian Fisheries Dispute in the Northwest Atlantic" (1995) 44 I.C.L.Q. 927; José A. de Yturriaga, "Fishing in the High Seas: From the 1982 UN Convention on the Law of the Sea to the 1995 Agreement on Straddling Stocks" (1995) 3 Afr. Y.B. Int'l L. 151; and Howard Mann, "Canada Should Support Trend to Consider Sustainable Development" *The Ottawa Citizen* (June 8, 1994) A13. For various Department of Foreign Affairs memos and records of Parliamentary debates related to the Canadian initiative, see (1994) 32 Can. Y.B. Int'l L. 309-311, 312-314, 333-337 and (1995) 33 Can. Y.B. Int'l L. 404-407.

17. See Paul Fauteux, "The Canadian Legal Initiatives on High Seas Fishing" (1993) 4 YIEL 57. Although Spain has filed suit in the ICJ, possibly feeling it has spotted a opening in the wording of the Canadian reservation: see Yturriaga, supra note 16 at 176-177. At the time of writing, the ICJ proceedings remain at the jurisdictional stage.

18. UNCLOS, reproduced at (1982) 21 I.L.M. 1261. 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, reproduced at (1995) 34 I.L.M. 1542. Beesley and Rowe report on the influence of the Canadian initiative on the Convention by noting that, following the consensus adoption of the text, "the chairman of the conference, Satya Nandan, indicated that Canada's actions in [the] 'turbot war' spurred on the process of arriving at a new convention: "Beesley and Rowe, *supra* note 16. Note also that Canada and the European Community entered into an agreement that preceded the Convention on Straddling and Highly Migratory Fish Stocks but which was based on the Draft Convention: see Canada-European Community, Agreed Minute on the Conservation and Management of Fish Stocks and accompanying documents, reproduced in (1995) 34 I.L.M. 1260. This agreement was without prejudice to EC claims that Canada's actions on the high seas, notably the arrest of the Spanish vessel *Estai*, and extension of its fisheries jurisdiction beyond 200 miles were unlawful: see Letter dated 16 April 1995 from the European Commission to Canada, *ibid.* at 1274.

19. Recall the sub-title of Louis Henkin's criticism of the 1970 Arctic waters initiative, "Does Canada Make - or Break - International Law?" Henkin, *supra* note 6.

20. CCIL 1972, *supra* note 1 at 238.

21. On the acquisitive / non-acquisitive distinction, see Gotlieb and Dalfen, *supra* note 3 at 254-257.

22. See *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, [1974] I.C.J. 3.

23. *Ibid.* at para. 53. This passage is to be compared to the ambiguity of the Court's preceding statement at para. 40 wherein the Court stated: "The Court is of the view that there is no incompatibility with its judicial function in making a pronouncement on the rights and duties of the Parties under existing international law *which would clearly be capable of having a forward reach.*" (emphasis added) It would seem that this passage must be read in light of the earlier view expressed by the Court that good faith negotiation (based on purposes of reasonable accommodation of economic interests and a general duty to cooperate to achieve the ends of conservation) is "the most appropriate method for the solution of the dispute" (para. 31) and in light of its subsequent concluding statement that, in the ensuing negotiations, the parties "will have the benefit of the above appraisal of their respective rights, and of certain guidelines defining their scope" (para. 78).

24. This latter term is intended to help straddle the notions of law-application and law-interpretation.

25. CCIL 1972, *supra* note 1 at 225-226.

26. If one were to assume a continuum with pure legal stasis and pure dynamism as its two poles, his approach might be located a step or two along the continuum from strong interpretation (or, what one might even call re-interpretation) and a step or two shy of blank-slate legislation.

27. For the International Law Commission's list of circumstances precluding wrongfulness, see Art. 29-35 in the ILC's 1980 Draft Articles on the Origin of Responsibility, reproduced in Ian Brownlie, ed., *Basic Documents in International Law*, 4th ed. (Oxford: Clarendon Press, 1995) 426 at 435. For a critical assessment of Canada's arguments regarding these defences, see Davies, *supra* note 16. See a memorandum dated April 19, 1994, written by the Department of Foreign Affairs' Legal Bureau on the doctrine of necessity, reproduced at (1994) 32 Can. Y.B. Int'l L. 312-314; see also the view taken by the Legal Bureau on countermeasures in the context of an analysis of another unilateral extraterritorial initiative, the U.S.'s Helms-Burton law, reproduced at (1995) 33 Can. Y.B. Int'l L. 386-388.

28. Although I am not excluding institutional reforms to the United Nations Environmental Program, the Commission on Sustainable Development or even the UN Trusteeship Council which could make the proposal for ICJ-centred reform less pressing or desirable.

29. Art. 38 (2) reads: "This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

30. See Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed. (New York: Routledge, 1997) at 288

31. In a contribution of the length of this comment, I cannot develop reasons why one might contemplate that a specialized chamber of the ICJ could engage in a wide-ranging normative analysis of international environmental law with a view to development-cum-creation of the law. It is recognized that even the suitability of the Court for regular, positive law litigation in the environmental field is already a contested question and that the present proposal might, upon further scrutiny, be shown to be undesirable: see e.g. Catherine A. Cooper, "The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques" (1986) 24 Can. Y.B. Int'l L. 257, *esp.* at 256-265.