Box 4716
Santa Barbara, California 93103

Pacem in Maribus

STATEMENT

by

ARVID PARDO

INTERNATIONAL OCEAN INSTITUTE

before the

THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

April 9, 1976

Box 4716
Santa Barbara, California 93103

Pacem in Maribus

I must express to you, Sir, and through you to the entire Conference, my deep appreciation for having been given permission to make a brief statement in this important debate. In this connection I must immediately make clear that, although I represent the International Ocean Institute, whatever I may say does not engage the official responsibility of the Institute or of its members, since the Institute has not taken an official position on the matter under discussion.

The preparation of Document A/CONF 62/WP.9 is one of the major, of the innumerable, substantive contributions which you, Mr. President, have made to the success of the Conference on the Law of the Sea. The structure of the system proposed is both flexible and comprehensive and combines general and special procedures in an innovative and imaginative manner. The structure could, in fact, be considered in its general lines as a model for that ocean space regime which must eventually emerge if the wealth of the oceans is to be utilized for the benefit of all people in the framework of a new international order.

There can be no question that Document A/CONF 62/WP.9 has great merits. Nevertheless, unavoidably, there are points which would appear to require further consideration and possibly modification. Among these is the unclear relationship between the Seabed Tribunal contemplated in Part I of Document A/CONF 62/WP.8 and the Law of the Sea Tribunal. A second point is the complexity of the procedural arrangement contemplated in Document WP.9 which, perhaps, is not always essential. A third point which could arouse concern are some of the provisions of Article 18 which might largely nullify in practice the effectiveness of the dispute settle-

Box 4716
Santa Barbara, California 93103

Pacem in Maribus

ment system proposed.

It would be presumptious of me to express my views on these and other points which have been commented upon by many delegations. I would instead, Sir, submit to your attention a few general considerations that may be relevant to any dispute settlement system established by this Conference.

There can be no doubt that ideally the international community would be best served by an effective and compulsory dispute settlement system that is both flexible and comprehensive in nature. Again, ideally, no category of cases should be excepted from such a system. In an ideal world such a system would provide protection to the weak, a uniform interpretation of the law, and stability of expectations to all. But we do not live in an ideal world. The world in which we live is riven by discord and conflict. In these circumstances the effectiveness of any dispute settlement system established by this Conference will depend not only on the perfection of its formal structure but also on whether it takes into realistic account the present nature of international society. Furthermore it is necessary to take into account the substantive provisions of the law which the dispute settlement system will serve and also whether it is possible credibly to provide for the impartiality of the arbitral or judicial organs charged with the task of applying or interpreting the law.

I shall not attempt to comment on the present nature of international society or international law. Others have done so. I would wish, with your permission, however, to relate some of the characteristics of the emerging law of the sea, as reflected in Document WP.8, to possible dispute settlement procedures.

Box 4716
Santa Barbara, California 93103

Pacem in Maribus

A fundamental point must immediately be made: The essence of the emerging law of the sea, as it is being considered at the Conference, will be largely a political compromise between perceived national interests, couched in legal language. Since there exist fundamental divergencies of perceived national interests among States on a number of important questions, the political compromises necessary for the attainment of agreement on a convention can sometimes be reached only by deliberate ambiguity of language. Can any tribunal, no matter how excellent, interpret in a consistent manner what is not, in substance, a legal matter but a political compromise couched in deliberatedly ambiguous language for a political purpose, that is, to attain agreement on a convention? This could only be a legitimate expectation were the judges to have knowledge of the understandings, mostly unrecorded in public documents, which formed the basis of the political compromises embodied in the text of the future convention. In this context, therefore, formal dispute settlement procedures of a legal nature may not be the most suitable means for authoritatively stabilizing and maintaining the political compromises embodied in the future convention. ~~Essential~~ More useful for this purpose would be the establishment by this Conference of a continuing body composed of all States Parties to the future Convention, capable of overseeing its implementation and of giving, in due course and if need be, authoritative interpretations of the political compromises the substance of which for the present must remain ambiguous. The establishment of such a continuing body has been proposed by some Delegations during this debate. It is my hope that it will be contemplated by the Conference as a whole.

Box 4716
Santa Barbara, California 93103

Pacem in Maribus

Also of considerable importance is the contradictory nature of important provisions included in Document WP.8. It is to be hoped that in due course obvious contradictions will be eliminated from the final text, for few judges are able convincingly to reconcile directly contradictory provisions.

Related to, but distinct from, the points just made is the excessive vagueness or excessive detail of numerous provisions in all three parts of Document WP.8.

Delimitation questions between States lying opposite or adjacent to each other are a category of disputes likely to become increasingly significant which it is proposed to subject either to the compulsory dispute settlement procedures indicated in Document WP.9 or to regional or other third-party procedures entailing a binding decision. The criteria for delimitation are indicated in Document WP.8: For the continental shelf and for the exclusive economic zone, delimitation is effected "in accordance with equitable principles, employing, where appropriate, the median or equidistance line and taking account of all the relevant circumstances." Are these very general criteria sufficient to eliminate a serious risk of unbalanced judicial decisions, particularly since the breadth of the exclusive economic zone is based on the criterion of distance from appropriate straight baselines while that of the legal continental shelf is based on the totally different criterion of natural prolongation of the land mass? Taking both criteria at their face value, complicated situations could arise, including cases where the legal continental shelf of one State lies under the exclusive economic zone of another. Compulsory and binding dispute settlement procedures may not be the

Box 4716
Santa Barbara, California 93103

Pacem in Maribus

most appropriate settlement method when the law and the criteria on which the law is based are so vague as to make any decision in some measure arbitrary. Part IV of WP.9 indeed foresees this kind of difficulty by making judicial dispute settlement measures only the last recourse.

In other instances the amount of detail which it is proposed to include in provisions of the future convention may cause difficulty. For instance, Article 50 (3), Part II of Document WP.8 provides that coastal State fishery conservation and management measures "shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing countries, and taking into account fishing patterns, the interdependence of stocks and any generally recommended subregional, regional, or global minimum standards."

Apart from proposing a fish harvesting standard -- the maximum sustainable yield -- which is increasingly questioned by an increasing number of scientists, this provision is remarkable for imposing on the coastal State the obligation of taking measures in respect of fisheries based on such a great number of laudable but varied considerations that in practice some must be ignored. Only the coastal State, I imagine, could reasonably construe such a complicated and not necessarily consistent article and it would be indeed hazardous for any panel of experts or jurists, including the International Court of Justice, to attempt to second-guess the coastal State in this connection.

Box 4716
Santa Barbara, California 93103

Pacem in Maribus

The concept of reasonable exercise by a State of its rights is fundamental both to traditional and to emerging law of the sea. But how can reasonable exercise of rights be judicially interpreted when no criteria of reasonableness are given in the law? Every State, for instance, has the right to draw straight baselines from which the breadth of marine areas under national sovereignty or jurisdiction is measured: Already some States have drawn straight baselines over 500 km long. How long does a baseline have to be before the action of the coastal State is considered unreasonable? While not underestimating the ingenuity of jurists, I would defy any tribunal, in the absence of any general criteria ~~whatsoever~~ on baseline length in a convention, to declare that a straight baseline of 600 km is an unreasonable exercise of coastal State rights while a straight baseline of 500 km is legitimate. And if straight baselines of 600 km are legitimate, why should not baselines of 1,000, 2,000, or 3,000 km be a legitimate exercise of coastal State rights?

It could be argued that precisely because of the vagueness (or) of the not always readily interpretable detail in the text, ultimate recourse to compulsory and binding dispute settlement procedures is essential. I do not think that such an argument would be entirely convincing if the future convention were to reproduce many of the present provisions contained in Document WP.8 Politically motivated ambiguities can only be authoritatively interpreted by a political body, preferably with a composition similar to that of the body which drafted the formulations. As for cases of excessive vagueness or detail, I can only say that judges need fairly clear guidance if the possibility of decisions which

Box 4716
Santa Barbara, California 93103

Pacem in Maribus

could have unfortunate consequences for international respect for the law is to be avoided. International law of the sea, ~~as it is being shaped by this Conference~~, is in a state of transition: Some, but not all, of the general principles which governed traditional law of the sea are being abandoned; there is an attempt to formulate new general principles but not all the new principles find equal support among States. In this situation it would appear unwise to expect arbiters, and even more, judges, to make binding decisions with respect to disputes concerning matters where there is vagueness in the law. Compulsory and binding dispute settlement provisions will become useful when the general conceptual framework of the new law of the sea has become clearer.

I am fortified in this view by the fact that Document WP 8 has certain characteristics which perhaps should not be reinforced by binding legal decisions.

There are grave lacunae in the document. Military activities, exclusively for peaceful purposes, in the marine environment interact with other uses of ocean space. A dangerous category of potential disputes could perhaps in part be avoided were there some clarification of the legal status of foreign military activities in national jurisdictional areas.

Part II and Part III of the document stress throughout the rights and competences of the coastal States; there is far less concern for the achievement of international equity or for the development of those effective measures of close international cooperation which are so desperately required for the management of ocean space resources and to harmonize inclusive and exclusive uses of the seas.

Box 4716
Santa Barbara, California 93103

Pacem in Maribus

Indeed, the document as a whole looks to past rather than to future uses of ocean space. Some forms of industrial farming of ocean space, having immense potential significance for the world, have, for instance, already reached an advanced experimental stage. In a decade, hundreds, perhaps thousands, of square miles of ocean space could be under cultivation. These developments which are probable, as well as others, will require an early and radical revision of many provisions included almost as a matter of course in the Single Negotiating Text.

Assured impartiality of organs charged with implementing binding dispute settlement procedures is essential. Without assured impartiality consistency in adjudications is hardly possible and it will be difficult to secure the political support of the international community which is necessary if full implementation of an international dispute settlement system is to be assured.

It is unfortunate that the accident of nationality appears increasingly relevant in international decision making. In this context and in the context of the applicable law which invites the exercise of a wide measure of judicial discretion, it is perhaps unfortunate that the Statute of the Law of the Sea Tribunal proposes that members of the Tribunal be elected in accordance with a geographical pattern than has become customary at the United Nations for elections to various bodies. A more appropriate way of attempting to secure consistency of decisions and impartiality of adjudication on the part of the ultimate, but also principal, judicial organ of the dispute settlement system envisaged could be

Box 4716
Santa Barbara, California 93103

Pacem in Maribus

to seek a continuing balance of interests, rather than of geographical regions. This is a delicate matter which, however, requires careful consideration.

In view of the present nature of international law and society; in view of the grave uncertainties and of the obsolescent nature of much of the content of Document WP.8, coupled with less than full assurance in the impartiality of the proposed tribunal, it could be argued that, at this stage, a compulsory and binding dispute settlement system might be an excessively innovative mechanism. The system could become not the bulwark of the weak but a means to deny the weak their legitimate rights. It could become a means to imprison international society in obsolete concepts of ocean resource management and in inadequate concepts of international cooperation. Nor would replacement of the Law of the Sea Tribunal by the International Court of Justice change the situation.

In conclusion, on the pessimistic assumption that most of the excessively vague or clearly inadequate provisions contained in Document WP 8 will not be substantially changed in the final text of the Convention, the establishment of a dispute settlement system that, ~~in a way, is~~ may be too advanced for the context in which it is to operate, might create difficulties. It might itself become an object of serious dispute or might not be fully or impartially implemented. This does not mean, of course, that the Conference should not affirm the obligation of Contracting Parties to settle any dispute between them relating to the interpretation or application of the future convention through the peaceful means indicated in Article 33 of the Charter or other peaceful means of their choice. Provisions for the exchange of

Box 4716
Santa Barbara, California 93103

Pacem in Maribus

information, for consultation, for impartial fact-finding, and for conciliation procedures would be very constructive as also binding arbitration procedures for certain categories of disputes, where the underlying law is reasonably clear and where differences concern clearly technical matters.

Part I of Document WP.8 is the seed of the future international order in the seas: a Tribunal for binding adjudication of disputes in respect of contracts or arrangements entered into pursuant to the provisions of the proposed convention on the seabed beyond the limits of national jurisdiction is here clearly required and it is equitable that persons or entities other than States be afforded access to such a Tribunal. With some further clarification of the provisions in Part I, the proposed Tribunal could also be entrusted with the task of authoritative interpreting this part of the Convention. The whole system could be completed by the creation of the continuing body to which I have already referred. To attempt more might be counter-productive, ~~on the basis of the pessimistic assumption that matters will stand pretty much where they now are~~.

On the other hand, one might make the more optimistic assumption that the more serious inequities, many of the uncertainties and much of the built-in obsolescence in Document WP.8 will be eliminated from the final text of the future convention. In this case the prospects of viability of the proposed convention on the law of the sea would be considerably improved and this would justify an attempt to create a compulsory and binding dispute settlement system on the lines proposed in document WP.9. It is possible to go further and to express the hope that it is

APPENDIX I