REMARKS BY J. ALAN BEESLEY, Q.C.*

My comments will be directed primarily to the implications for the international community of the successes, failures and future prospects of the United Nations Conference on the Law of the Sea. The multilateral law-making process is the preferred method of developing international law, although state practice is also a necessary part. On the subject of unilateral action, I wish to reiterate my long-standing opposition to the thesis that all such action is equal but some is more equal than others. I shall also endeavour to grapple with the thorny issue of the effect of unilateral action on multilateral efforts.

The Political Perspective. I have elsewhere expressed the view that the Third United Nations Conference on the Law of the Sea is more analogous to the classic debate between Grotius and Seldon than it is to the United Nations Law of the Sea Conferences of 1958 and 1960. My rationale is not merely that Seldon and Grotius were addressing the very problem at the heart of the present Conference, namely the breadth of coastal jurisdiction, but rather that the processes in both cases partake much more of progressive development than codification of international law.

Broad outlines of a political settlement are evident as a result of the creation and acceptance of a number of radical new legal concepts, including, in particular, the common heritage of mankind, the economic zone, transit passage and the archipelagic state. Admittedly, some basic elements in the comprehensive political foundation of the proposed new Constitution of the Oceans are not yet in place, such as the rights of the landlocked and the so-called geographically disadvantaged states and the overall package of trade-offs relating to the seabed regime.

....2

* Assistant Under-Secretary of State for External Affairs and Legal Adviser, Ottawa, Canada

The basis for political settlement nevertheless exists, if states are prepared to translate it into treaty form before it is too late, namely a 12 mile territorial sea, coupled probably with an additional 12 mile contiguous zone for certain purposes; a 200 mile economic zone comprising sovereign rights over the living and non-living resources of the water column and the seabed, coupled with limited and defined coastal rights to preserve the marine environment and control scientific research; agreement on the definition of the outer edge of the continental margin where it extends beyond 200 miles, coupled with a formula for revenue sharing derived from the resources of the shelf between 200 miles and the edge of the margin; guarantees of freedom of navigation in the economic zone and international straits; the acceptance of the archipelagic state concept, coupled with a precisely defined regime for sea-lanes through international straits traversing the waters of archipelagic states; and the elaboration of the concept of the common heritage of mankind in the form of concrete treaty provisions. For the first time, it is now possible also to perceive the outlines of a possible agreed seabed "package", which I shall discuss later.

The Legal Perspective. It is a curious reflection of the political pressures in the Conference that, although intensive negotiations took place concerning the composition of the Drafting Committee, it has never met and not one provision of the RSNT has yet been referred to it. The reason is not hard to find. No-one is prepared to refer any part of the text until all the inter-related issues are settled. As a consequence, rather more attention has been devoted to the negotiation of the basic political accommodations than to legal form and content.

A further curiosity of the Conference is that while it has proven impossible again and again to set up formal working groups charged with negotiating or drafting provisions of the proposed treaty, the Conference agreed to a procedure which is unique in the law-making experience of the United Nations whereby the Chairmen of the three Committees would draft negotiating texts covering the subject matter of their respective committees, while the President of the Conference drafts "Part Four" on the settlement of disputes. The role of the three Chairmen and the President of the Conference might be likened to that of the special rapporteurs appointed by the International Law Commission, although the differences may be more apparent than the similarities. Thus, while the work of the International Law Commission raises political, economic and, occasionally, military issues of varying importance and complexity, the test applied in determining whether a subject is "ripe for codification" by the Commission is, increasingly, the extent to which the exercise is primarily legal rather than political. In the Law of the Sea Conference, however, the three Chairmen and the President have had to attempt to reflect or develop the outlines of broad generalized accommodations on a whole range of sensitive political, economic and military issues, while couching their proposed solutions in legal formulations. At some stage in the Conference, however, it will be necessary to examine every one of the nearly 500 draft treaty provisions from a strictly legal point of view.

Presumably this task will fall to the Drafting Committee. Its mandate specifically excludes, however, any re-negotiation of issues and is confined to "drafting points". Yet there are a wide range of unsettled legal issues going well beyond drafting points which must eventually be addressed by the Conference. I propose, therefore, to

... 4

analyze, for illustrative purposes only, some of the legal implications of the RSNT.

Internal Waters. The RSNT does not deal directly with the regime of internal waters. Presumably, this is because the Geneva Convention on the Territorial Sea and the Contiguous Zone also did not deal directly with the regime of internal waters. The regime must be determined by inference from Article 1 of Part II, which confirms that the coastal state has sovereignty over internal waters, and by Article 7, which merely provides that waters on the landward side of the territorial sea baselines form part of the internal waters of that state and maintains the innocent passage rule of the 1958 Convention on the Territorial Sea. The only major change for internal waters is the adoption in Article 6(2) of "moveable baselines" to cover the problems of deltas, where the baseline may actually physically change over time.

Straight Baselines. Leaving aside for the moment the new provisions for archipelagos, it can be said that the 1958 rules on the use of straight baselines are maintained in the RSNT, except for changes relating to reefs and deltas and a provision for drawing straight baselines to and from low-tide elevations "in instances (of) general international recognition". Interestingly, the phrase "the high seas or the exclusive economic zone" is included in the prohibition against applying straight baselines so as to cut off the territorial sea of another state.

Historic Bays. Article 9 of the RSNT maintains the 24 mile "semi-circle" closing line for bays as well as pre-existing exemptions of "historic" waters, including bays, and those cases where the straight baseline system is applied. Article 14 on the delimitation of the territorial sea between states with opposite or adjacent

coasts does not apply to cases of "historic title" or "other special circumstances". This maintenance of the pre-existing rule is of particular interest in light of the significant changes proposed by the RSNT concerning delimitation rules for the continental shelf. A point of passing interest is that there appears to be no recognition of the possibility of historic claims to the shelf, a point which has not been addressed in the Conference except indirectly in the context of "acquired rights".

Territorial Waters. The breadth of the territorial sea is fixed at a "limit not exceeding 12 nautical miles", perhaps in general accord with customary international law. The 12 mile limit, erroneously regarded sometimes as an innovation, may actually reflect the old-fashioned "either-or" approach, whereby all bodies of salt water must be subject to either total sovereignty or total freedom. Given the implications of a 12 mile territorial sea for passage through international straits, it is the 3 mile territorial sea which might now be a more creative solution, when coupled with a 200 mile economic zone.

Provisions for innocent passage are significant. For example, coastal state security rights are spelled out in detail, including in Article 18(2)(h) "any act of willful and serious pollution, contrary to the present Convention". It is significant in the light of some of the legislative history of the environmental law principles finding their way into the RSNT that the definition of a state's security now includes environmental protection. Article 20(2), however, departs from the pre-existing rule concerning state sovereignty over the territorial sea. It not only prohibits unilateral coastal state standards of construction, design, manning and equipment, but prohibits also the imposition of any standards on "matters regulated by generally accepted international rules unless specifically authorized

by such rules". This Article, which is challenged by both the USA and Canada, would appear to directly contradict Article 21(3) of Part III which provides that coastal states may "in the exercise of their sovereignty establish national rules and regulations for the prevention, reduction and control of marine pollution from vessels" -- a provision vigorously supported by both the USA and Canada. Presumably, if Article 20(2) is accepted as is, then the United States would be obliged to amend its Port and Waterways Authority Act and other countries, including the USSR and Canada, would also have to amend their existing legislation. The conclusion is obvious; either the legislation of these three countries is contrary to existing international law, or the pre-existing rule is being altered.

Articles 26-31 dealing, inter alia, with criminal and civil jurisdiction and defining warships and immunities breaks new ground of some considerable significance in providing for flag-state responsibility going hand-in-hand with flag-state jurisdiction. Admittedly, Article 31 limits the effect of this provision by spelling out the sovereign immunities of such ships from legal process, but this does not lessen its legal significance.

The Contiguous Zone. The contiguous zone may not extend beyond 24 miles, a distance which appears to have no particular significance except as a multiple of the figure 12, which is the proposed breadth of the territorial sea. There is no provision for the delimitation of contiguous zones as between states with opposite or adjacent coasts.

Archipelagic States. The new rules concerning archipelagic states, while still under negotiation, are of special significance in light of the long-standing controversy concerning the concept. Article 1(1) provides that the sovereignty of a coastal state extends beyond its land territory and internal waters "and in the case of an archipelagic

state, its archipelagic waters" over an adjacent belt of sea described as the territorial sea, to the air space above, and the seabed, subsoil and resources below the archipelagic water. Several articles indicate that the status of archipelagic waters approximates that of the territorial sea rather than internal waters.

Of greatest interest is that, while the term "archipelago" is defined so broadly as to have application to many groups of islands, parts of islands and inter-connecting waters and other natural features, the archipelagic concept is now confined to "archipelagic states", which are defined as states "constituted wholly by one or more archipelagos and may include other islands". The RSNT establishes geographical criteria for archipelagic states, such as the ratio of the area of water to land and the length of straight baselines. Not only may the outer most points of the outer most islands be joined by straight archipelagic baselines, but so may drying reefs of the archipelago. The heart of the solution to the archipelagic dispute, however, are the provisions relating to sea-lanes and air routes which traverse the archipelago.

International Straits. The provisions of transit passage represent a major change in the pre-existing legal regime for navigation through international straits from one of non-suspendable innocent passage to one of "transit passage". Straits whose status is settled by international convention are not subject to the RSNT regime. No reference is made, however, to those straits whose status is settled by international adjudication or arbitration.

The failure of the RSNT to define the term "international strait" presents numerous legal issues, some of which have already been clarified to some extent by agreed interpretations such as, for example, that straits whose status is internal cannot be transformed into international straits merely by usage. It is understood that discussions and

negotiations have been carried on since the last session which will result in further interpretations which may help settle other unresolved legal issues concerning the straits regime, such as, for example, the rights of certain straits countries to establish minimum keel clearance standards. I refer to these provisions for straits only to emphasize the need for such interpretations if we are to avoid the possibility of serious disputes concerning their implementation. In the absence of agreed interpretations or drafting changes, the chapter on straits used for international navigation may present difficulties in determining what is an international strait and, in the case of an international strait, which regime -- transit passage or innocent passage -- applies to it. Perhaps the wave of the future is represented by two friends of mine, both master mariners, who have decided to obtain a law degree.

Economic Zone. Provisions for the economic zone leave unanswered a number of legal questions, such as the interpretation of the term "optimum sustainable yield". Article 51 of Part II leaves the determination of this question and that of conservation standards to the coastal state; the extent to which compulsory third-party settlement procedures will apply remains unsettled. It is possible that compulsory conciliation may prove acceptable or even some limited application of the "abuse of powers" principle. With respect to the resources of the seabed within the economic zone and the continental shelf beyond, there is little scope for dispute as to coastal state rights. It is unclear, however, what rights remain with respect to the activities of other states on the continental shelf of a coastal state. On the question of scientific research, the criterion of "resource oriented research" (Article 60) and the requirement of coastal state consent obviously raise many legal issues: for example, whether a particular scientific research project bears "substantially upon the exploration

and exploitation of the living or non-living resources" or whether it "unduly interferes with economic activities performed by the coastal state in accordance with its jurisdiction as provided for in this Convention". There is yet no final political settlement on the scientific research issue, but it seems unlikely at this stage that any political solution will resolve this type of broad legal issue.

Several legal issues are raised by the RSNT with respect to the rights of coastal states to preserve the marine environment. Although Article 44 of Part II would appear to recognize coastal state jurisdiction over the preservation of the marine environment and pollution control, it is clear from the language of Article 21(4) of Part III that the only coastal state power in the economic zone regarding the preservation of the marine environment is an enforcement power limited to "giving effect to international rules and standards". It is very difficult now and probably will become more difficult in the future for the coastal state to determine, in a given case, what is an "international rule and standard". Moreover, the legal difficulty of determining the exact nature of the RSNT Part III provisions on coastal and port state enforcement of environmental standards is complicated by the use of such subjective criteria as "flagrant or gross violation" and "substantial discharge and significant pollution" or "discharge causing major damage or threat of major damage".

Delimitation of Marine Boundaries. The test remains the pre-existing rule of delimitation of the territorial sea on the basis of the median line or equidistance concept, but does not lay down any rules for delimitation of the lateral limits of contiguous zones. Article 62 of Part II, however, provides a new rule of delimitation for the economic zones of states whose coasts are adjacent or opposite one another. In place of the reasonable degree of

certainty provided by the median line or equidistance rule, as modified only by special circumstances, and interpreted by a substantial body of state practices, the new rule is that "delimitation shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances". Its major difficulty is that it lays down the high subjective criterion of "equitable principles" without necessarily linking it to binding third-party adjudication procedures. If the Conference is able to reach agreement on such a linkage, as is envisaged by Article 62(2), then this criticism will be answered, although it will not remove the difficulty of determining what are the "equitable principles" applicable to any particular case.

The same rule of delimitation is contained in Article 71, Part II, for the lateral limits of the continental shelf. In this case, apart from the other difficulties mentioned with respect to the delimitation of the lateral limits of the economic zone, there is the problem of what happens with respect to pre-existing continental shelf settlements.

Unresolved Issues. Progress was made at the last session of the Conference on rights of transit of landlocked states, the more difficult issue of rights of access to the living resources of the landlocked states, the definition of the outer edge of the continental margin and a revenue-sharing formula applicable to the area between 200 miles from shore and the edge of the margin. Relatively little progress was made, however, on resolving the question of coastal state rights to control scientific research in the economic zone, and virtually no progress was made on the question of the legal status of the zone. There are a number of highly political issues remaining unresolved, in particular the justiciability of coastal state sovereign rights

over resources. Negotiations occurred on these issues at the last session for the first time in the Conference and it was generally recognized that while further work was required, the outlines of possible settlements could be perceived. This could result in differing principles being applied to the waters of the economic zone from those applied to the subjacent continental shelf. These potential difficulties, when added to the maintenance of the pre-existing rule for the territorial sea delimitation and the lack of any rule for the delimitation of contiguous zones, suggests that someone with a keen sense of humour has had a hand in drafting these delimitation provisions. The major unresolved issues, however, relate to the seabed beyond national jurisdiction.

Seabed beyond National Jurisdiction. It is well known that Committee I has lagged behind the other two Committees, even though it has had the benefit of over nine years of negotiations. The fact is that there has been a stalemate between some of the most powerful, developed countries on the one hand and the Group of 77 on the other. There may, however, be a ray of hope as a result of informal consultations held in Geneva earlier this year by the "Evensen Group". Significant progress was made. It may no longer be accurate to refer to a "continuing political stalemate" or "deadlock" on the seabed issue; it is at least possible now to see the outlines of a political accommodation. In a purely personal view, such an accommodation would obviously include the establishment of an international authority comprising not only a Governing Council, an Assembly and a Tribunal, but also an operating arm to be termed the "Enterprise". It would also include agreement upon the regime applicable to the seabed beyond national jurisdiction and thus subject to the regulation and control of the Authority. Furthermore, it would provide for the financing of the "Enterprise", "a system of exploitation", the regulatory powers of the Authority; the establishment of "reserved" and "non-reserved" areas of the seabed to be set aside respectively for the Enterprise and other entities; some stipulations on resource policy, including production controls; and provisions leaving open the possibility of a variety of forms of joint ventures. The whole package would be tied to a review process after a stated period, but with the possibility that the

Authority's power to regulate and control the exploitation of the international area would be enshrined in the treaty as jus cogens insulated from review.

Unilateral Action on the Seabed. It is well known that a number of countries have now acted unilaterally to establish 200 mile fishing zones in advance of the conclusion of the Conference, albeit in accordance with the emerging consensus on the issue. I doubt that such action will have any negative effects upon the Conference, mainly because it is based upon, and indeed has resulted from, the Conference negotiations. Such considerations do not apply at all, however, to unilateral action on the seabed beyond national jurisdiction. Such action would be viewed by many delegations as an attack upon one of the most important concepts to emerge from the Conference, namely the Common Heritage of Mankind, and would have an extremely negative effect upon the Conference as a whole and upon the particular interests and negotiating position of any country taking such action. Moreover, having consulted widely about the urgency for such action, I remain wholly unconvinced of the immediate necessity to license deep seabed mining, at least for another four years.

Prospects for the Conference. It seems likely that the Conference will require at least another two years to conclude its work. No one can say with certainty whether the Conference will succeed or fail. There is a danger that governments, because of the time, personnel and costs involved, may withdraw their support for further efforts. The next (sixth) session of the Conference is likely to be the "make or break" session. If the basis for agreement is worked out on the seabed regime, there will be great pressure to conclude negotiations on other unresolved issues. Even so, at least one further full substantive "tidying up" session may be required, in addition to considerable work by the Drafting Committee.

A successful Conference could mean agreement on over 500 treaty articles, including annexes, which would together comprise a comprehensive constitution of the oceans. These rules of law would not exist in a vacuum, but would find states to act in new ways. They would elaborate a wholly new regime for the rights of passage through international straits. They would lay down totally new principles concerning the management of ocean space. They would, for example, oblige all states to undertake the fundamental commitment to preserve the marine environment, to conserve its living resources, and to cooperate in the carrying out of scientific research. They would establish a single twelve-mile limit for the territorial sea throughout the world. They would result in a major re-allocation of resources as between distant water fishing states and coastal states, and, more importantly perhaps, from developed to developing states. They would give recognition to the concept of the archipelagic state, consisting of sovereignty over the waters of the archipelago, with clearly defined rights of passage and over-flight through sea-lanes. They would bind states to peaceful settlement procedures on most - unfortunately not all - issues. They would, moreover, establish something new in the history of man, an international management system for a major resource of the planet earth, the seabed beyond national jurisdiction. They would reserve this area for purely peaceful purposes. They would subject it to a legal regime governed by an international institution unlike anything known either in the U.N. system or outside it. These new rules, if accepted by the international community and coupled with binding peaceful settlement procedures, would undoubtedly make a major contribution to a peaceful world. Of equal importance perhaps, they would lay down an essential part of the foundation for a new international economic order, since it would effect a transfer, by consent, of powers and jurisdiction on

many issues from the richer and more powerful states to the poorer and less powerful.

A failed Conference would mean that while the twelve-mile territorial sea is a fact of life, there would be no agreed rules on rights of passage through straits. The 200 mile limit has come into existence as a fact of international life, while none of the safeguards embodied in the economic zone concept would necessarily apply, and many existing 200 mile limits would rapidly become translated into 200 mile territorial sea claims. New proposals concerning the delimitation of marine boundaries could have sufficient legal weight to erode the pre-existing equidistant-median line roles, but they would not be linked to binding third party settlement procedures without which the new "equitable" approach would have little meaning. Unilateral action would prevail - by developed states to authorize the mining of the deep ocean seabed, which would be countered by unilateral action by developing states claiming such areas on the basis of the exploitability test of the Continental Shelf Convention. All of the ten years of efforts to develop a legal regime and new international institutions for the management of the deep ocean seabed would go down the drain. Disputes over fishing rights, environmental jurisdiction, under-sea resource rights, conflicting delimitation claims, rights of passage in straits and claims to the deep ocean seabed could "surface" all over the globe. The conclusion is obvious: the Law of the Sea Conference has gone too far in developing new concepts and eroding the "old international law" for it to be permitted to fail at this stage. It lays with important opinion-making groups such as the American Society of International Law to ensure that the importance of the success of the Conference is made known to the decision-makers faced with these issues.