Text of remarks made by J. Alan Beesley, Canadian Ambassador to the United Nations Law of the Sea Conference, to the Canadian Council on International Law, Ottawa, October 30, 1981.

I now call upon Ambassador Beesley, and invite him to make a statement on the Impact of Technology on Development of International Law.

Ambassador Beesley: Merci, monsieur le president. Vous êtes très gentil. I am very appreciative of the opportunity to comment briefly. I shall try and do so in "shorthand", in deference to everyone's commitments.

I want to comment on the two themes raised last night in the address by our distinguished Under-Secretary, Allen Gotlieb, namely

a) technology in law and technology as law and

also on a second question, namely:

b) the role of the lawyer or the role of law in developing the new economic order, which is quite a new issue on the international plane.

I should make clear that with respect to the first point, I would like to sound a note of caution, while neither agreeing nor disagreeing with the distinguished speaker last night. My cautionary note is rather as to the relevance of the line of pursuit as to whether we are witnessing, in a particular instance, technology in law or technology as law.

On the second point, I would like to most sincerely congratulate Allen Gotlieb for his very courageous statement supporting the gradual development of a new economic order, the moreso given the well known fact that he is the announced appointee as Ambassador to Washington. It's no secret that some of the difficulties which the Law of the Sea Conference, as well as the Global Negotiations, amongst others, have run into, is this very issue of the relevance of such negotiations to the new economic order.

Having said that, I would like to return to my first point. If we think of the traditional rules of international law, we can hardly avoid consideration of the territorial sea, simply because much of international law has been founded upon the two basic principles of international law of state sovereignty, as exemplified in the concept of the territorial sea, as well as on land, and the freedom of the high seas, as it existed in all the waters beyond the limits of the territorial sea. Leaving aside the extent to which the three-mile territorial sea limit was really based on the cannon-shot rule, or to what extent this idea is mythology, the notion does provide a classic case of technology as the basis for international law, that is to say, received international law. Thus this is now a new issue, and I think we should bear that in mind. The question is whether technology ought

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Footnote: delivered before receipt of the text of the 1981 summer lectures at The Hague Academy by Mr. Gotlieb, which makes many of the same points touched on in these observations.

to have been the basis of the territorial sea limit, if it was. I would argue, as Buckminster Fuller has done, that it was a functional approach, because it enabled those powers making the law to use oceans of the world as they wished in developing their global empires and it certainly gave them the necessary freedom of the high seas to do so. Whether we would all agree that that is a desirable objective, it was a very functional rule.

A much more recent example, which is again a classic case of technology not only in law but as law is the "exploitability" test enshrined in the 1958 Geneva Convention on the Continental Shelf. There is no better example I can give. Having said that, I want to lay to rest any suggestion, which admittedly was not implied last night, that this is a new phenomenon, a new issue. That in no way denigrates the importance of the question. It does suggest that we should look back as well as forward in trying to obtain a perspective on that issue.

If I can leave the Law of the Sea for the moment, and deal with other fields of law before coming back to it, I would suggest that we consider air law. I would hazard a guess that the Chicago Convention was a direct consequence of the development of technology, especially during the Second World War. So technology in that case served as an impetus to the development of law. Probably no one would deny that air law is rather more developed today, than, for example, outer space law, or even law of the sea, certainly the law of the sea before the conclusion of the present conference.

Turning to outer space law, there we find an example of a relatively primitive stage of development of a whole field of law. Nevertheless, it's not a total legal vacuum. The basic principle which did apply for some time, as it has applied in certain other fields, was legalized unilateralism. What the space powers were able to do was done, without anyone's "by-your-leave" or permission, and without, to my knowledge, protest. If a country was able to fling something up into space, it did so. It seemed to be a classic example again, a very recent one, of technology not only in the law, but technology as the law. We have still not really regulated outer space law by, for example, prescribing orbits, to make sure that all that hardware out there doesn't crash into each other and come down here in Ottawa. Of course Canada has had some experience a little further to the north of Ottawa, as has Australia, since the days when we were demanding as Canadian negotiations a "victim-oriented" Liability Convention. I cite outer space law as probably the most primitive of these three examples I have referred to. Even there, however, we have a treaty banning claims to soveriegnty over outer space, over celestial bodies, so that is of some importance. In so saying, I think I should underline that the lawyers were really a little ahead of the technology. What would have occurred, to cite an example I have used on other occasions, had Russian machines landed on the moon, while American citizens and American flags, as well as machines, also landed on the moon, had we not had that prior treaty. The lawyers don't have too much to apologize for in that case, in spite of the rapid advance of technology.

With respect to the treaty banning the orbiting of weapons of mass destruction in space, there too, technology was in danger of getting in advance of the law, and the lawyers caught up with it, and did some good work. Was technology the evil, or was it a causative factor in the development of the law, or merely a neutral factor. In any event, it was something to be taken into account. With respect to the convention on the return of astronauts, I don't think that has too much to do with technology

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but it certainly was a spin-off from technology. The Liability Convention, I think, best illustrates the extent to which space law is fundamentally legalized unilateralism. Many of us worked very hard for many years to get a really effective liability convention, and weren't able to do so because the two major space powers were not yet prepared to accept binding arbitration. At first one was, while the other was not; eventually neither was.

Perhaps we should look at the Moon Treaty. It provides a good example of the interpenetration of discreet fields of law, since we find the Moon Treaty containing the common heritage concept, and thus being attacked and destroyed in some circles precisely because it borrowed the concept from the law of the sea, and the concept was being attacked as unacceptable in the law of the sea. Now, amusingly, we find the whole Law of the Sea Conference, and particularly this concept in the Convention, being attacked on the grounds that the Moon Treaty had it and it was dumped because of it. So there is a very interesting question here of interpenetration of separate fields of law, but I don't think technology is the boogie-man. I think that while technology is fundamentally a neutral factor, very often it can serve as a stimulus, a spur to the development of the law.

What about the field of arms control coventions? Consider the NPT, Non-Proliferation Treaty. In that case one might ask if the law made technology subject to the law, or whether technology dictated and even evaded the law. Perhaps there is a little bit of both, I suggest, because an attempt has been made to harness peaceful nuclear technology by convention, and through multilateral institutions, but the attempt has been only partially successful, and we all know which countries will not accede to the NPT, and indeed, one at least which has set off an explosion while a party to the IAEA statutes.

What about the partial test ban treaty? Surely that is a spin-off from technology. Many feel that a complete test ban would prevent the technological march that increases the nuclear arms race by quantum leaps, but was technology the danger there or was it the fears - the justifiable fears - of the motives of some of the powers which possessed the technology - those with the bomb, in other words. I am leading again, of course, to the point that technology itself, although it can serve as a spur, is not necessarily an evil thing, or a good thing, It's whatever states choose to make it.

The Seabed Arms Control Treaty is yet another example mentioned last night of the lawyers getting a little bit ahead of the fact and harnessing the technology before it got out of hand. It can be done. What about SALT I? Perhaps an example, perhaps not. SALT II? Well, where is it? Does it exist? I don't know, but the inter-relationship between technology and law is obvious even on a bilateral basis. Nevertheless it's not possible to single out technology as the boogie-man.

I should like to emphasize that I'm not suggesting that the whole concept of technology in law or technology as law is old hat merely because it goes back to the days of the cannon-shot rule; I'm suggesting only that we can't use it in order to determine who's wearing the white hats and who's wearing the black hats. In some fields, such as humanity and law, or the laws of war, not only was technology in the law, it was the law. When we think of gas warfare in the First World War, it was the technology that enabled poison gas to be developed that was the only rule. Those who had it used it. Not until much later did we achieve the Geneva protocol. Interestingly, although a very few states ratified it or even admitted it was binding on

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them, it seems to be treated as binding customary international law, or at least evidence of it. There I think we can see again technology as the law, and eventually, and perhaps this is a hopeful idea, the law harnessing technology. The lawyer's role becomes increasingly clear, I think when one considers these examples.

What about the Red Cross Conventions? Clearly, I haven't time to go into them, but I suppose if one thinks of a dum-dum bullet as technology, then one must think of the lawyer as someone who has to harness that technology and restrict it because of its potential for disaster.

Environmental law is another classic case of technology forcing the development of the law. Canadian technology was sufficient to pollute our neighbour with fumes from smokestacks -- which led to the Trail Smelter case. That, in turn, led to the Canadian initiatives at the Stockholm Environmental Conference. I'm sometimes surprised that we don't hear much about the Stockholm legal principles when we talk about acid rain. The law is there, if we want to use it. It may not be "hard law", to use Professor Cohen's phrase, but it's certainly law, or legal principles accepted as such at Stockholm. Thus we have the basis for resolving the acid rain cases, not too different a basis perhaps from what we find in the 1909 Boundary Waters Treaty, which was a very forward-looking environmental instrument. My point is merely that technology there certainly played a negative role, and the law had to be developed to contain it. Evidently now we must have another look at the problem, and see how successful we were in our law-making.

Turning now to examples where one does not see technology at work, I'm not aware that technology has had a big input into the development of human rights law on the international plane. It may have, but I'm not aware of it. I suggest that enforcement is the area for action in the human rights field, and that's the problem running right through the whole field of international law -- the extent to which we can apply the law we've developed, and therefore the extent to which we can persuade the powers which possess the technology to bind themselves by civilized rules of conduct.

Turning now to some very specific examples in which technology has influenced Canada, I don't need to go into them in any detail, but we all remember the case of the Manhattan in the ice (as distinct from ice in the Manhattan) when the Manhattan wanted to transit Arctic waters. There is no doubt that it had an impact both in persuading the Canadian Government to establish a 12-mile territorial sea, without, I might add, reserving our position in the International Court. We deliberately didn't reserve our position. But at the same time, that same technology, and its potentially disastrous effects, moved Canada to proclaim the Arctic Waters Pollution Prevention Act. So the technology was there, in that case, as a potential boogie-man, although it was utilized by the lawyers as a spur for developing a whole new environmental ethic, indeed a whole new chapter of international law. So, is technology bad, or is it good? I suggest that it is not too relevant a pursuit to examine that particular issue. It almost has to be done on an ad hoc case-by-case basis.

There are even more flagrant examples, I think, where technology has played a role. Over-fishing is one. Anyone who doesn't think there is a relationship between the over-fishing made possible by technology, particularly by two major fishing states, and the creation of the 200-mile limit, has not followed historical developments. Technology spurred the lawyers, spurred the scientists, spurred the politicians. Similarly, I think, with respect to pollution and environmental control - it wasn't only

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the Manhattan voyage, which was deliberately expressed as being intended to test technology, it was something else, the advent of super-tankers. The whole problem of flag-state jurisdiction, absent flag-state responsibility. Technology forced states to begin to develop new concepts, such as port-state jurisdiction, and coastal jurisdiction, as well as flag-state jurisdiction, so although technology may have been the evil, it did spur the development of a whole new branch of international law.

Now, turning to the Law of the Sea Conference, I'll be as brief as possible. The common heritage concept as developed in the Law of the Sea Conference includes of course questions of technology. Indeed the transfer of technology is one of the most sensitive and controversial issues. It's worth bearing in mind, however, that fears of technology, or rather fears that developed states with the technology would go out and make a grab of the seabed areas beyond national jurisdiction may not have been wholly justified, because both developed and developing states supported the common heritage concept, each of them recognizing that there could be no seabed mining, given the vast amounts of financial resources required, unless there were some basis for giving exclusive title; in other words, a multilateral treaty. So, although technology runs right through the whole Law of the Sea Conference, I would like to conclude by referring to examples in which it hasn't played any major role whatsoever, especially in the long string of successes achieved in the Law of the Sea Conference.

The timing of technology is important. It has proved important in outer space; it has proved important in arms control; it has proved important in the Law of the Sea. One example is the production control formula, whereby land-based producers of seabed minerals who were worried that they would be wiped out because of the sudden advent of technology, were successful in negotiating a regulatory mechanism. Another is the Review Conference, agreed to precisely because it's known that at a certain point in time it will be necessary to take stock of resources and technology. So, timing of technology is quite relevant, as much as is the nature of the technology.

To put this kind of problem in perspective, it's worth listing at least some of the great new concepts of international law, developed by consensus, and utilizing the Collegium as a decision-making unit, so to speak, reflecting the consensus developed by the Law of the Sea Conference (including, incidentally, a fourth chairman, the Chairman of the Drafting Committee). These are the concepts that have emerged in spite of problems of technology: the twelve-mile territorial sea; the 200-mile economic zone, with its three elements; environmental resource jurisdiction; living resource ownership; sovereign rights over the underlying resources and also of course juridsiction over scientific research; the continental shelf limits, a new approach to limits, a much more specific one, one that satisfies Canada very well, but coupled with revenue-sharing; transit passage, a totally new concept in international law applicable to international straits; the whole new branch of law relating to land-locked and geographically disadvantaged states -- not spurred by technology, with technology playing almost a non-role; the archipelagic concept, applicable to archipelagic states; the whole chapter on environmental law, where technology has played a role but the law hasn't been determined by technology. Indeed, it has almost been the other way around. Port-state jurisdiction, a new and imaginative concept. The common heritage concept itself.

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My conclusion is that it would be worthwhile bearing in mind this question of technology in law and technology as law in every endeavour on the international plane to develop the rule of law. But to treat technology as an enemy, which admittedly wasn't suggested last night, could be very counter-productive. Sometimes, perhaps, that is the way it's treated both by the North and the South; the North wants to hang on to it and the South wants to get a part of it.

It seems to me that technology is at times neutral, at times it's determinative, and times it's merely one of several causative factors leading to the creation of new rules of international law. There may be a question as to whether law should be a mere instrument of policy. I'm one of many who ask that question regularly. There may also be a question as to whether technology should be an instrument of policy, but I doubt. It always will be.

In conclusion, I don't think there should be any question that technology should be reflected in the law. Obviously, it ought to be. But should technology be the law, should it represent the law? That is called into question increasingly, now, and I suggest that the development is long overdue, even though the earlier technological basis has helped Canada in some respects, for example, as in the case of the continental shelf. Finally, I must associate myself again with the very courageous and explicit comments of the Under-Secretary on the new economic order. I think the role of law and the role of lawyers is clear-cut. It's to promote the rule of law. That doesn't mean it's easy. It's a continual balancing process between the narrow national interest and the larger national interest which must necessarily take into account the interests of the international community. I think also that law-making is not only desirable, I think it's essential to world peace and security, because as we regulate one area of human conduct after another, by binding rules of law, we gradually lessen and even remove more and more causes for conflict. Perhaps I could best conclude by referring you to the statement made by the Secretary of State for External Affairs, Mark MacGuigan, on September 21 in the General Assembly of the United Nations, at this very session, when he not only spoke in strong terms about the rule of law and its importance, but used the Law of the Sea Convention as a classic example. After listing how many different kinds of problems are regulated by the proposed Law of the Sea Convention, he referred to the proposed Convention as being absolutely vital not only to East-West relations and an essential part of the North-South dialogue, but fundamental to world peace and security. This, however, is not a plea for kind comments about the Law of the Sea Convention. It's rather a plea for a very detached and frankly, Canadian, look at these questions of technology based on, I would hope, the realization of the interdependence of all states and the need to gradually move by consensus. It is a slow-moving process, as the Law of the Sea attests, but it's the only way one can develop effective law on any major interest at stake in the international community.

Thank you very much.