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Summary record of the 302nd meeting

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

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42. It was not possible to grant a non-coastal State the right to participate in the regulation of fisheries in an area where it did not fish. No practical criterion could be devised to define the special interest of a non-coastal State, and any provision along the lines suggested by Mr. Scelle would, if included in article 4, leave the door open to intervention by any State. For it would always be possible to claim that some particular product of the sea was a raw material essential to the industry of a given State.

43. There were, indeed, cases where a non-coastal State might have some indirect interest in the living resources of a particular area, or certain historical rights therein. He therefore proposed that such eventual interests of non-coastal States be protected by providing that such a State should be entitled to demand of the States concerned in fishing or the coastal State, that they adopt the necessary conservation measures if they had not done so.

44. Mr. SCELLE said he accepted Sir Gerald Fitzmaurice's suggestion that any question as to a non-coastal State's alleged special interest should be subject to arbitration.

45. The CHAIRMAN pointed out that it would not be enough for the Commission itself to agree upon a draft; it must also bear in mind what the reaction of the General Assembly was likely to be.

46. The Commission could proceed to vote on the principle of Mr. Scelle's proposal that any State, and not a coastal State alone, should be allowed to participate in the regulation of fisheries in a given area if it had a special interest therein.

47. Mr. GARCÍA AMADOR, referring to Sir Gerald Fitzmaurice's remarks on arbitration, said that the arbitration clauses applied to all the preceding articles, including article 4.

48. He could not see his way to accept Mr. Scelle's amendment as submitted, because it would not conform to the true principle of equality, which required that unequal things be treated unequally. The indirect interest of a non-coastal State could never be analogous to the special interest of a coastal State.

49. It was possible for a non-coastal State to have some indirect interest at stake in a fishery. But that interest could never justify the extension to it of the privilege, which properly belonged to the coastal State alone, of being entitled to participate in any regulation of fisheries in waters where its nationals did not fish.

50. He therefore proposed that article 4 should not be amended, but that a second paragraph should be added to it reading somewhat as follows:

"Any other State, having a special interest in the maintenance of the productivity of the living resources in an area of the high seas, may demand from the States engaged in fishing in that area that they prescribe, where necessary, measures for the conservation of such living resources."

51. Mr. AMADO failed to see what title could be laid to the privileges conferred in article 4 by a State, that nationals of which did not fish in an area, and which was not a coastal State.

52. Mr. SCELLE maintained that the non-coastal State's title was as good as that of the coastal State. The principle of equality before the law meant that a person owning property worth 100 francs was entitled to the same legal protection, and had the same legal redress as a person owning property worth 1,000,000 francs.

53. Mr. FRANÇOIS (Special Rapporteur) considered that, following Mr. García Amador's concessions, it would probably be possible for the sub-committee to redraft article 4 in a manner that would enable it to command maximum support.

The meeting rose at 6 p.m.

302nd MEETING

Wednesday, 1 June 1955, at 10.15 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) (*continued*)

NEW DRAFT ARTICLES ON FISHERIES (*continued*)

Article 4 [4] (*continued*)

1. The CHAIRMAN announced that the sub-committee had drafted a second paragraph for article 4; it read as follows:

“Any State whose nationals do not carry on fishing in a particular area but which has a special interest in the maintenance of the productivity of the resources of the high seas in that area may make representations to the States whose nationals engage in fishing in that area, urging them to see that the necessary measures are taken to safeguard its interests. Any difference of view that may arise shall be settled in accordance with the procedure laid down in articles 7-10.”

2. Mr. SCHELLE accepted that text.

3. Mr. KRYLOV thought that in the French text, a better word than *insister* might be found for “make representations”.

4. Mr. SCHELLE agreed that the term was, perhaps, not a very happy one, but was prepared to accept it if no better alternative could be found.

5. Mr. FRANÇOIS (Special Rapporteur) said that the Drafting Committee might consider whether the expression “maintenance of the productivity of the resources” could not be replaced by a reference to the conservation of resources.

6. Mr. LIANG (Secretary to the Commission) wished to raise a question which was not of a substantive character, but related rather to the succinctness of the text.

7. As drafted, the proposed second paragraph provided that a non-coastal State whose nationals were not engaged in fishing in a given area should have the right to make representations, for the purpose of ensuring that its interests were safeguarded, to those States whose nationals were so engaged.

8. The position was that there were three categories of State: coastal States; non-coastal States whose nationals were engaged in fishing in a given area; and States which were not coastal States and whose nationals were not engaged in fishing in the area, but which had a special interest therein.

9. The proposed new paragraph was intended to safeguard the position of the third category of States in relation to the second, but did not appear to cover the case where a State in the third category, finding that its interests were not being properly respected, might consider it necessary to make representations to the coastal State, and not just to the States engaged in fishing.

10. The CHAIRMAN said that, if the coastal State was not engaged in fishing, it would seem that, although article 4, paragraph 1 recognized its right to participate in a system of regulation, it could not be urged by another State to adopt conservation measures. The coastal State might consider it had no interest in the matter.

11. Faris Bey el-KHOURI thought it might be more appropriate to refer to a State which “believed” it had a special interest, rather than to use the term “has a special interest”.

12. The CHAIRMAN pointed out that in any dispute there was always one party which believed it had a right; it was for the competent court or arbitration tribunal to decide whether that right could be validly asserted.

13. Mr. GARCÍA AMADOR said that the new paragraph had been drafted somewhat hastily, and called for improvement.

14. The expression “the necessary measures are taken to safeguard its interests” at the end of the first sentence was not appropriate, since conservation measures were taken in the general interest and not in the interests of the particular State mentioned in the paragraph; it should therefore be replaced by the words “the necessary measures are taken for the conservation of those resources.”

15. Again, the French version of the second sentences referred to *le règlement*. That seemed to suggest that the competence of the technical arbitration board would extend to the actual formulation of conservation regulations. Such was not the intention, and it was desirable that it be made clear that the competence of the board was limited to giving a ruling on the validity of the special interest invoked by the State concerned.

16. It would be better to use exactly the same wording as in article 6, paragraph 2, namely, *le règlement de la question*, in order to make it clear that the last sentence of the new paragraph referred to arbitration on the question of an alleged special interest.

17. Mr. AMADO thought it would be better not to use the word *règlement* at all in the French text since, to the ear of those using other Romance tongues, it had a somewhat equivocal connotation. It might be preferable simply to say that in case of dispute *on suivra la méthode prévue aux articles 7 à 10*.

18. Mr. SCHELLE said that the term “*règlement*” was not inappropriate. He pointed out, furthermore, that in French legal terminology there were two kinds of court decisions: *jugement de règlement* and *jugement d'intérêts*. The former were given in such cases as disputes over water rights, where a decision had to be handed down which would apply to all those using the waters concerned. The case had some analogy with that under discussion by the Commission, in that if a decision were adopted by the arbitration board with regard to conservation measures, that decision would constitute a ruling *erga omnes* on the validity or appropriateness of those measures.

Article 4, including the new paragraph as amended by Mr. García Amador, was adopted by 11 votes to none, with 2 abstentions.

Article 5 [5, para. 1]¹

19. Mr. SCHELLE said that the phrase “and that no agreement has been reached within a reasonable period of time” was superfluous, as was also the phrase “if it

¹ *Sec supra*, 300th meeting, para. 1.

has a special interest in the productivity of the resources of the high seas contiguous to its coast". The Commission had accepted the notion that the coastal State had a privilege in the matter, and it did not appear necessary—or even useful—to encumber the provision with the phrases in question. He would further suggest that the final phrase of the article should read "the coastal State may take the initiative of adopting whatever measures of conservation are appropriate".

20. Mr. AMADO agreed that the two phrases mentioned by Mr. Scelle were superfluous.

21. Mr. LIANG (Secretary to the Commission) said that it was most desirable that article 5 should mention specifically the circumstance that, the coastal State having actually engaged in negotiations, no agreement had been arrived at with the other States concerned within a reasonable period of time. It was vital to provide that if the coastal State refused absolutely to negotiate it would not be entitled to adopt conservation measures unilaterally. Lack of agreement alone could justify unilateral action.

22. He would prefer a simpler text along those lines, in which case the opening phrase of article 5 ("where there is no agreement among the States concerned") would become redundant.

23. Sir Gerald FITZMAURICE agreed with Mr. Liang; the sub-committee had adopted its article 5 precisely for the reasons just set forth by him. The purpose of the provision was to ensure that the coastal State would be free to adopt unilateral measures only if it had made an attempt to negotiate.

24. Mr. EDMONDS suggested, for the benefit of the Drafting Committee, that the last few words of article 5 might read "whatever measures of conservation are appropriate for such interests".

25. Mr. SCELLE considered that it would be better not to specify that the coastal State, which, after all, might allow foreign fishermen to act in a manner inconsistent with the purposes of conservation, should engage in negotiations; the initiative for instituting negotiations would thus be left with the non-coastal State or States, which in his view would be preferable.

26. The CHAIRMAN pointed out that article 2 already empowered any State concerned to invite others to negotiate on conservation measures. The purpose of article 5 was to make it clear that, in the specific case of a coastal State, such State should endeavour to reach agreement with other States before taking unilateral action.

27. Mr. EDMONDS enquired what would be the position if two coastal States adopted conflicting regulations.

28. The CHAIRMAN replied that in practice one of the two States would be the first to adopt a regulation.

The other State would not then be able to adopt a concurrent regulation, but would have the possibility of resorting to the procedure provided for in articles 7 to 10.

29. Mr. AMADO pointed out that article 5 had to be read in conjunction with article 6, which specified very strictly the limitations to the right of the coastal State.

Article 5 was adopted unanimously.

Article 6 [5, paras. 2 and 3]²

30. Mr. SCELLE proposed the addition to paragraph 1 of article 6 of two further sub-paragraphs, the first to read:

d) si elles n'affectent pas une étendue de mer disproportionnée avec les besoins légitimement invoqués.

31. It was clear that some reference to a spatial limitation was necessary. No problem would arise in the case of a country like Yugoslavia or Italy, because the Adriatic was a comparatively narrow sea. But in the case, for example, of Peru, it would be essential to make it clear that invocation of its interests could not justify the adoption of conservation measures affecting an indeterminate extent of the immense Pacific Ocean.

32. He would come to his second amendment later.

33. The CHAIRMAN pointed out that the only possible way of limiting the distance was to mention a specific number of miles. No formulation of the kind suggested by Mr. Scelle could add anything to the provisions already adopted. Article 4 made reference to the high seas contiguous to the coast, and the interpretation of the concept of contiguity in that context would be a matter for the board provided for in article 8, whose ruling would determine the application of articles 5 and 6.

34. Mr. SCELLE thought that it might none the less be desirable to suggest some criterion such as he had proposed.

35. Mr. LIANG (Secretary to the Commission) considered that, as a qualification of "scientific findings", the term "appropriate" used in sub-paragraph (b) of paragraph 1 was inexact; the proper word would be "valid", which was used in the French text.

36. With regard to arbitration, it was clear that the problems of interpretation pertaining to sub-paragraphs (a) and (b) would relate to purely scientific enquiries, for which a technical board of experts could well be appropriate. But sub-paragraph (c) and Mr. Scelle's proposed sub-paragraph (d) were concerned also with non-technical matters, namely: the principle of non-discrimination and the problem of the spatial scope of any measures taken unilaterally by the coastal State. It was doubtful whether fishery experts would be best fitted to arbitrate on such issues.

² *Ibid.*

37. Article 6 was of vital importance ; it was the key to the whole series. It was necessary first to settle the conditions to be required of the coastal State ; the problem of their implementation should be examined only afterwards. Moreover, such implementation would have to be adapted to the agreed substantive issues enumerated in article 6. Hence it was a matter of great importance whether a sub-paragraph such as the one proposed by Mr. Scelle was to be included or not.

38. Sir Gerald FITZMAURICE supported Mr. Scelle's proposal. He himself had had in mind to propose an additional sub-paragraph along much the same lines, reading :

“(d) that the area within which the measures are applied is reasonable having regard to all the circumstances.”

39. It was possible that, as the Chairman had suggested, the spatial limitation was implicit in the provisions already adopted by the Commission, but it was desirable, in view of the wide claims being made by certain States, that the matter be made perfectly clear.

40. The question of non-discrimination was a matter with which, in his opinion, fishery experts could well deal. In the field under consideration discrimination was never crude. Regulations were never framed so as explicitly to exclude foreign fishermen as such from a given area. The usual procedure was to prohibit methods employed by one class of fishermen and to permit others, notably those practised in the coastal State itself.

41. Mr. GARCÍA AMADOR recalled that, by adopting article 4 to replace the corresponding article in the draft on fisheries adopted at the fifth session, in which a limit of 100 miles had been laid down, the Commission had already abandoned the criterion of distance in favour of that of the coastal State's special interest in the maintenance of the productivity of resources, which was in harmony with the conclusions and recommendations of the International Technical Conference on the Conservation of the Living Resources of the Sea.

42. Article 6 had to be read in conjunction with article 5. Although the substance of Mr. Scelle's first proposal was implicit in the terms of article 5, it would not be wholly redundant to specify that the coastal State might adopt measures only in the area in which its interest was valid. He therefore proposed that article 5 be amended by adding to it the words : “in the area where that interest exists”.

43. Mr. SCELLE accepted Mr. García Amador's proposal, and withdrew his own proposed sub-paragraph (d) in its favour.

44. Mr. SANDSTRÖM thought that both Mr. Scelle's proposal and Mr. García Amador's amendment were too vague for the formulation of a specific spatial limitation of the coastal State's right.

45. Mr. KRYLOV agreed with Sir Gerald Fitzmaurice that the question of non-discrimination could well be decided by experts who were not jurists. It was a

question of fairness rather than legality.

46. Mr. SCELLE said that his second addition to article 6 would now read :

d) *si elles ont exclusivement pour objet la conservation des ressources biologiques de la mer.*

47. Such a provision might be regarded as self-evident, yet it would be expedient. His complete confidence in the good faith of his colleagues on the Commission did not extend to governments, which of necessity had to seize every possible advantage from any given situation for the benefit of their countries. He therefore feared that if the coastal State were to be given the right to regulate unilaterally certain aspects of the fishing industry, it would inevitably take the opportunity of instituting other, more restrictive, measures which might have discriminatory consequences and hence create differences between States. The machinery for the settlement of disputes provided for in articles 7 to 10 notwithstanding, an express provision was required to prevent governments from abusing the powers they would acquire if the draft articles were adopted. His amendment thus provided a necessary safeguard against the natural tendency of governments to extend their jurisdiction wherever possible.

48. Mr. SANDSTRÖM suggested that the closing words of article 5 (“whatever measures of conservation are appropriate”) were sufficient to meet the purpose Mr. Scelle had in mind. It would be illusory to suppose that repetition would be effective in preventing governments from going beyond their powers.

49. Faris Bey el-KHOURI considered that agreements concluded under article 2 should also be subject to the requirements laid down in article 6, otherwise they could not be made binding on other States. He therefore proposed the insertion of the words “and the measures adopted under article 2” after the words “adopts under article 5” in paragraph 1.

50. Mr. ZOUREK considered Mr. Scelle's first amendment to be useful, because it introduced a new element that was not to be found in Mr. García Amador's wording, which referred solely to the geographical criterion. He would accordingly have preferred the original text.

51. He wondered whether the purpose of Mr. Scelle's second amendment might not be achieved by inserting some such words as “for purposes of conservation of the living resources of the sea” after the words “the measures”, at the beginning of the article.

52. Mr. GARCÍA AMADOR said that Mr. Scelle's second amendment brought the Commission back to the fundamental issue of the whole purpose of the draft articles. It had already been clearly decided that they should be designed solely and exclusively to ensure the conservation of the living resources of the sea. He believed the Commission to be unanimous in thinking that coastal States and others must alike be prohibited from unduly limiting the freedom of fishing in the high seas, but wondered whether it was necessary to formu-

late that principle explicitly in the draft. It would surely be enough to insert some kind of a preamble, defining precisely the scope of the succeeding articles. Unlike Mr. Scelle's first amendment, the second was not only superfluous but also repetitious and misleading. There was no point whatsoever, in a draft entirely devoted to conservation, in prohibiting States from promulgating measures other than those strictly designed for that purpose. Moreover, the limitation expressed in Mr. Scelle's amendment should apply to the measures taken under articles 1 and 2, since otherwise the coastal State would be unfairly penalized.

53. Mr. SCELLE did not share Mr. García Amador's complete confidence that the precise purpose of the articles could be adequately defined in some general provision. If the sense of his amendment were accepted, he had no strong views about its form or place in the draft.

54. The CHAIRMAN observed that Mr. Scelle's point could be covered either in a preamble or in a general introductory article.

55. In reply to a question by the CHAIRMAN, Mr. SCELLE said that he could accept Mr. García Amador's wording in place of his own first amendment; Sir Gerald Fitzmaurice's wording, however, seemed to him too broad.

56. Mr. GARCÍA AMADOR said that the insertion of his wording in article 6, which appeared to be what Mr. Scelle wanted, would entail repetition. He therefore maintained that it be added to article 5.

57. Mr. SCELLE said that he would be prepared to agree to that course, though he did not find it fully satisfactory.

58. The CHAIRMAN put to the vote Mr. García Amador's proposal that the words "in the area where that interest exists" be added at the end of article 5.

The amendment was adopted by 12 votes to 1.

59. Mr. AMADO, explaining his vote, said that he had opposed the amendment because neither Mr. Scelle nor Mr. García Amador had succeeded in convincing him that it was not superfluous.

60. Mr. SANDSTRÖM, referring to Faris Bey el-Khouri's amendment to article 6, said that the situation brought about by the promulgation of measures under article 5 would not be the same as that resulting from an agreement concluded under article 2. If the latter gave rise to a dispute, the provisions of article 3 would come into play.

61. Faris Bey el-KHOURI pointed out that no regulations introduced under article 2 could be made binding on States other than those which had drawn them up, unless they were consistent with the requirements of article 6.

62. The CHAIRMAN considered Faris Bey el-Khouri's observation to be very pertinent.

63. Mr. ZOUREK agreed that Faris Bey el-Khouri had raised an important issue; his amendment would be fully consistent with the general conclusions reached at the Rome Conference to the effect that, if two States agreed to promulgate regulations, they must fulfil the conditions laid down in article 6.

64. Sir Gerald FITZMAURICE supported Faris Bey el-Khouri's amendment, because it had always been implicit in article 2 that the measures promulgated in virtue of its provisions should be genuinely designed for conservation purposes. That had not been expressly stated, because the coastal State was the only one which was entitled to adopt unilaterally measures applicable to foreign fishermen: in cases under article 2 they had to be the result of an agreement, from which there was a right of appeal under article 3. It had therefore been thought more necessary to make it clear that regulations emanating from a coastal State alone should be subject to certain conditions, but Faris Bey el-Khouri's amendment would certainly serve to underline the purpose of the entire draft.

65. The CHAIRMAN, speaking as a member of the Commission, pointed out that the right of appeal against an agreement reached under article 2 could only be exercised by States which had not previously engaged in fishing in the area concerned.

66. He considered Faris Bey el-Khouri's amendment sound: all conservation regulations should fulfil the requirements of article 6.

67. Mr. SCELLE had considerable sympathy for the amendment, but considered that it went somewhat farther than the law as it stood at present. To draw an analogy from another sphere, once a treaty had been ratified, non-signatory States could not appeal against any of its provisions unless they were able to prove that their rights had been prejudiced by those provisions.

68. In fact, Faris Bey el-Khouri's amendment constituted a great step forward, since it meant that another State would be able to intervene in order to secure the promulgation of vitally necessary regulations. Such progress would to some extent be a substitute for a supra-national authority within the framework of the United Nations, since it would bring nearer the integration of the international community and universal respect for *res communis*.

69. Mr. ZOUREK argued that the purpose of the amendment was surely not to concede to any State the right to intervene in agreements concluded under article 2, which would be going far beyond the existing rules of international law.

70. Faris Bey el-KHOURI said that all he had in mind was that regulations, if they were to be generally applicable, would have to be consistent with article 6. He was perfectly prepared to leave the drafting of his amendment to the Sub-Committee.

71. Mr. EDMONDS said that, if he had correctly understood the amendment, it would alter the whole

structure of the draft articles. He himself had interpreted article 2 as meaning that two or more States might negotiate an agreement on conservation measures which need not necessarily be wholly based on the requirements of article 6 pertaining to regulations promulgated unilaterally by the coastal State. He urged the Commission not to adopt the amendment without giving the most careful consideration to its ultimate effect on a draft which dealt differently with regulations promulgated by two or more States and with those promulgated unilaterally.

72. Faris Bey el-KHOURI did not consider that an agreement on conservation measures concluded between several States should confer a monopoly over a certain area of the high seas for the purpose of excluding foreign fishing vessels therefrom. They had only the right to regulate fisheries in the general interests and must therefore be bound by the provisions of article 6.

73. Mr. GARCÍA AMADOR agreed with Faris Bey el-Khouri that multilateral regulations under article 2 and unilateral regulations under article 1 must both be subject to the conditions of article 6, which circumscribed the full freedom of action both of the coastal and of other States. It would then be impossible for agreements between several States, prompted by motives of gain rather than concern for the maintenance of the maximum sustainable yield in the general interest, to be promulgated, since they would be contrary to article 6, paragraph 1(a); nor would States be entitled to initiate measures which were neither imperative nor urgent, owing to the provisions of paragraph 1(b). Since the purpose of all conservation measures must be to protect the general interest, they should fulfil the conditions set out in article 6, and particularly that of paragraph 1(b).

74. Mr. FRANÇOIS (Special Rapporteur) said that despite Mr. García Amador's remarks, he was still doubtful about the need for Faris Bey el-Khouri's amendment, since the conditions laid down in article 6 could not apply to regulations instituted by virtue of articles 1 and 2, where there could be no question of their being obligatory on a third party: the case of third States was provided for in article 3, when it would be for the board of experts to decide whether the terms of article 6 had been complied with.

75. Mr. SCALLE found the Special Rapporteur's argument unconvincing, because under the terms of articles 1 and 2 it would be possible for States to monopolize fishing in certain areas of the high seas, thereby violating a major principle of international law. At the outset, it had seemed that the amendment went too far, but he now realized that his first impression had been mistaken, since the notion of challenging a treaty or international agreement was not a new one, and had in fact been put into practice by Germany between the wars. Violation of the overriding principle of the freedom of the seas, or discrimination against foreign fishing vessels, could constitute grounds for declaring regulations null and void. Once the Commission had introduced the concept of the "special interest", it must

allow other States a right of appeal, but such a provision would be better placed in a general article dealing with the freedom of the seas, to make sure that States were precluded from invoking the requirements of conservation as a pretext for frustrating the fishing of others. However, for the time being he would be prepared to accept Faris Bey el-Khouri's amendment to article 6, on the understanding that he could later revert to the general principle involved.

76. The CHAIRMAN, speaking as a member of the Commission, observed that if the general principle implicit in the amendment were accepted, the Commission would reverse all its previous decisions on the draft before it, and would, in effect, be returning to article 32 in the Special Rapporteur's sixth report (A/CN.4/79) on the régime of the high seas.

77. Mr. KRYLOV said that the issue before the Commission was whether the three conditions laid down in article 6 must always be complied with, or whether they applied solely to measures adopted unilaterally by the coastal State.

78. Mr. SANDSTRÖM said that the Commission was faced with a very important issue which required further reflection. He himself was uncertain whether, given the present structure of the draft articles on fisheries, Faris Bey el-Khouri's amendment was appropriate. He accordingly moved that the decision be postponed until the following meeting.

The motion was carried.

The meeting rose at 1.10 p.m.

303rd MEETING

Thursday, 2 June 1955, at 10 a.m.

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