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Summary record of the 294th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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articles in the Special Rapporteur's sixth report (A/CN.4/79).

93. Strictly speaking, article 10 of the original draft (A/CN.4/79) was not concerned with the problem of the transfer of registration, but with the conditions under which a ship might acquire the nationality of a State or the right to fly its flag.

94. Mr. SANDSTRÖM said that the mere enunciation of the principle that a ship could not be validly registered in more than one State was not sufficient. If the Commission were to stop there, every State would be free to legislate according to its own lights, in order to prevent dual nationality; that would lead to chaos.

95. The Commission should either abandon the whole question of dual nationality or else lay down in what way such dual nationality could be avoided. For his part he had no preference for any particular method of preventing dual nationality.

96. Mr. SCELLE agreed with Mr. Sandström that it did not serve any useful purpose to lay down a principle unless its application was also provided for. If the Commission adopted article 10 of the Special Rapporteur's draft, it would be laying down a uniform international rule in the matter, a rule which would supersede municipal law; the conditions laid down by article 10 would apply to all States, which would no longer be free to legislate on the question.

97. The CHAIRMAN said that the Commission was not concerned with the unification of the rules governing the nationality of ships, but only with international law relating to the regime of the high seas.

98. Sir Gerald FITZMAURICE endorsed Mr. Liang's remarks on the present state of international law and the two courses open to the Commission.

99. The status of vessels was relevant to the regime of the high seas, but it was important in other connexions as well.

100. In view of the fact that the existing law of nations admitted the possibility of dual nationality for a ship, the best course would be for the Commission simply to state the consequences of that fact, rather than to endeavour *de lege ferenda* to eliminate the consequences of dual nationality.

101. Mr. FRANÇOIS (Special Rapporteur) recalled that his original draft article 9 had specified that a ship sailing under the flags of two or more States should be treated as if it were a ship without nationality. In that connexion it was important that the Commission should take a decision on article 10.

102. Mr. Zourek's proposal (A/CN.4/L.56) reduced article 10 to one short sentence and completely changed the meaning. He recalled that his own original draft, setting out the conditions for the recognition of a new registration, had been adopted by the Commission at its third session with only one dissenting vote.[10]

[10] *Yearbook of the International Law Commission, 1951*, vol. I, 121st meeting, para. 56.

103. He accordingly proposed that discussion on article 9 be deferred until the Commission had reached a decision on article 10.[11]

It was so agreed.

The meeting rose at 1 p.m.

[11] See *infra*, 294th meeting, para. 52.

294th MEETING

Wednesday, 18 May 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CN.4/L.56) (*continued*)

DRAFT ARTICLES (A/CN.4/79, SECTION II) (*continued*)

Article 10 [5]: Merchant ships on the high seas
(resumed from the 285th meeting)

1. Mr. FRANÇOIS (Special Rapporteur) said that Mr. Zourek's proposed articles 10 and 10 *bis* (A/CN.4/L.56)[1] were the very opposite of the text of article 10

[1] Articles 10 and 10 *bis* as proposed by Mr. Zourek (A/CN.4/L.56) read as follows:

Article 10:

"Each State is entitled to fix the conditions to which registration and transfer of registration are subject."

as adopted at the third session of the Commission with only one dissenting vote.[2] That text had been aimed at restricting the freedom of States by laying down the conditions under which a State could permit a ship to be registered in its territory and to fly its flag.

2. He could not accept Mr. Zourek's text for article 10 since it would allow States to fix for themselves the conditions under which their registration would be granted.

3. Mr. ZOUREK said that article 10 as drafted by the Special Rapporteur really dealt with two problems: the nationality of ships and the nationality of commercial companies and partnerships. It could not be expected that States would adopt uniform legislation concerning either.

4. The article was also unsatisfactory in another respect. It provided for registration only on the basis of ownership, although in many States—Czechoslovakia, for example—it was possible for a ship to be registered by an operator who was not the owner.

5. He felt, with other members of the Commission, that the best course would be simply to state the general principle, and not to go into such details as the nationality of partners or shareholders in commercial concerns owning ships. As regards the principle, he was in favour of recognizing the flag of a ship only in cases where it had been registered by a person or a legal entity of the same nationality as the flag, or if it actually belonged to the flag State.

6. Mr. SCELLE preferred the Special Rapporteur's draft to Mr. Zourek's proposal, because the former laid down conditions for the acquisition of a given flag by a ship. In fact, he would favour even stricter conditions; in particular, that the captain and the majority of the crew of the ship should have the same nationality as the flag: that condition had been proposed by Mr. François at the third session, but the Commission had not adopted it.[3]

7. With regard to proviso (*a*) of article 10, he proposed that persons permanently resident in the territory of the State concerned should also be required to be domiciled there before they could register a ship in that State. He also proposed that the requirement in proviso (*b*) should be a majority of nationals—or fifty-one per cent ownership—which was usual in most countries.

8. As to proviso (*c*), it was not sufficient to require that such joint stock companies should be organized under the laws of, and have their registered offices in the territory of, the State concerned; it must also be stipulated that the company should have its operating head office, as distinct from its nominal registered office, in that State. Finally he proposed the addition of a requirement that the majority of the managers and directors of the company be nationals of the flag State.

9. Mr. FRANÇOIS (Special Rapporteur) said that in his second report (A/CN.4/42),[4] submitted to the Commission at its third session, he had drawn inspiration, with regard to the nationality of ships, from the work of the Institute of International Law at its session held in Venice in 1896.[5] The Institute's draft had served as the basis for discussion at the Commission's third session (121st meeting), when Mr. Manley O. Hudson had suggested a number of improvements to it.

10. As explained in his second report, the legislation of the majority of countries required the captain, and frequently also a proportion of the crew, of a ship to possess the nationality of the country concerned as a condition for registration in that country. He had accordingly then proposed a set of rules embodying principles adopted by nearly all States and constituting the basis of international law on the matter. Provisos (a), (*b*) and (*c*) concerning the ownership of the ship as then drafted did not differ substantially from the proposals now before the Commission. He had, however, proposed a further requirement, namely, that the captain should possess the nationality of the State to which the flag belonged.[6] That second condition was extremely useful, in that it constituted an assurance that the law of the flag State would be properly enforced on board by a captain familiar with it and was a guarantee against unjustified concession.

11. The Commission had examined the question and approved the principle underlying his conclusions, namely, that States were not entirely at liberty to lay down conditions governing the nationality of ships as they thought fit but must observe certain general rules of international law governing the subject. It had given a first reading to the concrete provisions proposed by the rapporteur;[7] but the majority, while recognizing its desirability, had considered the rule concerning the nationality of the captain too strict, considering that allowance must be made for the fact that certain States still lacked sufficient qualified personnel to enable them to comply with the condition.

12. Although not sharing that opinion, he had naturally deferred to the Commission's decision, and had accordingly omitted the requirement concerning the captain's nationality from the relevant article in his sixth report.

Article 10 *bis*:

"In exceptional cases and for urgent reasons, the right to sail under the national flag may be granted by the government of any State for a strictly limited time to a ship which has not yet been entered in the national register, provided, however, that the owner or charterer of the ship is a national of the State in question."

[2] See *Yearbook of the International Law Commission, 1951*, vol I, 121st meeting, para. 56.

[3] *Ibid.*, paras. 103–127.

[4] In *Yearbook of the International Law Commission, 1951*, vol. II.

[5] Asser-Reay Report to the Institute of International Law, Venice 1896, *Annuaire de l'Institut de droit international*, vol. 15, p. 52.

[6] A/CN.4/42, para. 16.

[7] See "Report of the International Law Commission covering the work of its third session" (A/1858), para. 79, in *Yearbook of the International Law Commission, 1951*, vol. II.

13. Mr. SCELLE said that insistence on the captain's nationality being that of the flag would serve as a protection against the growing use of fictitious flags. In recent years there had been cases of the artificial inflation of the merchant navies of certain small States that had been prompted by a desire on the part of the owners and operators of the ships to evade the obligations imposed by the flag of the State to which they really belonged. If that tendency were not checked, the day might come when the flag of some small, and possibly land-locked principality, would fly over the largest merchant fleet in the world.

14. Mr. KRYLOV agreed with Mr. Scelle, and supported his proposal for the re-instatement of the requirement that the captain should have the nationality of the flag.

15. With regard to the three categories of owners dealt with in provisos (*a*), (*b*) and (*c*), one important category of ships, those owned by the State, had been omitted. Such ships should constitute a first category to be followed by the other three.

16. In view, too, of the disparity between the Anglo-Saxon and the French legal systems in the matter of commercial partnerships and companies, it might be as well to make the references to such legal entities in more general and flexible terms.

17. Sir Gerald FITZMAURICE agreed with Mr. Krylov that certain types of partnership, such as the *société en commandite* of French legal terminology, had no exact parallel in English law, so that the reference in proviso (6) to such a company would be inoperative so far as countries using the Anglo-Saxon legal system were concerned. But he would personally have no objection to leaving the provision as it was: the rest of the article applied to the United Kingdom, for example, and the provision concerning *sociétés en commandite* would apply only to countries in which such a partnership was known.

18. Mr. SANDSTRÖM pointed out that the possibility offered by proviso (*c*) of registering a ship in a State where the joint stock company owning it was itself organized and registered made the apparent stringency of provisos (*a*) and (*b*) quite illusory: it was very difficult to regulate the organization of joint stock companies, and it would therefore be quite easy to evade all restrictions by the simple process of transferring ownership to a joint stock company formed for that sole purpose.

19. It might be true that the reinstatement of the requirement concerning the captain's nationality, as proposed by Mr. Scelle, was the only way of preventing the use of fictitious flags, but so drastic a step would be unfair to certain States which did not yet possess a sufficient number of qualified officers.

20. Mr. AMADO noted that no reference had been made to certain types of company, in particular the *société à responsibilité limitée* (corresponding roughly to a private limited company) and companies partly owned by the State. The latter were of especial importance because in many countries ships were owned by companies in which the State held half, or sometimes fifty-one per cent, of the stock.

21. To meet all contingencies, he proposed that reference be also made in article 10 to: "any other form of commercial company organized in accordance with the laws of that State".

22. Mr. SCELLE considered it would be illusory to endeavour to trace the ownership of the stock of a company, and that the only valid criterion for the nationality both of a company and of any ship it owned was the nationality of the directors and managers, that was, of the persons responsible for the control and direction of the firm in question and of the ship itself.

23. Mr. ZOUREK said that the detailed provisions of clauses (*a*), (*b*) and (*c*) of the Special Rapporteur's text for article 10 could not be expected to bring order into the matter of the nationality of ships. As Mr. Sandström had just pointed out, it would be only too easy to transfer a ship to the ownership of a joint stock company with a purely fictitious registered office in a country chosen, for their own convenience, by the ship's real owners. Such possibilities of manipulation were indeed the reason why the legislation of many States required joint stock companies organized under their laws to be effectively controlled by their nationals; some countries even required all shares to be nominative.

24. Mr. SANDSTRÖM said that even the requirement that the directors of the proprietary company should be nationals of the flag State might prove illusory, since it was possible to appoint nominees with no effective powers.

25. Mr. AMADO said that the discussion showed quite clearly that the only possible way to ensure that the flag really represented the nationality of the ship was to insist that the captain be a national of the flag State. He recalled that in earlier times the master's word of honour used to be accepted as evidence of the identity of a ship.

Article 10 was approved in principle by 7 votes to 4, with 2 abstentions, subject to drafting changes to incorporate Mr. Scelle's suggestion regarding domicile and Mr. Amado's proposal that all types of company be covered.

Mr. Scelle's proposal that the captain must possess the nationality of the flag State was rejected, by 4 votes to 4, with 4 abstentions.

Mr. Krylov's proposal that the category of State-owned ships be included in article 10 was adopted, by 9 votes to none, with 4 abstentions.

Mr. Scelle's proposal that clause (b) be amended to refer to more than half the partners, instead of half the partners of the partnership or company concerned, was adopted, by 9 votes to none, with 3 abstentions.

26. The CHAIRMAN said that the Drafting Committee would re-draft article 10 accordingly. There remained,

however, Mr. Sandström's proposal that a second paragraph be added to the article, reading:

> "Each State shall also determine the conditions under which a registration may be cancelled (extinguished."

27. Mr. FRANÇOIS (Special Rapporteur) recalled that at its previous meeting[8] the Commission had discussed Mr. Zourek's proposal concerning article 9 (A/CN.4/L.56), which laid down that a ship could not validly be registered in more than one State; that proposal was still under consideration by the Commission, which had deferred its decision on article 9.

28. The intention of the Commission was to prevent dual nationality of ships. Should a ship sail under more than one flag, it would appear that only one of those flags should be regarded as legitimate.

29. Unfortunately, the case could occur of the ownership of a ship being legitimately transferred to a person or to a legal entity of a different nationality, and it would be undesirable in such an event to adopt the principle embodied in Mr. Sandström's proposed second paragraph to article 10; for that provision would give the flag State what would amount to a stranglehold on the ship, in that its authorities would be in a position to refuse to cancel the old registration, thus gravely embarrassing the new owners in respect of the change of registration to which they were entitled.

30. There were two alternative courses, either of which the Commission could properly take. One was to make no reference at all to the possibility of dual flag—an occurrence which was, in any event, very rare. The other was to revert to the text of article 9 in his sixth report (A/CN.4/79), which laid down that a ship sailing under more than one flag should be treated as though it had no nationality. Thus a ship holding certificates of registry (or sea-letters and/or sea-briefs) emanating from more than one State would be penalized by deprivation of the right to all protection.

31. Mr. SANDSTRÖM said that the legislation of certain States prohibited the sale of their ships to aliens. If that were true of the flag State, a provision such as his proposed second paragraph was necessary.

32. Sir Gerald FITZMAURICE pointed out that the provisions of article 10, which recognized the national character of a ship, did not render dual nationality impossible. It would be possible for a ship to qualify for the nationality of one State on the ground that it belonged to nationals or residents of that State, while at the same time qualifying for the nationality of another State on the ground that its owners had registered the operating company in that State. Article 10, as adopted by the Commission, rendered dual registration more difficult, but did not preclude it altogether.

33. Mr. SCELLE agreed with Sir Gerald Fitzmaurice that article 10 did not dispose of the problem of the dual flag, which was somewhat similar to that of dual nationality of individuals; the only solution to the latter was to allow the person concerned to choose between his two nationalities. In the case of ships, the only way to arrive at unity of flag was to allow the owner or the responsible operator of a vessel with dual nationality to choose between the flags involved.

34. Mr. FRANÇOIS (Special Rapporteur) said that under the terms of article 9 of his draft a third-party State would be entitled to draw its own conclusions regarding the true nationality of a ship sailing under more than one flag.

35. Mr. SCELLE considered the Special Rapporteur's solution unsatisfactory, in that different States might take conflicting decisions regarding one and the same ship.

36. Mr. ZOUREK said that Mr. Scelle's suggestion that the option be given to the owners or operators of the ship did not tally with the provisions of article 10 as adopted by the Commission, which laid down the conditions on which the nationality of a ship would be recognized. It therefore followed that a ship which ceased to satisfy those conditions would automatically lose its first nationality, and would thus be entitled to acquire a new one corresponding to that of the new controlling interest as defined in the rules laid down in the article.

37. A provision along the lines suggested by Mr. Sandström was necessary to give States the right to regulate the cancellation of their registration.

38. Mr. LIANG (Secretary to the Commission) pointed out that the Commission had adopted article 10 before taking a decision on article 9. He would submit that, in view of the first sentence of article 10 as adopted ("Each State may fix the conditions on which it will permit a ship to be registered in its territory and to fly its flag"), the Commission would be contradicting itself if it also adopted article 9 in the form proposed by Mr. Zourek and Mr. Sandström: "A ship cannot be validly registered in more than one State." Such a provision would nullify the right accorded to States by article 10 to fix the conditions on which ships might be registered in their territory.

39. Comparing the situation with that of dual nationality of an individual, it was clear that if the principle were established that a person could have only one nationality, it would be impossible to accord also to each State the right to fix the conditions on which it would grant its nationality.

40. The language of the second sentence of article 10 left some doubt as to its legal implications. The suggestion that the conditions laid down therein were required for the purposes of the recognition by other States of the ship's national character was something of a novelty.

41. Were the provisions of article 10 concerning the conditions for recognition of the national character of a

[8] 293rd meeting, paras. 71–103.

ship intended to be mandatory, then the second sentence constituted a limitation of the right acknowledged to States in the first sentence. Should a ship fail to fulfil the conditions laid down in the last three clauses of article 10, it would follow that the State concerned would not be at liberty to grant it registration.

42. If the Commission intended to legislate along the lines suggested by Mr. Zourek and Mr. Sandström, proclaiming that a ship could not be validly registered in more than one State, it would be necessary to amend the first sentence of article 10.

43. It was improbable that a majority of States would accept such a limitation of their freedom of action. The United Nations Secretariat was making a compilation of national legislations relating to the nationality of ships, which had already revealed the great variety of conditions which States stipulated for the grant of registration. Article 10 contained only a fraction of the conditions usually imposed, and States could hardly be expected to relinquish all those which did not conform with the criteria adopted by the Commission.

44. Mr. FRANÇOIS (Special Rapporteur) repeated his view that dual nationality of ships was an extremely rare occurrence, and proposed that article 9 be deleted.

45. Sir Gerald FITZMAURICE said it would be undesirable to delete article 9 altogether. Its provisions made it a perfectly legitimate article in the context. Those provisions formulated existing international law, which had been expressed as follows by Oppenheim:

> "A vessel sailing under the flags of two different States, like a vessel not sailing under the flag of any State, does not enjoy any protection whatever."[9]

46. It would be difficult for the Commission to lay down precise rules for preventing dual nationality. What it could do was to draw attention to the consequences of dual nationality when it occurred, and provide a sanction: it was proper to proclaim that ship-owners using more than one flag would be penalized by withdrawal of protection.

47. Mr. SCELLE agreed with Sir Gerald Fitzmaurice. The provision would not in practice be invoked in the case of a ship flying two flags simultaneously, which would be too simple. It was aimed at stopping the abusive practice of a vessel sailing successively under more than one flag, a practice which enabled a ship to emulate the bat in La Fontaine's fable, which would alternatively, as convenient, say either: "Je suis oiseau, voyez mes ailes", or "Je suis souris, vivent les rats!" Unscrupulous shipowners could, and unfortunately often did, change the flag of their ships to suit their purposes, and sometimes to evade their obligations.

48. Mr. ZOUREK said that the first two sentences of his proposed article 9 were inspired by conventions on the registration of aircraft; they had the immense advantage of facilitating the new registration when a legitimate change of ownership entailed a change of nationality. For his part, he would only insist on the first sentence of his proposal.

49. Mr. AMADO said that the first sentence of Mr. Zourek's proposal stated a valuable principle.

50. Mr. FRANÇOIS (Special Rapporteur) recalled that the Commission had still to take a decision on Mr. Sandström's proposed second paragraph to article 10.

51. The CHAIRMAN proposed that further discussion of Mr. Sandström's proposal be deferred until the Commission had voted on article 9.

It was so agreed.

Article 9 [6]: Merchant ships on the high seas
(resumed from the 293rd meeting)

52. Mr. SANDSTRÖM suggested that, in order to prevent dual nationality, a provision might be included to the effect that no ship could be registered in a new State until its previous registration had been cancelled.

53. Mr. SCELLE proposed that a provision be included giving the persons responsible for a ship the right to make a declaration before a judicial authority with the object of determining the effective nationality of the ship: such provision for an option would run parallel with the provisions in force in most countries for solving problems of dual nationality of individuals.

54. Faris Bey el-KHOURI approved of the Special Rapporteur's draft for article 9, which laid down the consequences in international law of dual flag; it was impossible to avoid dual nationality of ships altogether, and the Special Rapporteur's was the only wise solution.

55. He also approved of Mr. Scelle's proposal that the owner or owners of a ship should have the option of choosing between two or more possible flags; but if they did not make a frank choice and used more than one flag, the sanction of withdrawal of protection should apply.

56. Mr. SANDSTRÖM said that he was prepared to withdraw his text, which had been put forward as a counter-proposal to Mr. Zourek's amendment the precise implications of which he might have failed to appreciate.

57. The CHAIRMAN considered that, under the terms of the original text of article 9, it would be in the interest of shipowners to register in one State only; otherwise they would suffer the penalty of their ships being treated as ships without nationality.

58. Mr. ZOUREK said that until he knew the fate of article 9, which, to him, was totally unacceptable, and would give rise to great difficulties in practice, he could not decide whether or not to maintain his amendment. Rather than see it included in the present draft articles he would prefer it to be deleted.

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[9] *International Law*, seventh edition, vol. I, pp. 546–547; eighth edition, vol. I, pp. 595–596.

59. Mr. SCELLE observed that if article 9 were deleted the Commission would be allowing ships to sail under more than one flag.

60. The CHAIRMAN put to the vote the proposal that article 9 be deleted.

The proposal was rejected by 8 votes to 2 with 3 abstentions.

61. Mr. KRYLOV proposed the deletion of the words "and shall be treated as though it were a ship without a nationality", since it was not at all clear who should take the decision.

62. Mr. FRANÇOIS (Special Rapporteur) pointed out that the State into one of whose ports a ship sailing under two flags entered would be free to decide to which of the two States it belonged, or whether it should be regarded as a ship without nationality. He could not support Mr. Krylov's amendment, for he was convinced that the heaviest possible sanction should be imposed against dual nationality.

63. Sir Gerald FITZMAURICE said that Mr. Krylov's question had been answered by Oppenheim in the following passage:

> "The Law of Nations does not include any rules regarding the claim of vessels to sail under a certain maritime flag, but imposes the duty upon every State having a maritime flag to stipulate by its own municipal laws the conditions to be fulfilled by those vessels which wish to sail under its flag. In the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a state."[10]

64. Thus ships sailing under two or more flags were assimilated to ships without a flag and hence without any claim to protection.

65. Mr. GARCÍA AMADOR supported Mr. Krylov's proposal because he did not think there was any justification for a sanction of the kind proposed by the Special Rapporteur.

66. Mr. SCELLE considered that Mr. Krylov's amendment would not affect the meaning of the article, since ships sailing under two or more flags would still be unable to claim any of the nationalities in question.

67. The CHAIRMAN, speaking as a member of the Commission, disagreed with Mr. Scelle's interpretation since it was only with respect to another State that such ships would be unable to claim the nationalities of the flags it flew. It was the State aggrieved which should decide what law should be applied.

68. Mr. SCELLE maintained that such ships would still be ships without a nationality.

69. Mr. GARCÍA AMADOR observed that the legal status of such ships was similar to that of persons possessing dual nationality, who enjoyed protection in both the States concerned, though not elsewhere.

70. Mr. AMADO said that up to a point Mr. García Amador's comparison was a cogent one. However, he was still in favour of the sanction imposed in the original version of article 9, although he had previously been disposed to support Mr. Sandström's amendment.

71. The CHAIRMAN put to the vote Mr. Krylov's amendment consisting in the deletion of the words "and shall be treated as though it were a ship without a nationality".

The amendment was rejected by 6 votes to 5 with 2 abstentions.

72. Sir Gerald FITZMAURICE considered that the English translation of the words *sera assimilé à* in the French text was rather too strong, and therefore proposed that the words "assimilated to" be substituted for the words "treated as though it were".

It was so agreed.

73. Mr. ZOUREK said that in the light of the foregoing discussion he must press for the insertion at the beginning of article 9 of the first sentence of his amendment, namely: "A ship cannot be validly registered in more than one State"; unless it included such a provision the Commission would have done little towards eliminating the possibility of dual flag and disputes arising therefrom.

Mr. Zourek's amendment was rejected by 4 votes to 4 with 5 abstentions.

74. The CHAIRMAN put to the vote the original text of article 9 (A/CN.4/79), as amended in the English version by Sir Gerald Fitzmaurice.

Article 9 as amended (in English only) was adopted by 8 votes to none, with 4 abstentions.

75. Mr. ZOUREK said that he had abstained from voting on the text because it implied that ships could possess several nationalities and would give rise to difficulties in practice.

76. Mr. SCELLE explained that he had voted for the text, but with a mental reservation that it would only serve a useful purpose if the right of approach and the right of verification of the flag were recognized.

77. Faris Bey el-Khouri said that he had voted for the text because he did not think it would entail any difficulties, since ships with two nationalities would use only one flag at a time.

Articles 13 and 15 [9]: Safety of shipping
(resumed from the 285th meeting)

78. Mr. FRANÇOIS (Special Rapporteur) submitted a new text to replace articles 13 and 15, which read:

> "States shall issue, for their ships, regulations concerning the use of signals and the prevention of collisions on the high seas. Such regulations must not

[10] *Ibid.*, seventh edition, p. 548.

be inconsistent with those fixed by international agreement and applying to the majority of sea-going vessels, if such inconsistency would jeopardize the safety of life at sea."

79. Members would note that, in accordance with the views expressed during the previous discussion on article 13,[11] he had substituted for the words "the majority of maritime States" the words "the majority of sea-going vessels".

80. Mr. SANDSTRÖM said he would prefer that the article referred to tonnages than to sea-going vessels.

81. Mr. SCELLE agreed with Mr. Sandström, and also considered that the word "majority" should be qualified by the word "substantial".

82. Mr. FRANÇOIS (Special Rapporteur) said that both amendments were acceptable to him.

83. Mr. ZOUREK doubted whether Mr. Sandström's amendment would be a change for the better, since the article dealt with the protection of safety of life at sea, and it was clearly for each vessel, whatever its size, to respect the regulations concerning signals and the prevention of collisions.

84. Mr. KRYLOV opposed Mr. Sandström's amendment because it would tend to obscure the real purpose of the provision.

85. Mr. SCELLE favoured Mr. Sandström's amendment because it brought out more clearly that it was the obligation of the flag State to ensure that the regulations were observed by its own vessels. If it failed to take steps against any infringement of the regulations it should be made answerable before an international tribunal.

86. Mr. ZOUREK said that where safety was concerned the size of the vessel was of no moment, since small ones could inflict as much damage as large ones.

87. The CHAIRMAN, speaking as a member of the Commission, observed that the majority envisaged in the article was not a strictly numerical one.

88. Mr. SCELLE said that he had already illustrated the nature of the majority referred to in article 13 by reference to the composition of the Governing Body of the International Labour Office. In the present instance safety regulations were the creation of the main maritime powers.

89. Mr. ZOUREK did not think that Mr. Scelle's illustration was particularly germane to the problem of the safety of the high seas.

90. The CHAIRMAN, speaking as a member of the Commission, wondered whether the Commission might not be well advised to revert to the original text which, after all, was the fruit of long and careful study by an expert in the domain.

91. Mr. LIANG (Secretary to the Commission) observed that the inclusion of the words "by international agreement" presupposed that the regulations would be accepted by the majority. However, that would not be so if the agreement in question was a hypothetical one, and so far as the French text was concerned he was uncertain whether the words "par la voie internationale" were equivalent to "par un accord international".

92. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Scelle's point was not clearly brought out in the text as it stood, since an international agreement might be concluded by only a small number of States.

93. Mr. SCELLE said that the regulations with which article 13 was concerned were a typical instance of the growth of customary rules in response to need. For example, the French Government followed, without there being any formal agreement between the two countries, the United Kingdom practice with regard to sea routes. He favoured that kind of natural development of international law as distinct from deliberate codification.

94. Mr. FRANÇOIS, Special Rapporteur, said that he had had in mind not only customary rules but also tacit acceptance, as opposed to formal conventions, of certain regulations; that was why he had used the phrase "by international agreement".

95. Mr. AMADO pointed out that the purpose of article 13 was to prevent the establishment of regulations by one State alone. It conferred on the majority the rights previously exercised by the principal maritime Powers.

96. Sir Gerald FITZMAURICE said that the words "fixed by international agreement" were misleading, because it was only in certain spheres of maritime law that definite agreements existed, such as the International Load Line Convention Signed at London, on 5 July 1930[12] and the conventions for the safety of life at sea signed at London, on 10 June 1948.[13] But in other fields certain rules had come to be generally accepted and applied. It might, therefore, be advisable to substitute such wording as "generally accepted internationally and applicable" for the words "fixed by international agreement and applying".

97. Mr. LIANG (Secretary to the Commission) considered that the notion of regulations established by the majority of maritime States was not adequately conveyed by the words "by international agreement"; moreover, the Special Rapporteur had made no mention of how, or by whom, such regulations had been evolved. The applicability of such regulations was an entirely separate issue.

98. Mr. KRYLOV supported Sir Gerald Fitzmaurice's suggested wording, which was both clear and simple. All States recognized existing regulations on signals and

[11] 285th meeting, paras. 18–43.

[12] League of Nations, *Treaty Series*, vol. CXXXV, p. 32.

[13] United Nations, *Treaty Series*, vol. 191, pp. 21–57.

collisions, and there was no need to distinguish between the majority and the minority.

99. In reply to a question by Mr. AMADO, Sir Gerald FITZMAURICE said that his wording might be rendered in French by the phrase: *règles qui ont reçu l'accord général international.*

100. Mr. FRANÇOIS (Special Rapporteur) pointed out that if the regulations had been generally accepted there would be no need for article 13.

101. Sir Gerald FITZMAURICE, agreeing with the Special Rapporteur, observed that the purpose of the article was to oblige States to conform to generally accepted rules which *ex hypothesi* were not necessarily accepted by all States. It was essential to ensure that States did not issue regulations inconsistent with those observed by the great majority.

102. Mr. SCELLE proposed that the question whether the words "by international agreement" should be referred to the Drafting Committee.

103. Sir Gerald FITZMAURICE felt that the question whether the article should refer to the majority of sea-going vessels or to the greater part of the tonnages should be referred to the drafting committee. In the meantime, the Commission should not vote on the principle until a revised text had been circulated.

104. Turning to the final words of the article, reading "if such inconsistency would jeopardize the safety of life at sea", he asked whether it was either necessary or desirable to introduce such a subjective element. Who, for instance, was to decide whether certain regulations would endanger the safety of life at sea? It could be argued that any regulations differing from those in general use must do so, since the essence of safety regulations was their universal application. However excellent *per se*, any deviation from the general regulations must in most cases be a danger, and he therefore proposed the deletion of those words.

105. Mr. SCELLE wholeheartedly supported that view. The phrase not only served no useful purpose, but was positively harmful.

106. The CHAIRMAN reminded the Commission that during the earlier discussion of article 13 he had proposed that the words "in respect of" be inserted before the words "safety of life at sea".[14]

107. Mr. LIANG (Secretary to the Commission), observing that he had raised the same point as the Chairman, considered that the problem would be overcome if the last phrase in the new text were replaced by some such wording as "any matters regarding safety of life at sea".

108. Mr. FRANÇOIS (Special Rapporteur) said that the purpose of the wording to which Sir Gerald Fitzmaurice objected was to attenuate the stringent character of the provision. In his view, some latitude should be given to States to issue, for instance, rules of minor importance which could not possibly jeopardize the safety of life at sea, or regulations for areas where there was practically no international navigation.

109. Sir Gerald FITZMAURICE appreciated the Special Rapporteur's motives, but considered that his preoccupation was covered by the words "Such regulations must not be inconsistent with..." The Chairman's earlier proposal for the final words in the article would be acceptable.

110. Mr. LIANG (Secretary to the Commission) said that if his suggested wording were acceptable, the Special Rapporteur's point would be met, since rules of minor importance obviously had nothing whatsoever to do with safety of life at sea.

111. Mr. SCELLE reaffirmed his conviction that the last phrase in the Special Rapporteur's new text should be deleted, since it was nothing more than a repetition which would undoubtedly impair the force of the article.

112. The CHAIRMAN put to the vote the proposal to substitute the words "in respect of safety of life at sea" for the words "if such inconsistency would jeopardize the safety of life at sea".

The proposal was adopted by 10 votes to 1, with 2 abstentions.

It was decided to refer the new text to replace articles 13 and 15, as amended, to the Drafting Committee.

Order of business

113. The CHAIRMAN drew attention to the fact that the report of the International Technical Conference on the Conservation of the Living Resources of the Sea (A/CONF.10/6)[15] had now been circulated, and asked whether the Commission wished to take up the question of fisheries after it had disposed of Mr. Scelle's proposal concerning arbitration.

114. Mr. GARCÍA AMADOR considered that the report might be taken up after item 3, particularly as it was closely linked with the question of the territorial sea.

It was so agreed.

The meeting rose at 1.10 p.m.

[14] 285th meeting, para. 36.

[15] United Nations publication, Sales No.: 1955.II.B.2.