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37/The Sixties to the Seventies: The Perspective of the Legal Adviser

The perspective of the foreign ministry legal adviser presumably varies from country to country and from one historical period to the other. The vital interests of one or more countries may be directly engaged during certain periods by major international issues such as the Korean police action, the Hungarian uprising, the Suez invasion, the Bay of Pigs incident, the Cuban missile crisis, the Dominican Republic intervention, the Czech invasion, the Biafran civil war, the Rhodesian declaration of independence, and the Vietnam war. Such issues and the responses to them reveal the extent to which international law influences the basic foreign policy of the countries concerned. There were no such war and peace issues directly engaging Canada's vital national interests during the sixties and early seventies. There has, however, been a series of international legal problems of a different order which have touched directly or indirectly on Canada's national interests, particularly Canada's personality as a single state on the international plane and Canada's jurisdiction, sovereignty, and territoriality.

What follows is a purely personal appraisal of the responses by Canada over the past decade to a representative range of issues, with a view to determining whether they indicate a distinctive Canadian approach and, if so, its relevance to the problems of the seventies. While the views are personal the optic is nevertheless that of the legal adviser to the Department of External Affairs, and it is useful, therefore, to consider the perspective before discussing the perceptions.

THE FUNCTION

The point of departure of any foreign ministry legal adviser and the distinguishing feature of his role is the solicitor-client relationship arising out of his official position. The basic function of the Canadian legal adviser is to attempt to safeguard Canadian interests as they may be affected by international law. To perform this function he must not only provide advice to the foreign minister and the government on issues of international law touching on Canada's interests but must also attempt to ensure that through Canadian participation in the progressive development of international law the law reflects Canada's interests to the maximum degree attainable.[1]

THE RESOURCES

In the case of Canada, the legal adviser to the Department of External Affairs is also the director general of the Bureau of Legal Affairs, and the bureau provides the supporting staff for both the advisory and operational aspects of his area of

responsibilities. The bureau has been greatly strengthened over the past decade since the days when it comprised a single legal division with a relatively small staff. It is now composed of the Legal Advisory Division, consisting of 12 officers serving in 4 sections (treaty and constitutional, advisory, economic, and claims), and the Legal Operations Division, consisting of 12 officers serving in 4 sections (law of the sea, environmental law, UN and legal planning, and private international law). In addition there is a resident academic doing long-term research, and provision for two such positions to be filled at the same time (as was the case in 1972). The bureau is staffed in part by rotational legally qualified foreign service officers, most of whom spend approximately two-thirds of their career doing legal work in Ottawa and approximately one-third doing related work abroad, and in part by non-rotational legal advisers whose whole career is spent in the Legal Bureau.

THE PARAMETERS

There is a high degree of political content embodied in international law, both in its development and its interpretation.[2] No problem in international law can be viewed realistically in isolation from related economic, social, scientific, technical, and political factors. No solution to an international law problem can be achieved which does not take into account these considerations. This presupposes a close relationship between the legal adviser and the other foreign policy decision-makers. If this were true in the past it is increasingly true today, particularly with respect to such highly topical problem areas as environmental law, law of the sea, outer space law, hijacking, international terrorism, and humanitarian rules of war.

There is an interpenetration of national and international law. Acts on either plane can have constitutive legal effects on the other. Every legal adviser must therefore view questions of international law with a kind of double vision, focusing at one and the same time on both the domestic scene and the international world. If this is true as a generality, it is particularly true for Canada where this interpenetration exists not only on such classic issues as the legality in international law of unilateral assertions of marine jurisdiction but on peculiarly Canadian problems such as the constitutional validity of provincial action on the international plane. Examples of two-dimensional problems raising both kinds of complexity and illustrating the link between them can be seen, for example, in the differences existing between the federal and provincial levels of government concerning offshore mineral rights jurisdiction.

There is no automaticity in international law-making. Policy is not law on the international plane. Even major world powers must seek and obtain the acquiescence of the international community in the legality of their actions, failing which such action may be considered to be outside the law. Every policy option must be considered, therefore, not only in terms of national objectives but in the light of its acceptability internationally. As a consequence, there is at a relatively early stage of policy-making on international law issues a need to perceive the possibilities of attaining a reconciliation of national objectives with those of other states and even, in some cases, with the general interest of the international community.

There is a large element of responsiveness embodied in many foreign policy decisions, arising out of the organic link in this field between positive acts and reaction

to acts of others. Not infrequently policies are developed primarily in response to policies of other countries or to more general trends and developments in international law. More often, policies reflect a blend of action and reaction. Responsiveness can be of many kinds, and even deliberate passivity can be a form of reaction (as, for example, with claims of other states neither accepted nor challenged). Even where the policy is essentially responsive, however, there must be a clear perception of the policy objectives at stake.[3]

International law is dynamic. It is nearly always in a state of flux on at least some major issues. At times a state must be in motion merely to keep abreast of the law. Nothing is immutable, nothing completed, nothing certain. By the same token, there is a great scope for progressive development of the law through creativity, determination, skill, and common sense in translating ideas into reality.

There is an interrelationship between seemingly discrete fields of law on the international plane even more perhaps than on the municipal plane, where law is more highly developed. Unrelated subject areas draw upon one another for both doctrine and procedure. Air law, for example, may influence the future law of the sea. The development of law in particular fields can often be seen to double back and draw upon its early origins, as appears to be also occurring in the law of the sea. This process of 'cannibalization' and cross-fertilization is thus both horizontal and vertical. It imposes on the part of those concerned an open-mindedness, a willingness to question first principles, and a need for a continuing 'overview.'

There is no continuing stream of authoritative and binding judicial decisions in international law. In most cases the law must be determined from sources other than judicial decision. There is no doctrine of *stare decisis* in international law. Apart from article 94(2) of the UN Charter, there is no authority to impose decisions of the International Court. States may even accept or reject voluntarily the jurisdiction of the International Court with the consequence that it is often impossible to determine an issue by reference to the court. There is no legislature, in the usual sense of the term, laying down the laws to be enforced. International law is enforceable only by consent.

The foregoing characteristics suggest rather more freedom for states than may actually pertain. Given the vast interlocking network of bilateral and multilateral treaties on a variety of subjects, these apparent weaknesses in the legal system are not fatal. There is much evidence that states take their treaty obligations seriously and only rarely violate them. Every system of law relies for its enforcement ultimately on the will of the community it purports to regulate, and this is particularly true of international law. Thus the weaknesses in the legal system tend to reflect the relatively primitive stage of development of the international society but not of the law itself, and, as Percy Corbett points out, 'legal advisers draw upon a body of law which they treat as binding upon states' whether it originates from the customary or conventional law-making processes.

The international law-making process, whether customary or conventional, is complex, laborious, uncertain, and often painfully slow. Exceptions exist, such as the rapid emergence of the continental shelf doctrine during the period between the 1945 Truman Proclamation and the 1958 Geneva Law of the Sea Conference, perhaps because of the merging and coalescing of the customary and conventional processes through the agencies of the International Law Commission and the 1958

UN Law of the Sea Conference.[4] This situation imposes at once on the legal adviser the need for sensitivity to changes in international law and also to the possibilities for future changes in the law. Changes in the law may necessitate long-term planning and consistent and determined pursuit of goals through a variety of means, perhaps over a lengthy period.

The national interest on any particular issue of international law may not be clear-cut, and many factors may have to be considered in order to determine even the relevance or significance of an issue, yet alone the appropriate policy option. This is particularly true for Canada. At the simplest level an option which may appear to coincide with Canada's domestic interests may not coincide with Canada's national interests after the international consequences for Canada of the option in question are taken into account.

Canada is a complex country with a wide range of interests at stake on the international plane. Although a relatively small country in terms of population Canada encompasses a vast territory which must be 'protected.' At one level protection of Canada's 'sovereignty' takes the traditional forms of protection through the armed forces, alliances, and diplomacy; at another level the protection may consist of the kinds of action required to protect a specific range of interests, such as the quality of the environment and Canada's long-term economic interests. The range of factors to be included, for example, in seeking to determine the Canadian position on multilateral consideration of multinational enterprises might be that Canada is a major trading nation, a technologically advanced country with vast untapped natural resources, a considerable manufacturing capacity with no real lack of capital but recurring problems of inflation and unemployment, both a 'head office' country for Canadian-based multinational corporations and a 'branch plant' country with many foreign-based multinational enterprises operating in Canada. These considerations, when taken together, might justify a policy of inaction but instead resulted in a Canadian initiative at the XVI and XVII UN General Assemblies calling for the study of the implications for international trade law of the activities of multinational enterprises. It can readily be perceived from this single example that what is required in determining the policy options to achieve national objectives is a balancing of many factors coupled, ideally, with a sense of direction and timing concerning the subject matter, based as much on subjective considerations concerning the mood of the international community as on an appraisal of concrete factors.

CANADIAN INTERESTS

It would be idle to attempt to summarize the range of Canadian interests at stake on the international plane since they are as variable as the issues which may engage one or more such interests. Indeed, there are probably few states whose interests are more diverse and even at times conflicting or contradictory. In determining the Canadian interest which might be affected by a particular issue of international law, it may be necessary, for example, to take into account that Canada is a federal state with three levels of government (in some provinces four); two founding peoples with two languages (but encompassing many other ethnic groups); problems of regionalism rarely encountered short of whole continents; and belongs both to the Commonwealth and La Francophonie while maintaining continuing ties with both

'mother countries.' On another issue other factors may be relevant, such as the links between the Canadian economy and that of the United States at a time when a new form of Canadian economic nationalism appears to be welling up, or that Canada is both a substantial foreign investor and one of the world's greatest recipients of foreign investment.

Other problems may raise even broader considerations. Canada is physically located between the two major superpowers, facing both northwards and southwards, not merely geographically but in the sense of the north-south development gap, as Canada remains a country both developed and developing, with considerable scientific, technological, and industrial capacity but with natural resources in need of development; facing both eastwards and westwards in many senses other than the merely geographical, with long-established social, cultural, political, and economic links with western Europe and Commonwealth countries, and newly developing political, economic, and even cultural links with Africa, Asia, and Latin America, while strongly influenced politically, culturally, and socially as well as economically by the United States.

With respect to other problem areas, much more specific and particular factors may be relevant. Canada is a coastal state with an extremely long and vulnerable coastline and is not a major maritime power. It is a coastal fishing nation with few distant water fishing interests, and with an extensive and deeply glaciated continental shelf. While a major trading nation concerned to protect freedom of passage, Canada is sensitive about the status of the waters of the Arctic archipelago, particularly the Northwest Passage. On other matters, military-political considerations become relevant. Canada is a member of NATO, allied to the great powers of the West but with a long-standing interest in bringing about a complete ban of nuclear testing, and thus opposed to such tests, even by her allies; at the same time Canada is developing closer relations with the USSR and China while sharing many common interests with smaller 'non-aligned' countries which, like Canada, are essentially non-space, non-nuclear, non-maritime powers. On some issues, such as the Vietnam war, Canada has had little or no direct interest and yet a continuing commitment to peacekeeping and a highly developed capacity for it which could result in Canada's involvement in a further peacekeeping mission.[5] It is not surprising, in the light of the range of complex and seemingly unrelated considerations which must be taken into account in determining the Canadian position on a particular issue, that some Canadians may still wonder whether they have a clearcut national identity or why non-Canadians find it difficult to put Canada in an ideologically neat package or in a particular 'geographic' or economic pigeon-hole.

In such circumstances, and in the light of the parameters discussed above, it might be understandable if Canada were to play little or no role on the international plane, if only because of the difficulties in determining Canadian priorities in clear and unambiguous terms. It is suggested, however, that the range of seemingly conflicting considerations, contradictions, and inconsistencies concerning the Canadian national interest have required Canadian policy-makers to take a very hard look at one time or another at most of the contemporary international legal problem areas, ranging from the traditional war and peace issues to very particular and even highly technical legal problems in order to determine what are its particular implications for Canada, and at what point the Canadian interest and the interests of the

international community as a whole might appear to coincide. It is suggested further that as a consequence of this inability to make automatic assumptions about the Canadian position on any issue of international law, the Canadian approach to international law must necessarily be somewhat distinctive. It follows from this particularity of the Canadian outlook that Canada must be active in the development of the law if Canadian interests are to be protected.

THE ADVISORY FUNCTION

The nature of the issues requiring the advice of the legal adviser to the secretary of state for external affairs can vary from the strictly legal (the validity of a reservation to a treaty) through the highly technical (the precise point of criticality in legal terms of a nuclear energy plant at which time safeguards must begin to be applied) to the almost wholly political (the nature, form, and timing of recognition of a state or government). The problems can range also from the almost solely domestic (the permissibility under Canadian constitutional law of acts by a provincial government on the international plane) through the range of bilateral issues with other states (the liability for acts affecting the environment incurred pursuant to a treaty obligation or under customary international law) to the very general and most international of legal issues (the interpretation to be given to an advisory opinion of the International Court).

New questions can arise suddenly concerning areas of law regarded as settled, such as the precise nature and extent of the duty of a protecting state towards a kidnapped diplomat of another state. A legal opinion may be required as a matter of urgency on issues as delicate as the status of one of the belligerents in a civil war or whether the conflict itself is international or non-international. The precise language chosen to confer recognition emerging perhaps through a lengthy process of negotiation based on continuous legal as well as political advice on a variety of formulations can have a wholly disproportionate effect on issues as important as the admission of a state to the UN if enough other countries follow the precedent. Advice may be required in an area of law which is undeveloped or even virtually non-existent with consequences as serious as the submission of a new reservation to the jurisdiction of the International Court and as important as the development of a whole new concept in international law. Thus, the legal, political, and even economic consequences of a legal opinion on a practical issue may be extremely significant. It follows that the legal adviser must participate at a formative stage of the decision-making process on matters involving issues of international law.

Obviously, the political element in international law is so preponderant as to at times be predominant, necessitating a close relationship between the legal adviser and policy-makers on international legal-political issues. Nevertheless, the legal adviser must fulfil an essentially legal role in advising his foreign minister or government on matters of international law. Although there is often a dearth of clearly defined jurisprudence upon which advice may be based, there may be an overabundance of materials reflecting this jurisprudence, be they evidence of divergent state practice, disputed treaty provisions, conflicting views of authors, or contentious decisions of tribunals. These materials rarely provide certainty, in part because of the dynamic nature of international law itself. It does not follow from this, however,

that the legal opinions offered can be correspondingly vague or ambiguous, since policy decisions may have to be made on the basis of such opinions (together, of course, with other relevant factors). An opinion, for example, as to the legality of the twelve-mile territorial sea given in 1964 might lead to the assertion of a lesser claim, such as a twelve-mile fishing zone, while six years later an opinion on the same issue might lead to a twelve-mile territorial sea claim without even the protection of a reservation to the jurisdiction of the International Court. State practice may account for the substantive change in international law in such a short period. However, state practice itself, which must take into account public statements, protests to claims, and even resolutions and debates of the UN, on occasion, rarely provides a solid basis for a clear-cut opinion. As a consequence, international law is often elusive and difficult to define or to determine, and it requires, ideally, a feel for international law to ensure the weighting of all the legal, moral, political, economic, and even military factors which are in continuous interplay in the birth, development, and crystallization of law on any single issue.

The advisory function would appear to be simpler for the Canadian legal adviser today than for his predecessors in at least one respect: the materials and the sources of advice of Canadian origin are now much more numerous than heretofore, as the Canadian interest in international law increases and more and more able academics contribute to the sources of international law. The present volume provides evidence both of the richness of these sources and of the variety of Canadian perspectives. In at least one respect, however, the converse is true and the role of the Canadian legal adviser becomes more demanding as the range of international legal issues of importance to Canada continues to multiply, in part because of the increase in the number of law-makers as more and more countries emerge from colonial status, and in part because of the increase in law-making activities in the UN, which in turn reflect the growing diversity and complexity of international law as the foreign policy of states expands into fields never contemplated when foreign policy was seen essentially in terms of war, peace, and trade.

The range of problem areas considered and the nature of the opinions given by successive legal advisers during the sixties and the early seventies is indicated in the sections on Canadian Practice in International Law appearing in the *Canadian Yearbook of International Law* for these years. Even the selection of materials contained in that source, necessarily restricted for a variety of reasons, includes opinions and statements of the Canadian position on an extremely wide variety of issues of international law. It is interesting to note the range of action in two major areas of law which have required much of the attention of the successive legal advisers during the sixties and which will undoubtedly continue into the seventies; namely, questions touching on the nature and extent of the right of Canadian provinces to participate in action on the international plane and problems relating to the jurisdiction, sovereignty, and territory of Canada.[6]

It is central to the advisory function that the legal adviser must attempt to ensure that Canada's role in international affairs is conducted in accordance with recognized principles of international law.[7] Ideally, there is no conflict between this aspect of his responsibilities and his basic 'solicitor-client' function of protecting his country's national interests. Even from a purely national point of view, international law, as the basis for the developing world order, or even the lesser goal of

stable relations between states, benefits all states. Far from being incompatible with the protection of national interests, adherence to the rule of law may be seen as a specific and valuable form of protection of national interests. Occasions may arise, however, when international law does not reflect the national interests and even, perhaps, the general 'international' interests, when, for example, the law is undeveloped or out of touch with contemporary needs. In such instances, it may be necessary to seek to bring about changes in the law.[8] It is the role of the legal adviser to guard against the law being regarded as a mere instrument of policy, an approach inimical to the very concept of the rule of law. The interests of the international community must, in any event, be taken into account in order to achieve the accommodation of interests which is the prerequisite to the emergence of a new rule of law, however it is developed, whether by state practice or by multilateral law-making. Thus, the legal adviser must often pursue 'international goals' as part of his function of protecting his country's national interests, while conversely he must pursue 'national goals' in a manner which takes into account the interests of the international community as a whole.[9] Much turns, therefore, on how the national goals are pursued and the extent to which a particular policy does, in fact, embody a blend of national and 'international' interests, a point which will be examined later.

THE OPERATIONAL FUNCTION

A major distinction between the advisory and operational functions of a foreign ministry legal adviser is that the former is his particular and sole responsibility, in consultation, of course, with appropriate experts within and outside the government service; in the case of the operational function, however, the legal adviser carries out instructions of his government in the same way as do other public servants. Bureaucrats make recommendations but governments decide policy. If the legal adviser represents his country in bilateral or multilateral negotiations, he does so in a purely representative capacity. The implementation of a particular policy may fall to him and his colleagues in his own and in other government departments, but the policy is that of his country as determined by its government. The operational function may nevertheless be complex and involve, in the case of Canada, the hammering out of positions through consultations with a number of other government departments at the federal level, and on occasion (such as the Stockholm Conference) representatives from provinces and from industry. His operational function therefore usually consists of co-ordination, preparation, persuasion, and legal diplomacy, as compared to the essentially advisory nature of his other major function. The distinction is not unlike that between barristers and solicitors pertaining in the UK and some other parts of the world.

The legal adviser must look to a variety of sources for background information and advice. An area involving deep ideological differences may require the advice and expertise of political scientists in academic circles and the foreign service familiar with the historical background and the semantics involved on a particular issue. An attempt to develop an appropriate response on hijacking necessitates close consultation with civil aviation and security experts. An attempt to develop international environmental law requires a multidisciplinary approach presupposing close

collaboration between scientists, technicians, economists, political scientists, and lawyers (both domestic and international) and consultation with other departments, the provinces, private industry, and concerned members of the public. An initiative in the UN calling for the development of space law on a particular issue is the outcome of a series of discussions with experts on communications, within and outside the government service. The position to be adopted on the legal measures to be taken to combat terrorism must take into account the views of a whole range of experts concerned with security, the airlines, and the airline pilots association, as well as those familiar with the methodology of legal diplomacy in the UN, including in particular knowledge of the positions of various countries and groups of countries on such highly political issues. The development of proposals on the law of the sea requires consultation with experts on fisheries, naval strategy, mineral resource exploitation, hydrographers, cartographers, and related sciences, as well as representatives of industry, and members of the public and parliamentary committees.

The advisory function is presumably as effective for one country as another, assuming that the necessary resources are available. In the case of the operational role, whatever the availability of resources and the degree of success in coordinating action, the influence of any one country on the progressive development of international law, whether by custom or by convention, is necessarily limited. It is, accordingly, an important fact of life for the Canadian legal adviser that Canada is neither a major power able to impose its view on the law of other states nor a ministate helpless to influence events which may shape international law.[10]

The success of the advisory function is often, although not always, measurable by events, whereas the success of the operational role is more difficult to appraise since its effectiveness depends on subjective considerations, particularly in the case of conference diplomacy, including on occasion such intangibles as timing of a statement, mood of the conference, and even personal relationships with other delegates. On other occasions where it is necessary to join forces with representatives of other states sharing a similar position, the influence which has been or can be exerted on a particular area of developing law is more readily identifiable.

The advisory function is nearly always a confidential one, although public answers must often be given with respect to letters from the public, questions in House of Commons committees, debates in the UN, and in certain other situations. The operational 'role' is more often a public one and becoming increasingly so as foreign ministry legal advisers are participating more and more in open or semipublic debates on matters of international law. This is particularly true in the case of Canada in the light of the attention focused in recent years upon Canadian approaches to international environmental law and the law of the sea as reflected in Canadian legislation.

CANADIAN ACTIVISM

In the light of these considerations, any resumé of Canada's role during the past decade in both the codification and progressive development of international law, and also the customary law-making process, through state practice in particular, indicates what may be to some a surprising range and intensity of activity. Although it is fashionable to talk of international law having fallen into disrepute since the

days of the League of Nations, there is in fact a tremendous resurgence of codification and progressive development of international law. At the same time the development of customary international law by state practice has not fallen into desuetude nor can it, as new problems thrown up by technological developments continue to force governments to make decisions having constitutive legal implications on the international plane. The pace of both processes has, if anything, accelerated during the 1960s and shows every sign of continuing to do so during the 1970s.[1]

Over the past decade Canada has participated in virtually every important multilateral law-making activity. During this period, for example, a distinguished Canadian, Marcel Cadieux, was very active in the law-making activities of the International Law Commission in its studies on the law of treaties and special missions. Canada has also participated actively in the UN Human Rights Commission and the Third Committee of the UN on human rights problems; the major diplomatic conferences on diplomatic relations, consular relations, and the law of treaties; the 1969 Brussels IMCO Conference; the diplomatic conference on special missions; the UN Sub-Committee on the seven charter principles of 'friendly relations'; the legal committee of IMCO and a succession of IMCO conferences on maritime law; the UN Special Committee on the Definition of Aggression; the sessions of the UN Outer Space Legal Sub-Committee which have elaborated the outer space treaty, the return of astronauts convention, and the outer space liability convention, and is now working on a registration convention; the UN working group on direct broadcast satellites; the series of intergovernmental conferences leading to the establishment of Intelsat, the Ad Hoc and subsequent Standing Committee of the UN on the Seabed (which is also the preparatory committee for the Third Law of the Sea Conference); the several preparatory groups, including in particular those on marine pollution and on the Declaration on the Human Environment, established to prepare for the Stockholm Conference itself; the several preparatory conferences on the Ocean Dumping Convention, including the London conference at which the convention was concluded; a series of ICNAF conferences leading to new regional rules of law to conserve fisheries; the series of francophone conferences on education and cultural matters; the ICAO legal committee and subcommittees and the subsequent Montreal and Hague conferences on sabotage and hijacking of aircraft; the ICRC conference in Istanbul which started the process of up-dating humanitarian law in armed conflicts, and the subsequent ICRC conferences of government experts, in which Canada chaired the commission set up to further develop international humanitarian law in non-international conflicts; and the Sixth Committee studies on protection of diplomats and on international terrorism. Canada has also participated actively in the revision of the GATT, in the preparation of the GATT anti-dumping code, in the development of legal norms for the protection of foreign investment, and the range of conventions intended to facilitate international trade, from customs through the international combined transport of goods (TCM). Canada has also been active in recent years in the development of intellectual and industrial property conventions and in the preparation of the UNESCO conventions directed to the protection of the cultural heritage. Canada is also a member of UNIDROIT and the Hague Conference, which are both working actively on questions of private international law. Canada has made substantial contributions to the Sixth Commit-

tee studies on technical assistance in international law and on the role of the International Court of Justice (with considerable input from Canadian academics). Canada now expects to be appointed to the recently established UN Committee on Terrorism.

Merely to mention Canadian participation in the relevant commissions and committees and international conferences is no indication, of course, that Canada has been particularly active in these organizations or has made a substantive contribution in any of these diverse fields. Such evidence may, perhaps, be found in the other articles in this publication. The comments below will accordingly be directed to a few representative examples.

MULTILATERAL 'LAW-MAKING' ACTIVITIES

Canada has actively pursued a distinctive approach on a number of subject areas over the last decade, on some of which the Canadian national interest appeared to be directly engaged, on others merely indirectly, while on still others the Canadian interest was not markedly different from that of any other responsible member of the international community concerned to contribute to the development of the rule of law amongst nations.

In the first category of issues engaging the Canadian interest directly, an obvious example was the stance taken by Canada at the Law of Treaties Conference concerning the need to safeguard the constitutions of federal states against external interpretation and intervention. The Canadian member of the International Law Commission, Marcel Cadieux, had pointed out, together with some other members, the potentially serious, albeit unintended, dangers raised by the language of article 5 of the Law of Treaties Convention. The convention nonetheless went forward to the Law of Treaties Conference with the controversial language intact. The Canadian delegation, ably led by Max Wershof, deliberately refrained from active efforts to influence other states at the first session of the Law of Treaties Conference on the assumption that the view of federal states, that is to say those states directly affected by the article, would prevail. This did not prove to be the case, however, and Canada therefore worked actively both prior to and during the second session, together with other federal states (including in particular India, Mexico, and Australia) to persuade the delegates at the conference of the inadequacies of the article as drafted. In the event, the controversial language of the article was deleted by an overwhelming majority vote.

Another issue clearly involving the Canadian national interest was the nature and extent of participation by Canadian provinces in international francophone organizations. In spite of difficulties leading in one case to the suspension of relations with another state, it proved possible to work out accommodations which were sufficiently responsive to the real needs of the provinces to satisfy them and sufficiently flexible in legal terms to avoid doing violence either to the Canadian constitution or to international law. The contributions of Marcel Cadieux, Allan Gotlieb, and André Bissonnette during their time as legal advisers to the resolution of these problems were extremely significant.

A further such instance is the recent Canadian proposal in the Sixth Committee that the UN Commission on International Trade Law begin to consider the implica-

tions for the harmonization of trade law of the activities of multinational enterprises. The proposal was preceded by careful interdepartmental consultation on a range of matters. UNCITRAL was chosen as the appropriate organ for action in this field in spite of possible doubts concerning its mandate, because of its high professional competence in law-making on technical trade issues, and because it might be expected to adopt a workman-like approach divorced from polemics. A gradualist approach was adopted whereby the matter was first raised at the Sixteenth UN GA and put forth as a concrete proposal only a year later at the Seventeenth UN GA. The proposal was a deliberately modest one not likely to alarm the economic sector in Canada or abroad but intended nonetheless to provide an adequate basis for a serious study of some of the relevant legal issues. In the intervening period, subsequent to the initial suggestion by Canada and prior to the specific proposal, Chile and other countries put forth proposals that ECOSOC and UNCTAD consider certain aspects of the phenomenon of the multinational enterprise, but Canada was the first country in the UN to raise the legal issues.

Another such example was the Canadian proposal that the UN Outer Space Committee begin considering the range of problems raised by remote sensing of the earth by satellites. Apart from other considerations, including the general desirability of multilateral law on a highly technical matter on which existing technology is confined to relatively few states, the interest of Canada lies in safeguarding its own 'sovereign rights' to the information gained through such satellites concerning the national resources of Canada. Similarly, in pressing so long and so hard for a 'victim-oriented' liability convention for damage by space objects, Canada reflected its immediate national interest in protecting itself from damage by such objects, which was not seen as incompatible with Canada's long-term interests as a country with a developing space capability and thus a potential space power.

The Canadian position in the UN discussions on permanent sovereignty over national resources provides a further interesting example. Early in the UN discussions on permanent sovereignty it was concluded that Canada did not fit neatly into the categories either of developed or developing countries, and the Canadian position was therefore intended to reflect the fact that Canada was at once both a developed and a developing country. The most recent illustration of this position was the affirmative vote of the Canadian delegation to the XXVII UN GA on a resolution on permanent sovereignty over national resources which was supported by very few other 'developed' states.

Numerous similar examples can be found in the field of disarmament.[12] Canada took a lead and indeed was almost alone for a period in pressing for the Non-Proliferation Treaty and the Partial Test Ban treaties (which were regarded even in those early years as both environmental and disarmament measures), at a time when some of Canada's allies resisted or were lukewarm towards such action by Canada. More recently Canada adopted a distinctive and controversial position with respect to the seabed arms control treaty; Canada was the first country to call for the application of the treaty to the widest possible area of the seabed including even areas within national jurisdiction. Canada also proposed in the face of opposition from other western countries the banning of the implanting of all offensive weapons from the seabed and not merely weapons of mass destruction; Canada also took a lead in pressing strongly for effective rights of inspection by coastal states

to ensure compliance with the treaty. In all of these activities the Canadian position reflected the interests of Canada as a coastal state, not a major maritime power, not a great power, not a nuclear power, and not a space power; but a NATO country experienced in peacekeeping and with a strong interest in developing effective arms control measures. Similarly, in the adoption of a strong stance on outer space issues long before Canada had any space capability of its own, the Canadian position reflected an awareness of the future implications for Canada of conventions which at the time appeared to be essentially bilateral agreements between the two space powers sanctioned by the rest of the international community.

There may be a second category of issues which engage both a direct and an indirect Canadian interest. An example of a Canadian position on such matters was the early and consistent Canadian insistence at the diplomatic and consular conferences on the functional approach to diplomatic and consular immunities whereby only those immunities essential to the performance of the function would be admitted. Another such example was the active collaboration by Canada with Sweden in the preparation of a joint paper on the legal aspects of direct broadcast satellites. Another is the current Canadian initiative proposing an outer space registration convention. These policies have been vigorously pursued with the conscious recognition of the Canadian interest, both direct and indirect, but, it is suggested, in ways not inconsistent with the general interests of the international community.

A particularly apt example of a problem area engaging Canada's interests both directly and indirectly is provided by the attempts made over the past decade in the OECD and the IBRD and in the International Law Commission, which will undoubtedly continue on into the next decade, to produce legal norms concerning the protection of private foreign investment. Canada is both an exporter and an importer of capital but is a net importer. In recent years, however, Canada's interests have become more directly engaged as Canadian investments abroad have been subjected to expropriation. The Canadian position has, however, not been on all fours with that of the major capital exporting states and has tended to go further towards meeting the preoccupations of developing countries on such issues as 'promptness' of compensation while adhering in general to traditional concepts of state responsibility.

There may also be a third category of problem areas engaging Canadian interests only indirectly. Such was the case with respect to the 'Friendly Relations' committee's deliberations in the UN, in which there was an active and distinctive Canadian involvement in the negotiations leading to the establishment[13] and the subsequent deliberations of that committee over a seven-year period, resulting ultimately in the 25th anniversary declaration of the UN on friendly relations. The Canadian approach was motivated originally by the indirect interest of a western state desirous to channel the pressures for the codification of the principles of peaceful coexistence into a less ideologically motivated direction, and at the same time to involve developing countries directly in the elaboration of charter principles as a means of responding to the widespread feeling that they had not had a hand in the development of the law of the charter. Subsequently, the Canadian interest in the formulation of specific principles, such as non-intervention and self-determination, became more direct, while the Canadian interest in other principles such as the non-use of force became less direct.

An analogous example was the lead taken by Canada in the UN Special Commit-

tee on the Definition of Aggression in pressing for a western definition (in the face of thirty years of western resistance to such action), in order to ensure that any definition produced adequately safeguards the discretionary powers of the Security Council and also that the most common forms of twentieth century aggression, such as the incursion of armed bands across frontiers, would be covered. Canada's position on hijacking similarly reflected at the outset only an indirect interest although more latterly a direct interest, after the hijacking of Canadian aircraft and of non-Canadian aircraft in Canadian territory. The Canadian approach on this question has been from the outset based on the need for concrete action to combat hijacking which does not do violence either to existing bilateral air agreements or the general principles of treaty law concerning the right to apply treaties against non-parties. The Canadian approach on this issue falls between those who consider that pre-existing multilateral agreements such as the Chicago Convention provide an adequate foundation for sanctions and those who argue that sanctions can be taken only by the Security Council. While on some of these questions the Canadian interest may be merely indirect, the common element in the Canadian approach is clearly the general desirability of developing international law on the non-use of force as an end in itself as part of the process of developing a world order.

It is possible to discern a fourth category of issues of no direct Canadian interest and little or no perceivable indirect interest, on which there are, nevertheless, examples of a distinctive Canadian position, such as the Canadian proposal at the Istanbul Red Cross Conference for the establishment of an international legal aid fund for human rights litigants. A similar example is provided by the very early Canadian co-sponsorship in the Human Rights Commission of the proposal for the establishment of a human rights commissioner. The proposals by Canada at the Istanbul conference for concrete follow-up action to develop humanitarian laws of warfare by drafting protocols to the 1949 Geneva Red Cross Conventions on the rules applicable to non-international conflicts is another such example. The Canadian position on the rules of succession of states in respect of treaties was also, at the point in Canadian history when the Canadian government's comments were submitted to the International Law Commission, based in large part, if not entirely, on the general interest of Canada in ensuring certainty and stability of treaty relations. The general Canadian posture at the Law of Treaties Conference on such issues as coercion, *rebus sic stantibus* and *jus cogens* and perhaps, more important, Canada's early accession to the convention on the law of treaties, provide concrete evidence of Canada's continuing commitment to the development of international law, in this case the constitutional basis for much of existing international law.

It is mentioned above that there are two major problem areas which have occupied the attention of successive legal advisers during the last decade[14] and which it may be assumed will continue to do so over the next decade; namely, questions touching on the participation of the Canadian provinces in action by Canada on the international plane and questions of jurisdiction, sovereignty, and territoriality. Although both are discussed in depth elsewhere in this volume, it is necessary to refer, albeit briefly, to these two fields of law of particular interest to Canada in any attempt at an overview, however cursory, of Canadian approaches to international law.

Canadians appear to have realized at an early stage in the evolution of the Cana-

dian nation state that it would be necessary to modify both internal 'empire' law of the British Empire and international law in order to lay the basis for Canada's gradual and peaceful evolution from colony to nation. The temerity of Canadian politicians and statesmen is surprising in retrospect when one considers the extent of the changes they wrought. Certainly there was no precedent for their action in consistently moving towards independence by peaceful means, policies bold and inventive in concept, however gradualist in implementation. The development of the Canadian nation state has continued to reflect these early characteristics of willingness to bend both constitutional and international law in order to achieve acceptable accommodations.

The Canadian provinces have been accorded something tantamount to, while falling short of, a right of legation through their separate offices in London, Paris, and in Washington, while provincial representatives are now included in the offices of a number of Canadian embassies in other countries. One would search in vain for a precise rule of constitutional or international law for such a development. Similarly, while Canadian provinces have always been able to work out 'administrative arrangements' with member-states of the union south of the border, in recent years Canadian provinces have been able to conclude 'agreements' with France and other states resting for their validity upon umbrella treaties concluded by Canada and these other states. Once again, outside precedents from domestic, constitutional, or international law will be sought in vain. Even with respect to participation in international conferences, arrangements have been worked out for the inclusion of provincial delegates within the Canadian delegations to a series of francophone and other international conferences. No precise parallel exists in the state practice of other countries. In all these activities Canada may not have sought deliberately to alter international law but it has not hesitated to bend it where necessary. Similarly, Canada has not sought to postpone such developments until a formal constitutional solution is achieved but has developed practices within the existing constitution. Whether such practices have had constitutive legal effects either on the municipal or international legal plane is a moot point. What is of interest is the approach adopted (which will be referred to later).

The Canadian approach to questions of jurisdiction, sovereignty, and territory over the last decade provides a rich source of issues engaging the national interest directly in some cases, indirectly in others, and only peripherally in still others. There are numerous examples of a distinctive Canadian position on environmental law and on the law of the sea based on a readily discernible Canadian interest. Canada as a coastal state with an extremely lengthy coastline has an understandable concern in protecting its marine environment and has reflected this objective not only in its national legislation (and the accompanying reservations to the jurisdiction of the International Court) but in such multilateral action as the declaration of marine pollution principles presented by Canada to the Stockholm Marine Pollution Preparatory Committee and subsequently pursued at Stockholm, and the tabling of a working paper in the Seabed Committee on a comprehensive approach to marine pollution. Canada's more general interests in protecting its environment as a whole were reflected in the draft declaration of legal principles on the human environment submitted by Canada to the Stockholm Conference Preparatory Committee on the Declaration on the Human Environment. On both these issues, however, the Canadian position reflects also the environmental interest of every

member of the international community in the development of law to prevent the degradation of the environment.

Similarly on the law of the sea, Canada, as a state with an extensive and deeply glaciated continental shelf, has consistently supported the 'exploitability' test, embodied in the Geneva Continental Shelf Convention, to which Canada is a party, during the debates of the Seabed Committee. At the same time, Canada has put forth radical revenue-sharing proposals intended to benefit the international community as a whole. With respect to some issues cutting across both fields of law, such as the doctrine of innocent passage, Canada has proposed that the concept be revised and expanded so as to include the protection of the coastal state's environmental interests as well as its more traditional security interests. On fisheries questions Canada has protected its national interests by establishing new fishing zones by national legislation and negotiating bilaterally for the phasing out of the fishing activities of other countries in such zones. Canada has also proposed in the Seabed Committee the recognition of coastal state managerial rights and responsibility well beyond the territorial sea, together with coastal state preferences with respect to the living resources of the sea in areas adjacent to coastal states. Canada has also, however, opposed the extension of sovereignty as a means of protecting the living resources of the sea because of the effect such claims have on the interests of the international community as a whole. The Canadian working paper on scientific research principles tabled in the Seabed Committee was put forth as a deliberate attempt to strike a balance between coastal state interests and the general interest of the international community in freedom of research. There are equally numerous examples within these same two closely related fields of law where the Canadian interest is less direct, such as the regime for the resources of the seabed beyond national jurisdiction, with respect to which Canada has submitted a working paper postulating a functional approach directed towards economic exploitation subject to effective controls and leading to equitable distribution of proceeds.

The Canadian position on the Ocean Dumping Convention provides a recent and illustrative example of the way in which Canada's national interests are perceived and pursued. Throughout the year of preparatory discussions and the succeeding conference in London, the Canadian delegation pressed for an effective convention that would not leave the determination of the right to dump noxious substances to the discretion of the dumping state, as had been proposed by some delegations in early drafts. Thus the Canadian delegation strongly supported the 'black list-grey list' approach which banned the dumping of some substances and set up very strict controls over the dumping of other substances. On the jurisdictional issue the Canadian delegation argued that the convention should be enforceable by all parties, whether coastal or flag state. No attempt was made by Canada to include the concept of pollution zones in the convention but the way was paved for consideration of such a solution by a provision referred for consideration to the Law of the Sea Conference on the nature and extent of coastal state rights. The demonstrable Canadian interest in recognition of the right and responsibility of coastal states to protect their marine environment was thus maintained while at the same time the interests of the flag states, in many cases the major dumpers, were also accommodated.

The Canadian position on all of these environmental and law of the sea issues

can be seen as clearly reflecting Canada's national interests, both direct and indirect, but also the need to safeguard the 'international' interests at stake. Indeed, Canada is one of the few members of the UN Seabed Committee which has argued consistently that the interests of the international community as a whole, as well as the specific interest of coastal states, maritime states, and landlocked states, should be safeguarded in the future law of the sea. In an attempt to provide a conceptual bridge between the rights and responsibilities of states and between conflicting interests of states, Canada has put forth the notions of 'delegation of powers' by the international community to coastal states and the concept of 'custodianship' by the coastal states. Thus, while not hesitating to act 'unilaterally' when necessary, Canada has also engaged in bilateral negotiations with those countries directly affected by such action and has also acted multilaterally, participating actively in the negotiations in IMCO, the Stockholm Conference, the Seabed Committee, and the London Dumping Conference, in an attempt to work out accommodations on unresolved issues of environmental law and the law of the sea. The Canadian 'pluralistic' approach to these two fields of law may be indicative of basic Canadian attitudes towards international law.

STATE PRACTICE

Canadian contributions to international law by state practice similarly relate to a wide spectrum of fields of law and have been made through a variety of means. Evidence of the continuing and specifically Canadian contributions in the development of international law through state practice can be found in the successive issues of the *Canadian Yearbook of International Law* in the Canadian Practice sections, and the quotations from the yearbook and from direct Canadian sources in UN publications (such as, for example, the International Law Commission report on the succession of states in respect of treaties).

More public examples can be found in the series of national legislative measures and related public statements concerning the marine environment, such as the 1964 legislation establishing the nine-mile exclusive contiguous fishing zone; the series of orders in council based on that legislation establishing the straight baseline system along Canada's east and west coasts; the 1970 legislation laying down the basis for Arctic waters pollution prevention zones; the establishment of a twelve-mile territorial sea, the establishment of 'adjacent fishing zones,' and the extension of pollution control under the Canada Shipping Act to Canadian fishing zones. In addition to this series of unilateral acts, Canadian state practice includes a series of bilateral fisheries treaties with the United States, the USSR, France, the United Kingdom, Norway, Denmark, Portugal, and Spain, and the possible basis for the delineation of continental shelf limits with Denmark (Greenland) and France (St Pierre and Miquelon).

A relatively little known but highly significant example of Canadian state practice ranking in importance almost with Canada's decision to agree to arbitrate the *Trail Smelter* case was the decision to set up a special tribunal to arbitrate the damages suffered by US citizens from Canada's construction of Gut Dam. As a concrete example of a willingness to accept for the second time responsibility for damages to citizens of another state without the necessity of prior exhaustion of local remedies

by the individuals concerned, the case is extremely important. Not surprisingly, Canada requested the US immediately after the conclusion of the Stockholm Environmental Conference to respond in similar fashion, on the basis of the Stockholm principles, and accept responsibility for the damage suffered by Canada from the Cherry Point oil spill.

A much better known and highly controversial example of Canadian state practice was the reservation submitted by Canada to the International Court of Justice concerning Canadian environmental protection and living resources conservation legislation. Government spokesmen made clear at the time that the reservations had been made because of the lack of existing environmental and conservation law on the international plane, and that the reservations were intended to be temporary and analogous to interim injunctions pending the development of the law. The statements made clear also that Canada would take complementary action multilaterally to develop the law in these two fields, and Canada has since been extremely active in developing the law in these fields.

As mentioned above, Canadian state practice on federal-provincial and international issues may also have had a constitutive legal effect not only domestically but on the international plane, particularly with respect to the working out of the *accord cadre* mechanism enabling Canadian provinces to conclude arrangements with foreign states under the aegis of the umbrella treaties concluded by the Canadian government. As is the case with organized multilateral law-making activities, Canadian state practice provides considerable evidence of the implications for Canada of international law issues and the need to respond accordingly.

CONCLUSION: A CANADIAN APPROACH?

The following passage occurs in the late Lester B. Pearson's memoirs:[15]

> Everything I learned during the war confirmed and strengthened my view as a Canadian that our foreign policy must not be timid or fearful of commitments but activist in accepting international responsibilities. To me, nationalism and internationalism were two sides of the same coin. International co-operation for peace is the most important aspect of national policy. I have never wavered in this belief even though I have learned from experience how agonizingly difficult it is to convert conviction into reality.

Over the past decade Canada has been extremely active, indeed activist, on a wide range of issues of international law. The policies pursued have been goal-oriented and directed towards the attainment of Canadian objectives. Where particular issues have engaged the Canadian national interest, the objectives have reflected this interest; in other cases the objectives appear to be almost wholly internationalist. In many cases the perception of the national interest clearly takes into account the interdependence of states. Positions adopted are not always those of other 'western' or 'developed' states and have often been distinctive to the point that on some questions Canada has parted company with friends. There is an emphasis on concrete problem-solving and a lesser concern with doctrinal attitudes, particularly those stemming from traditional concepts. On a number of continuing problem areas, there is evidence of consistency and perseverance over

a lengthy period. There are many illustrations of a close co-ordination of Canada's positions on the same or similar issues arising in different fora. An innovative approach can be seen on many questions. On certain problems, such as environmental law and the law of the sea, a bold and dynamic approach is evident. There is a deliberate attempt on virtually every issue to develop the basis for accommodations between conflicting interests, in particular between the interests of Canada and those of the other members of the international community. A common characteristic throughout is a conscious tendency towards pragmatism, functionalism, and flexibility, most notably in responding to the need for change.

It is suggested that these characteristics, which, in my view, together comprise a distinctive Canadian approach to international law in the sixties, will continue to be required by Canada in the seventies, particularly with respect to the two main problem areas touched on briefly here: federal-provincial relations, and questions of jurisdiction, sovereignty, and territoriality.

NOTES

1 'In essence, foreign policy is the product of the Government's progressive definition and pursuit of national aims and interests in the international environment. It is the extension abroad of national policies.' Department of External Affairs, *Foreign Policy for Canadians* (1970) 9.

2 *Legal Advisers and Foreign Affairs* (1964), proceedings of the Princeton Conference. Marcel Cadieux' article on the role of the legal adviser, entitled 'An Inside View,' comments, at 35, as follows: 'As pointed out by the Royal Commission on Government Organization, which recently examined the Canadian Civil Service, "international law is intimately bound up with high policy questions and relationships with other nations." The Commission went on and concluded that "there is need ... to preserve a balance between policy considerations and legal implications." '

3 'Flexibility is essential but so too is a sense of direction and purpose, so that Canada's foreign policy is not over-reactive but is oriented positively in the direction of national aims. This is one of the main conclusions of the policy review.' *Foreign Policy for Canadians*, *supra* note 1, at 32.

4 A view on the interrelationship and interpenetration of customary and conventional law is contained in the following passage from a statement by the Canadian representative in the First Committee of the XXIV UN GA on 4 December 1970:

> The contemporary international law of the sea comprises both conventional and customary law. Conventional or multilateral treaty law must, of course, be developed primarily by multilateral action drawing as necessary upon principles of customary international law. Thus multilateral conventions often consist of both a codification of existing principles of international law and progressive development of new principles. Customary international law is, of course, derived primarily from state practice, that is to say, unilateral action by various states, although it frequently draws in turn upon the principles embodied in bilateral and limited multilateral treaties. Law-making treaties often become accepted as such not by virtue of their status as treaties but through a gradual acceptance by states of the principles they lay down. The complex process of the development of customary international law is still relevant and indeed, in our view, essential to the building of a world order. For these reasons we find it very difficult to be doctrinaire on such questions. The regime of the territorial sea, for example, derives in part from conventional law, including in particular the Geneva Convention on the Territorial Sea (which itself was based in large part upon customary principles) and in part from the very process of the development of customary international law. During the period when it was possible to say, if ever there was such a time, that there existed a rule of law that the breadth of the territorial sea extended to three nautical miles and no further, that principle was created by state

practice, and can be altered by state practice, that is to say, by unilateral action on the part of various states, accepted by other states and thus developed into customary international law.

5 'There could be further international demands for Canadian participation in peacekeeping operations – especially in regional conflicts. The Government is determined that this special brand of Canadian expertise will not be dispersed or wasted on ill-conceived operations but employed judiciously where the peacekeeping operation and the Canadian contribution to it seem likely to improve the chances for lasting settlement.' *Foreign Policy for Canadians*, *supra* note 1, at 23.

6 The following is a partial list of opinions or position statements in these two fields taken from the *Canadian Yearbook of International Law* for the years 1964-72:

Subjects of International Law:

Participation by provincial ministers of labour in the Canadian delegation to the annual conference of the International Labour Organization; participation by Canadian provinces in treaty-making and implementation (with particular respect to the Skagit River project); consultation with the provinces concerning Canadian accession to the 1949 United Nations Road Traffic Convention; procedure respecting ratification of International Labour conventions, touching in particular on the constitutional division of authority between the federal and provincial governments; the capacity of individual states of the United States to enter into agreements with the Canadian federal government concerning unemployment insurance; capacity of the state of Alaska to enter into an arrangement with a Canadian government department concerning the maintenance of an international highway; the legal status of the Portuguese overseas territories; the status of the Order of Malta; the role of the Canadian federal government in providing for the reciprocal enforcement of judgments between a Canadian province and an Australian state; the competent authorities under the Canadian constitution for the reciprocal enforcement of judgments and maintenance orders of foreign jurisdictions; the procedures for the reciprocal enforcement within the Commonwealth of maintenance orders, the legal basis for the Franco-Quebec educational entente and the form of the assent of the federal government; the Canadian constitutional authority concerning the treaty-making power and the appropriate procedures; the lack of harmony between treaty-making and treaty-implementing powers; the constitutional historical development of the process whereby the *accord cadre* procedure evolved; the legal basis for the making of ententes on cultural matters by provinces; the requirement for and form of consent by the federal government to the Franco-Quebec cultural entente; competence of the provinces concerning reciprocal enforcement of foreign adoptions; validity of 'informal arrangements' between provincial governments and foreign states; Franco-Quebec entente on cultural co-operation; role of provinces in treaty-making; federal government, the sole treaty-making authority; arrangements for representation of provinces in Canadian delegations to conferences of specialized agencies.

Jurisdiction, sovereignty, territory:

Requirement for consent of the government of Canada to overflights by US nuclear-armed aircraft; right of Canadian government to regulate broadcasting beamed at Canada from US stations; the basis of Canadian sovereignty over Arctic islands; nature of agreement between Canada and British Columbia respecting the Columbia River; legal basis for implementation of straight baseline system for delimiting Canadian territorial sea and contiguous fishing zones; legal implications for foreign fishermen of establishment of Canadian exclusive fishing zones; legal basis for 'abstention principle' embodied in north Pacific treaty; sovereign immunity of foreign state aircraft carrying foreign head of state through Canadian air space; non-requirement for registration of foreign lobbyists; status of Geneva Law of the Sea Conventions; status of Gulf of St Lawrence and Hudson Bay under Canadian Territorial and Fishing Zones Act; date of acquisition of Canadian independence and sovereignty; extraditability of foreign national for crime committed in Canadian embassy abroad; territorial boundaries of another state as a fact of state; Arctic sovereignty; Canadian sovereignty over Arctic islands and seabed; status of waters of Arctic archipelago; implications for Cana-

dian sovereignty of voyage of s.s. *Manhattan* through Northwest Passage; applicability of doctrine of innocent passage to waters of Arctic archipelago; legal effect of establishment of straight baseline system for delimitation of Canadian territorial sea; limits of Canadian jurisdiction over seabed; delimitation between continental margin and oceanic basin; Canadian position in Seabed Committee on limits of national jurisdiction over seabed; validity of unilateral extensions of jurisdiction over marine environment; role of unilateral action in customary law-making process; legal basis of Canadian assertion of marine pollution control jurisdiction over Arctic waters; Canadian exclusive fishing zones; legal validity of issues raised in US protest note to Canadian Arctic Pollution Prevention Act; legal content of concept of common heritage of mankind.

Similar examples can be found in the annual yearbook with respect to other broad special areas such as diplomatic and consular relations, recognition of states and governments, rights and duties of states, state responsibility, extradition law and procedures, treaty law, nationality, asylum, succession of states and governments, human rights, law of international organizations, civil procedure, outer space, judicial settlement, war and international conflict, general principles of international law, treatment of aliens, consular matters which are too numerous to list in terms of specific issues, etc.

7 Cadieux, *supra* note 2, comments at 36 as follows: 'The function of the Legal Adviser to the Department of External Affairs might be defined in general terms as attempting to ensure that Canada's role in international affairs is conducted in accordance with generally accepted legal principles, practices and processes.'

8 'In sum, while basing its foreign policy on recognized principles of international law, Canada will continue to introduce constructive innovations (as Canada has done on the law of the sea and on the Arctic environment) where international law is not sufficiently responsive to present or future needs.' *Foreign Policy for Canadians*, *supra* note 1, *United Nations*, at 30.

9 'Canada has less reason than most countries to anticipate conflicts between its national aims and those of the international community as a whole. Many Canadian policies can be directed toward the broad goals of that community without unfavourable reaction from the Canadian public. Peace in all its manifestations, economic and social progress, environmental control, the development of international law and institutions – these are international goals which fall squarely into that category ... Canada's action to advance self-interest often coincides with the kind of worthwhile contribution to international affairs that most Canadians clearly favour.' *Foreign Policy for Canadians*, *supra* note 1 at 11.

10 Ibid. at 19: 'Foreign policy can be shaped, and is shaped, mainly by the value judgments of the Government at any given time. But it is also shaped by the possibilities that are open to Canada at any given time – basically by the constraints or opportunities presented by the prevailing international situation. It is shaped too by domestic considerations, by the internal pressures exerted on the Government, by the amount of resources which the Government can afford to deploy.'

11 'The impetus for change has ... been reflected in the progressive development and codification of international law within the United Nations. The various organizations within the U.N. system have increasingly turned to the drafting of multilateral conventions as the best method of achieving this end.' *Foreign Policy for Canadians*, *supra* note 1, *United Nations*, at 7.

12 An excellent analysis of the role of the law and lawyers in disarmament negotiations is contained in Allan Gotlieb's well-known publication *Disarmament and International Law* (1965).

13 These developments, including in particular an exposition of the Canadian approach to the problem and the methodology of Canadian diplomacy on the issue, are outlined in an article by the Honourable Paul Martin entitled 'Co-Existence or Friendly Relations? The Canadian Approach,' and my accompanying article entitled 'Canadian Initiatives in East-West Legal Relations in the United Nations,' which appeared in the collection of essays, *Law, Policy and the East-West Détente*, edited by Edward McWhinney (1964). These articles, together with others appearing in the same volume, provide a useful basis for measuring the

nature and extent of the Canadian interest in the item at its outset as against the Canadian interest as it may be seen in retrospect.

14 The Canadian legal advisers over the period in question were: Marcel Cadieux, Max Wershof, Allan Gotlieb, André Bissonnette, and L. Alan Beesley.

15 Ibid.; *Memoirs of the Right Honourable Lester B. Pearson*, 1 (1972).