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A/CN.4/SR.352

Summary record of the 352nd meeting

Topic:

Law of the sea - régime of the high seas

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81. If Mr. Spiropoulos' text had been put to the vote first, he would have supported it.

82. Mr. SANDSTRÖM said that, although he agreed that the coastal State had a special interest in conservation in the area contiguous to its coasts, he had opposed the amendment because it might reduce the chances of agreement on the draft as a whole.

83. Mr. EDMONDS said that he had voted against the amendment because, although he had no objection to the statement of fact it contained, it might give rise to difficulties and conflicts because it took no account of the other provisions in the draft.

84. Mr. ZOUREK said that he had supported the amendment because it was consistent with the economic interests of coastal States, which had already been recognized on an even wider scale by the Commission in its draft articles on the continental shelf. In view of the latter decision, it would have been strange not to refer to the rights of coastal States to promulgate regulations for conservation, which, he pointed out, would in no way discriminate against nationals of other States.

85. Mr. PADILLA-NERVO observed that the Commission had now recognized the special interest of the coastal State in positive instead of conditional terms.

86. Mr. SCELLE said that he had already adequately explained his reasons for opposing the amendment.

The meeting rose at 1.15 p.m.

352nd MEETING

Thursday, 24 May 1956, at 9.30 a.m.

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Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. L. PADILLA-NERVO, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Also present: Mr. M. CANYES, representative of the Pan-American Union.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97/Add.3, A/CN.4/99 and Add.1-7) (*continued*)

Conservation of the living resources of the high seas (continued)

Article 29 (continued)

1. The CHAIRMAN recalled that at the previous meeting the Commission had adopted Mr. Padilla-Nervo's amendment to Mr. Spiropoulos' combined text for articles 28 and 29. It remained to take a decision on Mr. Spiropoulos' text itself[1] which had now been appended by the inclusion of the provision contained in paragraph 2 (*a*) of the article adopted at the previous session.

2. Mr. SPIROPOULOS pointed out that he had also accepted certain drafting changes proposed by Sir Gerald Fitzmaurice, which could be referred to the Drafting Committee.

3. Referring to paragraph 3 of article 29 as adopted the previous year, he expressed concern at the possible contradiction between the stipulation that measures unilaterally adopted by the coastal State would remain obligatory pending the arbitral decision and the statement in paragraph 2 that the measures would be valid as to other States only if the requirements set out in sub-paragraphs (*a*), (*b*) and (*c*) were fulfilled.

4. Mr. PADILLA-NERVO said that it was not clear from Mr. Spiropoulos' text whether a coastal State was entitled to adopt conservation measures unilaterally after failure to reach agreement with the other States concerned.

5. The CHAIRMAN explained that, after lengthy discussion at the previous session, the Commission had decided that the coastal State should be obliged to initiate negotiations, the nature of which had not been specified, with other interested States for the purpose of reaching agreement on the conservation measures to be taken. It was only after that requirement had been fulfilled, and if no result had been reached within " a reasonable period of time "—and it had been left to the discretion of the coastal State to decide what constituted a reasonable period of time—that the coastal State could act unilaterally.

6. Mr. SANDSTRÖM considered that the condition was rather more rigorous and required States to make a real effort to initiate serious negotiations.

7. Mr. EDMONDS asked that the Drafting Committee should consider the following revised text for article 29:

1. A coastal State having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coast may adopt unilaterally such measure or measures of conservation as may be appropriate for such area, provided that negotiations with the other States concerned have not led to an agreement within a reasonable period of time.

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[1] A/CN.4/SR.351, para. 5.

2. Any measure which the coastal State adopts under the first paragraph of this article shall be valid as to other States only if the following requirements are fulfilled:

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

(b) The measure or measures adopted are based on appropriate scientific findings; and

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

3. If a proposed measure or measures are not accepted by the other States concerned, any of the parties may initiate the procedure provided for in article 31. Subject to paragraph 2 of article 32, any such measure shall be in full force and effect pending the arbitral decision.

The changes he had made were of an editorial character.

8. Although he remained of the opinion he had expressed at the previous session,[2] that unilateral conservation measures promulgated by the coastal State should not be binding on others pending the arbitral award, he did not propose to reopen the question.

9. Mr. PAL said that paragraph 3 needed further clarification because it did not specify which were the other States concerned, and whether those which might have a potential interest in fishing in the area in question were included.

10. With regard to paragraph 1, he wished to sponsor the Indian Government's amendment (A/CN.4/97/Add.3, para. 48) substituting the words " provided that a State whose nationals are engaged or may be engaged in fishing in those areas may request the coastal State to enter into negotiations with it in respect of these measures " for the words " provided that negotiations . . . reasonable period of time ". The purpose of that amendment was to enable the coastal State to inaugurate conservation measures without first consulting the other States concerned. Those States could enter into negotiations with the coastal State if they found the measures objectionable.

11. Mr. SPIROPOULOS considered that the Indian Government's wish was met by article 27, the provisions of which could perhaps be made applicable to article 29, though that was a matter more of drafting than of substance.

12. Faris Bey el-KHOURI said that in cases where there were several coastal States grouped round one part of the high seas, the Commission should lay down that conservation measures could be promulgated only by agreement amongst all concerned, for it would be quite inadmissible to allow one State to impose its own regulations on the others.

13. Mr. PAL said that the Commission must also consider two more points. First, it must decide whether the tests contemplated in article 29, paragraph 2, were to apply only to the measures taken by a coastal State, or whether they should be extended to all conservation measures taken by any State or group of States, as in articles 25 and 26. Since all such measures would curtail the freedom of the high seas to some extent, he would ask that they too should be subjected to the tests. Although the last sentence of article 32, paragraph 1, indicated acceptance of that view to some extent, some more specific and clearer provision on the matter was required. Secondly, article 29 should specify what was meant by the term " coastal State " and which area would be the " area of the high seas contiguous to its coasts ".

14. Mr. SPIROPOULOS said that the draft gave rise to a whole series of intricate problems which it would probably be inadvisable to examine if the Commission was ever to complete its task. For example, when the draft spoke of a State whose nationals were engaged in fishing, did it in fact refer to ships flying the flag of that State, and not to their crews, which might include nationals of other States? Another question was in which area the regulations of one coastal State would apply, when there were several others in the vicinity?

15. In drafting rules on conservation the Commission should seek to lay down general principles without going into technical details; those could be considered at a later stage if a diplomatic conference were convened to examine the draft. In the present circumstances the Commission could not do more than seek some general way of regulating fisheries in accordance with existing international law, and he doubted whether a more radical approach would yield any results. He therefore believed it would be preferable to refer the point raised by Faris Bey el-Khouri to the Drafting Committee in order to avoid complicating the discussion.

16. Sir Gerald FITZMAURICE, while agreeing that the Commission could not enter into questions of detail, emphasized that the draft articles, if adopted, would have to be applied by fisheries experts, so that the Commission must take certain technical problems into account.

17. Faris Bey el-Khouri had drawn attention to a very pertinent point, to which he had himself referred at the previous meeting.[3] The case of several coastal States grouped round one part of the high seas was not unusual and was to be found, for example, in the eastern and western Mediterranean, in the Baltic Sea, in the North Sea, in the Caribbean, in the upper Indian Ocean, in certain parts of south-east Asia and in certain areas near Japan—all of which contained important fishing grounds. He had always felt that the Commission had concentrated too much in its draft on the case of a single coastal State fronting an open stretch of sea, interest in which had been largely responsible for initiating the discussion on conservation. The matter raised by Faris Bey el-Khouri called for a decision. If the confusion which might be caused by coastal States' enacting conservation measures unilaterally in the same area was to be avoided, such measures must be decided upon by agreement. The existence of conventions between coastal States in the North Sea, although perhaps not comprehensive in every respect, proved that agreement was possible.

[2] A/CN.4/SR.298, para. 6.

[3] A/CN.4/SR.351, para. 38.

18. Mr. SPIROPOULOS, though agreeing with the views expressed by Faris Bey el-Khouri and Sir Gerald Fitzmaurice, considered that the problem they had referred to would not be insurmountable and could be referred to the Drafting Committee. The fact that other coastal States in the area could appeal to the arbitral commission if they found unilateral regulations objectionable provided some safeguard against the possibility of chaos.

19. Faris Bey el-KHOURI considered that, throughout the discussions on the draft articles, the Commission had adopted an entirely wrong approach. Since conservation of the living resources of the high seas was a matter of universal interest, the necessary regulations should have been enacted by an international body such as the Food and Agriculture Organization. They would then have been uniform and generally applicable. However, now that the problem had been tackled from the national standpoint, both at the Rome Conference and by the Commission itself, it was too late to adopt the better course. He therefore proposed that a provision be included at the end of article 29, paragraph 1, to the effect that a coastal State wishing to initiate conservation measures in an area which was also contiguous to the coasts of other States must, if it were unable to reach agreement with the other States, submit its proposals to an arbitral commission before taking any action.

20. The CHAIRMAN doubted whether such a provision could be inserted in article 29, paragraph 1, since that article did not relate to the particular case which Faris Bey el-Khouri had in mind. If the Drafting Committee came to the conclusion that there was no appropriate place for such a provision in the draft articles themselves, perhaps the question might be mentioned in the comment.

21. Faris Bey el-KHOURI said that he had no objection to referring his proposal to the Drafting Committee; but he strongly believed that it should be incorporated in the articles rather than in the comment.

22. The CHAIRMAN said that he had suggested that the point might be mentioned in the comment only as a last resort.

23. Mr. ZOUREK said that, before taking up another article, the Commission must give the Drafting Committee some further guidance. First, it must decide about Mr. Pal's amendment to the latter part of article 29, paragraph 1,[4] and secondly, it must express its opinion on Mr. Pal's suggestion that the provisions of article 29, paragraph 2, should be applicable in all cases.[5] His own view was that, as the second question was already decided in the affirmative for all cases referred to the arbitral commission by the last sentence of article 32, paragraph 1, Mr. Pal's proposal to generalize the application of article 29, paragraph 2, should be adopted. It could easily be done by putting the provisions in question into a separate article, suitably modified.

24. Mr. SPIROPOULOS felt that the Commission should not decide the second point mentioned by Mr. Zourek until a much later stage.

25. Mr. PAL said that there was yet a third question to be dealt with—namely, that of definition—since it was not clear from the present draft what was meant by an area contiguous to the coast of a coastal State.

26. He added that the Indian Government had proposed a fundamental amendment to article 29, paragraph 1. The existing draft made negotiation with other States a prior condition for the initiation of any unilateral measure by a coastal State. The Government of India had suggested that the right of the coastal State in that matter should not be subject to any such condition. Paragraph 2 of the article amply indicated when, why and in what circumstances a coastal State would be entitled to take such measures. Urgency was one of the conditions for that power; negotiation with others, as a prior condition, would defeat its very purpose. The aim of the Indian amendment which he was now sponsoring was to remove a provision which might frustrate the purpose of the whole draft.

27. The CHAIRMAN agreed that the Commission itself must decide the important questions raised by Mr. Pal.

28. Sir Gerald FITZMAURICE, referring to Mr. Pal's amendment to paragraph 1, observed that after lengthy discussion at the previous session, the Commission had concluded that it would be both right and just to impose, as a prior condition, an obligation on the coastal State to try to reach agreement with the other States concerned before it could exercise the right of acting unilaterally;[6] for it would be inequitable to allow a coastal State, whose nationals might not previously have fished in the area concerned at all, to promulgate regulations without having attempted to reach agreement with States whose nationals might have done so for many years, and the words " within a reasonable period of time " protected the interests of the coastal State. That condition was important to non-coastal States, which might find the draft unacceptable without it. It should not be forgotten that the provisions would then not be binding, and coastal States would not be able to exercise the rights laid down in the draft, since they were not at present part of international law.

29. Mr. SPIROPOULOS agreed with Sir Gerald Fitzmaurice's conclusion, but not with his arguments. It was a general principle of international law that, before resorting to arbitration, States should try negotiation. The requirement in paragraph 1 was therefore a logical one and would not endanger the interests of the coastal State, since if the negotiations failed to result in an agreement, it could act unilaterally.

30. Mr. SANDSTRÖM endorsed Mr. Spiropoulos' remarks. Nevertheless, he thought the Drafting Committee should consider the possibility of two or more coastal States claiming the right to inaugurate conserva-

[4] See para. 10, above.

[5] See para. 13, above.

[6] A/CN.4/SR.302, paras. 21-29.

tion measures unilaterally in the same area. In his opinion, it was obvious that neither possessed a better right than the other.

31. The CHAIRMAN put to the vote Mr. Pal's amendment to the last phrase of article 29, paragraph 1, from the words " provided that negotiations " to the end.

Mr. Pal's amendment was rejected by 8 votes to 5 with 1 abstention.

32. The CHAIRMAN, referring to Mr. Pal's contention that the Commission should define what was meant by a coastal State, pointed out that the need to do so had not been felt either at the Rome Conference or during the Commission's own discussions. In view of the difficulties involved, he doubted whether an attempt to draft a definition would be successful.

33. Mr. KRYLOV agreed with the Chairman: not only was a definition unnecessary, because it was generally understood what was meant, but it might even be dangerous.

34. In response to an appeal by Mr. SPIROPOULOS, Mr. PAL said that he would not press his proposal.

35. The CHAIRMAN suggested that the Commission could now refer to the Drafting Committee paragraphs 1 and 2 of article 29 together with Mr. Padilla-Nervo's amendment adopted at the previous meeting and Mr. Spiropoulos' combined text [7] for articles 28 and 29 as amended during the discussion, which seemed to have gained general support.

It was so agreed.

36. The CHAIRMAN then invited the Commission to take up paragraph 3 of article 29.

37. Mr. FRANÇOIS, Special Rapporteur, said that the principle of compulsory arbitration had not been questioned by any government, though there was some divergence of opinion as to whether unilateral measures should be binding on other States pending the arbitral award.

38. Mr. ZOUREK drew attention to the comments of the Government of Israel [8] on the question.

36. Mr. FRANÇOIS, Special Rapporteur, reaffirmed his belief that in the two paragraphs referred to by Mr. Zourek the Israel Government was not contesting that conflicts arising from the draft articles should be submitted to compulsory arbitration, but was directing criticism to certain procedural matters.

40. Mr. SPIROPOULOS did not think there was any force in the Israel Government's comments.

41. Mr. SANDSTRÖM said that his impression had been that the Israel Government, like Faris Bey el-Khouri, favoured the establishment of some permanent body to deal with the regulation of fisheries from the outset. The statements contained in the first two sentences of the second paragraph referred to by Mr. Zourek were so indefinite that it was difficult to understand precisely what the Israel Government had in mind.

42. Mr. KRYLOV pointed out that far more serious objections to the arbitration provisions were those raised by Mr. Padilla-Nervo in his statement at the 338th meeting.[9]

43. Arbitration had played a great and honourable role in the history of international relations, but compulsory arbitration was fast disappearing and was now to all intents and purposes accepted only by small States. Members should be mindful of the reception given to the draft on arbitral procedure by the General Assembly and of the fact that the draft had so far led to no practical results, the reason being that both the eminent special rapporteur on the subject and the Commission itself had been too ambitious.

44. He was surprised that lawyers of such distinction should *expect* governments to commit themselves to compulsory arbitration when machinery for the peaceful settlement of disputes was provided by Article 33 of the United Nations Charter. Without in any way wishing to be intransigent, he urged the Commission to drop the provisions concerning compulsory arbitration and the time-limits, upon which Sir Gerald Fitzmaurice had insisted with such energy at the previous session and which it would be difficult for States to accept, and to substitute for that unnecessarily stringent and formal machinery a provision for the settlement of disputes in accordance with the procedures laid down in Article 33 of the Charter. Once the General Assembly had taken some final decision concerning the draft on arbitral procedure, the Commission could revert to the present articles which deal with implementation.

45. In conclusion, he suggested that, as a matter of drafting, it would be preferable to deal with the settlement of disputes in a single article, so as to remove the somewhat clumsy repetition which now occurred in, for example, articles 26, 27, 28 and 29.

46. Mr. SPIROPOULOS suggested that the whole question of principle raised by Mr. Krylov related to article 31, discussion of which had not yet begun.

47. Faris Bey el-KHOURI saw no reason why unilateral measures should be binding on other States pending the arbitral award. It would be unjust to place the burden of applying to the arbitral commission on those States, when they had not been responsible for the regulations.

48. The CHAIRMAN said that it was impossible to discuss the articles on conservation separately, one by one. That had been proved by the discussion on article 25. Similarly, article 29, paragraph 3, could not be discussed independently of article 31.

49. He therefore suggested that the principle of arbitration should be considered in that joint context. Once that question had been settled, a decision on the other aspects of the matter should be relatively easy.

[7] A/CN.4/SR.351, para. 5.

[8] A/CN.4/99Add.1, page 27.

[9] A/CN.4/SR.338, para. 14.

It was agreed to discuss the principle of arbitration as an essential preliminary to the decision on articles 29, 31, 32 and 33.

50. Mr. SCELLE said that the question under consideration was not really arbitration, but only a secondary and rather special aspect of it. It was only natural that jurists and States whose conception of international law was based on sovereignty should hesitate to approve the concept of arbitration, which entailed a limitation of sovereignty. Sovereignty carried to its extreme could, however, lead only to international chaos.

51. The Commission was concerned with the question of conservation, and the issue of arbitration had been raised because of the possibility of regulating and controlling fishing activities by means of an international organization. Although that stage had not been reached, the draft articles did represent a step towards it. Since States were sovereign entities, arbitration was the appropriate solution for any conflicts that might arise. Arbitration, however, was not a precise and uniform concept, for there were three types: diplomatic, legislative and judicial arbitration. It was the second type, by which regulations were made, that was under consideration, and the question whether arbitration was optional or compulsory was of secondary importance.

52. In connexion with Mr. Krylov's remarks, he pointed out that the attitude of the United Nations General Assembly to the Commission's draft on arbitral procedure had not been different from its attitude to other proposals submitted by the Commission.

53. He had often pointed out the important part played by conciliation in arbitral decisions on disputes between States. Purely judicial arbitration did not exist, and he was therefore inclined to agree with the Special Rapporteur that the Government of Israel's criticism was unfounded. It was, on the other hand, true that a more accurate term than " arbitral commission " might have been chosen for the organ which would settle disputes; perhaps some such term as " commission of experts " might be preferable.

54. Mr. AMADO said that the question at issue was whether the provisions on arbitration should or should not be retained. In his view, arbitration was the application of law.

55. Mr. SALAMANCA, endorsing the Chairman's point of view, said that a question of substance of considerable importance had been raised. He was convinced that the major problems should be tackled first, leaving points of detail till later. A decision should be taken on Mr. Spiropoulos' text.[10] It was obvious that article 29, paragraph 3 and article 31 were closely related.

56. The CHAIRMAN said that the Commission would doubtless find it desirable to take up the question of arbitration in connexion with the conservation of the living resources of the high seas on the basis of the system set out in article 31. The approach, however, should be of a strictly practical nature.

It was so agreed.

57. Mr. FRANÇOIS, Special Rapporteur, felt that Mr. Krylov's implicit reproach that, in his report, he had not dealt fully with governments' comments on the articles on arbitration was hardly justified. He had been asked by the Chairman to summarize the comments, not on the details of the arbitration procedure proposed, but on the principle of compulsory arbitration for the settlement of disputes regarding conservation measures. Although some governments—in particular, those of India and Israel—had made reservations, not a single one had opposed the principle of arbitration in that field. He was aware that the governments of some countries, including those of Mr. Krylov, Mr. Zourek and Mr. Padilla-Nervo, were opposed to compulsory arbitration; but since no comment had been received from them, he had been unable to summarize their views.

58. He shared Mr. Krylov's opinion that the Commission should not, as a rule, insert arbitration clauses in its drafts. Its task was codification, not the settlement of disputes, which was an entirely separate issue. The articles on the conservation of the living resources of the high seas, however, were not a mere codification of existing law, but constituted, rather, a progressive development of the law, entailing some restriction of the traditional freedom of States. It was understandable that States should be reluctant to accept such restrictions unless they could be convinced that the new rules would not be applied arbitrarily; there was therefore no doubt that many States would make their acceptance of the articles on conservation dependent upon the principle of compulsory arbitration for the settlement of disputes arising under those articles. If the new rights of coastal States were dissociated from the obligation to submit to arbitration in case of dispute, many States would reject the draft articles and the Commission's entire system of conservation measures would collapse. The discussion, therefore, could not be restricted to article 29, paragraph 1, and exclude paragraph 3. Certain governments had commented on article 31; for the moment, however, it might be preferable to confine the discussion to general principles.

59. Sir Gerald FITZMAURICE said that the Special Rapporteur had explained the point of principle with admirable succinctness, and he would add only that the draft articles on conservation gave certain rights to coastal States which under existing law they did not possess. It was quite clear that arbitration was an indispensable condition for the acceptance of the articles by other States when they were asked to agree to the new system.

60. Mr. Krylov had praised conciliation as superior to arbitration. But conciliation would not provide any solution in cases of disputes regarding conservation measures. To take the example of a number of States whose nationals were fishing in an area of the high seas near the coast of a coastal State: the coastal State might maintain that there should be a close season, on the

[10] A/CN.4/SR.351, para. 5, and para. 35 above.

ground that the fish in that area spawned during a certain period of the year. If the other States were to contest that view, there was clearly no room for conciliation; the only way to establish whether the proposed conservation measure was justifiable or not was by scientific investigation by an expert and authoritative body. The case was quite different where there was a dispute over, say, the exact area to be fished respectively by two States both having the right to engage in fishing in a particular zone; in any such clash of rights conciliation could certainly be brought into play.

61. The concern of the Commission, however, was with conservation, and it was absolutely essential for the successful functioning of the system conceived that the articles on arbitration should be retained substantially as they stood.

62. Mr. KRYLOV agreed with the Special Rapporteur that the settlement of disputes was quite a different issue from the establishment of substantive rules. For that reason he proposed that a formal vote on the question of arbitration in connexion with the conservation of living resources of the high seas should be deferred until the general question of arbitration had been settled.

63. He was unable to follow Sir Gerald Fitzmaurice's argument that conservation and arbitration could not be dissociated. There seemed to be no adequate reason why a settlement of any disputes that might arise should not be sought by other peaceful means and, of course, always on the basis of expert scientific advice. He was not opposed to arbitration in principle, although in general his preference would be for optional rather than compulsory arbitration. The conservation of the living resources of the high seas was, after all, not a political issue, but a matter which gave full scope for conciliation.

64. With regard to his comments on the Special Rapporteur's treatment of the question, he had not raised specific objections to the comment of the Government of Israel—although he regarded it as too long—and had merely intended to express his regret that an unsatisfactory method of presentation had been forced upon the Special Rapporteur.

65. Mr. SANDSTRÖM, supporting the views of the Special Rapporteur and Sir Gerald Fitzmaurice, said he would merely add that he was certainly not opposed to the settlement of disputes by other peaceful means than arbitration. Indeed, the articles had stressed the procedure of negotiation as a preliminary, arbitration following only if negotiations had failed to produce agreement. As Mr. Scelle had said, the term "arbitration" was perhaps not a very good choice.

66. Mr. HSU suggested that the point was perhaps being laboured to excess, since the draft articles had not been adopted by the General Assembly, which was the final arbiter. In the question of the adoption of judicial measures for the settlement of disputes it was of little importance whether the articles were drafted on the basis of Mr. Scelle's approach or according to the traditional model. They were, however, the corner-stone of the whole edifice. The Commission's ideas with regard to conservation had evolved in the direction of restricting the rights of States on the high seas by recognizing the special interests of the coastal State in the regulation and control of fishing. In order to win the acceptance of those States whose freedom had previously been unfettered, it was essential to provide some judicial method for the settlement of disputes, namely—arbitration. It would be impossible to abandon one part of the new provisions—dealing with arbitration—while giving full force to the other part: the extended rights of the coastal States. Such a course would bring down the whole scheme.

67. Mr. PADILLA-NERVO, referring to the Special Rapporteur's statement that the Mexican Government was opposed to compulsory arbitration, said that that was not the case. He need only instance the Pact of Bogotá of 1948, signed by his country, which had been one of the few to ratify it without reservations.

68. In matters of conservation, compulsory arbitration was not desirable. It might be true that some States would not accept the draft articles if those dealing with arbitration were not included. A greater number of States, however, would reject the system if the arbitration articles were included. The principle of compulsory arbitration had not gained acceptance among States, as was indicated by the fact that of 21 States signatories to the Pact of Bogotá only 8, including Mexico, had ratified the agreement; he recalled that the United States had entered an express reservation with regard to the article on compulsory arbitration. Again, the General Act of Geneva for the Pacific Settlement of International Disputes, of 1928, had received only a dozen ratifications. Mexico accepted the principle of general compulsory arbitration, and in any specific case the Mexican Government would be bound by the provisions of the Pact of Bogotá. As he had stated previously, opposition to compulsory arbitration was widespread and he was convinced that, on the basis of the good faith of States, settlement of disputes by voluntary means was a more solid foundation for lasting agreement.

69. The conditions in article 29, paragraph 2, were technical and could be opposed by no government acting in good faith. For purely practical reasons the pacific settlement of a dispute by means such as were suggested in Article 33 of the United Nations Charter, was perfectly feasible, always provided that the conditions in article 29, paragraph 2, were precisely drafted.

70. He proposed that article 29, paragraph 3, and articles 31, 32 and 33 be replaced by the following text:

> If these measures are not accepted by the other States concerned, the parties to the dispute shall seek a settlement by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, reference to regional bodies or by other peaceful means of their choice.

He was convinced that that was the most satisfactory solution of the problem. Compulsory arbitration might well exaggerate the importance of minor specific cases and even lead to more serious disputes. He was putting forward his personal view and not that of the Mexican Government.

71. The establishment of regional expert bodies to decide whether the provisions of article 29, paragraph 2, had been fulfilled was a possibility worth considering, and he recalled that the Inter-American Specialized Conference held at Ciudad Trujillo in 1955 had decided to set up an oceanographic institute. The technical advice of an institute of that kind would carry great weight.

72. Mr. ZOUREK said that several speakers had urged that compulsory arbitration was an indispensable condition for the practical application of the draft articles on conservation. He had not been convinced by the arguments adduced and failed to see what advantage the articles on arbitration had over other existing means for the settlement of disputes. For there was no lack of other means; he need only mention the Hague Convention of 1907 for the Pacific Settlement of International Disputes, the General Act of Geneva of 1928 for the Pacific Settlement of International Disputes (revised in 1949), the optional clause in Article 36 of the Statute of the International Court of Justice, the procedure for the settlement of disputes by the Security Council of the United Nations and many bilateral agreements between States interested in fishing on the high seas.

73. A further point was the question whether the procedure proposed in the draft article was in fact arbitration. He would agree with Mr. Amado[11] that the classic conception embodied in article 37 of the Hague Convention implied a legal basis for settlement. In the cases to which the present draft referred, however, it would usually be necessary to make new rules, and that was not within the scope of arbitration. Moreover, the cases covered by the draft articles varied widely in importance and scope, and a single instrument for dealing with them irrespective of their nature was inappropriate. In some cases, an expert opinion would suffice; in others, it would be advisable to have recourse to a commission of inquiry or a joint commission, while in yet others the best means of arriving at a solution might be to refer the matter to an arbitral tribunal after drawing up a *compromis*. He would take only one example. It might be considered that the purpose of conservation of the living resources of the sea was either to maintain those resources at their existing level or to develop them in order to secure the maximum supply of food and other marine products. A dispute between a coastal State, the growth of whose population urgently demanded that emphasis be laid on the latter aspect and another State, which wished only to maintain the *status quo*, was hardly a question that could be left to the decision of an arbitral commission. Such a matter, which was of vital importance to the coastal State, could be settled by the States concerned only by means of an international convention.

74. If it were objected that other means than arbitration were available under the articles, his reply would be that in practice an arbitration clause was always invoked without first seeking a settlement by other means. What was important was the obligation to settle the dispute by peaceful means. If that were codified, the decisive factor would be the common desire to settle and not a set of articles on compulsory arbitration.

75. Sir Gerald FITZMAURICE suggested that Mr. Zourek had misconceived the situation. The means for settling disputes that he had quoted were perfectly valid provided the States concerned *wished* to resolve a difficulty that had arisen. That, precisely, was the nub of the whole matter, for what would be the situation if the State that had unilaterally imposed certain measures of conservation did not want a settlement of any resulting dispute? Under Mr. Padilla-Nervo's proposal, such a State, while paying lip service to the principle of conciliation, might procrastinate for a period perhaps of years, during which time the conservation measures would be imposed, despite the disagreement of the other State. Only a positive obligation to submit a difference to arbitration could lead to a satisfactory solution. The Commission must draft articles that would be acceptable to all the States concerned, and it was in the interests of the partisans of the coastal State to work to that end. The attitude that they had adopted, however, if maintained, would inevitably lead to the frustration of their own hopes. At its previous session the Commission had gone a long way to meet their point of view. Without destroying the system it had set up, it could not possibly agree to the deletion of the provisions on arbitration contained in article 29, paragraph 3, and articles 31, 32 and 33.

The meeting rose at 1 p.m.

[11] See para. 54 above.

353rd MEETING

Friday, 25 May 1956, at 9.30 a.m.

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Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. L. PADILLA-NERVO, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Also present: Mr. M. CANYES, representative of the Pan-American Union.