THE CANADIAN APPROACH - ENVIRONMENTAL LAW ON THE INTERNATIONAL PLANE

Address given by J. Alan Beesley,
Legal Adviser to the
Department of External Affairs
of Canada
on June 15, 1973

Introduction:

The Canadian approach to international environmental law can be characterized very simply and briefly. Firstly, it is our view that existing international environmental law is inadequate, both in scope and substance - in scope, in that it is incomplete, and in substance, in that it is inconsistent, fragmentary and in large part inchoate. Secondly, it is our position that international environmental law must be developed on the basis of the principle that all states have a duty to preserve the environment and that states must accept responsibility for any damage they cause to the environment of another state or the environment beyond any state's jurisdiction. Thirdly, it is the Canadian position that both substantive and adjectival law must be developed so as to enable effective application of this principle, either through existing institutions or through new ones established for the purpose of resolving environmental disputes.

Pre-Stockholm Law:

It is generally recognized that international environmental law prior to the 1972 Stockholm Environmental Conference was limited to a few international agreements concerned primarily with marine and radio-active pollution, some important examples of international case law, writings of scholars and draft codifications by learned societies, and a certain amount of limited regional and state practice. This piecemeal approach to the utilization of legal techniques as a means for combating environmental problems has been described by Professor L.F.E. Goldie[1] as

...2

an example of "Fire Brigade" mentality in international law. Before the preparations for the Stockholm Conference, little or no effort had been made to involve all these separate sources into a regime of international law "which has been universally accepted and which is capable of transnational application".[2] The environmental law which had been developed since the turn of the century whether by agreement, case law or state practice, together constituted a partial, unharmonized, uncoordinated approach to environmental law. Not surprisingly, there were many gaps in the law and many deficiencies in the scanty examples of existing law. In the words of Samuel Bleicher: "Dozens of agreements are ratified, pending or proposed, applying marginally different rules to essentially similar situations and leaving great gaps where no regulation exists at all."[3]

It was in the light of these considerations that Canada played an extremely active role in the preparations for the Stockholm Conference. This activism did not reflect a sudden discovery of the importance of preserving the quality of the environment. On the contrary, there is considerable evidence of continuity in Canadian thinking on this question. Canada was much involved in the development of the pre-Stockholm law of the environment: an involvement which was to have a significant influence in later Canadian attitudes. For example, Canada was a party, along with the U.S., to one of the earliest international agreements which prohibited water pollution, the 1909 Boundary Waters Treaty. Canada and the U.S. again made a significant contribution to pre-Stockholm law in the Trail Smelter Arbitration, in which Canada accepted responsibility for a private concern which was

...3

damaging the environment of a foreign jurisdiction. For years the courts in Canada have been concerned with disputes which today would be categorized as environmental problems.[4] The United States courts have been similarly engaged in the resolution of issues involving the protection of public and private property from the encroachment of pollution.[5] Indeed, much of the argumentation of the Trail Smelter Arbitration drew heavily on U.S. case law involving issues of water pollution.[6] The three ancient forms of action, trespass, negligence and nuisance and the century-old concept of strict liability for ultra-hazardous activity adumbrated in Rylands v. Fletcher[7] coupled with an award of damages or the imposition of an injunction, have provided the means to remedy pollution damage. The basis for such actions is the "good neighbour" concept; the principle of 'Use your own property so as not to injure that of another' (Sic utere tuo ut alienum non laedas). However, prior to Stockholm, the application of the principle at the international level, in particular in cases of transnational pollution, was regarded with some skepticism. Trail Smelter and the Gut Dam cases[8] were, together with the land-mark Corfu Channel case, virtually the only instances of its significant application. It is interesting to note that despite skepticism from many sides, and some difficulties in practical application, the "good neighbour" approach has proven the best, if not the only practical and equitable basis for the development of international environmental law.

The "good neighbour" principle as embodied in the 1909 Canada/U.S.A. Waters Treaty, is reflected in Article 4 of the Treaty,

...4

which advanced the proposition novel for its day that "boundary waters or water flowing across the boundary, shall not be polluted on either side to the injury of health or property on the other". This and other provisions of the Treaty were to be implemented through a six-member International Joint Commission. The establishment of this Commission has proved to be at least as complex as the substantive provisions of the treaty which created it. Since the Commission was established in 1912 it has played an influential role in both the consideration and study of boundary waters pollution problems and the determination, in accordance with its recommendations, of possible remedies. The basis of its authority to act is Article 9 of the Treaty, which allows the Commission, at the initiation of either government, to investigate and recommend on any matter to which the Convention relates or any other questions involving the interests of either party to the other along the frontier. Since its inception the I.J.C. has handled nine references on trans-border pollution ranging from typhoid in the waters of the Great Lakes in 1929, to atmospheric pollution in the Windsor-Detroit area in 1949 and pollution of Lake Erie from oil and gas drilling in 1969.[9] The result of many of these recommendations has been the establishment of on-going co-operative programmes to abate the pollution threat.

Professor Bilder has called the provision of Article 4 on which the I.C.J. received its mandate for these references "an early and still significant precedent in international environmental law"; and added, "even today customary international law has not progressed to the

...5

point where one can safely say that transnational pollution is prohibited, and similar treaty prohibitions on pollution remain few in number."[10] The method the governments chose for putting Article 4 into effect was not that of an injured party referring a pollution claim to international adjudication but rather that of binational investigation and report through the institution of the I.C.J. As Bilder points out, "the most sensible way of dealing with such complex continuing, technical and politically sensitive problems is through flexible and on-going programmes which take account of a multiplicity of factors...."[11] The key to the success of these programmes has been, he concludes, the formal acknowledgment of the international character of the pollution problem in Article 4 and of the propriety of its international treatment.[12]

One must ask, of course, how successful have these programmes been in abating pollution? The I.J.C. can only make recommendations and there is no provision in the 1909 Treaty for the effective enforcement of the injunction against transfrontier pollution. It is one thing to develop appropriate environmental managerial schemes or techniques, on a co-operative basis, in respect of boundary areas which will permit intensified and diversified resource use while guarding against environmental damage, but what happens when management breaks down? The Great Lakes are in an appalling state of degradation. Despite the recent Quality Agreement designed to rescue the Lakes, there are indications that the established water quality objectives may not be achieved on schedule. As a corollary to the development of the means for proper management of the environment in boundary areas, it is essential to establish a regime for the settlement

...6

of disputes involving claims for environmental damage across the boundary. While arrangements for the protection of boundary areas between Canada and the U.S. are among the most advanced in the world, this gap in the development of legal institutions for the protection of the environment is one which I hope will soon be filled.

The Boundary Waters Treaty stands, however, as one of the first examples, perhaps the first, of an internationally agreed duty not to pollute. The later Trail Smelter Arbitration,[13] also provided another first major step in the development of international environmental law when Canada assumed state responsibility for international environmental damage. As everyone here presumably knows, the case arose out of the operation of a smelter in British Columbia close to the U.S. border, whereby fumes travelled across the border and did extensive damage in Washington State. The International Joint Commission investigated at the request of both governments and in 1931 awarded $350,000 damages to the U.S. The damage however continued and in 1935, under the Ottawa Convention, Canada accepted responsibility for the damage and the matter was referred to an arbitrational tribunal to determine the nature and extent of liability as well as the method to abate further damage. In its finding, the tribunal held, in language which was to be reflected in the Stockholm Declaration more than 25 years later, that: "Under the principles of international law...no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or to the properties or persons therein, when the case is of serious consequence and injury is established by clear and convincing evidence."[14]

...7

In other words, if a state is carrying out an activity which is having a serious deleterious consequence in another state, it has a duty to take action to prevent the continued occurrence of these consequences. This was the outcome of the Trail Smelter case. Canada was ordered to pay for the damages already caused and a regime was established so as to abate future serious consequences occurring to the environment in the State of Washington. According to G.E. Read, Legal Adviser to the Department of External Affairs at the time of the case, it was recognized by the tribunal that "in the public interest, in the case of pollution problems of this kind, it may be necessary to establish a regime of control which would legalize further damage but which would make provision for indemnity or compensation if such damage was caused."[15] In the result, if a state's activities have serious consequences in another, the state must take steps to prevent or at least abate that serious consequence and must pay compensation for any resulting claims - past, present or future. I think it is important to note that the Trail Smelter Arbitration provides authority for the principle that payment of compensation is required for all damage. In effect, the case is an early reflection of the "polluter-pays" principle, that is to say, that to prevent or abate pollution the polluter must pay not only for the installation of control measures but also for any residual damages which may occur. This point is worth noting in light of the widely-shared view that concern about the environment is a relatively recent phenomenon while the pressure for economic growth is long-standing. There has been a tendency to overlook these legal precedents as irrelevent to the development of strategies to protect the environment, and to dismiss the

...8

whole legal responsibility approach as a potential complicating factor in the development of optimum resource use. However, these principles and the manner in which they were established, were to play a later and key role in shaping Canadian attitudes to the Stockholm Conference. Before turning to this topic, a brief examination of developments outside North America regarding international environmental law is relevant.

To say that the international community had not been doing much would perhaps be uncharitable but not necessarily inaccurate. While the list of international environmental agreements or those with environmental protection implications during the past two decades is lengthy, little headway has been made in ensuring their implementation. A form of international obligation requiring states to regulate pollution of the sea by the discharge of oil, the exploration of the seabed and the dumping of radioactive wastes was included in the 1958 Geneva Conventions on the High Seas and the Continental Shelf. While these provisions were useful in establishing a basis for state responsibility in this area, the provisions did not make any detailed or specific provisions for the discharge of these obligations.[16] Even specific treaties such as the 1954 International Convention for the Prevention of Pollution of the Sea by Oil and its amendments do not make provision for the effective application and enforcement of the standards established in it. The Convention regulates discharge on the high seas and prohibits such discharges within certain distances from land but from the beginning "the convention's effectiveness was limited...since (its) enforcement lay exclusively within the jurisdiction of the states of registry of the ship. It contains no recognition of a coastal state's right of abatement, even in the defined 'prohibited zones'; nor does it deal with the

...9

vexed issues of liability for harm.[17] (Only two prosecutions for a convention offence outside a state's territorial sea have been recorded.[18]) Later IMCO-sponsored conventions such as the 1969 Conventions on Intervention on the High Seas in Cases of Oil Pollution Casualties and Civil Liability for Oil Pollution Damage and the 1971 Convention on an International Fund for Compensation for Oil Pollution Damage all suffer from the same basic defect of reliance on the flag state enforcement with no recognition of the coastal state's essential role in combatting pollution. The first international convention to recognise the complementary roles of both flag states and coastal states in the preservation of the marine environment was the 1972 London Dumping Convention, to which I shall return later.

While international regulation of marine pollution has to date been disappointing, the one other area in which international environmental law has been progressing, that of nuclear hazards, has become fairly well developed. Chief among treaties on this subject is the 1963 Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under-Water which has been ratified by three of the five nuclear powers, namely the USA, the UK and the USSR. The Non-Proliferation Treaty is essentially an arms control agreement but one with potentially beneficial long-term environmental implications. The treaties banning the placing in orbit of nuclear weapons and their emplacement on the seabed are the further arms control treaties with significant environmental implications. I might add that Canada played an extremely active role in the negotiation of all these treaties. Three other agreements round out the nuclear treaty series: The International Convention on Civil Liability for Nuclear Damage, 1963; the Brussels Convention on the Liability of Operators of Nuclear Ships, 1963; and the Convention on Third Party Liability in the Field of Nuclear Energy,

...10

1960, signed by the members of the Organization for European Economic Co-operation. These conventions may prove influential as possible precedents beyond their immediate ambit since they place strict liability on the operator of the nuclear facility in case of accidents. However, in spite of the apparent interest among states in attempting to govern this field internationally, none of the latter three conventions has yet entered into force. Bleicher attributes this in part to the low level of progress in most states toward peaceful use of nuclear energy and a corresponding lack of interest in regulation.[19]

State practice has also contributed to the development of certain principles which may be acquiring legal status. For example, Canada has consistently protested all nuclear-weapons testing in any environment, and has made this position known to every country conducting nuclear-weapons tests,[20] not only bilaterally but in every multilateral forum in which the issue has been raised. The Canadian voice has been among the growing chorus of state protests regarding nuclear testing: protests which collectively may contribute to the development of a rule of customary international law forbidding nuclear testing. It is relevant to note that both Australia and New Zealand have referred in their applications to the International Court of Justice against French nuclear testing, to the protests made by them and by other states against nuclear testing.[21]

In appraising the pre-Stockholm environmental law, it must be recognized that the International Court and arbitration tribunals have made little contribution. While many publicists refer to the Trail Smelter Arbitration as a milestone[22] in this development, their search for similar decisions has revealed only two: the Corfu Channel case[23] and the more recent Lac Lanoux

...11

Arbitration.[24] Although the first case deals with responsibility for damage by a mine-field in a territorial sea and the second with a river diversion plan, both cases have been cited[25] as examples of state responsibility becoming engaged for transnational pollution damage. While the relevance of these cases is apparent, they provide evidence of the lengths environmental lawyers have had to go in order to find sources for international environmental law. A third decision usually overlooked by writers is the decision in the Gut Dam arbitration, pursuant to which Canada paid the U.S. compensation for damage allegedly suffered by U.S. cottage-owners through the raising of the level of Lake Ontario by the Canadian-built Gut Dam. Once again Canada recognized its environmental responsibilities towards its neighbour state. (Canada has not yet had corresponding success with the Cherry Point Oil spill, in which an oil spill in U.S. internal waters caused damage to Canadian internal waters.)

Against this background, the Canadian approach to pre-Stockholm environmental law was developed, with some care and with certain specific objectives very clearly in mind. The approach has consisted of three types of action, some of it highly controversial: unilateral action; regional accords; and multilateral proposals.

Canadian unilateral action is perhaps the best known, particularly the Arctic Waters Pollution Prevention Act. Less well-known but almost equally significant has been Canada's anti-pollution amendments to the Canada Shipping Act, the Territorial Seas and Fishing Zones Act and the Fisheries Act.[26] The publicly stated reason for this series of unilateral acts was the incomplete and primitive state of pre-Stockholm environmental law. The Arctic legislation and the accompanying reservation to the jurisdiction of the

International Court was described by Prime Minister Trudeau as an "interim measure", pending multilateral development of the law, intended to "push back the frontiers of international law". It was the conclusion of the Canadian Government that attempts to develop and apply effective measures for the prevention of ocean pollution were being frustrated through the literal application of concepts of international law no longer equitable, effective or relevant, concepts which had developed in an era free of environmental concerns. Grotius, writing 360 years ago, has become a whipping boy for his observation that "most things become exhausted by promiscuous use...but that is not the case with the sea: it can be exhausted neither by navigation nor by fishing, that is to say, in neither of the two ways in which it can be used." Traditional concepts of the Law of the Sea are, unfortunately, still founded upon the assumptions reflected in this pronouncement by the learned publicist. Unfortunately modern technology has radically altered the whole nature of the uses of the sea, and, thus, the problems requiring regulations by the Law of the Sea and the law of the environment, and the development of the law has lagged behind the advances of technology. As I pointed out in a statement in the U.N., Grotius can be excused for not being able to foresee the far-reaching implications for the law of the sea of modern technology such as whether nuclear ships and loaded supertankers can be capable of innocent passage, whether radio-active waste and nerve gas may be dumped into the ocean on the basis of the principle of the freedom of the high seas, whether safeguards are required for off-shore drilling, and whether fleets of modern fishing vessels vaster than the Spanish Armada can be left to fish the high seas at will. We cannot be excused, however, for ignoring the impact of modern technology upon rules

...13

designed for the days of sailing ships and ancient empires. The uses of the sea have multiplied since the time of Grotius. The sea now can be exhausted by "promiscuous use" and it is the Canadian position that it is incumbent upon all of us to develop international environmental laws to prevent this catastrophy.

Canada's unilateral action must be seen in the light of the law it sought to develop, and the practical problems it sought to resolve. In the words of U.S. Supreme Court Justice William Douglas, Canada enacted the Arctic Waters Pollution Prevention Act which "alertly fills a void created by the failure of the family of nations to create a common environmental code for the oceans."[27] Canada did not assert its long-standing claims to sovereignty over its Arctic waters but rather "only that degree of jurisdiction was asserted that was essential to meet the real (as distinct from the psychological) needs."[28]

In acting unilaterally, the Canadian Government was of course well aware of the controversial nature of these measures but was aware also that one of the traditional methods of developing international law has always been state practice - unilateral measures gradually acquiesced in and followed by other states.[28A] It was by this method that the concept and the traditional three-mile breadth of the territorial sea came into being. It was by this same method that the 12-mile exclusive contiguous fishing zone also acquired recognition. It will be recalled that in 1964 when Canada passed legislation establishing 12-mile contiguous fishing zones, after having expended great effort at the 1958 and 1960 conferences to produce agreement on that concept, the U.S. and other countries protested this action by Canada. Two years later in 1966, the U.S. passed virtually identical legislation. It is interesting to note also that the U.S. has made clear

...14

to all the world through its own legislation, namely the Ports and Waterways Safety Act, its intention to act unilaterally in 1976 in laying down standards for ship construction and ship manning if the international community has not produced adequate standards in these fields by that time. A good deal is heard about the dangers of states acting individually on such questions because of the problems of shipping states having to cope with a "patchwork quilt" of uncoordinated unharmonized and even conflicting legislation. It is for just such reasons that both Canada and the U.S. are working very vigorously for the development of international standards. It is significant, however, that both countries have shown their recognition of the need for unilateral measures in the absence of adequate international law. The difference, of course, is that Canada acted first because of the immediate threat arising out of the probability at the time of the legislation of navigation by oil tankers through the Northwest Passage of the Canadian Arctic archipelago, whereas the U.S. has preferred to hold off acting unilaterally, in the light of no comparable immediate threat, unless and until it is clear that multilateral action is too little or too late.

It may be seen that the Canadian Government has quite deliberately adopted policies intended to provide some leadership in the development of international environmental law. This should not surprise anyone familiar with the Canadian position on other questions of international law ranging from classic war and peace issues, such as the definition of aggression and the declaration of principles of friendly relations, to highly technical issues such as the liability convention for outer space and the draft treaty for the registration of outer space objects, and

...15

embracing also wholly new and controversial concepts such as international legal measures to regulate the activities of multinational corporations. In all of these fields and in others, Canada has played an extremely active role. In the case of outer space, of course, it was the USSR and USA which acted unilaterally and later collaborated with other states in the development of legal principles, and eventually treaty obligations, to regulate, or at least authorize their separate and continuing unilateral acts in outer space. In the case of the law of the sea, Canada, and many other states, have taken unilateral action rather than continue to accept a series of legal principles which now only serve the interests of the few at the expense of the interests of the majority.

It should be noted also that while not hesitating to act unilaterally when it considered such measures essential, the Canadian Government has made clear by actions as well as words[29] its determination to be equally active in pressing for multilateral solutions to the problems raised by the ever-increasing need to protect the living resources of the sea and preserve the quality of the marine environment. The Government explained its position by stating that while pressing for such action multilaterally the Government "is not prepared to abdicate in the meantime its own primary responsibilities concerning these questions."[30]

It should be borne in mind too that Canada has expended considerable time, energy and both human and financial resources in attempting to negotiate a multilateral treaty for the preservation of the Arctic environment as a whole. Ironically, while the U.S. continues to protest the legality of Canada's Arctic Waters Pollution Prevention legislation, and the USSR acquiesces in it, the U.S. supports Canada's attempts at a multilateral solution and the USSR equally strongly opposes it. Is it any wonder in the

...16

light of these considerations why Canada has chosen to act for itself to protect its own environment?

It is significant also that Canada's Arctic Waters Pollution Prevention Act represents unilateralism of a new kind, quite apart from the novelty of its substantive provisions. Canadian officials have consulted at the expert level with officials of other governments all over the world during a period of more than two years concerning the regulations to be enacted pursuant to the Arctic legislation, and, as a consequence, Canada promulgated such regulations only last August, so as to ensure by this means that the regulations were reasonable, effective and generally acceptable to the international community. It is ironic that while some states continue to strongly oppose the legislation, it has been accepted by their own experts, and Lloyds of London has sanctioned it by agreeing to write insurance pursuant to the legislation.

One final point is worth noting with respect to Canada's Arctic Waters Pollution Prevention Act. If one analyses the philosophy of "custodianship" reflected in the Act, later developed as the basis of the whole Canadian approach to the Law of the Sea, and considers the specific provisions of the legislation, it can be seen that there is a close relationship between that legislation and the draft articles produced by the Institute of International Law at its 1969 Edinburgh session. The preamble to the Edinburgh draft articles makes clear that it is in the interest of the international community as a whole that states take appropriate measures to prevent accidents occuring to ships which carry polluting materials. The articles set forth the duty that all states must take appropriate measures to prevent pollution of the seas "either individually or jointly under

...17

international agreements to be concluded, without ignoring the principle of freedom of the seas" and go on to postulate "the duties and rights of states to prevent pollutions caused by ships which carry polluting materials." The draft articles assert the right of coastal states to take measures relating to the design and equipment of ships, navigation instruments, standards of qualifications of officers and members of the crew, traffic regulations, and mandatory routing schemes, maximum speeds and compulsory pilotage procedures. They state clearly that states have the right to prohibit any ship not conforming to such standards from crossing their territorial seas and contiguous zones and from reaching their ports. I do not of course suggest that these draft articles have the force of law or anything approaching it, but they do represent the considered judgment of a prestigious body of international jurists which should, I suggest, be taken into account in appraising the propriety of the Canadian legislation.

It was against this background of a long-standing tradition of "regional action" with the U.S. to curb trans-boundary pollution, the growing recognition of the inadequacy of international environmental law, active participation in multilateral efforts to develop arms control agreements with important environmental implications, and the clear commitment Canada had made to seek multilateral as well as unilateral solutions, that the Canadian stance for Stockholm and beyond was developed.

Stockholm

The Stockholm Conference in June 1972 was opportune for Canada since it provided the forum in which we could focus concerns over existing environmental law and approaches for its future development. It appeared to us as a unique opportunity to take a multidisciplinary approach to

...18

environmental problems, with a view to laying the foundation for future international environmental law. It was our hope that through the intergovernmental discussion prior to Stockholm and then in the working groups and plenary sessions of the Conference itself, a commonly accepted set of legal principles respecting the environmental rights and responsibilities of states would emerge. These principles in turn would provide the foundation for a system of agreements, treaties and practical arrangements on which the future law of the environment would be based. It was our hope that the principles would be translated by IMCO into technical rules and by the Law of the Sea Conference into basic law-making treaties.

In the course of the preparations for the Stockholm Conference, Canada focused much of its attention on the elaboration of the proposed Declaration on the Human Environment. The Declaration was viewed as an opportunity to obtain a common understanding on the need and basis for the development of international environmental law. A declaration of principles analagous to the declaration of principles on Outer Space was the objective. This attitude was based on Canadian experience and analysis of existing international law. In the Canadian view the basic requirement for the attainment of an "environmental ethic" was the principle that nations accept responsibility for the effects their actions have on the environment of other states or on the environment beyond the limits of national jurisdiction. This keystone idea was reflected in a Canadian draft declaration tabled at the first session of the Working Group established to prepare the Declaration. The Canadian draft contained four basic legal principles: (1) the duty not to pollute one's neighbour states; (2) the duty not to use areas of common concern to the disadvantage of others; (3) the duty to compensate for damage done to

...19

others; and the duty to consult where such damage may occur.[4] The first three principles were eventually embodied as Principles 21 and 22 of the Stockholm Conference Declaration on the Human Environment which states:

Principle 21

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 22

States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

(The fourth principle was eventually endorsed in modified form at the subsequent session of the 27th UNGA, having failed to achieve endorsement at Stockholm due to differences between Brazil and Argentina.)

The influence of the Boundary Waters Treaty and the Trail Smelter Award on the Canadian position is apparent. The Canadian recognition of the utility of the pollution-prohibition article in the Boundary Waters agreement, the use of the I.J.C. as a consultative mechanism, and the belief that the Trail Smelter finding of state responsibility for environmental damage could be applied to a wider plane, lay at the root of the Canadian approach. It was the Canadian view that impairment of the environment of a state constitutes impairment or interference with the

...20

sovereignty of that state. This view was based on the finding in the Trail Smelter case. It was supported, for example, by the former legal adviser to the U.S. State Department, G.H. Hackworth, who in giving a legal opinion on the case said:

> "It is a fundamental principle of the law of nations that a sovereign state is supreme within its own territorial domain and that it and its nationals are entitled to use and enjoy their territory and property without interference from an outside source. We are arbitrating this case because, as we contend, as Canada virtually admits by the Convention, an international wrong has been committed. The wrong consists of acts which deprive us of the free and untrammeled use of our territory in a manner which we as a sovereign state have an inherent and incontestable right to use it. Our right is essentially a sovereign right. Interference with it is at once an interference with our sovereignty."[31]

In support of his thesis that no sovereign state is required to submit to the use of or interference with its territory, and hence its environment, by another sovereign state, Mr. Hackworth cited various judgments and opinions. They numbered eight in all, ranging from Justice Marshall's judgment in the Schooner Exchange: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute"[32] to Oppenheim "...the right of every state to demand that other states themselves abstain...from committing any act which constitutes a violation of its independence and territorial or personal supremacy"[33] and Baty "...immunity from foreign interference enjoyed by an independent state must not only be complete but assured...."[34]

The authorities cited by Hackworth, and indeed his own opinion, demonstrate that the decision in the Trail Smelter case was based on existing principles of international law. The tribunal itself made this exact finding in stating that: "under the principles of international law...no state has

...21

the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another...."[35] These considerations prompted the inclusion in the Canadian draft declaration of a principle seeking recognition within the concept of sovereignty of the right of states to what was termed "environmental integrity" and the right to maintain that integrity in every sense of the meaning of the word, that is: "unimpaired or uncorrupted state"; "original perfect condition", or "in a state of soundness". The relationship between territorial integrity and environmental integrity is not so thin or so strained as it may seem at first sight. The right to maintain territory in its state of wholeness and the right to maintain the natural environment within that territory in a state of "wholesomeness" are logically complementary. Without the maintenance of "environmental integrity" the territory of a state could be virtually uninhabitable and hence territorial integrity could become qualitatively if not quantitatively impaired. This theme has recently been echoed by Maurice Strong, Executive Director of the United Nations Environmental Programme. In a recent statement to the World Federalists he observed:

> "Today...for a country knowingly to continue pouring pollutants into an international waterway or air shed, or to employ the new techniques of weather modification or to alter the course or level of a shared water resource to the extent that it causes economic or social damage to a neighbouring country, could well constitute a new form of aggression."[36]

Canada has had to face the threat of foreign tanker traffic through the ecologically sensitive Arctic waters and along the navigationally hazardous west coast through the Straits of Juan de Fuca, already crowded with shipping. We have had to cope with underground nuclear testing near

...22

Canadian territory, schemes which will affect the flow of our rivers and depletion of our coastal fisheries by foreign fleets. Canada is not alone in feeling the effects on her environment of activities of other states. It may well be that Canada itself is not wholly guiltless of encroaching on the environmental integrity of other states. It is to maintain a state's sovereign right to the purity of its environment that Canada put forth its legal principles on state responsibility and duty to compensate for environmental damage which are now either fully or partially embodied in Principles 21 and 22 of the Stockholm Declaration. In the Canadian view, Principle 21 is declaratory of international law and Principle 22 is reflective of an existing duty on states to develop further the international law regarding liability and compensation for trans-boundary or extra-jurisdictional pollution.[37]

Of all the states represented at Stockholm, only Canada affirmed in a statement in Plenary on the closing day of the Conference that it accepted these principles as already existing principles of customary international law. Unfortunately, other states, instead of following suit, expressed a series of reservations about the Declaration. Nevertheless, it was passed unanimously, no mean achievement in the light of the intense controversy it had provoked, necessitating its complete renegotiation at Stockholm. The International Law Association recognized the significance of these principles in its report on the Stockholm Conference, when it stated:

> "The issuance of a Declaration on the Human Environment consisted of a preamble and 26 principles. It 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 declares that States have 'the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.'"[38]

.../2

The precepts of the initial Canadian proposal for state responsibility for environmental damage, the need to protect areas of common concern, and the requirement to develop the law for compensation for such damage were maintained throughout the discussion prior to and during the Stockholm Conference and became part of the Declaration itself. The acceptance, however, of another concept which Canada also supported equally strongly, that of the duty to consult with other states concerning activities which may have the risk of significant adverse effects on such other states, proved more difficult to achieve. This concept was originally expressed as the eighth principle in the first Canadian draft declaration on the human environment which stated "every state has a duty to consult with other states before undertaking activities which may damage the environment of such states...." It was eventually included as Principle 20 of the draft declaration by the working group and provided that: "Relevant information must be supplied by states on activities or developments within their jurisdiction or under their control whenever they believe, or have reason to believe, that such information is needed to avoid the risk of significant adverse effects on the environment in areas beyond their national jurisdiction." Unfortunately, the principle failed to win acceptance in a working group at the conference itself. The reasons for this related directly to an environmental dispute between Brazil and Argentina. Since this difficulty so aptly demonstrates the relevance of the Stockholm Declaration, a brief history is in order.

Brazil has for the past five years undertaken feasibility studies for constructing a giant hydro-electric installation at Sete Quedas on the Parana River which separates Brazil and Paraguay and then flows into

...24

Argentina to eventually become La Plata. Argentina was concerned that the power project might cause an alteration of the river's course producing floods, droughts and water pollution in the downstream Argentinian portion of the river. Argentina therefore requested of Brazil that consultations be held before the actual construction was commenced. Argentina submitted an amendment to the draft Principle 20 during preparatory discussion for Stockholm, which would have required information on such developments to be supplied at the request of any of the parties concerned so as to enable the other party to judge for itself the nature and probable effects of the proposed activities. Brazil rejected this amendment in the Conference working group discussing the Declaration and, since it did not prove possible, in spite of extremely lengthy negotiations, to produce agreement between these two countries on Principle 20, the working group, and subsequently the Stockholm Conference, decided to refer the principle to the United Nations General Assembly for consideration. By autumn, Brazil and Argentina had consulted and submitted a joint resolution to the General Assembly on the duty to consult, which recognized that co-operation between states in the field of the environment will be "effectively achieved if official and public knowledge is provided of the technical data relating to the work to be carried out by States within their national jurisdictions with a view to avoiding significant harm that may occur in the environment of the adjacent area."[39] It was the Canadian view that this resolution also embodied an interpretation of the scope and significance of Principles 21 and 22 which had been unanimously adopted at Stockholm[40] and which, presumably inadvertantly, could have resulted in an undermining of the principles as an agreed basis for the development of international environmental law.

...25

Canada, therefore, with the support of other delegations, particularly New Zealand and Mexico, introduced an amendment[41] to make clear that the effect of the Brazil-Argentina resolution was limited to the issue of the duty to consult. This amendment was subsequently withdrawn after Brazil and Argentina affirmed in interpretative statements that nothing in their draft resolution affected any of the rights or duties of states embodied in the provisions of the Stockholm Declaration, in particular Principles 21 and 22.[42] This affirmation was included in a separate resolution put forth by Mexico and co-sponsored by Canada, in which the General Assembly declared that no resolution adopted at its 27th Session can affect Principles 21 and 22 of the Declaration on the Human Environment.[43]

It can be seen that the effect of this bilateral dispute on the duty to consult contained in Principle 20 was, initially, to exclude this Principle from the Stockholm Declaration. But the story has a happy ending - not only for the two disputing parties but in terms of the relationship of the difference of views to the Stockholm principles. As part of the agreement in which they submitted the joint resolution on Principle 20 to the General Assembly, Brazil and Argentina agreed to give mutual official and public notification of any works undertaken within the territory of either state involving the exploitation of natural resources which could affect the environment of either. Since discussions to achieve this end had been going on for five years prior to Stockholm, it is apparent the spirit of Principle 20 played no small role in achieving these results. This is a clear indication of the immediacy and relevancy of the Stockholm principles to practical and concrete environmental problems between states. The Stockholm declaration has encouraged states to recognize defined legal principles to govern their future bilateral and multilateral action with regard to the

...26

environment, a point to which I shall return in discussing the Cherry Point Oil spill. Acceptance of the duty to consult has been recognized elsewhere. A form of the duty to consult was included in the Stockholm Action Plan for the Human Environment which in Recommendation 70 recommended that "Governments be mindful of activities in which there is an appreciable risk of effects on climate and to this end...consult fully other interested states when activities carrying a risk of such effects are being contemplated or implemented." The Ocean Dumping Convention, approved after Stockholm, also includes a provision in Article V requiring parties in cases of the emergency dumping of "black listed substances" to consult countries likely to be affected by dumping, a provision which did not appear in the pre-Stockholm draft negotiated at Reykjavik. Thus only a few months after the Stockholm Conference one of the principles presented to the conference was translated into treaty form.

It will be noted that the legal principles which Canada introduced into the Stockholm Declaration deal with state responsibility for all aspects of the environment. In more specific terms and as a natural out-growth of Canada's direct and immediate interest in preserving the marine environment, evidenced in Canada's domestic legislation, Canada was also concerned with ensuring recognition by states of an agreed basis in the form of principles for the development of a comprehensive approach to combat marine pollution. At a pre-conference meeting of the Intergovernmental Working Group on Marine Pollution in Ottawa in November 1971, the Canadian delegation submitted a list of principles for the preservation of the marine environment, and agreement was reached at the meeting on 23 General Principles concerned primarily with the responsibility of states with respect to the marine environment, based

...27

in large part on the Canadian list. Three further Canadian principles on the Rights and Duties of Coastal States in the exercise of these responsibilities obtained the support of the majority of the states participating in the Working Group, but the Canadian delegation did not submit them for approval as a number of delegations considered that they raised basic law of the sea issues which should be settled at the Law of the Sea Conference. The 23 Principles were suggested as guiding concepts representing a basis for general agreement among states[44] and as such, were endorsed by the Stockholm Conference and referred to the Law of the Sea Conference for action and the IMCO Marine Pollution Conference for information. The three principles on coastal state rights and duties were also referred to the Law of the Sea Conference for appropriate action and to the IMCO Conference for information.

While the Canadian proposals on the Declaration were to a large extent influenced by Canada's regional experience in the Boundary Waters Treaty and the Trail Smelter Arbitration, existing Canadian legislative practice helped determine the proposals on marine pollution. As noted previously, Canada has already, through the Arctic Waters Pollution Prevention Act and the anti-pollution amendments to the Canada Shipping Act, the Territorial Seas Act and the Fisheries Act, recognized its responsibilities to abate pollution in areas adjacent to its coasts, and has undertaken legislative action to enforce these anti-pollution responsibilities. In introducing these principles for Stockholm, however, Canada was not seeking international approval of its domestic legislation but was underlining the need for all coastal states to take measures to protect the environment, and, in so doing, giving evidence also of the contribution state practice can make to the development of customary international law.[45] The three

...28

Canadian principles on the rights of coastal states are, in the Canadian view, firmly rooted in customary law in a state's right to maintain its territorial integrity[46] and a fortiori its 'environmental integrity'.

Stockholm provided Canada with the opportunity, and indeed the obligation, to begin to make good the pledge it made when it took unilateral action to protect its environment - the promise to seek multinational solutions and contribute to the development of something which did not then exist - a comprehensive international environmental law. Whether or not all those present agree with the particular approaches adopted by Canada, it can hardly be denied that Canada made good this pledge in so far as the Stockholm Conference is concerned.

Stockholm and Beyond:

Stockholm was the beginning - the first and most important major step in the development of international environmental law. It must be recognized, however, that while Stockholm had provided the tools, it is up to states to use them individually and collectively to build the Stockholm principles into binding agreements on concrete issues. Canada has attempted to do this by a number of means: through the negotiation of bilateral accords based on the Stockholm Declaration; through multilateral negotiations such as the London Dumping Conference at which Canada encouraged the use of the marine pollution principles approved at Stockholm; and through attempts to build upon the results of Stockholm in negotiations on draft treaty articles preparatory to the Law of the Sea Conference.

One of the speediest and most effective methods of bringing the Stockholm principles into effect is by their application to concrete situations through bilateral negotiations. This approach has the double advantage of allowing states to benefit at an early date from the guideline

principles endorsed by the Stockholm Conference and establishing a pattern of co-operation which may gradually begin to have global impact. It should be no surprise that an early example of such action should once again be found in Canada-USA relations. Less than one month after the Stockholm Conference, the Canadian Minister of the Environment met in Washington with his American counterpart, the Chairman of the U.S. Council on Environmental Quality, to consult concerning a range of environmental issues of mutual concern, including the Cherry Point Oil spill, which had occurred during the Stockholm Conference. A spill of oil had occurred in USA internal waters during the unloading of a tanker at the Cherry Point refinery in Puget Sound. Prevailing tides and ocean currents quickly carried the oil northward into Canadian internal waters, fouling beaches, including federal, municipal and private property in Canada. The Canadian House of Commons passed a unanimous resolution, a most unusual occurrence under Canada's parliamentary system, calling on the USA to make good the damage done. The Stockholm marine pollution principles and the Declaration on the Human Environment provided a highly appropriate basis on which to negotiate on the question. On the Canadian side, it was considered that the case was on all fours with the Trail Smelter case, the only difference being that the damage was being caused by sea-borne oil rather than air-borne fumes, and that this time Canada was the victim. The Canadian delegation therefore proposed that the USA accept responsibility for the damage on the basis of the Stockholm Declaration Principles 21 and 22. The USA confirmed in a diplomatic note its willingness to approach the problem on the basis of these principles. The two sides further agreed to begin consultations to develop law and procedures for the settlement of disputes of an environmental nature

...30

along the common border and the east and west coasts, on the basis of the Stockholm principles.

The Cherry Point incident raised in concrete form, fortunately in a case involving relatively small damage, the important point of principle involved should west coast tanker traffic begin to bring Alaskan oil to U.S. west coast refineries down past the west coast of Canada and through the Straits of Juan de Fuca. As an immediate step, an oil pollution contingency plan has been put into effect to ensure mutual co-operation in cleaning oil spills in shared waters along the Great Lakes and the east and west coasts. Consultations are continuing to establish a similar plan in Arctic waters. These plans reflect in concrete form Principle 24 of the Stockholm Declaration that "co-operation through multilateral or bilateral arrangement or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects...." Once again, Canada and the USA are showing the way in developing environmental law and procedures. Analagous attempts at a regional approach to environmental problems are occurring in discussions between other countries concerning the Mediterranean, the Baltic, the North Sea and the Caribbean. It is to be hoped that they too will be based upon the Stockholm principles and will be utilized deliberately as opportunities to avoid a purely ad hoc approach, and attempt instead to contribute to the development of environmental law. (It is interesting that the Baltic talks are continuing to encounter the same kind of problems which arose in Canada's attempts to develop a multilateral regime for all Arctic waters, namely the desire on the part of some states to adopt a sector approach to the areas in question.)

Another area of developing interest between Canada and the USA is that of weather modification, raising the possibility of an agreement dealing with liability for a weather modification activity on one side of

...31

much more complex when the activity has environmental effects, both beneficial and harmful, to more than the acting state or states alone.[49] For example, a weather modification programme to increase the rainfall of a river basin serving several nations will offer potential benefits to them all[50] but might also cause damage to some states, including both those receiving the benefits and those which may not. It is apparent that some notion of 'those who share the benefits must also share the burdens' must be developed in order to evenly apportion responsibility and compensation among the states involved. There is also the problem with weather modification activities, whether they involve two or more than two states, that private concerns might undertake them and this raises the controversial and complex question of state responsibility for private acts which cause damage in another jurisdiction. Not every state may be willing at first to accept, as did Canada in the Trail Smelter arbitration, that acts by private individuals and corporations can create state responsibilities for the country in whose jurisdiction they are carried out. It seems fairly obvious, however, that all states must eventually accept such principles as binding rules of law, if only in the interests of self-preservation.

Recommendation 70 of the Stockholm Declaration is also a basis for the Canadian proposal, which I have already mentioned, to the NATO Committee on the Challenges to Modern Society to study the effects of supersonic flight in the atmosphere. In this respect, it is worth quoting the recommendation which suggests that "Governments be mindful of activities in which there is an appreciable risk of effects on climate, and to this end: (a) Carefully evaluate the likelihood and magnitude of climatic effects and disseminate their findings to the maximum extent feasible before embarking on such activities; (b) Consult fully other interested States when activities carrying a risk of such effects are being contemplated or implemented."

...33

Here we see again a further international recognition of two essential and basic principles of international environmental law, namely the duty to consult and the duty to avoid activities posing a risk of serious damage to the environment.

For Canada, weather modifications and the environmental effect of supersonic aircraft provide rich fields for future development of international environmental law. For the time being it is in multilateral negotiations on the problem of marine pollution that Canada has directed the major thrust of its efforts, to ensure that the results of the Stockholm Conference are given international consideration and action. Our objective has been to make certain that the developments on this topic within the U.N. Seabed Committee, the Ocean Dumping Conference and IMCO are consistent and compatible with the outcome of Stockholm. The reasons for Canada's desire to achieve international solutions to the marine pollution problem are obvious, and include geographic and economic as well as more altruistic considerations. Canada has the world's longest coastline, the second largest continental shelf, is not a major maritime power with an extensive merchant fleet and is a coastal rather than a distant water fishing nation. The sum of these factors adds up to the need to ensure through international means that Canada's coastal waters and fishing zones and, of course, those of other coastal states, are protected from pollution - pollution resulting mainly from foreign shipping. The Canadian Government has not, however, approached these problems from a narrow nationalistic or chauvinistic point of view. If the marine environment is indivisible ecologically, so is the legal and political problem of the requirement to protect the marine environment. I have indicated some of the ways in which

...34

Canada has acted unilaterally, bilaterally and multilaterally in these fields. Canada has attempted to persuade states to accept the long-standing Canadian "functional" approach to jurisdiction over marine areas. It is encouraging that more and more states are now accepting such an approach, and rejecting outright claims to sovereignty and proposing instead the extension by coastal states of only that jurisdiction necessary both in nature and extent to the resolution of the specific problem necessitating such jurisdiction. This has long been Canada's approach to fisheries and continental shelf questions and is now also Canadian policy with respect to marine pollution control. The major proposals tabled in the Seabed Committee - the economic zone concept and the patrimonial sea concept - are both based on this approach.

The Canadian approach to these questions has also been based on the concept of "custodianship", whereby the coastal state would accept certain duties towards the international community which would go hand in hand with any coastal state rights embodied in the new law of the sea. This concept is also receiving increasing acceptance, and the major proposals mentioned as well as those of a number of other states are now focussed as much on the development of duties as on the traditional concepts of competing rights on which the major part of the law of the sea has been founded to date.

The approval by Stockholm of the 23 marine pollution principles and the referral of the three rights of coastal states to the U.N. Seabed Committee provided the framework within which Canada could safeguard her geographic and economic position in the law of the sea discussions but, equally important, has provided the broad basis for the protection of the interests of the international community as a whole. It is this framework

...35

that Canada has advanced which has become known as the "comprehensive approach" to marine pollution.

This approach involves a concerted attack on all sources of marine pollution whether land or marine based, and is composed of three elements: a broad range of national and international measures (with national measures related to the problem area of land based pollution); the harmonization of such national and international measures; and the assignment and co-ordination of functions among national and international institutions.[51] Canada does not envisage a single treaty instrument dealing with all aspects of marine pollution but rather hopes the Law of the Sea Conference will elaborate an "umbrella" treaty. This master convention would establish both the rights and obligations of states in preserving the marine environment, affirm a commitment to adhere to particular specialized treaties, give common direction to further development of international instruments and national measures and fix uniform rules for certain problems inherent in such instruments such as enforcement and jurisdiction.[52] Canada outlined this approach in the form of a working paper on preservation of the marine environment tabled at the 1972 summer session of the 96-member U.N. Seabed Committee which is preparing for the Law of the Sea Conference, and Canada followed up this initiative in the March session of the Committee by introducing a set of draft articles for a comprehensive marine pollution convention based on the previous working paper.

An examination of the treaty draft gives perhaps the best indication of the Canadian post-Stockholm approach to environmental problems since the draft brings together the Canadian experience generated by our

...36

domestic legislation, regional environmental activity and reliance on the results of the Stockholm Conference in establishing general goals and objectives for the environment. The theme running through the draft articles is the necessity to protect not only the specific interests of any state or group of states, but the interests of the international community as a whole and, thus, the need to "lay the groundwork for an accommodation between the interests of the coastal and flag states on the one hand and the international community on the other."[52(a)] Canada has rejected the principle of "floating sovereignty" whereby only flag states have jurisdiction over ships outside the territorial sea (and some say even within it). Flag state reluctance to enforce anti-pollution measures and the ineffectiveness of the international anti-pollution measures to be enforced were the reasons for Canada's unilateral anti-pollution legislation. These articles attempt to surmount this difficulty by elaborating a form of shared jurisdiction between coastal and flag states, to the exclusion of neither, to protect the marine environment. They call "for a departure from the old laissez-faire concepts and recognize the need for regulation of the uses of the sea in the interests of environmental preservation...."[53]

International discussion of two recent conventions, one already adopted and the other still under consideration, demonstrates the need for such a comprehensive approach to the problem of marine pollution. The first convention was a direct result of Stockholm where a set of draft articles on ocean dumping had been referred to an international conference in London in November 1972 for approval. The second convention, dealing with discharges from ships, is still under discussion within IMCO and, it

...37

is hoped, will be adopted at a conference, also in London in October 1973. Both conventions raise the question of flag and coastal state enforcement and the limits of coastal state jurisdiction. The first deals with land based pollution, the only convention to do so, and the second with marine based pollution. As a result of the insistence of coastal states represented at the London Conference, the Ocean Dumping Convention is enforceable not only against vessels registered in the territory or flying the flag of a contracting state but against vessels and fixed or floating platforms "under the jurisdiction of a contracting state and believed to be engaged in dumping."[54] It is the first convention enforceable by all parties, whether flag states or non-flag coastal states. So as not to prejudice the results of the Law of the Sea Conference, Article XIII specifically provides that the "nature and extent of the right and responsibility of a coastal state to apply the convention in a zone adjacent to its coast" will be resolved at a meeting of contracting parties after the Law of the Sea Conference.

Interestingly, the Convention recognizes that the position of states on flag state jurisdiction as well as on coastal state jurisdiction will not in the meantime be prejudiced, recognizing that the status of both concepts is in dispute. The Convention may prove to be a break-through in showing the way to the resolution of one of the most difficult jurisdictional issues in the whole law of the sea. Unfortunately, the draft IMCO convention for the Prevention of Pollution from Ships has thus far followed the traditional pattern of enforcement of the convention only by the flag state and by any other state only when an offence contrary to the convention occurs "within its territorial sea". Canada has attempted in two ways to make enforcement of the convention more of an equal partnership between flag and

...38

coastal states. First, it has pressed, together with other coastal states[55] at preparatory meetings for the Conference to have the term "territorial sea" altered to "waters under its jurisdiction", followed by a saving clause similar to that on the dumping question leaving the resolution of the jurisdictional issues to the Law of the Sea Conference. Secondly, it has introduced the novel "port state jurisdiction" concept which would allow a state to enforce the convention against ships which are found in its ports wherever the contravention may have occurred. Thus, Canada is asking the contracting parties of the convention to allow all parties the right to prosecute ships for breaches of the convention even when these offences occur outside the prosecuting state's jurisdiction. A provision under the convention requiring discharge monitoring equipment for ships will facilitate the gathering of evidence of convention contraventions and makes port state prosecutions viable.

The comprehensive marine pollution treaty proposed by Canada in the Seabed Committee would augment these specialized conventions but would not in any way interfere with their application, enforcement and operation. The proposed comprehensive convention would in fact encourage states to adhere to these treaties which deal with certain aspects of marine pollution like dumping wastes at sea or discharge from ships. At the same time, the comprehensive convention would set uniform rules for dealing with certain recurring problems arising from these varied marine pollution treaties such as enforcement jurisdiction, compensation for damage and settlement of disputes. The proposed comprehensive convention would establish an environmental protection zone within which conventions such as the ones on ocean dumping or intentional discharge would be enforceable also by the coastal state. Moreover, instead of a number of marine pollution treaties with different terms of enforcement and different limits of coastal state

...39

jurisdiction, the comprehensive treaty would establish an overall limit to coastal state jurisdiction and define in specific terms the precise enforcement powers and obligations of the flag and coastal states.

In putting forth this comprehensive treaty, Canada has attempted to found its proposals on the concepts discussed and approved at the Stockholm Conference as well as other international fora. The preamble to the comprehensive convention tabled at the U.N. Seabed Committee, therefore, includes the three principles on the rights of coastal states reviewed by the Stockholm Conference, Principle 21 of the Stockholm Declaration and a number of the 23 marine pollution principles endorsed by the Conference. Article I of the draft convention states the basic obligation of states to protect and preserve the marine environment. This obligation was agreed to by Canada and the U.S. with regard to water pollution in 1909 and was included as Principle 1 of the 23 marine pollution principles. Article II incorporates Principle 7 of the Stockholm Declaration that "states shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health", as well as the obligation found in Principle 21 and the Trail Smelter Award that states ensure "activities under their jurisdiction or control do not cause damage to other states, including the environment of other states by pollution of the marine environment." The article also lists measures states should take to prevent marine pollution and these in turn are drawn from the Stockholm Resolutions, the Edinburgh principles elaborated by the Institut de Droit international in 1969, the General Assembly's Declaration of Principles on the Seabed and the various IMCO resolutions.[56] The principles of Stockholm are reflected throughout the Canadian draft: in Article III dealing with development of measures to prevent pollution; in Article V on the need for international programmes;

...40

in Article VI on monitoring of pollution; and in Article VII on compensation for damage.

Article VII on compensation for damage recognizes as a consequence of the obligation of states to ensure that activities under their jurisdiction or control do not cause damage to other states (as provided for in Article II of the Canadian draft), the need to ensure that compensation should be available to the victims of pollution damage where this obligation has not been met. The three paragraphs of draft Article VII envisage that a variety of means could be devised for ensuring such compensation, ranging from international compensation funds or insurance schemes to private rights of action established under the laws of each state in accordance with internationally agreed obligations, and, in the appropriate circumstances, to direct compensation by the responsible state. What is important is that compensation be readily available and adequate to cover the damage suffered, and this is the objective which draft Article VII is intended to achieve both in immediate terms and in terms of the longer range development of international law. That objective is of obvious importance both in terms of ensuring a comprehensive approach to the problems of marine pollution and an accommodation on those problems. That we are approaching such an accommodation is suggested by the very encouraging fact that both the U.S. and the USSR have publicly indicated their willingness to accept strict liability for environmental damage which might be caused by their flag vessels in passing through international straits. There would appear to be no ground for limiting this principle in this way, but this nevertheless represents a very major step in the right direction.

The draft also builds upon Canadian experience in preventing marine pollution. Article IV allows a state to take 'special measures'

...41

in the light of geographical and ecological characteristics, but adds that these measures "must remain within the strict limits of the objectives of this Convention and must not be discriminatory in their application." The Canadian Arctic provides an example of an area where climatic, geographic and ecological circumstances dictate in favour of measures stricter than the international norm to preserve the environment. Enclosed waters such as the Gulf of St.Lawrence, the Mediterranean and the Baltic would also merit special consideration. The intense pollution threat to such enclosed waters has recently been recognized by the draft IMCO Convention on prevention of pollution from ships which includes special provisions for enclosed seas. Regulations for the prevention of pollution in these areas may in certain cases be more stringent than those that may be agreed internationally. However, the application of more stringent standards unilaterally is widely recognized as a device for the development of international standards. I have in mind, for example, the recent U.S. legislation on Ports and Waterways Safety, already referred to.

The reflection of the Canadian desire to provide an accommodation between coastal and flag state interests is contained in Article X on enforcement procedures. Clearly, no marine pollution agreement is workable without some accommodation on the question of jurisdiction to enforce anti-pollution measures. Canada has consistently maintained the view that if agreement is reached on the basic obligation of all states to preserve the marine environment and to prevent marine pollution by the implementation of internationally agreed rules and standards, the jurisdictional issues involved would to a large extent be removed. This would be the case, in the Canadian view, since once the international rules to be enforced have been agreed upon,

...42

the fact that they can be enforced by both coastal and flag states should become a non-issue. What is essential and what has been lacking in all earlier agreements on marine pollution (with the exception now of the London Dumping Convention) is the means for ensuring that states abide by their own undertaking to adopt and maintain certain standards of operation. The Canadian draft attempts to reach such an accommodation between flag and coastal state interests by elaborating a three-part plan of shared jurisdiction involving:

(a) enforcement of environmental preservation measures by the coastal state within the limit of its national jurisdiction including environmental protection zones - in addition to the coastal state's authority to promulgate national measures in these same zones as envisaged in draft Article IV as special measures;

(b) concurrent or shared responsibility of the flag state to enforce environmental preservation measures in areas under the jurisdiction of another state;

(c) enforcement by flag states in respect of their vessels and aircraft beyond the limits of national jurisdiction and by the responsible state in respect of man-made structures of platforms beyond these same limits.[57]

The maximum limits of the environmental protection zones would be determined at the Law of the Sea Conference.

The Canadian draft articles were introduced in the marine pollution sub-committee of the U.N. Seabed Committee at its session in New York in March of this year, and are being used as the working draft for the sub-committee's projected set of draft treaty articles on marine pollution. It is with a certain sense of satisfaction that we have seen these articles so well received since they represent in many respects the culmination of

...43

the Canadian approach to environmental law. It has been an approach which began with regional activity to abate trans-boundary pollution followed by unilateral and multilateral action when international law failed to meet Canadian concerns on marine pollution. Canada has viewed the law of the environment as fragmented and lacking clearly defined goals and has made a commitment to seek multinational solutions. Stockholm presented Canada with the opportunity to help lay the foundations for the future development of international environmental law, and our regional and domestic experience in maintaining the quality of the environment to a large extent shaped Canadian aspirations for the Conference. Since Stockholm, Canada has attempted to utilize the principles, recommendations and action plans endorsed by the Conference as the basis for future agreements to protect the world's environment - enduring agreements with high quality standards which will safeguard not only specific Canadian concerns but also the interests of every state and every people in the preservation of the quality of the environment. The Draft Comprehensive Marine Pollution Treaty embodies the Canadian approaches to environmental law in the marine field since it attempts to ensure the protection of the marine environment through the maintenance and encouragement of internationally agreed measures on the basis of the principles of environmental law established by the Stockholm Conference. It is not possible to say at this time how successful we will be in translating these principles into binding treaty obligations. I can assure you, however, that Canada will continue to be tireless in its efforts to achieve this objective.

FOOTNOTES

1. L.F.E.Goldie, Development of an International Environmental Law, Discussion Paper for the A.S.I.L. Conference on Legal and Institutional Responses to the Problems of the Environment, Washington, D.C. (September 1970) at 57.

2. Id

3. G.A.Bleicher, An Overview of Environmental Legislation, 2 Ecology Law Quarterly 1 (1972) at 90.

4. For example see, Smith v Consolidated Mining (1909) 11 WLR 488, (B.C.C.A); Beamish v Glenn 28 OLR 702 (1916) (Ont. C.A); Sadowski v Secon (1943) 2 DLR 472, (Ont. H.C); River Park Enterprises v St. John (1967) 62 DLR 519 (B.C...C.).

5. For example see Nelson v C & C Plywood (1970) 465 P (2d) 314 (Mont. S.C.); Martin v Reynolds Metals Co. (1959) 342 P (2d) 790 (Ore. S.C.); American Cyanamid Co. v. M.G. Sparto (1959) 267 F (2d) 425 (5th Cir.); Bouquet v Hakensach Water Co (1917) 101 A 379 (Ct. Err & App.)

6. Kansas v Colorado (85 US 125 (1902) (U.S.S.C.); State of Georgia v Tennessee Copper 206 US 230 (1907) (U.S.S.C.)

7. (1868) 3 L.R. 330 (H.L.)

8. Trail Smelter Arbitration (Canada-U.S.) 3 RIAA 1906 (1938); Gut Dam Arbitration (Canada-U.S.) (1965). U.S. Treaties and other International Agreement 6624.

9. R.B.Bilder, Controlling Great Lakes Pollution. Background Paper for the A.S.I.L. Conference on Legal & Institutional Responses etc. Washington, D.C. (Sept. 1970) at 19.

10. ibid at 41

11. ibid at 44

12. ibid at 68

13. see n.3 supra

14. ibid at 1965

15. John Read, The Trail Smelter Dispute 1 CANADIAN YEARBOOK OF INTERNATIONAL LAW 213 (1963) at 224.

16. Canada: Working Paper on Preservation on the Marine Environment, U.N.G.A. Committee on the Peaceful Uses of the Seabed, Sub-Committee III, A/AC. 13819.C.III L.26 (Aug. 1972) at 2.

17. Goldie supra n.1 at 20

18. The most recent was the prosecution of the owners and master of The Hunting by the United Kingdom on October 26, 1972, for discharging oil contrary to the 19 Convention. The owner was fined 2,500 plus 1,000 costs and the master was fine 250. The only other known prosecution was of the owners of the Texaco Mississippi by the United States Coast Guard in October, 1966 for for discharge contrary to the Convention. Both prosecutions were the results of citing report by crews of Canadian Forces aircraft.

19. Bleicher, supra n.3 at 46-7.

20. J.A.Beesley, Statement on the Declaration on the Human Environment, Planary Session of the U.N. Conference on the Human Environment, June 14, 1972, External Affairs, Statements and Speeches No. 72/19.

21. see the Applications of the Governments of Australia and New Zealand to the International Court of Justice, The Hague, May 9, 1973.

22. Bleicher, supra n.3 at 19; Goldie, supra n.1 at 41; Read, supra n.15 at 213; and Garcia Amador State Responsibility, 94 Hague Recueil (1958) at 388

23. (1949) I.C.J. Reports 4.

24. 12 U.N.R.I.A.A. 281 (1957)

25. Bleicher, supra n.3 at 28 and Goldie, supra n.1 at 41.

26. Arctic Waters Pollution Prevention Act, S.C., C.67, 1970.
Canada Shipping Act as amended, S.C., C.27, 1970-71
Territorial Seas and Fishing Zones Act, as amended, S.C., C.68, 1970
Fisheries Act, as amended, S.C., C.63, 1970

27. W.O.Douglas, Pollution, an International Problem needing International Solutions, 7 Texas, INTERNATIONAL LAW FORUM (1971) at 3.

28. J.A.Beesley, The Law of the Sea Conference: Factors Behind Canada's Stand, CANADIAN PUBLIC POLICY/ANALYSE DE POLITIQUES July-August (1972) at 28.

29. Canadian Note to the Government of the United States on the Arctic Waters Pollution Prevention Act, H.C. Debates April 17, 1970 at 6027 which noted two recent instances of state practice developing customary international law: the 1945 Truman Proclamation on the Continental Shelf and the 1966 unilateral establishment by the U.S. of exclusive fishing zones. And see also Oppenheim INTERNATIONAL LAW (Longman's Green & Co. 7th ed.) at 25 and Right of Passage Case ICJ Reports (1960) at 99.

29. Rt. Hon. Pierre Trudeau, Statement by the Prime Minister to the Annual Meeting of the Canadian Press, April 15, 1970. Hon. Mitchell Sharp, Statement House of Commons, April 16, 1970.

30. Hon. Mitchell Sharp, id.; J.A.Beesley, Statement on the Law of the Sea UNGA XVII, First Committee, Canadian Delegation to the U.N., Press Release No. Nov. 30, 1972.

31. G.H.Hackworth, Memorandum in relation to the Arbitration of the Trail Smelter Case, 5 DIGEST OF INTERNATIONAL LAW (Whiteman ed.) at 183.

32. 7 Cranch 116 (1812) at 136 (U.S.S.C.)

33. Oppenheim INTERNATIONAL LAW (Longman's Green & Co., London, 4th ed. 19 at 25 .

34. Baty, THE CANONS OF INTERNATIONAL LAW (C.Murray, London, 1930) at 87-88.

35. Trail Smelter Arbitration, supra n.8 at 1965.

36. Maurice Strong, Address to the World Federalists, New York, May 2, 1972.

37. Ambassador J.S.G.Hardy, Statement in the Second Committee of the 27th General Assembly, Canadian Delegation to the U.N. Press Release No. 13, Oct. 24, 1972.

38. International Law Association, Report on the U.N. Conference on the Human Environment, I.L.A. Conference, New York, 1972 at 2.

39. U.N. General Assembly, Committee II, A/C. 2/L1227 (XXVII).

40. Ambassador J.S.G.Hardy supra n.37

41. U.N. General Assembly, Committee II, A.C. 2/L1233 (XXVII)

42. Ambassador J.S.G.Hardy, Statement in the Second Committee of the 27th General Assembly, Canadian Mission to the U.N. Press Release No. 20, Nov. 2, 1972.

43. U.N. General Assembly, A/Res 2996 (XXVII).

44. U.N. Conference on the Human Environment, A/Conf. 48111/Annex III.

45. see supra n.28A

46. see supra n.31 to n.34

47. Bangkok Conference on World Peace through Law (Sept. 1969), Recommendations of the Conference, World Peace through Law Centre, Geneva, 1969.

48. J. Manuels, Prospective International Control of Weather Modification Activities, 21 U.T.L.J. (1971) at 51.

49. id.

50. ibid. at 51-2

51. Canada, Working Paper on the Human Environment, see supra n.16 at 1-2.

52. id.

52A. J.A.Beesley, Statement to the U.N. Seabed Committee, Sub-Committee III, March 14, 1973.

53. id.

54. Convention on the Dumping of Wastes at Sea, Adopted in London, November 1972, Article VII.

55. In particular, Egypt, Chile, Brazil and Australia.

56. J.A.Beesley, supra n.52A.

57. id.