SUMMARY OF COMMENTS BY J. ALAN BEESLEY, O.C., Q.C. TO THE CANADIAN COUNCIL ON INTERNATIONAL LAW OTTAWA, OCTOBER 20, 1989

State Responsibility and the Environment

This topic is a controversial one. It arouses difference of views, even in the International Law Commission, of which I have the honour to be a member.

In a treatise published in 1973, which won the ASIL award, entitled World Public Order of the Environment, Jan Schneider entitled one chapter "State Responsibility". Interestingly, however, the International Law Commission is addressing international environmental law primarily under the subject - "Liability for Injurious Consequences - Acts Not Prohibited by International Law". Views within the Commission still differ on whether this title embraces environmental law, and there is even a minority opinion which questions whether there is even a body of principles or rules which might properly be characterized as environmental law.

You have heard enough already today to be fully aware of the importance of the Trail Smelter case, the Lac Lanoux case and the Corfu Channel case. Reference may even have been made to the Gut Dam case.

We are all aware of the extent to which the Stockholm Legal Principles reflected and were founded on these cases. These principles, still described by some as "soft law" were translated soon after the Stockholm Conference into hard law in the London Dumping Convention. It took some years of tough negotiation however to produce Chapter XII of the Law of the Sea Convention of 1982, widely accepted now as customary international law.

Yet we continue to hear that there is no such thing as environmental law on the international plane, or alternatively, that it is so new that it cannot be codified, and it is even premature to attempt progressive development. This sounds strange to Canadians and Americans, who recall that the Trail Smelter arbitration goes back to the late thirties - some fifty years ago.

Yet Canada made a declaration at the Stockholm Environmental Conference of 1972 acknowledging Stockholm Principle 21 as customary international law. Shortly afterwards the principle was built into the Exchange of Notes between the USA and Canada on the Cherry Point Oil Spill.

It is important, however, to note and emphasize that not all states accept the Trail Smelter case or Stockholm Principle 21 as having any legal force beyond the specific facts of the case and the parties to the arbitration. To assume otherwise would be to ignore the continuing opposition to the progressive development of international environmental law, and thus do a disservice to the cause of the preservation and protection of the environment.

If we are still not at a consensus on the issue of state responsibility for damage to the environment of another state, we are facing even greater difficulties with respect to the global commons. It will be recalled that Principle 21 of the Stockholm Conference specifically refers to "damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction".

It would be wrong however, to adopt a defeatist attitude. I should like to take the liberty of associating myself with the call for action addressed to us this morning by Professor Falk. My own view has long been that lawyers must be activists on environmental issues. In adopting an overview, however, we must not lose sight of the nature of the problem, when we consider the Commons. We must have regard to the difficulty of basing law-making solely on liability, as in the Trail Smelter line of cases. We may have to develop new conceptual approaches, such as, for example, something analgous to a no fault insurance scheme, requiring the establishment of an international environmental fund, provided this can be done without appearing to absolve states from any duty vis-à-vis the Commons.

If we turn to the underlying doctrinal issues, we cannot ignore the debates in the International Law Commission as to whether fault should be based on the concept of damage, or on risk, or both. The question is not an idle one, as many here know very well, and has not yet been resolved in the ILC, although the majority view, which I share, supports the concept of damage as the basis for liability.

The need for a broad ecological approach to the development of international environmental law is obvious. The global environment threat should lead states towards greater recognition of interdependence, of shared responsibility. We must translate these words into principles, and develop these principles into binding rules of international law.

The need for the codification and progressive development of international environmental law is a given if we are really serious about pursuing the goal of sustainable

development. It follows of course that we must have regard to the conservation of the living resources of the ecosystem of this planet, particularly the fisheries of the high seas, and the need to bring an end to such destructive practices as driftnet fishing and overfishing, including fishing of nursery stocks.

Before I close, I should like to indulge in a little special pleading. I would ask that when we address environmental issues, we bear in mind the need for a broad ecological perspective, based on the Brundtland Commission concept of sustainable development, if we are to achieve meaningful results.

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Innovative Solutions to
North American Environmental Problems

Thank you very much Chantal. I'm not here to represent Canada. I'm speaking on a purely personal basis. I want to make one or two preliminary comments before I touch on substantive issues.

I note that Ted Lee is here; we have each served twice as Legal Advisor to the Department of External Affairs. Against that experience I am increasingly conscious, as the years have gone by, of the challenges, and achievements, but also the limitations of legal strategies. My second point is that having gone through the Stockholm Environmental Conference in 1972 and its preparatory meeting, I am increasingly conscious of how forward-looking that conference was, and how badly we have done in some areas in following up on it.

I endorse with conviction virtually everything that was said by both speakers. It is very reassuring to discover the extent to which we share common purposes and common objectives. We could describe the three countries any way we choose: as a superpower, an influential developing country with great natural resources and human talents, and a middle power somewhere between the two, in some respects both a developing country and a developed country. If these three countries could work together on environmental issues on a broad North American regional basis, they might well produce a model for global cooperation on the environment. We have not yet done so. I suggest that we approach this concept in light of the title of this panel, namely: "Innovative Solutions to North American Environmental Problems".

I can echo also what was said earlier, about the outcome of our breakfast discussion and the informal arrangements we made to meet again if possible, perhaps during the forthcoming UNGA. The comments made by my two fellow panelists indicate not merely the opportunities and challenges which face us, but the extent to which our three countries have not yet availed ourselves of these opportunities nor met these challenges.

To return to my point about legal strategies, the 1909 Boundary Waters Treaty ought to have had the kind of positive long term impact that would have led to something better than what we now have in the whole Great Lakes region, the more so since it was coupled with the creation

of the International Joint Commission, which does a superb job, but is overloaded. Clearly, it is not enough to have an international treaty, it is not enough to have national legislation, and not enough even to have an institution such as the IJC.

In light of the foregoing considerations, surely we should try to harmonize the environmental legislation of the three countries to the extent possible, such as, for example, legislation on the exclusive economic zones. Mexico and the USA have passed economic zone legislation whereas Canada has not, although its legislation may amount to the same thing. With respect to air quality, while the three countries might have different points of departure, they undoubtedly share broad purposes and objectives on such questions as the depletion of the ozone layer and the potential dangers of global warming. On emissions standards, they might have differing standards, while still sharing a common view as to where all three countries should eventually be. On boundary waters, much has been said on what is being done bilaterally, by Mexico and the USA, by Canada and the USA, but not by all three. We now know more than before about the impact of polluted rivers, lakes and ground run-off upon the marine environment. Much more is now known also about the impact of atmospheric-borne pollutants upon the marine environment. To give only one example, Canada carried out a four year study intended, initially, to concentrate on PCBs left behind in the Canadian Arctic when early warning stations were dismantled, and we were shocked to discover, after four years of study by an interdisciplinary group, that pollution by toxic substances in the Arctic food chain was very severe. This is a problem Canada is still grapling with, one which Canada took to a conference last month in Rovaniemi, Finland at the first Arctic Environmental Conference. It is worth noting that many of the substances found in the Arctic food chain - the whole food chain, on which Canada's northern peoples depend - are not produced or used in Canada. We can draw conclusions about atmospheric-borne pollutants, marine-borne pollutants, glacial run-offs, etc. This leads to the obvious conclusion, that a broad ecological approach is what the three countries have to develop - a very broad ecological approach, not the kind of narrow sectoral approach of the past nor a hit and miss "fly-swatter" approach adopted on particular problems. Perhaps the regional ecological approach being developed by circumpolar nations for the Arctic could provide lessons for a regional North American ecological approach.

Quite apart from legal strategies, the three countries really have to do better on scientific, technical and research cooperation in developing common programmes aimed at achieving common objectives. However we do it, we must at least begin to do it.

I would like to be able to say that our three countries provide a model for the world. While they may do so in their bilateral arrangements, in their national actions and in the kind of contributions they make multilaterally, they have not done so on a regional basis. Why have these three countries not been working together, when they share a whole continent? I don't know the anwer; I can only ask the question. Continental cooperation on the environment need not give rise to fear of continental resource policies.

I suggest also that there ought to be a consultative cooperative North American regional process on environmental issues. This may entail consideration of the establishment of a mechanism of some sort. All three countries are burdened with commissions, committees, and other processes, but this new kind of regional cooperation could be very important, and ought not to be just an "add on". It is something which should already be in place. It seems clear that the time has come to make a beginning, on a North American trilateral basis, of a broad North American regional approach to the serious, important and increasingly urgent environmental problems our three countries share.