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Summary record of the 297th meeting

Topic:
Law of the sea - régime of the high seas

Extract from the Yearbook of the International Law Commission:-
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58. Mr. LIANG (Secretary to the Commission) considered that General Assembly resolution 900 (IX) might be interpreted as meaning that the Commission should consider subjects other than those on which it had already submitted texts to the General Assembly, or that it could modify the latter after studying the report of the Rome Conference. But at all events, since the Commission was not bound by the rigid procedure of a judicial tribunal, it could in the present instance regard itself as free to reconsider texts already adopted.

59. Mr. SANDSTRÖM agreed with the Chairman that the Commission could reconsider its articles on fisheries in the light of the recommendations of the Rome Conference; moreover, the latter might not affect the draft very greatly, since they dealt mainly with technical measures for the conservation of the living resources of the sea. On the other hand, if the special case of fisheries were used as a pretext for reopening discussion on other articles, the Commission's authority might be impaired unless there were very cogent reasons for modifying texts already adopted.

60. With regard to the procedural question raised by Mr. Amado, he observed that the Commission now had two texts before it designed to serve the same purpose. After a general discussion had been held, it should be possible to decide which was the more satisfactory.

61. Mr. GARCÍA AMADOR expressed the view that, as the Commission had already adopted the three articles on fisheries, it was no longer open to the Special Rapporteur to withdraw them.

62. The CHAIRMAN said that, given the form in which Mr. García Amador had presented his draft articles, it might be difficult to consider them as an amendment under the terms of rule 92 of the General Assembly's rules of procedure. If the Commission decided that the draft articles constituted a separate proposal, the procedure to follow would be that laid down in rule 93. In the meantime, the most practical course would be to examine both texts from the point of view of the principles involved, and subsequently, if necessary, to request the Drafting Committee to prepare a new version.

63. Mr. LIANG (Secretary to the Commission) did not consider that the articles adopted by the Commission at its fifth session, and now before the General Assembly, could be treated on the same footing as Mr. García Amador's text. The General Assembly's rules of procedure in the present instance had little relevance. Perhaps the Commission might for the time being confine itself to an examination of Mr. García Amador's draft articles, which, if approved, would replace those already adopted. Alternatively, the Special Rapporteur and Mr. García Amador might later find it possible to submit a new text jointly.

64. The CHAIRMAN said he did not feel that there was any substantial divergence of view on the procedural issue. It was true that the articles adopted at the fifth session were before the General Assembly, but they could always be put forward by a member of the Commission as a counter-proposal to that of Mr. García Amador.

65. Mr. FRANÇOIS (Special Rapporteur) considered it essential that Mr. García Amador circulate the text of article 7 as quickly as possible, if the discussion was to be fruitful.

The meeting rose at 6 p.m.

297th MEETING

Tuesday, 24 May 1955, at 10 a.m.

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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/CONF.10/6) (*continued*)

NEW DRAFT ARTICLES ON FISHERIES (*continued*)

1. Mr. HSU agreed with the views expressed at the previous meeting both by Mr. García Amador and by Mr. Scelle. He considered that they were perfectly reconcilable, since Mr. Scelle, though pressing for the establishment of an international authority to regulate fishing activities, did not deny that more weight should be given to the views of coastal States, while Mr. García Amador admitted that the final word must lie with the international authority.

2. The draft articles submitted by Mr. García Amador represented a new proposal which was worthy of support, because, as in the case of the continental shelf, it recognized the interests of the coastal State. He was unable to see how those States which had put forward excessive claims for the width of their territorial sea could be induced to take a more moderate line unless the Commission was prepared to make some such concession, and surely everything possible ought to be done to protect the freedom of the high seas from encroachment.

3. He welcomed the fact that Mr. García Amador had based his provisions on the need to conserve the living resources of the sea rather than on the exercise of special rights in a contiguous zone.

4. Finally, he did not think the procedural question raised at the previous meeting[1] need cause any difficulty, since if the draft articles were found acceptable they could be treated as the basic text.

5. Mr. SANDSTRÖM, comparing Mr. García Amador's draft articles with those adopted by the Commission at its fifth session (A/2456), said that there was no difference between the two systems proposed, except in so far as the special interests of the coastal State were involved. According to the former, the coastal State would take part on an equal footing, even though its nationals did not carry on fishing in the area concerned, in any system of regulation, without reference to the distance of that area from its territorial sea. A further and more important difference was that when there was failure to reach agreement on measures for conservation, the coastal State, according to Mr. García Amador's draft, could adopt whatever measures were appropriate, provided certain conditions were fulfilled.

6. In emphasizing the special interests of the coastal State Mr. García Amador was not propounding a new theory, for the issue had been clearly brought out by the Commission in its comment on the articles adopted at the fifth session. He agreed, however, that due weight should be given to such special interests, particularly as some coastal States possessed only small fishing fleets. Perhaps Mr. García Amador's draft articles could be submitted for consideration to the General Assembly, which could then decide between them and the articles referred to it by the Commission in 1955, and still before it.

7. Sir Gerald FITZMAURICE agreed that Mr. García Amador had made an important contribution to the Commission's work on fisheries, by putting forward draft articles which, with certain modifications, might be regarded as a possible basis for the text to be submitted to the General Assembly. Should some of the observations he was about to make appear critical of certain aspects of those articles, he wished to make clear that that would be due not to the fact that the text was fundamentally unacceptable to him, but to his desire that the provisions should command as wide an area of acceptance as possible, particularly since the Commission was not at the moment engaged in codification, but, being in the field of *lege ferenda,* was breaking new ground.

8. As they stood, Mr. García Amador's draft articles might be considered to tilt the balance too heavily in one direction, by stressing almost exclusively the position of the coastal State. In paragraph 4 of the preamble, Mr. García Amador had come near to suggesting that the coastal State alone was in a special position. He himself believed that if such provisions were to find favour with a large number of States, account would have to be taken of other very real and important interests, though he recognized that within the framework of the present discussion there were reasons for giving particular prominence to the position of the coastal State, because of the close connexion between the question of fisheries and that of the territorial sea. It was certainly true that recent claims for a very broad territorial sea seemed to have been largely inspired by considerations arising out of fishing activities. In the circumstances, the vote on the draft articles should be deferred until the outcome of the Commission's discussions on the breadth of the territorial sea was known.

9. While fully recognizing the cogent reasons for the prominence given to the coastal State in Mr. García Amador's draft, he believed that, if the whole question was to be placed in its proper perspective, the need for safeguarding the position of the other States concerned must be emphasized. He reminded the Commission that there was a considerable number of countries which had for decades—or in some instances even centuries—been engaged in deep-sea fishing in distant waters where the coastal State had not been particularly interested in fishing, or had not exploited the resources of the sea to any appreciable extent. Such countries had thus acquired what might be regarded as a vested interest in continuing such fishing on a reasonable basis, because it had come to form part of an important industry which provided employment for considerable numbers of people, and contributed significantly to those countries' exports. Hence it was disconcerting for them when coastal States, which had never previously evinced any great interest in fisheries, abruptly announced their intention of imposing regulations which might, in effect, lead to the exclusion of foreign vessels from their traditional fishing grounds.

10. Another factor to be taken into account was that it sometimes happened that the coastal State, though large in area, had only a small population, whereas other States, though small in area, had large populations to support and were even more dependent than the coastal State on fish for food. On the other hand, there were States such as the Soviet Union, which, though of great size, had an exceptionally large population to feed, and where fish was an important item of diet. Thus Soviet Union vessels had for long been accustomed to fish in the North Atlantic and elsewhere. In his opinion, such efforts to increase the world supply of fish as a food were perfectly legitimate, and there was no justification for thinking that fishing by foreign vessels in certain waters deprived the coastal State of supplies. Indeed, were it not for the activity of foreign vessels the amount of fishing in certain areas would be inadequate: a situation which, perhaps, occurred more frequently than did over-fishing. In cases where the coastal State had legitimate grounds for complaint, conservation measures must, of course, be adopted by agreement.

11. The Commission should also take into account the position of those countries, or groups of countries, which

[1] 296th meeting, paras. 43 *et seq.*

had maintained the optimum sustainable yield in certain localities by means of experiment, research and self-restraint, and whose special interests had as much claim to protection as those of the coastal State itself.

12. In the light of those considerations, he wondered whether Mr. García Amador, in his draft articles, had not given too dominant a place to the coastal State. If articles 1 and 4 were read in conjunction, it would be seen that, unless agreement could be reached on the necessary measures for conservation, the coastal State was entitled to promulgate certain measures unilaterally. Apart from that intrinsic advantage, it was thereby placed in a particularly strong position in the negotiation of agreements. Moreover, the author said nothing about the crucially important time factor. At what point, for instance, could it be presumed that there had been failure to reach agreement? He was not suggesting that coastal States would necessarily take advantage of the latitude allowed them, but it was none the less open to them under article 4 to institute measures unilaterally in cases where, for example, no agreement had been mooted, or where negotiations had hardly begun. In his view, the coastal State should not be free to act unilaterally until it had sought to reach agreement with the other States concerned, and until a reasonable period for negotiation had elapsed.

13. Another point to which thought must be given was the extent of the area within which the coastal State would be entitled to enforce measures promulgated unilaterally. According to the text of article 4, which referred to "the high seas contiguous to its [the coastal State's] coast", there was no limitation, apart from the restrictions laid down in article 5 which might require further elaboration, on the area within which such measures would be operative.

14. He entirely agreed with the provision in article 6 that differences concerning the measures adopted should be settled by arbitration, but considered that the nature and functions of the arbitral commission or committee of experts should be defined. It would not be sufficient for the organ set up merely to pronounce on whether or not the measures were appropriate: if it found them wanting, it should, as was provided for in article 3 of the Commission's own text, state what were the correct measures to take, such finding to be binding upon all the States concerned.

15. The analysis he had outlined was based on the assumption that the scheme of the draft articles before the Commission would be retained. But an alternative arrangement was possible, whereby article 1 would provide that if the States engaged in fishing in any area of the high seas were unable to reach agreement on the necessary measures for the conservation of the living resources of that area, the case should immediately be referred to an arbitral commission or expert committee, whose decision would be binding. Time-limits for the submission of the difference and for delivery of the decision could be prescribed, and the whole process need not take more than two to three months. Articles 4, 5 and 6 would then become unnecessary. He was not suggesting such a change, but simply mentioned the possibility, in order to show how the interests of all the States concerned could be safeguarded without giving the coastal State an interim right to introduce unilateral measures.

16. Mr. EDMONDS had little to add to Sir Gerald Fitzmaurice's very comprehensive statement; he only wished to urge the need for ensuring that measures promulgated unilaterally should not come into effect before a reasonable period had elapsed, in order to enable possible objections to be lodged. In practice, the provisions suggested by Mr. García Amador might operate in that way, but it was conceivable that before the arbitral commission had pronounced on a dispute, States other than the coastal State might be debarred from certain operations. Perfectly genuine differences of opinion could arise, even between experts, in deciding whether the requirements of article 5 had been fulfilled; thus a time-lag was important, because it would prevent a coastal State from introducing a succession of unilateral measures, each of which in turn might be found deficient, but which would in the meantime preclude other States from exercising their fishing rights. The procedure he advocated would ensure that any measures promulgated had a sound foundation and deserved respect.

17. The CHAIRMAN considered that the Commission was moving towards agreement.

18. Mr. SCELLE expressed his keen interest in the statements made by Sir Gerald Fitzmaurice and Mr. Edmonds. The former had brought out in a particularly effective manner that there was a common interest involved as well as the special interests of the coastal State, which could, of course, be very important, as was demonstrated by the fact that many governments sought to assimilate fishing rights to the rights exercised over the continental shelf. That tendency was well illustrated by the efforts of the Australian Government to protect its pearl fisheries against Japanese competition. With all the good will in the world, it was very unlikely that a coastal State would not consider its own interests first and foremost, if not to the exclusion of all others. There again, the Australian-Japanese case was interesting in that it revealed the importance attached to considerations of national defence, as distinct from economic ones.

19. Mr. García Amador's text failed to make clear the scope of the measures which the coastal State was entitled to promulgate, and he feared that such States might exercise their rights concerning fisheries as a pretext for precluding other States from exploiting other resources of their continental shelf, such as petroleum deposits. Indeed, it was a moot point whether it would be possible to draw a distinction between the rights exercised over the various resources of the continental shelf.

20. No unilateral decision could ever be disinterested, and he was *a priori* opposed to conferring such a right upon States: it should be exercised only by an

impartial organ capable of giving due weight to all the interests involved and of sacrificing a particular interest to the common good. In that connexion, he pointed out that an arbitral tribunal and an expert committee were not one and the same. The former should certainly make use of expert advice, as was implicit in article 3 of the Commission's own text, but it was not for experts to take upon themselves the task of arbitrating. He hoped the Commission would ultimately reach agreement much on the lines of the provisions of article 3 as adopted at the fifth session.

21. Mr. SALAMANCA observed that States were sometimes impelled to take independent action to protect their own interests, as in the case of Peru, which had made certain claims relating to the territorial sea because guano, indispensable in a country where there was virtually no rainfall, was deposited on small islands by birds that fed mainly on anchovies occurring in an area some 150 miles from the islands.

22. He supported Mr. García Amador's draft articles because they reconciled the various interests involved, and considered that they could be regarded as an amendment to the general provisions on fisheries adopted by the Commission at its fifth session.

23. In conclusion, he considered that Mr. Sandström's interesting procedural suggestion merited consideration after the general discussion had been concluded.

24. Mr. GARCÍA AMADOR said that he would need time for reflection before replying to all the points raised during the discussion. In the meantime, he could briefly deal with a few.

25. He thought that Mr. Scelle had, perhaps, been guilty of exaggeration in asserting that unilateral measures must of their very nature be biased. There had been many instances in the past of the most reasonable measures being introduced by a single State, as was recognized in paragraph 1 of the general conclusions reached by the Rome Conference on the Conservation of the Living Resources of the Sea.

26. Generally speaking, and subject to further reflection, he admitted that the interests of other States should be recognized, as was done implicitly in paragraph 3 of his preamble, which set forth the primary objective of the conservation of the living resources of the sea. However, the question was so intricate that he had not sought to deal with it in his draft articles. Until such time as effective international co-operation became a reality, the coastal State should be allowed to take such steps as were necessary to protect its own interests, its rights being, however, limited in order to prevent arbitrary action.

27. He felt that the Commission was nearing agreement, since most of the discussion hinged upon matters of detail and not of substance, and was hopeful that an acceptable text could be prepared on the basis of an agreement on the prime purpose of conservation of the living resources of the sea.

28. He then introduced article 7 of his draft on fisheries, which entailed a minor drafting change to article 6 as introduced at the previous meeting. The two articles would then read:

"*Article 6*

"In case of differences between the coastal State and other States concerned or between States which are parties to an international agreement and third States, either on the scientific and technical justification for the measures adopted, or on their nature or scope, such differences shall be settled in accordance with the provisions of article 7.

"*Article 7*

[General directives for the formulation of this article.]

"*Obligation to accept Arbitration*

"In the resolution adopting this article, the General Assembly would invite States to conclude general or special agreements stipulating that the differences referred to in article 6 must be submitted to arbitration.

"*Composition of Technical Arbitration Boards*

"(*a*) A technical Arbitration Board composed of qualified experts on the subject would be set up.

"(b) On this Board the States concerned would have equitable, and where advisable, equal representation. (Rule similar to that laid down by the Charter with regard to the Trusteeship Council.)

"(*c*) The Chairman of the Board would be appointed by the Secretary-General of the United Nations in consultation with the Director-General of FAO, as would also the arbitrators when the parties have failed to appoint them within a reasonable time.

"*Procedure*

"The Boards shall take up its duties with the least possible delay, and shall lay down its own rules of procedure in consultation with the parties.

"*Competence*

"The Board shall be competent to deal with any difference relating to the questions referred to in earlier articles.

"*Validity of Findings*

"The findings of the Board shall be final and without appeal, and shall be binding on the States concerned, except where the said findings are in the nature of recommendations. Nevertheless, recommendations by the Board must receive the greatest possible consideration."

29. He stressed that he wished the article on arbitration to be the work of the Commission rather than his own,

and his proposals were accordingly intended to serve as a basis for discussion; hence the note below the title of article 7.

30. Article 6 laid down the obligation to settle disputes amicably, and was consonant with Article 2, paragraph 3, of the Charter of the United Nations. The manner in which that obligation was to be discharged was laid down in article 7, in formulating which he had proceeded on the assumption that the General Assembly would adopt a resolution on the regime of the high seas (including fisheries), rather than a draft convention.

31. It would have been premature to introduce a general compulsory arbitration clause in the matter of fisheries. Such a blank cheque would hardly have been endorsed by a majority of States Members of the United Nations. Therefore his article was based on the voluntary acceptance of arbitration by means of general or special conventions. That was the system laid down in Article 36 of the Statute of the International Court of Justice. It was one to which States were already accustomed, and was therefore more likely to be accepted than the provisions of article 3 of the Commission's 1953 draft.

32. In the paragraph dealing with the composition of the technical arbitration boards, he had specified, in sub-paragraph (*a*), that those boards should be composed of experts—a provision inspired by the findings of the Rome Conference (A/CONF.10/6, chapter VI).

33. Sub-paragraph (*b*) drew its inspiration from Article 86, paragraph 1, of the United Nations Charter, which laid down an equitable system of representation in the case of the Trusteeship Council. When ensuring such equitable representation on the technical arbitration boards, the case in which a coastal State found itself in conflict with a number of non-coastal States would have to be contemplated: hence sub-paragraph (*b*) did not lay down an absolute rule of equal representation; in the case under reference, the non-coastal States would not be entitled to a stronger representation than the coastal State.

34. Sub-paragraph (*c*), concerning the powers of the Secretary-General of the United Nations to appoint not only the chairman of the board but also the other members (or arbitrators) when the parties failed to appoint them, drew its inspiration from the provisions of the American Treaty on Pacific Settlement (Pact of Bogotá)[2] signed at the IXth International Conference of American States held at Bogotá in March and April 1948, at the same time as the Charter of the Organization of American States.

35. With regard to the competence of the boards, he stressed that, although the interpretation of article 5 would be their main concern, they would also have to decide such problems as those envisaged in article 2.

36. The paragraph on validity of findings empowered the boards to pronounce their findings in the form of recommendations in cases where the matter in dispute was not of a character warranting a binding decision. That situation was already occurring within existing organizations of commissions dealing with fisheries conservation, which often simply invited the responsible authorities to make a close study of a particular question, in cases where there was no need for a formal decision of a judicial character.

37. Mr. HSU said that it was necessary to make a more thorough study of the relationship between article 4 and article 7. He wished to know whether it was Mr. García Amador's intention that, if a coastal State refused to conclude the arbitration treaty envisaged in article 7, article 4 should still apply, thus enabling a recalcitrant State to adopt unilateral measures simply because it happened to be a coastal State.

38. Mr. GARCÍA AMADOR undertook to examine Mr. Hsu's valuable suggestion, and would endeavour to include in article 7 a provision to fill the gap in question.

39. The crux of the matter was that article 3 of the Commission's 1953 draft, which provided for the setting up of an international authority with compulsory jurisdiction under article 1, did not command the agreement of States: and so long as States did not agree, article 3, and with it the whole draft on fisheries, would remain a dead letter.

40. The Commission must face the issue. Where conservation became necessary because of the danger of depletion of stocks, someone would have to initiate those measures; it would be most unrealistic to expect a coastal State, which had a serious interest in preventing depletion, to wait until other States had agreed before taking the necessary measures. He wished to emphasize, however, that, under article 5, the coastal State would only be entitled to adopt such measures where the strict requirements of that article were satisfied, and, furthermore, where the coastal State in question could demonstrate that it had a genuine special interest in the productivity of the resources of the high seas contiguous to its coast.

41. Mr. SANDSTRÖM enquired whether it was Mr. García Amador's intention that the technical arbitration boards should be in the nature of tribunals.

42. Mr. GARCÍA AMADOR said the boards would be in the nature of mixed commissions with equitable representation of the opposing interests; that rule would apply also in the case where all the arbitrators were appointed by the Secretary-General of the United Nations under sub-paragraph (*c*).

43. Sir Gerald FITZMAURICE said that he was somewhat reassured by Mr. García Amador's agreement to take Mr. Hsu's suggestion into account in re-drafting article 7. There was, however, another serious point: under the terms of article 6, if the coastal State adopted unilateral measures to which another State had grounds for objecting, the second State would be entitled to have recourse to a technical arbitration board. But under

[2] Pan American Union, *Law and Treaty Series*, No. 24.

article 7, such a board could not be set up without the consent of the coastal State: it would therefore appear to be possible for a coastal State to adopt unilateral measures while at the same time withholding its consent to the setting up of an arbitration board with competence to adjudicate on the disputes to which its own action gave rise.

44. Mr. AMADO supported Sir Gerald Fitzmaurice's remarks on the undue latitude given to the coastal State. He felt, moreover, that article 4 went too far in authorizing a coastal State to adopt unilateral conservation measures at its discretion, even in cases where its nationals were not engaged in fishing in the area concerned. Such a provision would seem to authorize measures to exclude the more active nationals of other States by a State whose citizens had neglected to develop the resources near their coasts.

45. He stressed the importance of laying down a time-limit, as had been suggested by Sir Gerald Fitzmaurice, during which States should endeavour to reach agreement. If the matter were left open, the permission to take unilateral measures would become a blanket authority of indefinite duration.

46. A further limitation appeared to him essential: that of the maximum distance from the coast to which the powers of the coastal State would be restricted.

47. Mr. LIANG (Secretary to the Commission) wished to offer some remarks on Mr. García Amador's articles, as a contribution to the work of the Commission and Drafting Committee.

48. Although the text was, perhaps, not altogether clear on the point, Mr. García Amador's technical arbitration boards would appear to be in the nature of *ad hoc* arbitral tribunals, as provided for by The Hague Convention of 1907 for the Pacific Settlement of International Disputes,[3] by which the Permanent Court of Arbitration had been set up. The *ad hoc* element was essential to both, because the parties would be different in each case referred to them. In the draft articles on fisheries adopted in 1953, the Commission had envisaged a permanent international authority to be created within the framework of the United Nations. That authority would have had a continuous existence and presumably a stable composition; in short, it would have been more akin to the International Court of Justice.

49. Furthermore, article 7 raised wider issues. The heading of the first paragraph, "Obligation to accept Arbitration", was not part of the article; but it was intended to show the importance of the provision it contained. That provision, however, stated that the General Assembly should invite States to conclude general or special agreements providing for arbitration. It was clear, therefore, that States would be under no obligation to accept arbitration unless they entered into such agreements; it was thus a case of voluntary, not of compulsory, arbitration.

50. He recalled that many of the provisions of the Charter of the United Nations (article 2, paragraph 3, and article 33, for instance) imposed on States Members the obligation to settle their disputes by peaceful means. The parties to a dispute had the choice of several methods of pacific settlement: arbitration was only one such.

51. Perhaps some re-drafting of article 7 was called for to make clear the exact nature of the obligations of States in the matter of arbitration. He recalled that after the Commission had adopted, at its fourth session, its draft on arbitral procedure, some misgivings had been expressed in the Sixth Committee of the General Assembly: some speakers had misconstrued the draft, thinking it to be a proposal for an actual arbitration treaty, whereas in fact it had been no more than a draft code of arbitral procedure.

52. Finally, with regard to the competence of the technical arbitration board, it would be important to reconcile the text of article 6 with that of article 7. Article 6 specified that the board would be competent to give a ruling on the scientific and technical justification for the conservation measures adopted; article 7, on the other hand, empowered the Board to deal with any difference relating to the questions referred to in the earlier articles. That suggested a wider competence than was provided for in article 6.

53. When re-drafting articles 6 and 7 accordingly, it would be advisable also to make the technical arbitration board competent to deal with disputes arising out of a contention that a State had no right to make any conservation regulations whatsoever. As Mr. García Amador's draft stood, it was permissible to doubt whether such a dispute would be open to arbitration.

54. Mr. FRANÇOIS (Special Rapporteur) considered that Mr. García Amador's proposals regarding arbitration were too complicated. In his second report on the high seas (A/CN.4/42), submitted at the third session, he (the Special Rapporteur) had suggested that recognition of the right to establish protective zones should be made conditional upon acceptance of the jurisdiction of the International Court of Justice in such matters. If it were considered inadvisable to entrust the International Court with fishery conservation disputes, it was still possible to adopt either the procedure provided for by the 1907 Convention on the Pacific Settlement of Disputes, or the method laid down in the Commission's own draft code of arbitral procedure, which constituted a watertight arbitration system. Under either of those systems the parties to a dispute would be free to choose either fishery experts or jurists—or for that matter any other experts—as arbitrators.

55. The case of a dispute between the coastal State on the one hand and a number of non-coastal States on the other, did not require any special complicated provision. There were precedents: The Venezuelan Pre-

[3] J. B. Scott, *The Reports of The Hague Conferences of 1899 and 1907* (Oxford, 1917), p. 292.

ferential Claims Case, heard before the Permanent Court of Arbitration in 1904, had brought Venezuela into opposition with the three Powers which had undertaken the pacific bloackade of Venezuelan ports, namely, Germany, Great Britain and Italy, who had been joined be several other States. Venezuela's three opponents had jointly chosen their arbitrator, and had entered joint pleas with the Permanent Court of Arbitration.

56. He could not see his way to accepting article 7. The obligation to arbitrate should proceed direct from the articles to be adopted by the Commission, and not be made conditional upon the conclusion of a further, separate agreement.

57. The proposed technical arbitration board was a veritable arbitration tribunal: if, in accordance with subparagraph (*c*), the entire board were to be appointed by the Secretary-General of the United Nations, it was questionable whether it would be acceptable to States which, it had been claimed, were unlikely to be satisfied with a provision conferring jurisdiction on the International Court of Justice, or even one for arbitration by a tribunal chosen by the interested parties themselves.

58. The CHAIRMAN said that the Commission must bear in mind that the question of the special rights of the coastal State would become very much graver if no provision were made for compulsory arbitration.

59. Mr. KRYLOV said that the Permanent Court of Arbitration had done very useful work in the past, but was hardly suited to the task of arbitrating disputes over problems of fisheries conservation. Nor was the International Court of Justice equipped to deal with such problems, which were essentially of a technical nature. It was highly desirable that the technical arbitration boards be composed of specialists in fishery questions, capable of finding the correct practical solution to the problems that would be brought before them.

60. Mr. GARCÍA AMADOR, replying to the criticisms of article 4, said that a coastal State whose nationals were not engaged in fishing could still be vitally interested in fishery conservation. Such was the case with Peru, already mentioned by Mr. Salamanca; as late as the 1920s there had appeared to be no conceivable danger to the ecological process he had described. But more recent events had shown that, with the aid of modern technical equipment, over-fishing of anchovies had become possible and indeed probable, a situation which might have disastrous effects on Peru's food supplies and, indeed, on its whole economy.

61. As he had already emphasized, article 7 was only a basis for discussion, and he hoped to improve it in the light of all the suggestions made by members. On one point, however, he must stand firm: the International Court of Justice was certainly not fitted to deal with the disputes for the settlement of which he was suggesting that technical arbitration boards should be set up. Those disputes would concern such problems as the size of mesh of the nets, the size and weight of the fish it was permissible to catch, possible limitations of total catch by weight or number, limitations on the age of fish caught, and, in some cases, the problem of abstention from fishing a particular species in order to maintain an ecological balance. Mr. Krylov, himself a distinguished former member of the International Court of Justice, had emphasized that such problems were best dealt with by technical experts, not by jurists.

62. With regard to the compulsory character of arbitration, it had been shown by the reaction of States to the Commission's draft articles on fisheries, adopted in 1953, that the solution suggested therein, providing for the compulsory jurisdiction of an international authority, the decisions of which would be binding upon States, was not a feasible one. Given that situation, only two alternatives were possible. One would be to provide for compulsory arbitration without conferring binding force on the arbitral decisions: such a course would meet with general approval, but would be ineffectual, as there would be no possibility of enforcement. The other alternative—the only practicable one, which he had embodied in article 7—was to provide for voluntary acceptance of arbitration, while at the same time laying down that the decisions of the arbitration boards would be final and binding on the parties.

63. Finally, he urged those members who had made suggestions to formulate them in texts, so that they could be usefully discussed by the Commission.

64. The CHAIRMAN thought that the best course the Commission could adopt would be, after a further short general discussion, to go on to vote on certain leading principles on the basis of concrete suggestions by members. The Commission could thus decide in principle whether the arbitration tribunals should be of a technical character or not; whether arbitration should be voluntary or compulsory; whether an international authority to deal with fisheries conservation was required; and, finally, whether the special position of the coastal State should be explicitly recognized.

65. In the light of those votes, the Drafting Committee —or a special committee—could prepare a final draft on fisheries.

The meeting rose at 1.10 p.m.

298th MEETING

Wednesday, 25 May 1955, at 10 a.m.

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