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Summary record of the 300th meeting

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

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Case between the United Kingdom and Norway had recognized the right of a country such as Norway, the coast of which was deeply indented or cut into, to measure the breadth of its territorial sea from straight base lines drawn from headland to headland, or from headland to island under certain conditions.⁶

87. That judgement had been concerned only with the method of measuring the breadth of the territorial sea and its effect on the extent thereof. It had, however, had a secondary effect which the International Court had not contemplated, and, indeed, had been under no compulsion to consider, in delivering its judgement on the fisheries issues. That effect was that the waters between the straight base lines and the coast acquired a new legal status: instead of territorial waters, they were now internal waters. Until that time, internal waters—where no right of passage existed—had covered only rivers, lakes, estuaries and certain deep bays, that was, waters almost exclusively behind the coastline. The new internal waters were on the seaward side of the coast, and were now to be excluded from the régime of the territorial sea. Hence his proposal concerning the recognition of the right of innocent passage in those waters which, upon straight base lines being drawn in front of them, had ceased to be part of the territorial sea and had technically become internal waters.

88. The waters which were thus now technically known as internal waters were geographically part of the sea and necessary to navigation. The right of innocent passage therein must therefore be protected, at least in cases where the waters concerned had always been used by international shipping.

89. When the subject had been discussed at the sixth session, the Special Rapporteur had pointed out that most of the waters enclosed within the Norwegian base lines were in any event too dangerous to be navigated, so that the question of the right of passage therein would not arise in practice. That was not always the case: the Norwegian base lines enclosed, and had thus transformed into internal waters, the important traditional shipping lane between the islands and the Norwegian coast known as the Indreleia. Moreover, the concept of base lines resulting from the International Court of Justice's judgement in the Norwegian Fisheries Case could well be applied by States other than Norway. It was true that so far only Iceland, and Denmark with regard to Greenland, appeared to have done so, but it was always open to any State with a rugged coastline to invoke the principle in question. It was therefore extremely important that the Commission should lay it down as a general principle that where territorial waters were thus abruptly transformed into internal waters, following the drawing of straight base lines, the right of innocent passage in such waters should persist, to allow international shipping to continue to use them without let or hindrance.

90. Mr. FRANÇOIS (Special Rapporteur) said that Sir Gerald Fitzmaurice's proposal could best be

examined when the Commission came to discuss article 5, which dealt with straight base lines.

It was so agreed.

The meeting rose at 1 p.m.

300th MEETING

Friday, 27 May 1955, at 10 a.m.

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* The number within brackets indicates the article number in the draft contained in Annex to 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/CONF.10/6) (resumed from the 298th meeting)

NEW DRAFT ARTICLES ON FISHERIES (resumed from the 298th meeting)

1. Mr. FRANÇOIS (Special Rapporteur) said that the sub-committee¹ had unanimously agreed on the following text for the articles on fisheries :

"Article 1

"A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged may adopt measures for regulating and controlling fishing acti-

⁶ *I.C.J. Reports 1951*, pp. 129-130.

¹ Set up at the 298th meeting. See *supra*, 298th meeting, para. 49.

vities in such areas for the purpose of the conservation of the living resources of the sea.

"Article 2

"If the nationals of two or more States are engaged in fishing in any area of the high seas, the States concerned shall, on request of any of them, enter into negotiations in order to prescribe by agreement the necessary measures for the conservation of the living resources of the sea.

"Article 3

"If, subsequent to the adoption of the measures referred to in articles 1 and 2, nationals of other States engage in fishing in the area and those States do not accept the measures so adopted, the question shall, at the request of any one of the parties concerned, be referred to the method of settlement provided for in articles 7-10.

"Article 4

"If a coastal State has a special interest in the maintenance of the productivity of the resources of the high seas contiguous to its coast, such State is entitled to take part on an equal footing in any system of regulation, even though its nationals do not carry on fishing in the area.

"Article 5

"Where there is no agreement among the States concerned as to the measures for conservation and provided that the coastal State had engaged in negotiations for that purpose, and that no agreement has been reached within a reasonable period of time, the coastal State may, if it has a special interest in the productivity of the resources of the high seas contiguous to its coast, adopt whatever measures of conservation are appropriate.

"Article 6

"1. The measures which the coastal State adopts under article 5 shall be valid as to other States only if the following requirements are fulfilled:

"(a) That scientific evidence shows that there is an imperative and urgent need for measures of conservation;

"(b) That the measures adopted are based on appropriate scientific findings;

"(c) That such measures do not discriminate against foreign fishermen.

"2. In case of disagreement with the measures adopted by the coastal State, the matter shall, at the request of any of the States concerned, be referred to the method of settlement provided for in articles 7-10.

"Article 7

"The differences between States envisaged in articles 3 and 6, as well as in other cases where States, after engaging in negotiations according to article 2, have not been able to reach agreement, shall be settled by arbitration as provided for in article 8 unless the parties agree on another manner of peaceful settlement.

"Article 8

"1. The method of settlement referred to in the preceding articles shall be by reference to a Board of qualified experts, to be chosen by agreement between the parties. Failing such agreement within the period of three months from the date of the original request, the Board of Experts shall, at the request of any of the parties, be appointed by the Secretary-General of the United Nations in consultation with the Director-General of the Food and Agriculture Organization. The President of the Board shall equally be appointed by the Secretary-General of the United Nations.

"2. The Board shall in all cases be constituted within five months from the date of the original request for settlement, and shall render its decision within a further period of three months unless it decides to extend that time limit.

"Article 9

"The Board may decide that pending its award the measures in dispute shall not be applied.

"Article 10

"The decisions of the Board shall be final and without appeal and shall be binding on the States concerned. Any recommendations of the Board shall receive the greatest possible consideration."

2. The first three articles drew their inspiration from the provisions of article 1 of the draft articles on fisheries adopted by the Commission at its fifth session, in 1953 (A/2456, para. 94).² Article 4 corresponded to article 2 of the 1953 draft, but did not limit the coastal State's right to an area situated within 100 miles from the territorial sea.

3. Article 5 introduced a new principle by providing that the coastal State should be free to adopt conservation measures unilaterally if it failed to reach agreement in its negotiations with other States within a reasonable period of time. Article 6 made that right conditional upon certain specific requirements and also subject to the right of any State concerned that disagreed with the unilateral measures thus taken to refer the matter to the method of settlement provided for in articles 7-10.

² *Yearbook of the International Law Commission, 1953, vol. II.*

4. The CHAIRMAN invited general comments on the draft articles just introduced by the Special Rapporteur.

5. Mr. SCELLE said that it was necessary to define the precise limits of the coastal State's special rights. The Commission must decide whether that right extended indefinitely, or only to a given distance from the territorial sea. If no exact distance were specified, it would be essential to determine whether the question of limitation of the extent of the right was one which could and should be submitted to arbitration.

6. It seemed to him that articles 7 to 9 did not provide for genuine arbitration. In any event, he considered it inadvisable to saddle the Secretary-General of the United Nations with responsibility for appointing the experts to the Board of Arbitration.

7. Faris Bey el-KHOURI said that the articles on fisheries were presented as a sub-section of the Commission's draft articles on the régime of the high seas. The impression was thus being created that that sub-section comprised a set of articles regulating fisheries. But the articles drafted by the sub-committee made no mention of the one basic principle of international law in the matter, namely, that the high seas were free for all nations to fish. If the intention was to regulate fisheries on the high seas, it was not sufficient, as the Commission was doing, to draft articles dealing with conservation measures and with the competence of States in the matter. It was essential to include a provision to the effect that the Commission's draft articles in no way affected the right of nationals of all States to fish in the high seas.

8. Mr. ZOUREK said that it was desirable that the vote on the draft articles proposed by the sub-committee should be deferred until the following meeting, to give members time to study the articles more closely, and particularly the French text, which had not yet been circulated.

9. Mr. FRANÇOIS (Special Rapporteur) said that Mr. Scelle's observations on spatial limitation could best be discussed when the Commission took up article 4 in detail.

10. He agreed with Faris Bey el-KHOURI's remarks, and felt that the draft articles would be better described by some such title as "Articles on the conservation of the living resources of the sea". The freedom of the high seas had been recognized in general terms in article 2 of the draft articles on the high seas, as adopted by the Commission at its 293rd meeting.³ Perhaps a specific reference to the freedom to fish in the high seas would be appropriate.

11. Mr. EDMONDS proposed that the Commission's decision on the draft articles on fisheries be considered as provisional, pending its vote on the breadth of the territorial sea which would clearly affect the question of fisheries.

12. Mr. HSU said that, while there would be no harm in postponing the final decision on fisheries until the Commission had voted upon related questions, he did not consider that the problem of fisheries conservation—with which alone the Commission was at that stage concerned—was very closely linked with that of the breadth of the territorial sea. The extent of the territorial sea over which it had exclusive jurisdiction was a vital matter to the coastal State in many connexions, but it seemed unlikely that the coastal State would be able to assert such jurisdiction beyond a limit of 12 nautical miles. In the matter of fisheries conservation, however, which was another vital concern of the coastal State, claims to special interest had been made in respect of distances of up to 200 miles from the coast.

13. Mr. GARCÍA AMADOR said that, when drafting the articles on fisheries, the sub-committee had had in mind that the Commission would not be in a position at that stage to take a definite vote on the precise terms of each article. Quite apart from the fact that the final drafting would be left to the Drafting Committee, any vote by the Commission on the proposed articles on fisheries would necessarily be provisional, because of the close relation between that subject and the questions of the territorial sea and the contiguous zones.

14. Mr. ZOUREK recalled that at the 295th meeting the Commission had decided to take up the question of fisheries before that of the breadth of the territorial sea, in the belief that such an arrangement would expedite its work.⁴

15. If the Commission were now to take the view that it could not vote on the articles on fisheries until the breadth of the territorial sea had been determined, he feared it would become caught in a vicious circle.

16. The CHAIRMAN proposed that the vote on the new draft articles on fisheries should be provisional, since that seemed to be the general feeling.

It was so agreed.

17. Mr. SCELLE said that the subject of fisheries raised two further issues which, as he understood, had already been decided by the Commission at the previous meeting.

18. First, the Commission had abandoned the draft articles on fisheries adopted at the fifth session, and their place had been taken by the articles at present under discussion.

19. The second issue was that of the fundamental principle of existing international law in the matter of fisheries, namely, the freedom of the high seas for all to fish. It was in his view desirable that the Commission should state explicitly that the articles on fisheries were subordinate to respect for that freedom, and in no way abrogated that fundamental rule of traditional law.

³ 293rd meeting, para. 68.

⁴ 295th meeting, paras. 53–68.

20. Sir Gerald FITZMAURICE supported Faris Bey el-Khouri's views about the necessity of explicitly safeguarding the principle of the freedom to fish in the high seas. Such a provision would make the Commission's draft articles acceptable to the largest number of States; it would also mean that they would be adopted by the largest majority in the Commission.

21. The Special Rapporteur had drawn attention to the provisions of article 2 of the draft articles on the régime of the high seas, as adopted in principle by the Commission at the 293rd meeting; that article proclaimed the freedom of the high seas in general terms, and implicitly covered such specific freedoms as the freedom to fish—except in so far as derogations from those freedoms were provided for in other articles adopted by the Commission.

22. He (Sir Gerald Fitzmaurice) felt that the matter of fisheries stood apart in two respects. First, the Commission's draft articles on fisheries were *de lege ferenda*, and so differed from the other provisions on the high seas, which represented a codification of existing international law. Secondly, they formed a self-contained part of the Commission's code, and had their own special provisions relating to arbitration. In the light of those two considerations, the position would be greatly clarified if the Commission were to cap those articles with the enunciation of one or two fundamental principles on the entire question of fisheries, particularly that of the freedom of the nationals of all States to fish in the high seas.

23. Mr. GARCÍA AMADOR explained that the new draft articles in no way implied the sacrifice of the basic principle of the freedom to fish in the high seas: their purpose was to regulate the exercise of that freedom in order to prevent abuse. Such regulation had become imperative, because technical progress was endangering more and more the existence of certain marine species. The position was no different from that which obtained in the case of freedom of navigation; there, too, the Commission had made provision for those cases in which interference with that freedom was legitimate, and, indeed, necessary to the policing of the high seas. The point raised by Mr. Scelle, Faris Bey el-Khouri and Sir Gerald Fitzmaurice had been met by the third paragraph of the preamble to the draft articles he had submitted at the 296th meeting,⁵ in which he had specified that the primary objective of conservation measures must be to obtain the optimum sustainable yield in the interests of all mankind. A similar preamble could be added to the draft articles now under discussion, in which it could be made clear that the regulations embodied in the draft articles were to be construed within the framework of the freedom of the high seas, that was, in the same general interest.

24. Alternatively, the Commission could include in its draft articles on fisheries a definition of conservation.

That would make clear the exact purpose of the articles, and show that no derogation from the freedom of fishing was intended, other than what was indispensable in the interests of mankind for the safeguarding of species from extermination.

25. Mr. Scelle's suggestion could also be met by including in article 2 of the draft articles on the régime of the high seas an enumeration of the four basic freedoms involved: freedom of navigation, freedom to fish, freedom to lay submarine cables and freedom to fly in the air space over the high seas.

26. Mr. SCELLE said that the best course would perhaps be to state in a preamble that, in order to guarantee the freedom to fish in the high seas, that freedom must be regulated in the general interest, to make sure that the living resources of the high seas were not depleted and that their yield could be maintained in the interests of mankind. He fully concurred with Mr. García Amador's view that freedom was inseparable from regulation: that was the classical distinction between freedom and licence.

27. Mr. LIANG (Secretary to the Commission) said that to describe the articles under discussion as articles on fisheries was to misname them. Section III of chapter III (Régime of the High Seas) of the Commission's report covering the work of its fifth session (A/2456)⁷ had been entitled "Fisheries". In many other documents issued by the Commission the same laconic style had been used, thus unfortunately creating the impression that the Commission was engaged on drafting an international code for the regulation of fisheries. Such titles did not accurately describe the content of the articles concerned. It was clear that the purpose of the articles the Commission was at present engaged in drafting was to regulate the conservation of the living resources of the sea.

28. It was difficult to see how a preamble could be fitted into a draft of the kind under discussion. The articles on fisheries conservation were to be included within the general framework of the draft articles on the régime of the high seas, and it would be most unusual to have a separate preamble to a sub-section. Perhaps the best course would be to insert an article at the beginning of the sub-section, enunciating the general principle that all States had the duty to co-operate in conservation measures.

29. It would not be wise for the Commission to go beyond the topic before it—which was the problem of conservation—and embark upon a general discussion of the whole field of the regulation of fisheries. Such an excursion would bring the Commission face to face with the need for defining what constituted the high seas for the purposes of fisheries regulation.

30. The Commission had never pretended to engage in the regulation of fisheries in general. The basic rule of international law in the matter was the equal right of

⁵ 293rd meeting, para. 68.

⁶ 296th meeting, para. 16.

⁷ Yearbook of the International Law Commission, 1953, vol. II.

all nationals to fish in the high seas, and the Commission's articles on the conservation of the living resources of the sea clearly would not derogate from that principle.

31. Mr. AMADO said that freedom of fishing was an inherent right. The fact that the Commission was laying down certain rights relating to the conservation of the living resources of the sea for the purpose of ensuring the optimum sustainable yield could not possibly affect that basic principle of international law. It was therefore unnecessary to refer to the freedom to fish.

32. The CHAIRMAN agreed with the Secretary that it would hardly be practicable to introduce a preamble to cap the articles on fisheries, which constituted only one section of the draft on the high seas.

33. The best course would be to refer specifically in article 2 to the freedom of the nationals of all States to fish in the high seas.

34. Mr. SCALLE thought that it would be better to express the freedom to fish in a preamble, because a preamble dominated the articles it capped. It would thus be made clear that the articles on fisheries conservation were not a derogation from the general principle of freedom, but rather sought to regulate the exercise of that freedom, that was, its application.

35. He had no absolute preference, however, for the preambular form, and he would accept any other form of reference to the fundamental principle of freedom to fish in the high seas. The important thing was to express that principle somewhere and clearly.

36. Finally, to the question of what constituted the high seas, he would reply that they were constituted by the maritime zones outside the territorial sea. The contiguous zones and the superjacent waters of the continental shelf, in spite of their peculiarities, were part and parcel of the high seas. The great distinction in international law was between the high seas, governed by the principle of freedom for all nations, and the territorial sea, with its special régime dominated by the interests of the coastal State.

37. Mr. ZOUREK recalled that, in the course of the discussion on article 2, he had proposed that it be made more explicit by the inclusion of a clear enumeration of the specific rights and freedoms to be recognized in the high seas;⁸ among those rights he had mentioned the freedom for all to fish and to hunt in the high seas. As he had understood the decision taken at that meeting on article 2, the Drafting Committee had been instructed to include that enumeration in the final draft of the article.⁹ Such was the understanding on which, to his mind, article 2 had been adopted.

38. The CHAIRMAN said that, in view of the doubts that seemed to persist in some members' minds on the point, it would perhaps be better to reiterate the

decision that in article 2 specific reference be made to the right to fish.

It was so agreed.

39. Mr. SANDSTRÖM suggested that the title of the section be amended to read: "Conservation of the living resources of the sea".

40. Mr. GARCÍA AMADOR thought that the present discussion was, perhaps, somewhat premature. The articles on fisheries had indeed in the first place been conceived as part of the Commission's general articles on the régime of the high seas but the General Assembly, in its resolution 900 (IX) had detached the problem of fisheries from its previous context and laid down a new procedure for its study. It was therefore open to the Commission to present the draft articles on fisheries conservation in a different way. It could, for instance, prepare a specific draft on fisheries which would include a preamble in which the freedom of the seas in respect of fisheries was expressed, and in which conservation was defined and its objectives set out in order to make clear that the articles on fisheries constituted a necessary regulation of the fundamental freedom to fish in the high seas.

41. It was not, however, necessary for the Commission to take a decision on the question of presentation at that stage; it could do so when it came to draft its final report on the régime of the high seas, the régime of the territorial sea and all related problems, in compliance with the terms of General Assembly resolution 899 (IX).

42. The CHAIRMAN invited the Commission to consider the draft articles one by one.

Article 1 [1]

43. Mr. SCALLE said that it would be desirable to specify in article 1 that the measures adopted by the State concerned were only applicable to the nationals of that State.

44. Mr. GARCÍA AMADOR agreed to that suggestion.

45. Mr. EDMONDS pointed out that article 1 provided that a State "may adopt measures..." whereas article 2, which referred to the case where the nationals of two or more States were engaged in fishing in a given area, used the term "shall". If it were intended that an obligation should exist in all cases it would perhaps be better to use the term "shall" throughout.

46. Mr. GARCÍA AMADOR said that such a course would be dangerous in the case of article 4 or article 5, which gave expression to certain rights of the coastal State but did not actually impose upon it the duty to adopt the measures concerned. So far as those two articles, at least, were concerned, it was probable that the retention of the term "may", which implied a right rather than a duty, would make them more acceptable.

47. Faris Bey el-KHOURI said that it would be desirable to make some reference to the minimum amount of fishing required on the part of the nationals

⁸ 293rd meeting, para. 43.

⁹ *Ibid.*, paras. 60 and 68.

of a State to bring them within the scope of the description: "engaged in fishing in any area".

48. Mr. EDMONDS thought that the wording "engaged in commercial fishing" might cover the point.

49. The CHAIRMAN said that it would be undesirable to amend the text itself of the article. The question was one of interpretation of the term "engaged in fishing", and it could be left to the Drafting Committee to decide whether some reference in the comment might not be helpful in that interpretation.

It was so agreed.

50. Mr. SANDSTRÖM, referring to Mr. Scelle's remark, said that the language of article 3 left no doubt that any measures adopted under article 1 would apply only to the nationals of the State adopting them.

51. The CHAIRMAN suggested that the matter be left to the Drafting Committee.

It was so agreed.

52. Mr. SCELLE agreed with Mr. Edmonds' remark concerning the use of the term "may" in article 1, and formally proposed that it be replaced by the word "shall". Clearly it was not merely the right of a State to adopt conservation measures in an area where its nationals alone fished; it was a duty of the State towards the international community, which was interested in the conservation of the living resources of the sea. If it failed to adopt appropriate conservation measures, its fishermen might deplete the stock of fish in that area. It was the duty of every State to fill gaps in international regulation. Policing of the high seas for purposes of conservation was just as necessary as was the policing of the high seas by the warships of each State for the protection of merchant vessels flying its flag.

53. Mr. AMADO congratulated the sub-committee on an eminently practical text, which was the outcome of long and careful discussion. He had himself devoted a great deal of time to the study of maritime law, and believed that the proposed text represented the best solution. He urged members not to expatiate at length on articles 1 and 2 which seemed to have been conceived in a logical manner and whose substance had already been discussed in plenary meeting. Surely it would be better now to concentrate on those articles which had divided the Commission; in other words, on those dealing with the settlement of disputes and without which the whole draft would remain ineffective.

54. Mr. ZOUREK considered that Mr. Scelle's point deserved careful thought. If the Commission started from the notion that conservation of the living resources of the sea was in the interests of the world as a whole, then a State could not stand aside and allow those resources to be endangered by fishing activities, even if they were being undertaken by its own nationals. The present disparity between articles 1 and 2 should be removed.

55. Faris Bey el-KHOURI noted that the request he had made at the 298th meeting,¹⁰ that measures promulgated for regulating and controlling fishing activities be given the widest possible publicity to bring them to the notice of all States, had not been taken into account by the sub-committee. He hoped that omission would be made good before the final draft was approved.

56. Mr. SCELLE, repeating his objection to article 1 being optional and article 2 mandatory, said that he was prepared to supplement his amendment to the former by inserting the words "if necessary" after the word "shall".

57. Mr. AMADO wondered whether there was any sanction that could be enforced against States that failed to comply with the provisions of article 1.

58. Mr. GARCÍA AMADOR said that the difference between articles 1 and 2 resided in the simple fact that the first enunciated a right and the second a duty; hence it would not be feasible to cast them in identical form. But he was prepared to consider the insertion of the words "if necessary" in article 1.

59. Mr. HSU observed that Mr. García Amador had made an important concession. Certainly, if the question was approached from the point of view of conservation, there was much force in Mr. Scelle's argument, but he was doubtful whether it would be advisable to impose such an obligation on States.

60. Mr. SALAMANCA said that Mr. Scelle's point was well illustrated by the case of Peru, which had been forced to take steps for the regulation of fisheries in order to protect certain of its vital economic interests. Regulation in such cases was imperative, and he considered the solution offered in the sub-committee's draft to be acceptable. Mr. Scelle, who believed that the draft went too far in conferring certain rights on States, should note that it had successfully reconciled the need for preserving the freedom to fish in the high seas with the universal interest in the conservation of resources.

61. Sir Gerald FITZMAURICE said that, without going into the merits of the difference between articles 1 and 2, he wished to point out the reasons for it. The obligation imposed on States in article 2 was not absolute, but conditional on a request by any one of them. The situation which article 1 was designed to cover was different since, generally speaking—and he spoke subject to correction—fishing by nationals of one State alone was unlikely to lead to over-fishing in the area concerned; and even if it did, that State would be the first to feel the effects and would, presumably, adopt in its own interests the necessary measures for conservation. If the reasons for the difference between the two articles were sound, they might be accepted as they stood.

62. The CHAIRMAN, speaking as a member of the Commission, considered that the effect of both articles would in fact be the same.

¹⁰ 298th meeting, para. 54.

63. Sir Gerald FITZMAURICE did not think that Mr. Scelle's amendment would substantially alter the text, since the words "shall if necessary" meant much the same as "may".

64. Mr. SCELLE disagreed, because the inclusion of the words "if necessary" would make it possible to call in question the failure of a State to promulgate conservation measures.

65. Sir Gerald FITZMAURICE pointed out that in the case covered by article 1 it rested with the State concerned to decide whether conservation measures were necessary or not, which was why Mr. Scelle's amendment would not bring about any modification of substance.

66. Mr. HSU considered that if the word "shall" were substituted for the word "may" another State would be able to challenge the State whose nationals were engaged in fishing in any area, on the ground that it was not protecting resources in the interests of the international community as a whole.

67. Faris Bey el-KHOURI asked that Mr. Scelle's amendment be put to the vote in two parts, since he could not support the insertion of the words "if necessary".

68. Mr. AMADO believed that Mr. Scelle's concern was misplaced, since he agreed with Sir Gerald Fitzmaurice that the nationals of one State were unlikely to exhaust the resources of an area in the high seas which they alone were exploiting.

69. The CHAIRMAN put to the vote Mr. Scelle's amendment that the word "shall" be substituted for the word "may".

The amendment was rejected by 9 votes to 4.

70. Sir Gerald FITZMAURICE, referring to the second part of Mr. Scelle's amendment, asked where the right would lay to determine whether or not conservation measures were necessary. Would the decision lie solely with the State concerned, or was Mr. Scelle contemplating that another State not engaged in fishing in that area of the high seas could pronounce on the question?

71. Mr. SCELLE argued in favour of the second hypothesis. It was open to the coastal State or any other to ask that fisheries be regulated: if such a request gave rise to a difference of opinion it would be submitted to arbitration. In his view, the right to fish in the high seas must be coupled with the duty to conserve resources.

72. Sir Gerald FITZMAURICE thought that article 4 was intended to cover the case of the coastal State.

73. Mr. SCELLE, pointing out that all States possessed equal rights on the high seas, said that it was not only the coastal State that was involved, but any other; for example, a State which wished to begin fishing in a certain area hitherto only fished by the nationals of one State.

74. Mr. FRANÇOIS (Special Rapporteur) contended

that if Mr. Scelle's argument were followed to its logical conclusion, any State would be entitled to intervene on the ground that resources were being exterminated, and that would be entirely contrary to the whole purpose of the draft. As to the coastal State, its interests were already protected in article 4.

75. Mr. AMADO appealed to Mr. Scelle to abandon his search for the ideal in order to enable agreement to be reached on a text which might have some chance of general acceptance.

76. Mr. SCELLE maintained that the interests of any State might be threatened if proper steps were not taken to control fishing activities, and saw no reason why the right to insist on such control should be confined solely to the coastal State. He was not seeking to impose his own concept, but to protect a basic principle of international law — that of the equality of States.

77. The CHAIRMAN put to the vote Mr. Scelle's amendment that the words "if necessary" be inserted before the words "adopt measures".

The amendment was rejected by 7 votes to 5, with 1 abstention.

Article 1 was adopted by 9 votes to 1, with 3 abstentions.

Article 2 [2]

Article 2 was adopted without comment, by 12 votes to none, with 1 abstention.

Article 3 [3]

Article 3 was adopted without comment, by 12 votes to none, with 1 abstention.

Article 4 [4]

78. Mr. ZOUREK asked for an explanation of the precise meaning of the words "contiguous to its coast", and wondered whether they implied an absence of any spatial limitation.

79. Mr. SCELLE said that if there were no spatial limitation he would be unable to support the article.

80. Mr. GARCÍA AMADOR said that the issue was one which had caused him the greatest concern in preparing his original draft, and he would like to take the present opportunity of making it perfectly clear that there was a very definite limitation, based on the criterion of the special interest of the coastal State. The sub-committee had abandoned the limit of 100 miles adopted by the Commission at its fifth session, because in some cases it was inadequate and in others excessive, thereby gratuitously conferring certain rights on States. He believed that criterion to be the only possible one. It had been accepted by the International Technical Conference on the Conservation of the Living Resources of the Sea. Any difference to which the criterion gave rise could be submitted to arbitration.

81. Mr. SCELLE said that, following Mr. García Amador's explanation, he would be prepared to support article 4, provided it was subject to the provisions of articles 7 to 10.

82. Mr. ZOUREK said that the special interest of the coastal State was an acceptable criterion, but might give rise to drafting difficulties. He therefore believed that it should be defined as precisely as possible in the comment, in order to preclude the possibility of exorbitant claims. For example, the movements of migrant species of fish could lead to interminable international disputes. Perhaps the Drafting Committee might consider using some other word than "contiguous" which already bore a certain connotation in international maritime law.

83. Mr. SANDSTRÖM suggested that the Committee might consider some such wording as "in a certain zone".

84. Mr. SCELLE considered that if a State other than a coastal State had an equal interest in the preservation of the living resources of the sea in a certain area, it should enjoy the same privileges as the coastal State. It was conceivable, for example, that States wishing to engage in pearl fishing might be as interested in its regulation and control as the Australian Government.

85. Sir Gerald FITZMAURICE said that, as he sympathized with many of the ideas underlying Mr. Scelle's thesis, he wished to explain why he could not associate himself with it. To give any State a special position was a derogation from the vitally important principle of freedom of the high seas and freedom to fish therein, and if it had been found necessary for special reasons to do so in the case of the coastal State, that was no justification for further derogating from the principle by giving other States similar rights. Any State which began to fish in an area immediately acquired the rights enunciated in the articles under discussion, and he did not consider that a State which had never engaged in fishing and did not intend to do so should be entitled to lay claim to such rights. But he would make an exception for the latent interest of the coastal State, which he did recognize—albeit with some reluctance.

86. Mr. SANDSTRÖM sympathized with Mr. Scelle's views because some States might have a certain interest in the regulation of fisheries in remote areas. He mentioned the case of eels, which left the normal fishing grounds and crossed the Atlantic to breed in the Sargasso Sea.

87. Mr. SCELLE explained that since the world had not yet achieved that utopian state of affairs when the high seas would be regulated by the international community acting as one, he wished every State to have an equal right in ensuring that fishing activities were controlled. Despite all the arguments adduced to the contrary, he was still unable to understand why, when a general interest was involved, the coastal State should be the only one allowed to intervene, though he was

prepared to admit that, as its interest might be more closely affected than those of others, it was more likely to take the necessary steps. He therefore proposed that article 4 be amplified by the addition of some such wording as: *Si un Etat autre que l'Etat riverain peut justifier d'un intérêt analogue, il jouira des mêmes prérogatives.*

88. Mr. GARCÍA AMADOR said that article 4 had been unanimously accepted by the sub-committee after exhaustive discussion. He did not consider that the Commission would be able to take a decision immediately on Mr. Scelle's entirely new proposal, and therefore urged that its consideration be deferred until the next meeting.

It was so agreed.

The meeting rose at 1.05 p.m.

301st MEETING

Tuesday, 31 May 1955, at 3 p.m.

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

Chairman: Mr. S. B. KRYLOV, First Vice-Chairman
later: 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. 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*)

Article 4 [4] (*continued*)

Mr. Krylov, First Vice-Chairman, took the Chair.

1. The CHAIRMAN invited the Commission to continue its examination of article 4 of the new draft