ITEM I

Assessment of the Results of the Law of the Sea Conference

Chairman: Mr. Reynaldo Galindo Pohl

Rapporteur: Mr. Alan Beesley

Opening the proceedings of Pacem in Maribus VII the Chairman of the Planning Council pointed out that the purpose of the exercise was not to repeat what the Law of the Sea Conference could do with more authority. What was desired was to experiment with new ideas, especially at a time when the Conference was looking for new openings in some crucial areas.

The leading speaker, Minister Jens Evensen of Norway, outlined developments at the Fifth Session of the Law of the Sea Conference focusing particularly on negotiations in the First Committee on the Seabed Beyond National Jurisdiction, and on the discussions in Plenary on dispute settlement procedures.

The Conference, he said, was engaged in drawing up a constitution for the oceans comprising 70 percent of the earth's surface. The problems involved are numerous and far reaching and raise delicate political and economic issues for every member of the United Nations.

For hundreds of years many of these problems had been buried under the wide-spread agreement on freedom of navitation and a three mile limit to the territorial sea. These traditional doctrines no longer fulfil world requirements due to technological advances and the rapid increase in the number of states who are not prepared to accept irrelevant doctrine.

The magnitude of the task is indicated by the volume of the Revised Single Negotiating Texts which, all included, comprise between 500 and 600 articles. The political and economic issues under consideration are inextricably linked. The task is to lay down general and legally binding principles, not to solve particular disputes. The Conference is not directed towards disarming ocean space although the United Nations General Assembly agreed that the seabed beyond national jurisdiction would be reserved for purely peaceful purposes. The task is made more difficult by the agreement of the Conference to work by consensus.

The first question is whether such an ambitious goal is attainable, and if so, what is the time frame involved. The speaker expressed the view that the Conference will succeed

and has made tremendous progress since the beginning of its preparation in 1968. The Revised Single Negotiating Text is a very impressive document containing all the essential elements for a modern constitution for ocean space, reflecting also the basic objectives of the new international economic order. The speaker strongly disagreed with those who would claim that it was better to have no convention than the one now emerging from the Conference. One of the major repercussions of failure of the Conference would be an erosion of confidence in the United Nations, which cannot afford a failure. Another consequence would be lawlessness on the oceans instead of a binding Convention even if it were to be one falling short of every one's dreams and expectations.

As to the time frame, four substantive sessions have already been held and two more may be needed. The Caracas session made a successful examination in depth of the problems involved. The Geneva session made a breakthrough for certain major concepts, especially the Economic Zone, and resulted in a comprehensive Single Negotiating Text. The next Session in New York resulted in a more widely acceptable Revised Single Negotiating Text. The most recent New York session, while not as productive as earlier ones, made concrete progress on unresolved problems relating to the Economic Zone. The First Committee, however, did not produce any compromise formulation on the regime or the international machinery for the seabed beyond national jurisdiction. In the 8-9 months remaining before the next session of the Conference it will be essential to have inter-sessional negotiations on First-Committee matters. Similarly, such negotiations will be required on the peaceful settlement of disputes.

The Conference is attempting to develop new international institutions to administer the economic resources of the seabed beyond national jurisdiction. It is doing pioneer work not merely in the sense that these resources are as yet untapped, but also insofar as it is attempting to create a new economic order to apply to these areas, to be governed by a new institution with supranational powers. The legal , political, and economic consequences are far reaching and of vital importance to all members of the United Nations.

With regard to other issues, it is safe to assume that the Conference will agree on a territorial sea of twelve miles coupled with the revolutionary new concept of the 200 mile Economic Zone. Within the Zone coastal states will have resource rights over fisheries, over the continental shelf, and certain jurisdictional rights and responsibilities for the preservation of the marine environment and the regulation of scientific research. Coastal States would have the obligation to negotiate with other States concerning access to the fisheries in the Zone surplus to the coastal State's needs, and an obligation to conserve the fisheries, particularly migratory species. In the view of the speaker, the concept of the 200-mile Economic Zone is already an established principle of international law. The speaker

referred to examples of State practice involving the establishment of 200-mile fisheries or economic zones in the North Atlantic, Latin America, and other parts of the world. He stressed that the Economic Zone constitutes a functional approach -- the very approach being advocated by certain critics of the Conference. He drew particular attention to the preservation of the freedom of navigation in the Economic Zone.

The speaker also drew attention to the new rules on "right of transit" being proposed for passage through international straits and the new concept of the "archipelagic State" emerging from the Conference. He also referred to the provisions in the Revised Single Negotiating Text recognizing coastal State claims to the Continental Shelf beyond 200 miles on the basis of the 1958 Geneva Convention on the Continental Shelf. He described proposals introduced in the Conference to define with precision the outer edge of the continental margin and to provide for revenue sharing beyond 200 miles as part of the over-all "package."

The speaker explained the difficulties encountered in the attempt to ensure equitable treatment for landlocked and geographically disadvantaged States with respect to rights of access to resources and rights of transit. He suggested that the sharing in the living resources may present less difficulties than sharing in mineral resources.

The speaker drew encouragement from the progress made in resolving the problems of coastal State jurisdiction in matters pertaining to the preservation of the marine environment, and from the nearly successful effort to reach agreement on coastal State control over scientific research in the Economic Zone and on the Continental Shelf. He then explained some of the intricacies involved in the deliberations of the First Committee and in developing a consensus approach to peaceful settlement procedures.

Minister Evensen's presentation was followed by a series of comments.

Ambassador Galindo Pohl emphasized the particular difficulties that arose from the fact that the Conference started without a basic text for discussion but with many competing national proposals. Three sessions were required to produce a Single Negotiating Text. The exercise was political as much as legal. A second problem arose from the agreement to proceed by consensus. The Conference is "paying the price of learning how to work in new ways with 150 participants." While considerable progress had been made in several areas, the First Committee had reached a stage of stagnation which could become dangerous if it were allowed to continue. The speaker agreed with the previous one, however, that the Conference would be successful.

In conclusion, Ambassador Galindo Pohl pointed to the emergence of some new developments. Some delegations had begun to

work on the concept of an integrative machinery to ensure the effective regulation and harmonization of all uses of ocean space and resources. The Delegation of Portugal, in particular, had taken the initiative of introducing some background papers for this discussion. The second new development concerned the relations between the Law of the Sea Conference and the effort to build a new international economic order. More thinking would be needed to articulate this interaction.

Mr. Ruivo of Portugal drew attention to the numerous references, in the Revised Single Negotiating Text, to "competent international organizations" -- both on the regional and on the global level: organizations which evidently were required for the successful implementation of the provisions of the Text but which, at present, did not exist or where they existed, were not structured in such a way that theycould assume the new tasks imposed on them by the Text.

He drew attention to the need for coordination of the activities of international organizations and other mechanisms with competence in ocean affairs. As activities in each major sector of ocean uses increased in magnitude and complexity, the gap between problems requiring international cooperation and the measures adopted to cope with them had reached by the end of the 'sixties a critical level in practically all sectors: research, management and conservation of living resources; regulation, development, and transfer of technology; protection of the marine environment and technical assistance. With respect to new uses such as the exploration and exploitation of mineral resources and considering new levels of interaction between the international zone and coastal areas in such matters as marine pollution, no satisfactory international mechanisms are available. There are major gaps in the legal framework now under consideration by the Law of the Sea Conference.

The major deficiencies, resulting in gaps on the one hand and overlappings of functions on the other, stem from the sectoral organization of the U.N. system of specialized agencies and other U.N. related institutions (e.g., living resources and fisheries; shipping) and functions (marine research, protection of human health, etc.). This approach is no longer sufficient.

In addition to international conflicts among member States, there had developed inter-agency conflicts of competence or duplication of effort. Attempts to update the U.N. system to respond to new requirements were essentially provisional and remedial in nature and not based on a comprehensive assessment of future requirements in ocean affairs. This piecemeal and pragmatic approach produced contradictions within the U.N. system. The difficulties of the Law of the Sea Conference highlighted the deficiencies in the institutional system.

The United Nations Conference on the Human Environment

had contributed to the development of better cooperation and the promotion of programs based on priorities established on a world scale by Governments through the creation of the United Nations Environment Programme. A number of difficulties, however, had arisen in its functioning. The Third United Nations Conference on the Law of the Sea constitutes a unique opportunity to promote international action aimed at the improvement and rationalization of the institutional arrangements required to facilitate the implementation of the Convention. The time is ripe and the occasion is unique.

Ambassador Perisic of Yugoslavia drew attention to the need to adopt a clear-cut definition of the limit of the continental margin beyond 200 miles. While neither agreeing or disagreeing with coastal State claims beyond 200 miles, he pointed to the dangers of a definition which could enable States to claim an indefinite area of the seabed beyond 200 miles. The problem was assuming an entirely new aspect because the area beyond national jurisdiction would be governed by the Seabed Authority, and the more extensive coastal States' claims, the less would be available for the Common Heritage. The limits must be extremely precise. He was not convinced that any of the propsals advanced thus far gave the degree of presision ~~necessary~~ needed. He was concerned to ensure that the Convention should not provoke disputes but would facilitate settlement of differences.

Ambassador Perisic then commented on the generally accepted view that the Geneva Single Negotiating Text favored developing countries on First-Committee issues, while the New York Revised Single Negotiating Text favored developed States. Neither approach would be justified. What was needed was an institution which would protect the interests of all States whether landlocked or geographically disadvantaged or coastal or powerful or weak. This was the way to work towards a new economic order. This was the guideline the Conference should follow.

Ambassador Beesley of Canada emphasized the need to develop new principles of international law not based on either of the two pre-existing fundamental principles of State sovereignty and freedom of the high seas: principles which would reflect a functional approach to the problems of ocean space. It was important to bear in mind that the Third United Nations Conference on the Law of the Sea is a global law-making exercise attempting to resolve fundamental legal, political, and economic issues. As a law-making exercise it is directed far more towards progressive development than codification of international law. The law is being restructured along new and radical lines but at the same time whole new approaches are being taken to international institutions. Both the substance of the legal regime being negotiated and the powers of the proposed international Seabed Authority raise basic questions affecting every State.

The speaker expressed the view that while no one can say with certainty whether the Conference will succeed or fail, there is a good chance that it can succeed provided Governments

do not refuse to continue with the exercise because of the time it has taken, the costs involved, and the self-restraint it imposes on them. In his view, the next session of the Conference will be crucial. However, if it proved possible to work out the basis of agreement on the seabed regime through intersessional negotiations, there will then be great pressure to conclude the negotiation on the Economic Zone, international straits, the delimitation of boundaries, and other issues.

Ambassador Beesley then warned of the consequences of a failure of the Conference. Success would mean agreement on over 500 treaty articles binding States to act in new ways in an area comprising 70% of the earth's surface. These articles would lay down new principles concerning the management of ocean space. They would result in a major re-allocation of resources which would make a major contribution to the new international order. They would result in a transfer of powers and jurisdictions on most issues (other than military) from the powerful to the less powerful States. They would bind States to peaceful settlement procedures.

A failure of the Conference, on the other hand would mean that while the 200-mile limit was now a fact of life, the safeguards embodied in the draft treaty would not necessarily apply. A 200-mile territorial sea would be a more likely development than a 200-mile Economic Zone confined to specific jurisdictions and coupled with stringent safeguards. The 12-mile territorial sea would be a fact of life but its application to international straits would not be coupled with agreed rules concerning rights of passage. New proposals concerning the delimitation of marine boundaries could have attained sufficient status to erode the pre-existing equidistance-median line rule but would not be linked to binding third-party settlement procedures, without which the "equitable" approach would be meaningless. Seven years of work on the international regime applicable to the seabed beyond national jurisdiction would be lost. Some developed States might take unilateral action authorizing their own nationals and other legal entities to explore and exploit the deep seabed beyond the limits claimed by any State. Certain developing States might respond, as they have threatened to do, by unilateral action asserting national jurisdiction over these same areas. Conflicts over fishing rights, environmental jurisdiction, undersea 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, in the view of the speaker, is obvious. The Law of the Sea Conference has gone too far in developing new concepts and in eroding the "old international law" for it to be permitted to fail at this stage. Governments must continue to pursue the Conference solution.

The next speaker, Dr. Anatoly Kolodkin of the Soviet Union, pointed to a number of areas in which the Conference had already reached virtual agreement: a 12-mile territorial sea; a successful balancing of interests between the international community and coastal States with regard to navigation and the passage through international straits. He pointed out that the Draft Treaty confirmed the freedom of the high seas as a principle of jus cogens, and drew attention to Article 76 of Part II which affirms freedom of scientific research for the first time in the history of international treaty law.

He stressed the importance of Article 1 of Part I which affirms that the seabed is open to use exclusively for peaceful purposes by all States and to other indications of agreement on the power of States to explore and exploit the international seabed area. In his view, the system of exploitation should be acceptable to socialist, developing, and capitalist countries. What was required was a mixed system but one which would not deny rights to sovereign States, while recognizing the powers and functions of the international Enterprise. Access by States to the Area should be limited, however. The Common Heritage of Mankind should not be auctioned off to the highest bidder.

Dr. Kolodkin criticized the actions by those countries which have adopted unilateral measures on the subject matter of the Conference. In his view such action has had an adverse effect on the whole Conference. He also expressed the view that in spite of the recognition of certain coastal State rights in the Economic Zone, the area remains a part of the high seas. In the case both of the Continental Shelf and the contiguous zone, the water column has remained high seas. The Economic Zone is subject to sovereign rights and jurisdictions, but not to sovereignty. This is why it is part of the high seas and not a zone sui generis. Along with some other speakers, he stressed the importance of trying to solve all problems of the conference in a "package deal." This must be based on consensus reflecting the reciprocity of rights of sovereign States.

Dr. Arvid Pardo of Malta referred to the Revised Single Negotiating Text as a document without precedent in the history of international negotiation. He stressed that it would be impossible to create a new equitable international order on land unless it were applied by the Conference to the oceans where sovereign rights are less entrenched than on land. In this sense the Law of the Sea Conference was a test case for the establishment of a new international order, including an economic order.

The oceans contain more hydrocarbons and minerals than land. Ocean space contains vast living resources, largely unexploited, which could make a far greater contribution to resolving the world's food problem than is the case today.

The task of the Law of the Sea Conference, according to the speaker, is to harmonize the interests of States in ocean space not only for their own national ends but in the interest of the international community as a whole. While it is not possible to expect total realization of the ideals voiced in public statements, certain conditions must be fulfilled: (1) States must be willing to reasonably limit their claims: or else the oceans will become nationalized; (2) States must have reasonable regard to the needs of other States and the international community: or else disputes will occur; (3) States must have regard to differing and potentially conflicting uses and must both impose and submit to a system of ocean management; (4) States must be willing to apply the principle of Common Heritage even within their national jurisdiction. Disregard of these principles creates disagreement and results in ambiguous formulation on basic issues.

The establishment of the Economic Zone responds to the pressures for extensions of jurisdiction by States in recent years. It means that 90% of the traditional commercial fisheries, 90% of the petroleum resources, and 100% of exploitable sediments will fall under coastal State jurisdiction. This should reasonably satisfy the coastal States, but instead they continue to extend their claims. If further extensions are to be avoided, certain basic questions must be reconsidered and clarified, namely (a) the question of baselines: already hundreds of thousands of square miles have been enclosed as internal waters by the drawing of straight baselines, some limit to their length must be established; (2) the seaward limit of the continental shelf must be strictly defined. The best solution would undoubtedly be to have it coincide with the limit of the 200-mile economic zone; States with a physical shelf shallower than 200 meters but extending beyond 200 miles should be compensated; (c) the regime of islands must be better defined so that claims cannot be made hundreds of miles from mere rocks. Further requirements are the tightening up of the regime of innocent passage in the territorial sea and freedom of passage in the economic zone. Provisions must be drafted to better regulate conflicting uses of ocean space and to provide clear rules of ocean management.

Dr. Pardo pointed out that the provisions on "peaceful uses" of ocean space are so broad that they might cause trouble. Either they should be more clearly defined, or they should be dropped.

In his view, the provisions of the Single Negotiating Text were often based on obsolete scientific notions and written for the past rather than for the future. Thus scientists today widely agreed that the concept of "maximum sustainable yield" or "optimum sustainable yield" was meaningless in a situation of intense exploitation, due to the ecological interdependence of species, the interaction of ocean areas, and the natural instability of the system. He cited some scientific evidence that the "maximum"

or "optimum" exploitation of the living resources off the coast of a developing country might not at all be to that country's best economic interest, and that Article of Part II of the Text might be prejudicial in this respect.

With regard to the international area, Dr. Pardo noted the existence of two different and conflicting regimes: the seabed beyond the limits of national jurisdiction was to be governed by a new regime based on the concept of the Common Heritage of Mankind, while the water column was to retain the status of High Seas. A number of difficulties could arise from the incompatibility of these two regimes.

Finally, Dr. Pardo predicted difficulties arising from the drawing of the boundary between the international area and the Antarctic continental shelf. This boundary could be determined either by the new Treaty Law or by the Antarctic Treaty. The result would be different in either case and in both cases would probably require lengthy negotiations. It would therefore be advisable to provide that the Seabed Authority has the right to draw a provisional boundary.

Mr. Hellners of Sweden
Ambassador ~~Richardson~~ of ~~Jamaica~~ referred to previous expressions of optimism and pessimism concerning the conference and proposed a realistic approach directed to exerting every effort to conclude the Treaty. He pointed out that the crucial moment will come when it is known how many States will sign, ratify, or accede to, the Treaty. Even if many States do not become parties to the Treaty, however, the Treaty could still create new international law. The concept of the economic zone, for example, is approaching acceptance under international law, however regrettable it may be that this is occurring through unilateral measures as much as through Conference negotiation.

The speaker expressed some reservations as to whether the Single Negotiating Text is in conformity with the principles of the New International Order. While there is no reference to the oceans in some of the basic documents on the new international order, sea space certainly should be included. The speaker referred to claims by certain countries to large economic zones and continental shelves as being in conflict with the new international order. If 77% of ocean space falls under national jurisdiction while more than one-third of the States obtain only slight benefit therefrom, then this seems to run counter to the principle of the Common Heritage of Mankind. In 1970 the United Nations adopted a resolution affirming that the principle of the Common Heritage of Mankind would apply to the seabed beyond national jurisdiction. Unfortunately, the realities of the situation make it impossible to roll back developments to the point of eliminating the economic zone; however, some issues require attention, such as the definition of the continental shelf and margin. Both geologists and jurists have trouble understanding each other on this issue. It should be a precondition that a clear definition be developed that should be understandable even to lawyers. If it is regrettably impossible to

eliminate claims to the continental shelf beyond 200 miles, then it is imperative to have some form of revenue-sharing. Otherwise many States might refuse to accept the Convention.

With respect to the First Committee, it was essential to create a strong international Authority without which the Treaty would be incompatible with the new international order. While the speaker did not suggest that any single system was the only possible one, but rather considered that several different possibilities might be developed, the decisive point was that there must be a strong international Authority. This would not exclude States or private enterprises whose cooperation would be needed by the Authority. In particular, the Authority would require financial assistance from States if it is to become viable.

The next speaker, Mr. Hocine Mesloub of Algeria, drew attention to the origins of the Law of the Sea Conference in Resolution 2749 setting forth a Declaration of Principles on the seabed, and the outcome of the Sixth Special Session of the General Assembly. In determining whether the new law of the sea responds to the requirements of the New International Order, several questions must be considered. Firstly, the Revised Single Negotiating Text recognizes very few rights to landlocked and geographically disadvantaged States in the Economic Zone. The only references relate to living resources surplus to the needs of coastal States, and these references are ambiguous. They are inadequate to protect the needs and interests of African landlocked States who are among the poorest. It is the responsibility of the international community as a whole to protect the interests of the landlocked.

With respect to the continental shelf, the speaker could find no raison d'être in the new law of the sea for the retention of the continental shelf doctrine. While a number of developing countries also make claims based on the continental shelf Convention, the trend of further extending national claims over the continental margin is really based on the desire of certain developed countries looking for more riches. They are basing their claim on the 1958 Convention on the Continental Shelf, but they conveniently forget that the exploitability criterion in that Convention is linked to the criterion of adjacency. There is no worse risk to the common heritage than the adoption of a continental margin doctrine favoring the rich against the poor. 90% of the petroleum is within the continental margin and will thus not accrue to the common heritage. While the common heritage concept should generate a zone of liberty, in reality it will reflect domination. The developing countries must join to ensure that the new legal order embraces the concept of the common heritage of mankind, and that this concept be applied to the law of the sea. National interests must not be overstimulated. New appetites must be contained.

The next speaker, M. R.C. Chao of Singapore, described the last session of the Law of the Sea Conference as disappointing to many delegates because no text emerged which they could take home.

During the period 1971-73 six sessions were held in preparation for the Conference. While this period engendered considerable

general debate and, eventually, agreement on a list of issues, it was, nevertheless, characterized by many monologues and little dialogue. At Caracas, in 1973, there was an intensification of the exchange of views, but not yet negotiation. By 1975 the Conference had produced the Single Negotiating Text. This was of great value even though it represented only the personal views of the three Chairmen of the main Committees and was not a negotiated text nor a compromise. In New York, in the spring of 1976, delegates focused on specific issues and engaged in direct negotiation resulting in the Revised Single Negotiating Text. During the summer, 1976, session in New York the Conference reached the crucial point in the discussion of certain fundamental problems. The speaker did not agree that no progress had been made during that session. He was hopeful that the results of this fundamental discussion would surface during the next session.

With respect to the present status of the Economic Zone, he noted that the first speaker had expressed the view that it had become a part of customary international law. This speaker was unable to agree with that conclusion.

Referring to the dangers of a failure of the Conference, he raised the possibility that landlocked and geographically disadvantaged States might assert claims to the deep ocean floor just as well as coastal States.

The discussion on Item I on the Agenda was concluded.