STOCKHOLM AND BEYOND

Lecture delivered at Rutgers University, Newark,
by J. Alan Beesley

December 1, 1972

"We have taken the first steps on a new journey of hope for the future of mankind. But the journey before us is long and difficult, and we have hardly begun it."

So spoke Maurice Strong at the close of the Stockholm Conference which he had served so ably as Secretary General. Despite these cautionary words that the results of the Conference represented only a bare beginning to a long journey, the results of the Stockholm Conference were highly significant, highly positive, and highly political. Highly significant because 113 nations in two short weeks were able to agree upon a very complex range of environmental issues. Highly positive because of the innovative and forward-looking nature of many of the recommendations of the action plan. Highly political because of the conscious effort on the part of the participants to take policy decisions on international environmental issues in some cases in the face of important and controversial political and economic implications.

Perhaps the area in which the political controversy was the most intense was that part of the Conference which dealt with the protection and the preservation of the marine environment. It was in this area where we witnessed a greater concentration to work toward the development of new concepts of sovereignty and new codes of international law as a means of giving effect to principles of international responsibility and conduct as one of the essential ingredients for effectively coping with international environmental conflicts. The Declaration on the Human Environment adopted at Stockholm and since noted by the United Nations General Assembly has been characterized as being one of the most significant achievements of the

...2

Conference. In the report of a meeting last August of the International Law Association, the Association pointed out that the Declaration contains important new principles which may serve as a foundation for developing international law relating to the environment. Chief among these is Principle 21 which has been described by Maurice Strong as "the very basic principle of our age of environment", namely, "that it is every nation's responsibility to ensure that activities within its jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of international jurisdiction."

Acceptance of this basic principle by a majority of the international community may represent only a modest beginning to a long journey in the development of international environmental law. It is, however, a beginning and despite its modest proportions, it is a step forward which seems to be troubling a number of states in the aftermath of the great sense of purpose and spirit that prevailed at the Stockholm Conference where the principle was adopted by acclamation. As I mentioned earlier, the United Nations General Assembly has now taken note of the Declaration.

A certain amount is known about Stockholm; not very much is known about the legal implications of what took place there. I do not know of any development of comparable significance, in terms of its potential world impact, of a conference lasting only two weeks. The Stockholm Conference on the Human Environment represents in my view a very remarkable achievement in terms of international law. Nothing happened there that one could characterize as "instant law" but a good deal transpired which, in my view, is going to shape the future development of international environmental law, and indeed is already influencing it, and we are talking now about a field where the law has been almost non-existent.

...3

I think I should begin by explaining that Canada's preoccupation with international environmental law is not, essentially, founded on our bilateral relations with the USA. The USA has taken as enlightened an approach to these questions as any other government. Moreover, what I have to say should not be interpreted solely against the background of some of the confrontations we have had, and which I assume we will have again, where we differ on certain points. It is worth bearing in mind, for example, that as early as 1909 we together negotiated the Boundary Waters Treaty, which contains a very important environmental principle, the duty not to pollute each other's boundary waters. That very example provides, of course, an excellent indication of the difficulties of pursuing a purely legal strategy, because neither government was able, or considered itself able, to take all the necessary measures to implement that particular principle, and in fact we ended up grossly polluting the Great Lakes. I could refer to other examples where we have worked together on similar matters, such as the Partial Test Ban Treaty, which people think of as a disarmament measure but which we regarded at the time as an important environmental measure. I think it is worth bearing in mind this continuing history of co-operation on environmental matters in the light of some of the other things I will say where you will discern a slightly different approach.

I said that the Stockholm Conference represented a remarkable accomplishment in terms of international law. I will abbreviate much of what went on and be prepared to talk about it if we have time, in the question period for example. Basically, what Canada wanted out of Stockholm in terms of international law was agreement on three simple principles: the duty of states not to pollute the environment of other states or the area beyond anyone's national jurisdiction; the duty of states to pay compensation - to

...4

accept responsibility if they did do serious damage (the Trail Smelter principle, in other words); and the corresponding duty to consult with one another when they are about to embark on activities which might have an adverse environmental impact upon their neighbours. Now these principles I suppose, sound almost Pollyannalike, but they proved, as we knew they would, highly controversial. Nevertheless, Canada tabled a Declaration of Principles in the Working Group on The Declaration on the Environment preparatory to Stockholm, which consisted of a declaration of legal principles roughly analagous to the Declaration on Outer Space for example, or even the Declaration on the Human Rights. Initially, many other states found it difficult to come to grips with these legal principles because there were so many serious implications in it for them. Ultimately, however, these principles did find their way into the draft declaration submitted to Stockholm, and the first two principles were endorsed. The third, the duty to consult, was not; it was sent to the UN for further consideration. I'll come back to that in a moment.

Now, in addition to that declaration of general legal principles on the environment, we have been seeking to develop environmental law relating to the marine environment in particular. To that end we tabled a declaration of principles relating to the marine environment also. Here too the story is of considerable success, although not complete success. A little more than a year ago, the Intergovernmental Working Group on Marine Pollution, one of the Stockholm preparatory working groups, agreed at its meeting in Ottawa in November 1971, on the text of 23 principles on control of pollution of the marine environment. Some of them related to land-based environment, some marine-based. These principles were subsequently endorsed unanimously by the Stockholm Conference and referred to the Law of the Sea

...5

Conference for appropriate action, and to the proposed IMCO Pollution Conference for information.

There were three other principles submitted by Canada, which were neither endorsed nor rejected at that Ottawa Group Meeting and similarly in Stockholm. We did not press to have them adopted, although they had majority support at both meetings, as we were not particularly interested in making a test on these principles. They postulated coastal state rights and obligations based on the concept of "custodianship" which is the conceptual approach developed by Canada reflecting the kind of obligations coastal states will have to undertake in our opinion, if we are going to really attack the problem of the preservation of the marine environment. Those three principles were also referred by the Stockholm Conference to the Law of the Sea Conference through the Seabed Committee for appropriate action, and they were also referred to the IMCO Conference for information.

Now the third element in this many-pronged approach was a Dumping Convention, originally put forth as an initiative of the USA. There were strong differences amongst states concerning the substance of that convention during the early days of its negotiation. By the time we had had a third full session on it at Reykjavik we had produced a draft convention, which in the Canadian view was a pretty respectable achievement. The draft was not presented to Stockholm for action because it was known that there were still difficulties unresolved, and there simply had not been adequate time to consider them. From the outset of the preparations for Stockholm, Canada had limited its objectives to the development of legal principles and had cautioned against attempting to produce completed conventions in so short a time. The convention was therefore referred to the London Ocean Dumping Conference held a few weeks ago, beginning October 31. I was at London;

...6

I participated in that Conference (and in the other conferences mentioned), and I would like to talk about that conference a little later.

There was one other element in what I might term a four-pronged approach by Canada, namely the concept of "ocean management". The "statement of objective" reflecting that concept was also accepted at the Ottawa meeting I mentioned, and endorsed unanimously in Stockholm, and it is probably the fundamental underlying concept of the greatest importance in terms of the marine environment, becuase it postulates once again the fundamental principle that there is a need for ocean management, and that the coastal state has a special interest in carrying out that management.

This is the background against which I would like to speak. I do not have any hesitation in saying that from the point of view of those who viewed Stockholm as an opportunity to develop a multi-disciplinary approach in laying the foundation for the future development of international environmental law, Stockholm was a great success.

I would like to refer briefly to another aspect of the topic "Stockholm and Beyond". On one issue on which there are perhaps only peripheral legal implications, namely, control of whaling, the first conference after Stockholm, the meeting in London of the International Whaling Commission, did not affirm the results of the Stockholm Conference. I do not propose to say more about that because it is not, in my view, one of the fundamental issues touching on future development of environmental law.

The next international forum to consider the Stockholm results was the meeting of the UN Seabed Committee, the preparatory committee for the Third Law of the Sea Conference, which met this summer in Geneva again. There we found a rather ambiguous response - many states had not had time

...7

to digest the results of Stockholm - nevertheless, there was a rather intelligent debate of the results. The Eastern Europeans were not enchanted with the Seabed discussions of the Stockholm results, not so much because they disapproved of the results but because they were not present at the Conference for political reasons and they did not want to highlight or headline Stockholm as such. However, as a direct consequence of Stockholm, it proved possible to set up a Working Group on the preservation of the marine environment within the Seabed Committee, and my own view is that this, in itself, was a considerable achievement, given the difficulty of moving that Committee to that kind of concrete action. States have now been asked by the Seabed Committee to submit comments on a comprehensive marine pollution treaty, and this is a signal development. Canada, for example, will be submitting comments in the form of a draft treaty sometime in the next few weeks in time for consideration at the March session of the Seabed Committee.

I think the best way of indicating as briefly as possible both the difficulties and the opportunities in taking the Stockholm results a step further is to consider certain concrete examples. The London Ocean Dumping Conference raised a lot of these underlying principles of the Stockholm marine environmental principles in a very concrete form, because we were then faced with a situation which really required states to decide whether they meant business or not in attacking one aspect of the problem of marine pollution. I think the results were extremely encouraging. There were a number of serious differences of views at the Conference - most of them between the major maritime powers on the one hand and the coastal states on the other hand. I think it is worth noting, however, that no one forced the major maritime powers to go to that Conference. The major maritime powers are in the main

...8

the major industrialized powers, and they are also, as a consequence, the major dumpers of the world. These countries nevertheless participated in the London Conference, not because they were forced to, as will eventually be the case at the third Law of the Sea Conference, but because there was a desire on their part to do something about the problem of dumping noxious wastes from land into the ocean. Coastal states were also invited, and it became clear very quickly at the Conference that they had no intention of sitting silently and providing a rubber stamp for what the maritime states decided was good for the world. The result was some difference of views, both in terms of the precise regime to be laid down and the manner of enforcement of the regime.

In the result, the Conference adopted the basic approach pioneered in the Oslo Dumping Convention, and it is a good approach, namely the "black list/grey list" approach. The "black" list consists of substances which may not be dumped under any circumstances (a point I'll come back to in a moment), and the "grey" list consists of substances that can be dumped only under very strict controls. This element of prohibition and control was missing from the earlier drafts. We had characterized the initial drafts, perhaps unfairly, as merely a "licence to dump" because they left so much to the discretion of individual states. This is no longer the case. Admittedly this agreement on the "black list/grey list" is weakened somewhat by a definition of dumping which was not contained in the Reykjavik draft nor in the Oslo Convention consisting of a loophole added at London to the effect that dumping which does not occur by means of an activity intended to be dumping is not dumping. I do not know what examples others might have in mind of such activities but one such is an atmospheric nuclear explosion. Perhaps no one thinks of that activity as a dumping operation, but it could certainly have

a serious dumping effect. Unfortunately, such activities do not now fall directly within the definition of prohibited dumping pursuant to the Convention.

Another loophole which Canada strongly opposed but accepted, ultimately, on the grounds that what was needed was a Convention which was acceptable to all, not just one that suited Canada and other coastal states, was an emergency provision which would permit any state in an emergency situation to dump even the most noxious of wastes such as chemical biological warfare elements or radiological agents, etc. The USA spokesmen here may wish to outline their position on this point. It is worth noting, however, that the USA has pretty tough legislation on this issue, even although they resisted the inclusion of a similarly tough provision in the Convention, presumably on the grounds of sovereignty. In any event, we did agree on a loophole - an emergency dumping provision. I think though it is worth looking at that provision as an indication of both the possibilities and the limitations on what we are capable of achieving and also in what direction we are going.

Before turning to the actual draft Convention agreed to at London, I should perhaps mention as background that even with respect to the three basic principles (the duty not to pollute one's neighbour, the duty to compensate, and the duty to consult before doing something that might pollute or damage), only the first two of these principles was accepted at Stockholm while the third was referred to the UN for action. The Declaration on the Human Environment as a whole was of course referred to the UN but not for action (carefully avoided because of fears that perhaps the whole Stockholm Conference would come tumbling down about our ears if some states took a wholly new approach at the UN to all these problems). The Declaration was merely noted

by the UN. The single principle not agreed, the principle on the duty to consult, became a rather controversial issue during this session of the UN. It was put forth in the form of a Resolution, originally tabled by Brazil and Argentina together with a number of other countries. It reported an attempt by them to resolve their bilateral difficulties which had been the major factor in holding up the agreement at Stockholm on that principle. As it happened, Canada and a number of other countries was not favourably disposed to this particular resolution, because as we read it, it appeared (perhaps quite unintentionally) to undermine the other fundamental principles agreed to at Stockholm so as to seriously erode their effect. The result was a good deal of negotiation, some interpretative statements and a separate resolution making clear that the other major principles, particularly principles 21 and 22 of the Human Environment Declaration on the duty not to damage and the duty to develop procedures to determine liability and compensation, were unaffected by the particular resolution. Thus there was a multilateral consideration of part of the results of Stockholm which, in the event, was not unsatisfactory. We would have preferred a different outcome, but at least it did not erode the two basic principles.

The duty to consult did not come out of the UN looking very much like a duty to consult; it looks rather like a duty to publish information to which, one would hope, other states will obtain access, and that seems to be the extent of the duty suggested in this particular resolution. We look on the duty as a much stronger one. A point of some importance which may be worth noting is that at Stockholm the Canadian delegation made a statement in plenary on the closing day, affirming that in so far as the Canadian government is concerned all of these three basic principles represent for Canada existing international law.

...11

I think it is also worth noting another concrete case where the Stockholm principles have been applied, this time on the bilateral plane. Canada and the USA have had discussions emanating from the Cherry Point oil spill, and they have resulted in agreement that the two countries will work on the basis of the Stockholm principles for the development of new laws and procedures for the settlement of disputes of an environmental nature. This is no small thing, not just in terms of Canada/USA relations or USA/Canada relations but its ultimate impact on the future development of international environmental law.

Returning to the London Dumping Convention, I mentioned that it reached agreement on the "black list/grey list" approach. I think it is worth noting also that it incorporates the Stockholm principle on state responsibility both in its preamble and in its text. There had been a stronger provision negotiated at Reykjavik, and once again the Convention was weakened somewhat. Some of the countries present wanted to weaken it to the point where it would not have been clear at all that any state responsibility was involved - it might be liability of a ship owner, it might be a liability of a cargo owner, it might be a liability of the Captain. This was unacceptable to coastal states, and a compromise formulation was agreed upon which I think still maintains the basic principle of the need to develop procedures to determine liability and compensation.

A further point worth noting is that this Convention posits, for the first time in any convention to my knowledge on the use of the ocean, a general duty on the part of States to prevent marine pollution. Once again the provision was watered down and weakened; once again whatever one's point of view on the results, certainly Canada was one of the States that provoked

...12

controversy by refusing to have it weakened; once again we accepted a weakening, but not beyond the point which we felt would have really negated the purpose of the Convention. Here again I think we find the result reasonably acceptable, and one that we can build upon.

The Convention also reflects principle 7 of the Declaration on the Human Environment, namely:

> "States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea."

It also embodies the general effect of the 23 principles on marine pollution which I mentioned earlier, which had been elaborated at the Ottawa session of the intergovernmental Working Group on marine pollution, and which were endorsed at Stockholm.

The Dumping Convention also reflects the environmental goal established under principle 6 of the Stockholm Declaration respecting the control and the discharge of toxic substances and other substances so as to prevent such discharge exceeding the capacity of the environment to render substances harmless. So even though it is only dumping we are talking about, the fact that we have translated that principle into binding treaty form is of some considerable significance.

Now, rather interestingly, the provisions of Article V (2) of the Convention embody the principle on the duty to consult, the very principle which caused so much controversy at Stockholm and which has not yet been included in the Declaration on the Human Environment, in spite of the controversial consideration of it that I just mentioned. The language of Article V (2), which is the emergency dumping provision, the controversial one, is clear and unequivocable. It requires that before undertaking dumping operations in certain emergency circumstances, the party shall consult any

other country or countries that are likely to be affected, and with the organization to be established under the terms of the Convention. Both other countries and the organization must be consulted. It provides as follows:

> "A Contracting Party may issue a special permit as an exception to Article IV (1-a), in emergencies, posing unacceptable risk relating to human health and admitting no other feasible solution. Before doing so the Party shall consult any other country or countries that are likely to be affected and the Organisation which, after consulting other Parties, and international organisations as appropriate, shall, in accordance with Article XIV promptly recommend to the Party the most appropriate procedures to adopt. The Party shall follow these recommendations to the maximum extent feasible consistent with the time within which action must be taken and with the general obligation to avoid damage to the marine environment and shall inform the Organisation of the action it takes. The Parties pledge themselves to assist one another in such situations."

That same provision makes it clear too that this is not a blanket licence to pollute. The duty to prevent marine pollution is still enshrined even in that emergency provision, once again at Canadian insistence. So even in the loophole the basic principles were maintained, and the effect, I would hope, would be that states would be very reluctant to avail themselves of that particular provision.

Also at Canadian insistence, and we were controversial again on this, we said: Let's not inflict this provision on everyone. Let's make it a kind of optional protocol. So it is provided in that very provision that states may waive that provision when they ratify the Convention, and I suppose this will separate the sheep from the goats. We in Canada will have to decide whether we want to waive that provision ourselves when we ratify it. I hope and expect we will waive it.

I think, to sum up on this point, we are certainly already building upon the foundation established at Stockholm, and at this first Conference designed to draft a multilateral treaty since Stockholm we have

...14

come a long step further in developing international environmental law.

Now I would like to refer in passing to one of the most controversial aspects of the Dumping Convention, and that is the jurisdictional question: How it shall be dnforced. The outcome was, in my view, eminently acceptable, eminently reasonable and extremely encouraging in terms of the future development of international law. The outcome was agreement in Article VII that all states parties to the Convention can enforce it; not merely flag states, not merely coastal states with ships loading in its (sic) territory or in its territorial water. As provided, any party may enforce the Convention against ships, aircraft, floating and fixed platforms "under its jurisdiction believed to be engaged in dumping". Perhaps the phrase "under its jurisdiction" sounds a little ambiguous, but it was made clear at London that in so far as the coastal states are concerned it means a specific recognition of their right to enforce.

Article 13 makes clear that at a subsequent conference, namely the Law of the Sea Conference, followed up later by the convening of the parties to the ocean dumping Convention, the precise nature and extent of coastal state rights to enforce will be determined. In the meantime, it is not determined. The point of significance, however, is that these two groups of states, flag states (or maritime states) and coastal states, came together and decided to share in the enforcement of a Convention. That might not seem so radical, it might seem merely eminently sensible, but it could prove a breakthrough in the development of the law of the sea because it postulates the possibility of co-operation, of shared enforcement, of universal jurisdiction, something a little analagous to the law on piracy and the slave trade. No one runs around to Lloyds Register trying to find out who is the flag state

in the case of piracy or the slave trade. I think if we look at the development of air law, we will see also the concept of universal jurisdiction in the Montreal and Hague hijacking and sabotage of aircraft agreements. And the effects are quite profound, in my opinion, and I hope that these effects are maintained and not watered down by either side or the other seeking to put its gloss on the results of that Conference. If coastal states argue that Article VII provides clear recognition, for example, of coastal state pollution zones, this does violence to the real outcome of the Conference. The Convention does not negate pollution control zones; it opens up the possibility of their establishment but it does not establish them. On the other hand, if maritime states argue that this is a simple flag state Convention, just another IMCO Convention obtained under a kind of trick, this will have very adverse affects for the Law of the Sea Conference because it is not that, and it should not be portrayed as such, as some of the press reports have portrayed it, incidentally.

I might mention in passing that Canada and India did wage quite a battle at thatConference on this issue, but we never pressed for the establishment of pollution control zones. We felt this would have been irresponsible at a time at least a year, possibly two, before the Law of the Sea Conference. It was suggested in press reports that some two-thirds of the Conference rejected this concept - this is not true because it was never put to the Conference. Having been there I know how many votes we could have garnered, had we chosen to take that approach, and I am quite satisfied that the outcome would have been favourable to the coastal state but I think also it could have destroyed the Convention. We needed the major dumping countries to agree on that Convention, and I think they needed us to make clear that this was not just a little monopoly.

...16

That is all I want to say on the Convention. I am treating it only as an indicator of the problems; the difficulties of resolving them; and, finally, the fact that progress can be made. I am hopeful that everyone now agrees that it is silly to attempt to make the distinction between flag states, major maritime states, distant water fishing states on one hand, and coastal states on the other, as we all have the same vital interest in preserving the marine environment. And I am hopeful that the same approach will be translated into solutions to other parts of the environmental problem, pollution of the air, which of course is the major cause of pollution of the marine environment.

If I sound a little optimistic, it is because I am. If I sound sometimes like a crusador, perhaps it is because I am. I think Bernie Oxman or possibly Don McKernan might refer to me as the Godfather of the Mafia; but I prefer to think of myself as Mr. Clean. In any event, this is my view of the state of the international law on the environment at the present moment. Thank you very much.