To a question from the floor, Professor McCaffrey responded that a domestic injunction against a foreign corporation for its trans-frontier pollution would likely be unenforceable if the corporation had been acting pursuant to its own law. Such a judgment might be deemed to invade the foreign sovereignty. Regarding a question about coastal state jurisdiction over foreign vessels in the territorial sea, Mr. Beesley responded that no one has challenged the doctrine of sovereign immunity with regard to military vessels or government vessels engaged in non-commercial operation, but states are expected to comply voluntarily with the environmental regulations of coastal states through whose territorial seas they might pass. Mr. Beesley strongly endorsed a proposal to require the filing of environmental impact statements, perhaps with UNEP. He remarked that in order to exercise its mandate to protect the marine environment, the future international seabed authority will need to consider what in essence are international environmental impact statements. Useful precedent are the studies, which amount to EIS's, prepared by the United States-Canada International Joint Commission. Mr. Hargrove added that such statements might be used to provide environmental assessment of projects developing natural resources of the commons. where the transnational effects are not immediately apparent.

A member of the audience noted that the United States Council on Environmental Quality currently requires EIS's on U.S. projects with foreign impacts, and AID carries out extensive environmental impact reviews as part of its loan screening process.

A member of the UNEP group studying principles of international liability for environmental damage commented that the UNEP experts decided to use a pluralistic, diverse approach in the report cited earlier by

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They felt this was more useful than attempting at this early stage to formulate a set of principles for all disputes based on environmental liability. The group has recognized the need to develop legal mechanisms for the protection of the commons, and many members hope UNEP will assume a greater role in this area.

To a question, Mr. Beesley responded that a variety of means are available to challenge the construction of an activity in either the United States or Canada with potentially harmful effects of trans-frontier pollution in the other country.

1) The Ämchitka Nuclear Tests case was one in which Canada chose the diplomatic route, delivering a note to the United States Department of State, objecting to the tests as contrary to international law; 2) As a last resort, tribunals can be set up, as in the Ïrail Smelter arbitration, where acts of private parties were dealt with on a state-to-state level; 3) The issue of west coast tanker traffic may be settled at the diplomatic level, by developing agreements on traffic separation schemes acceptable to both countries; 4) Class action theories are being developed in the U.S. and Canada, and may, in due course, become applicable internationally. It is possible the United States citizens may eventually be provided a cause of action in the Canadian courts. Professor Ïirgis suggested urging the local court to apply its own law, using international law principles of treaty or custom to persuade the court that there would be liability on the part of the Canadian Government at least to the extent that it permits or ....

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Mr. Beesley remarked first that, while considerable progress has been made at the municipal level in combatting air and water pollution, much remains to be done internationally. Citing the Trail Smelter arbitration and the Garrison Diversion case as examples of attempts to contain or compensate for international pollution damage or damage to shared resources, he urged the use of a pluralistic legal strategy to deal with international pollution problems. He pointed out that either the state responsibility approach or the private course of action may be used in a given case, although these strategies are not mutually exclusive. However, some cases require the state responsibility approach because it is unclear which party within a country may be held liable. Moreover, with respect to some countries, local remedies for foreigners might never become available. The principle of state liability was embodied, after months of negotiation, in Principle 21 of the Stockholm Conference. This Principle fails, however, to address the problems of liability and compensation in any effective way.

Speculating on the future development of rules for state responsibility, Mr. Beesley cautioned that there is considerable resistance to the development of international law on the basis of Trail Smelter. For example, some of the leading European countries maintained a strong opposition to the principle during the Stockholm Conference and subsequent to it. European environmental laws may require a polluter to compensate a victim for environmental damage, or may provide for insurance compensation on a reciprocal basis, but do not incorporate the duty of one state to compensate another. There are, however, embryonic applications of the principle of state responsibility in the RSNT. For example,

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flag states are to be held responsible for damages caused by military or public vessels (not engaged in commerce) passing through international straits. This represents significant movement from the traditional rules of flag state jurisdiction free of responsibility and of sovereign immunity and of innocent passage toward the principle of state liability for damage to the environment. It was a small but significant step.

Mr. Beesley went on to suggest that while many international environmental disputes may be resolved by resort to the appropriate national fora, others, such as the dispute between Argentina and Brazil over the development of the Amazon River Basin, will probably require the aid of an international tribunal. Thus both national and international approaches to such problems must be explored. He expressed his strong concern that lawyers have failed to show sufficient initiative, imagination and activism in the development of both mechanisms and principles for international environmental dispute settlement. Too often the profession has waited until the scientists and politicians granted leave to proceed on an issue. Yet if, for example, they had waited for a definitive answer from the scientists or the politicians on the pollution of the Great Lakes, we would probably be "walking on the water" by now, and for the wrong reasons. In this instance, however, legal actions were brought, controls were installed, a treaty was negotiated, reflecting a longstanding obligation under the 1909 Boundary Waters Treaty, and we have reduced the pollution of the Great Lakes to where we can begin fighting over the fish again. That is progress.

Citing the work of the U.N. Environment Program (UNEP) and the success of regional conventions on such problems as oil pollution, as in the Baltic and Mediterranean, Mr. Beesley called for an interdisciplinary approach to international environmental pollution. He suggested that as all things are increasingly interrelated, so lawyers must work closely with scientists, economists and politicians to develop principles of liability and compensation for marine and atmospheric pollution, liability for damage to the commons, an improvement of remedies for victims of transfrontier pollution. Document #WG 82 of UNEP, dated

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January 18, 1977, provides a recent and comprehensive survey of principles of liability for international environmental damage. UNEP has stated its intention to pursue further studies of the very topics discussed in this session: responsibility for the commons, liability for land-based pollution of the oceans, and responsibility for environmental damage from ultrahazardous materials.

Mr. Beesley concluded by listing some of the many international agencies and organizations having effects upon the world environment and calling for effective coordination of information and effort among all groups and agencies, based upon the interdisciplinary approach recommended above. He suggested that at least some of the solutions to these great and pressing problems would come from groups like the American Society of International Law and that the most fruitful attitude toward these concerns is neither optimism nor pessimism, but realistic commitment.