Document:-

A/CN.4/SR.354

Summary record of the 354th meeting

Topic:

Law of the sea - régime of the high seas

Extract from the Yearbook of the International Law Commission:-

1956, vol. I

ment was gaining ground, he did not believe it was practicable at the present stage.

65. Mr. SCELLE said that if there had been any chance of the Brazilian proposal being accepted by governments he would have been the first to support it, but in the present circumstances he would vote in favour of the text adopted at the previous session.

66. Mr. SANDSTRÖM also had much sympathy for the Brazilian Government's proposal, but would not vote for it for the reasons given by Mr. Scelle. Nevertheless, he believed that an international body with advisory and research functions was desirable, and some statement to that effect might well be made in the comment.

Mr. Sandström's suggestion was approved.

At the Chairman's suggestion, it was agreed to refer the points raised by the Governments of South Africa and the Netherlands to the Drafting Committee.

67. Sir Gerald FITZMAURICE explained that the reason for the United Kingdom Government's proposal, which he supported, that the arbitral commission should not be empowered to extend the time-limit for rendering its decision, was that fisheries circles would find it difficult to accept a provision allowing a State or group of States acting in agreement, to adopt unilaterally conservation measures that were binding on other States. A system under which such unilateral measures would have to obtain the sanction of an international body before being promulgated would have been preferable. That course, however, had been rejected by the Commission, and the unilateral measures would now remain in force until the arbitral decision had been given, so that a whole fishing season might be missed, with resultant financial and economic loss. Consequently, it was most desirable for the arbitral proceedings to be concluded speedily. The arbitral commission, however, would probably avail itself of the power given to it to extend the time-limit, particularly since discussions between scientists and technical experts, who frequently disagreed amongst themselves, tended to be lengthy. He considered that the period allowed in paragraph 3, though not long, was reasonable, and that there was no need to give the commission power to extend it, since that might encourage delay.

68. Mr. PAL was in favour of retaining the provision at the end of paragraph 3, because owing to its very nature the question to be settled might require considerable time. There were no grounds for apprehending that the arbitral commission would abuse the right of extension given to it. Furthermore, the United Kingdom Government's concern should be allayed by the provision in article 32, paragraph 2, by virtue of which the arbitral commission could decide that pending its award the measures in dispute should not be applied.

69. Mr. SANDSTRÖM agreed with Mr. Pal, because he thought that three months was a very short period. However, the Commission could stress in its report the need for the arbitral commission to reach a settlement as quickly as possible.

70. Mr. KRYLOV could not support the United Kingdom Government's proposal and hoped that Sir Gerald Fitzmaurice would not press it.

71. Mr. SPIROPOULOS, though sympathizing with the United Kingdom Government's point of view, feared that it was virtually impossible to conclude the arbitral proceedings, during which each of the parties would probably wish to make an oral submission, in three months, particularly if certain scientific questions had to be examined as well. Nevertheless, he thought it was valuable to prescribe a fairly short time-limit, such as that in paragraph 3, allowing for an extension if necessary.

72. Mr. AMADO said that while he was not in favour of a substantive change in paragraph 3, it might be well to make the provision more stringent by ensuring that the time-limit could be extended only when strictly necessary.

73. Sir Gerald FITZMAURICE recognized the force of the objections to the United Kingdom Government's proposal and said that he would be satisfied if attention were drawn, in the comment, to the danger of delay if the arbitral commission was unable to reach a decision within the time-limit prescribed.

74. The CHAIRMAN suggested that the Special Rapporteur be asked to amend paragraph 3 in the sense suggested by Mr. Amado and to prepare a statement on the lines suggested by Sir Gerald Fitzmaurice for inclusion in the comment.

It was so agreed.

75. Mr. EDMONDS, introducing his new text for article 31, explained that paragraph 1 remained unchanged. The modifications he had proposed followed the United States Government's suggestions concerning the procedural and administrative provisions relating to the constitution of the arbitral commission.

The meeting rose at 1 p.m.

354th MEETING

Monday, 28 May 1956, at 3 p.m.

CONTENTS

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 31 (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 31 and the alternative text proposed by Mr. Edmonds.[1]

2. Mr. EDMONDS, in amplification of his brief remarks at the previous meeting[2] introducing the new text proposed by him for article 31, pointed out that some differences between States might be of a kind that required the arbitral commission to be entirely, or almost entirely, composed of technical experts. A dispute of another kind might require a commission of lawyers. He had therefore provided that the selection of arbitrators be made according to the nature of the dispute.

3. In the interests of prompt appointment, he had proposed that two members of the arbitral commission should be nominated by each of the parties to the dispute. That provision, he said, would also ensure that the remaining three members would be designated without delay; the existing procedure for nomination, as laid down in the Commission's draft, might result in much delay. In the event of disagreement between the parties, the remaining three members should be selected by the Secretary-General of the United Nations, the President of the International Court of Justice (ICJ), and the Director-General of the Food and Agriculture Organization (FAO) respectively. That too should make for greater flexibility, since both the President of ICJ and the Director-General of FAO would tend to select persons with special qualifications in the legal and technical fields.

4. Finally, he had added a paragraph dealing with the remuneration of the arbitral commission.

5. His text contained no fundamental changes; it was designed only to clarify the original article and to make certain that the arbitral process was carried out expeditiously.

6. Mr. FRANÇOIS, Special Rapporteur, doubted whether Mr. Edmonds' amendments were necessary. He particularly deplored the effect they would have of reducing the number of absolutely impartial arbitrators to three. It was true that national arbitrators tried not to act as the advocates of their governments, but it was almost impossible for them to be entirely disinterested; and as in fisheries disputes the interests involved were numerous and varied, it was desirable for the arbitral commission to include as many independent technical experts as possible. He also feared that Mr. Edmonds' provision that, in the event of disagreement between the parties, the Secretary-General, the President of the ICJ and the Director-General of FAO should choose the remaining three members without having to consult each other, would not be conducive to achieving a proper balance. He could agree to the parties' nominating one member each—that would be consistent with the Commission's draft on arbitral procedure—but with regard to the five other members, he thought that the Commission should retain the provisions adopted at its previous sessions, which would give some assurance that the arbitral commission would be a balanced one.

7. Faris Bey el-KHOURI asked whether Mr. Edmonds had taken account of the possibility of there being more than two parties to a dispute. If the several parties on one side did not agree among themselves, would each have the right to nominate two members of the commission? The point should be elucidated either in the article itself, or in the comment.

8. Mr. FRANÇOIS, Special Rapporteur, said that in such cases the parties on one side should nominate their two members, as provided in Mr. Edmonds' text, by agreement.

9. Mr. EDMONDS, observing that the point was an important one, said that nearly always, although there might be more than two parties, there were only two sides to a controversy. It would certainly not be equitable to allow each one of a group of States on one side of a dispute to nominate a member of the arbitral commission. His object, in that regard, was made clear in the first sentence of paragraph 3 of his text, reading: "Two members shall be named by the State or States on the one side of the dispute; and two members shall be named by the State or States contending to the contrary."

10. Faris Bey el-KHOURI asked what would happen if a group of such States failed to agree on the nominations.

11. Sir Gerald FITZMAURICE said that the answer to Faris Bey el-Khouri's question was given in the third sentence of paragraph 3 in Mr. Edmonds' text, where it was laid down that if within a period of three months the parties failed to make a nomination, it would be made by the Secretary-General of the United Nations.

12. Referring to the Special Rapporteur's observations, he expressed disagreement with the view that the Commission's original text would secure the appointment of the largest number of impartial experts, since, according to the terms of the first sentence of paragraph 2, there was nothing to prevent the two parties from agreeing to appoint three or more of their own nationals. He thought that in all probability they would agree to nominate at least two members each so that there would be only three neutral experts. Notwithstanding, the Commission's text had certain disadvantages.

[1] A/CN.4/SR.353, para. 56.

[2] *Ibid.*, para. 75.

13. The merit of Mr. Edmonds' text, on the other hand, lay in its drawing attention to the important point that in most disputes there was one major issue at stake, and that the parties tended to divide into two sides. The original text implicitly provided for the situation where there was more than one State on one side and where it would be inequitable for each to nominate members of the tribunal, by stipulating that if the parties failed to reach agreement the tribunal would be appointed by the Secretary-General, who would take into account the need for a balanced membership and the nature of the dispute. Perhaps Mr. Edmonds had been prompted to propose a change by the fear that the Secretary-General might find himself in a position of some embarrassment.

14. At the same time, although it was true that generally speaking there would be two sides to a dispute, there could be cases in which different points of view were held on one side, and would have to be represented on an arbitral commission. If a provision to meet such cases could be inserted in Mr. Edmonds' text, he would be abie to accept it.

15. Mr. EDMONDS said he would be prepared to insert a provision of the kind suggested by Sir Gerald Fitzmaurice.

16. Mr. SPIROPOULOS considered that the question was whether or not national arbitrators should be appointed in cases where the parties disagreed. Personally he did not favour their being appointed, because with very few exceptions and for very natural reasons they never took a contrary view to that of the government appointing them. Given that the parties to a dispute were able to submit their case through an agent, it was unnecessary to have national arbitrators and it would be far preferable for the commission to consist entirely of neutral experts.

17. Although he did not believe that the Secretary-General of the United Nations would exercise the functions conferred upon him in the original text in an arbitrary way, there was some merit in Mr. Edmonds' proposal concerning the designation of the remaining three members of the commission when there was disagreement between the parties.

18. Mr. PAL said that he had already had occasion to comment on article 31, paragraph 2,[3] of the present draft, and had objected to its acceptance on the grounds that it added stringency to the already rigorous provision that differences should be submitted to compulsory arbitration. The essence of arbitration was its voluntary character, and Mr. Edmonds' text was therefore a distinct improvement, because it left the parties at least some freedom of choice in the appointment of the arbitral commission. Judging by the difficulties experienced in reaching agreement even on the choice of one umpire in ordinary cases of arbitration, he thought that the Commission's present text, which required agreement of the parties on each and every one of the arbitrators, amounted to denial of choice to the parties. Furthermore, Mr. Edmonds had provided for the appointment of technical experts who would undoubtedly be needed for settling disputes concerning fisheries. Although he would have preferred the parties to have even wider powers in the selection of the arbitrators, coupled with appropriate safeguards to ensure an adequate number of impartial experts, he found Mr. Edmonds' text acceptable.

19. He could not subscribe to the view that only neutral arbitrators were capable of impartiality. If the Commission really believed that national arbitrators were so lacking in integrity, he saw no purpose whatsoever in establishing arbitral machinery at all. Confidence in justice was, indeed, the primary consideration in the administration of justice and it was always sought to be secured by giving the parties the choice of their own judges in matters of arbitration.

20. Although it was conceivable that there might be more than two States parties to a dispute, he believed that the differences themselves would centre on whether there was need for measures of conservation, and if so whether the measures proposed were appropriate. It should suffice to clarify that point in the comment and to allow for the nomination of more arbitrators if necessary.

21. Mr. SANDSTRÖM, referring to the question of impartiality, said that the important point was that the parties would have more confidence in the arbitral commission if it included one of their own nationals to expound their point of view during the proceedings. He had had personal experience of presiding over a tribunal dealing with disputes between employers and workers, consisting of two members appointed by each of the two groups and three appointed by the government. The tribunal, which had operated well, had won the respect and trust of both sides. He therefore saw no objection to allowing each of the parties to nominate one or two members.

22. The question raised by Faris Bey el-Khouri concerning cases in which there were more than two States parties to a dispute could be referred to the Drafting Committee.

23. Mr. HSU said that at its previous session the Commission appeared to have been influenced by the idea that arbitral commissions for settling fisheries disputes would be of a different character from traditional arbitral tribunals, because of the technical nature of the disputes in question. But all arbitral tribunals required expert advice. Hence he did not think that the provisions laid down at that session for the appointment of the arbitral commission were particularly sound. Apart from the provision that in certain circumstances the President of the ICJ and the Director-General of FAO might appoint a member each, which might not help matters, he favoured Mr. Edmonds' text, because it approximated more closely to the classical conception of an arbitral tribunal.

24. Although there might be several parties to a dispute, they were likely to take two sides, because the question at issue would in all probability be whether measures of conservation were necessary to obtain the maximum sustainable yield, and if so whether the measures taken should be binding on third parties.

25. Mr. SPIROPOULOS said that some provision analogous to that contained in Article 31. paragraph 5,

[3] A/CN.4/SR.353, para. 24.

of the Statute of the International Court of Justice must be made in Mr. Edmonds' text, in order to ensure that responsibility was placed somewhere for deciding whether there were several parties to a dispute in the same interest.

26. Faris Bey el-KHOURI said that it was not clear whether the commission's decision would be binding on all States, or only on those which were parties to the dispute.

27. If there were several States on one side of the dispute and they were unable to reach agreement on the members to be nominated, some States might withdraw from the arbitration proceedings altogether, in which case other proceedings might have to be initiated at a later stage.

28. Mr. PADILLA-NERVO said that the discussion had confirmed his contention that the arbitral provisions in the draft would give rise to many difficulties.

29. Personally he believed that the problem of there being several parties in the same interest had been exaggerated, because the questions whether conservation measures were necessary and what form they should take would naturally tend to create two sides.

30. On the other hand, the Commission must give its attention to the problem of how long and for what States the arbitral decision would be binding. Certain measures of conservation might become obsolete and should then cease to be enforceable.

31. Mr. EDMONDS observed that, although different parties on the same side might be relying on different grounds in seeking to achieve a certain result, there would nearly always be only one real issue in dispute. However, he would agree to provide for those cases where there was more than one issue.

32. In reply to Mr. Spiropoulos' he pointed out that there was no requirement in his text for the appointment of a national arbitrator. Indeed, there had been numerous instances of arbitral tribunals having none. Personally he did not think that they need necessarily be prejudiced.

33. He also stressed that, according to his text, by agreement the whole commission could be appointed by the parties. It was only when they failed to exercise that prerogative that the Secretary-General of the United Nations and others were authorized to act for them.

34. With regard to the point raised by Faris Bey el-Khouri as to whether the commission's decision would be binding on all States he said that States not parties to the arbitral proceedings could not be bound by the decision.

35. His text could be referred to the Drafting Committee so that an additional provision of the kind suggested by Sir Gerald Fitzmaurice could be incorporated.

36. Mr. HSU said that, since the most important person in any arbitral procedure was the umpire, one such official would act more efficiently than three.

37. In such technical issues, the advice of the expert was the most reliable guide. In that respect the text of Mr. Edmonds' paragraph 2 was sound.

38. Mr. ZOUREK observed that the Commission was in fact reviewing a question which had often been brought up at previous sessions, but without being adequately settled. The functioning of the arbitral commission had been discussed without taking into consideration the different types of case it should be competent to hear. If a dispute under article 26, for example, were submitted to the so-called arbitral commission because the various States concerned had been unable to reach agreement, it would be impossible to resolve such a conflict of interests on the basis of existing international law.

39. The CHAIRMAN stressed that the draft for the General Assembly must be general in its outline of the composition, organization, and procedure of the arbitral commission. The Commission should not discuss the technical aspects of possible disputes, which should be referred to a body having special competence in the matter. The broad principles for compulsory arbitration had been established in article 31, and since there seemed to be some measure of support for Mr. Edmonds' proposal—which would undoubtedly improve the 1955 draft —the article could be referred to the Drafting Committee, to which Mr. Edmonds might fittingly be appointed.

It was so agreed.

Article 32

40. The CHAIRMAN said that Mr. Edmonds had submitted a proposal for article 32, which read as follows:

1. The arbitral commission shall, in each case, make the determinations and apply the criteria listed in the appropriate articles.

2. The commission may decide that, pending its award, the measures in dispute shall not be applied.

41. The first sentence of paragraph 1 of the Commission's draft article could be adopted, but until articles 26-28 and 30 had been discussed, it would be difficult to take a decision on the second sentence; the same applied to paragraph 2. It would therefore be advisable to defer consideration of the article and meanwhile to leave it in the hands of the Drafting Committee.

It was so agreed.

Article 33

42. The CHAIRMAN said that Mr. Edmonds had submitted a proposal for article 33 which read as follows:

1. The decisions of the arbitral commission shall be by a simple majority of four votes and shall be based on written or oral evidence submitted by the parties to the dispute or obtained from other qualified sources.

2. The decisions of the arbitral commission shall be binding upon the States concerned. If the decision includes a recommendation, it shall receive the greatest possible consideration.

43. Mr. SANDSTRÖM said that the United States comment on article 26 (A/CN.4/97/Add.3, paragraph 23) was linked with the provisions of article 33, and the question of the role of the arbitral commission was one that should be discussed. He understood that the United States considered that the arbitral commission was restricted to consideration of the conservation proposals of the parties to the dispute, and could not take the initiative in making proposals itself. In his interpretation

it had been the Commission's intention in the 1955 draft that the arbitral commission would give binding decisions only on the proposals of the parties, but would have the power to make recommendations to the parties even if they went beyond those proposals. But the position was not quite clear and ought to be clarified.

44. After a short discussion Mr. FRANÇOIS, Special Rapporteur, said that, in drafting the phrase concerning recommendations in article 33, the Commission had had in mind that the arbitral commission should not only impose conservation measures on parties, but should add some recommendations on the way in which they should be executed.

45. Mr. EDMONDS suggested that Mr. Sandström was perhaps confusing the United States Government's comment, in so far as recommendations as to conservation were concerned, with what was stated in article 33. There might be recommendations in an arbitral decision which had nothing to do with conservation in its technical aspects. The arbitral commission should not be a technical body either charged with the duty or with competence to recommend conservation measures. It could, however, make recommendations of a non-technical conservation character for the settlement of a dispute. He asserted that article 26 and the provisions of article 33 with regard to recommendations were not necessarily contradictory.

46. Mr. SCELLE shared some of Mr. Sandström's doubts. The view of governments that it was the prerogative of States to submit proposals for regulations was understandable. If two States proposed different regulations, the arbitral commission would decide between them, but governments were hardly likely to accept regulations that neither party had proposed. They would consider that such a regulation was not a decision.

47. The so-called arbitral commission was quite unlike a domestic administrative tribunal, which could impose its own regulations. It was not an arbitral tribunal, for its powers were far more restricted, but was more in the nature of a conciliation board. In a dispute, say, over riparian rights, an administrative tribunal could impose on both parties such regulations as it saw fit. A dispute between States, however, could be settled only on the basis of claims put forward by the parties to the dispute. That fact did not seem to emerge clearly from the article as drafted.

48. Mr. AMADO failed to see the point of the second sentence of the article; it seemed to be a quite unnecessary appendix to the categorical statement in the first sentence, which conveyed the essence of the question—namely, the binding nature of the decision of the arbitral commission. Moreover, the recommendations to which Mr. Sandström had referred had no relevance in the context of article 26. The United States proposal, in its enumeration of criteria, applied to all the articles.

49. The CHAIRMAN, speaking as a member of the Commission, recalled that at its seventh session the Commission had replaced the system elaborated in 1953 [4] by a different system, particularly in respect of the substitution of arbitral procedure for the permanent international body.

50. With regard to Mr. Amado's point, his own interpretation of the text was that the arbitral commission could not only take decisions, but also make recommendations, the difference being that the former were mandatory and compliance with the latter optional. They were similar only in that they were resolutions of the arbitral commission.

51. Mr. FRANÇOIS, Special Rapporteur, suggested that the comments of Mr. Sandström and Mr. Scelle, however interesting, had no particular relevance to article 33, for the Commission, in inserting the recommendations clause, had not had in mind the other question of the arbitral commission's decisions being bound by the claims of the parties. The arbitral commission was not bound to restrict itself to proposals put forward by one or other of the parties, and was perfectly competent, if it thought fit, to initiate proposals itself. That was why it had been given the title of " arbitral commission " and not " arbitral tribunal ", although the epithet was perhaps misleading. The concept behind its function was what he might perhaps describe as " compulsory conciliation ". He would be quite willing to meet Mr. Amado's point by deleting the second sentence.

52. Mr. SCELLE recalled that, prior to the Commission's study of the question, the only means of settling disputes in such matters had been by mutual agreement. The Commission had taken a step forward by proposing the setting up of a conciliatory organ, which, as he had pointed out earlier, was not strictly arbitral in its functions, for in arbitration the decision was taken on the basis of law, whereas the proposed arbitral commission would proceed on a basis of regulation. It would arrive at its decision independently of the attitude of the States parties to the dispute. Neither State claimed a positive right based on international law, but each claimed that it possessed a means of regulating fishing in a certain area and asked the arbitration commission to decide whether such regulation was permissible subject to certain conditions. It was the difference between the application and the establishment of a juridical provision. For that reason he himself would favour giving regulating powers to a duly authorized United Nations technical organ.

53. Mr. SALAMANCA pointed out the added complication that whereas, at the seventh session, when the chapter on fishing had been added, the problem had been discussed in general terms, during the present discussion the Commission had turned to points of detail which, not unnaturally, had given rise to difficulties. Juridically speaking, there was a great difference between article 31, which referred merely to a decision of the arbitral commission, and article 33, which added that its recommendations should receive the greatest possible consideration. The difficulty of interpretation might be resolved by drafting, but on the whole he agreed with Mr. Amado.

54. Mr. AMADO said that the second sentence of article 33 was very like the kind of declaration that the Commission was reluctant to include in an article and

[4] Officials Records of the General Assembly, Eighth session, Supplement No. 9 (A/2456), p. 17.

usually disposed of in the comment. The fundamental necessity was for the arbitral commission to decide whether the proposed measures were based on justice. Once that had been decided and the decision taken, recommendations became otiose.

55. Mr. SANDSTRÖM said that between its fifth and seventh sessions the Commission had made important changes in its approach to the question; having abandoned the idea of a permanent international body, it had adopted the concept of an arbitral commission to be set up in each specific case of dispute. As to the recommendations in article 33, they were to some extent inevitably out of line with the other activities of the arbitral commission. The comment, at least, should make the interpretation to be placed on the article perfectly clear.

56. Mr. EDMONDS said that if the text of the article were read together with the comment it would be seen that there was no inconsistency with the normal procedure in domestic law, in which the judgment, while providing the final settlement of a dispute, would often include a recommendation with regard to the enforcement of the right it had recognized. He would deprecate granting the arbitral commission competence to recommend measures of conservation, for the Commission had never had that kind of body in mind. Moreover, governments had not agreed to any such step. There was therefore no ground for construing the text as allowing the arbitral commission to initiate or to make binding any measure of conservation. His proposal aimed at stressing the necessity for stating clearly the criteria adopted in each case. He would, however, agree to the deletion of the second sentence of the article.

57. Mr. KRYLOV suggested that, in view of the gradual broadening of the concept of the means for the settlement of disputes since the Commission's fifth session, the Special Rapporteur's lapidary phrase "compulsory conciliation" be examined with a view to its definition by the Sub-Committee.

58. Mr. LIANG said that the second sentence of the article had been discussed at length at the previous session.[5] The recommendations referred to did not stand on their own, but were dependent on a decision of the arbitral commission. The comment brought out that the amplification by recommendations was essentially part of the decision.

59. As to the United States comment, it had never been contended that the decision of the arbitral commission should include measures of conservation independently of the specific issue. As he saw it, the United States Government was anxious to make that point quite clear. The second sentence, however, might well be deleted.

60. Mr. SPIROPOULOS said that admittedly there was more than one possible interpretation of the text of article 33. To find a satisfactory solution, the Commission should perhaps discuss the other articles of the draft in order to decide whether to adopt the criteria proposed by Mr. Edmonds. If all the articles established clear criteria, as did article 29, the situation would be much simpler. But articles 26 and 28, for instance, established no criteria at all.

61. Most of the cases which came before the arbitral commission, however, would be disputes over concrete issues, which would be settled by a decision of the commission. In due course, the commission's decisions on disputed issues of that kind would establish a body of case law, and that, added to the issues in which there was no dispute, would then constitute a set of regulations for fishing.

62. The CHAIRMAN observed that the regulating powers of the international authority which the Commission had proposed in the draft adopted at its fifth session[6] had now been transferred to a compulsory arbitral commission, which could enact regulations by virtue of articles 26 and 27, or could confine itself to rendering a binding decision and in addition make recommendations.

63. Mr. SCELLE said it was difficult to believe that States would be prepared to accept a specialized agency's making regulations. He believed that the three draft articles adopted at the fifth session were clear, simple and bold and he appealed to the Commission to revert to that text and to abandon the provisions agreed upon at its seventh session. Under those provisions the functions of the international authority were given over to a compulsory arbitral commission, with the result that even if an arbitral settlement could be reached between two States, a whole series of arbitral proceedings between other States would inevitably become necessary.

64. Sir Gerald FITZMAURICE said that there were two types of question which could be referred to the arbitral commission. First, unilateral measures promulgated under articles 25 and 29 and challenged by another State. There, the commission would only need to decide whether those measures were justified or not and would not be called upon to fulfil regulating functions of any sort. Secondly, recourse might be had to the arbitral commission if, under articles 26 and 27, a number of States had tried and failed to reach agreement on conservation measures. There would then be no measures in existence and the commission would have to decide between various alternative proposals. In the text adopted at the previous session, the question whether the arbitral commission could propose other measures of its own had been left open. Mr. Edmonds was seeking to tie the arbitral commission to the proposals put forward by the parties, and though it was probable that in fact its decision should be based on those proposals, he doubted whether such rigidity was really necessary and whether the Commission's original text needed modification on that point.

65. He had no strong views as to whether or not the second sentence in article 33 should be retained. The question was not of great moment, because in each case the commission was called upon to reach a decision and it would obviously bear in mind any matters on which a recommendation might be necessary.

[5] A/CN.4/SR.305, paras. 108, 109 and A/CN.4/SR.306, paras. 8-24.

[6] *Official Records of the General Assembly, Eighth session, Supplement No. 9* (A/2456), p. 17.

66. Mr. PAL did not think that the retention or deletion of the second sentence in article 33 would meet the United States Government's comment on article 26, paragraph 2. It was significant that the United States Government, when commenting on article 33, had made no observation on that sentence. It did not take the sentence as having any important bearing on the question raised.

67. Perhaps Sir Gerald Fitzmaurice had over-simplified the question of whether or not the decision should be based on the measures suggested by the parties. Even in the case of measures promulgated under articles 25 and 29, the subject of the dispute might be the denial for any necessity for conservation measures and also of the adequacy or justification of the particular measures adopted. It the arbitral commission concluded that measures were necessary, but that those adopted did not fulfil the conditions laid down in article 29, paragraph 2, would it have completed its task or should it also decide what measures were needed? Then again, under article 26 the disagreement might be on the necessity for any conservation measures and also on the measures suggested by the several States. The arbitral commission would then be invited to settle the dispute, which should mean settling the disagreement. Would it suffice for the arbitrators to declare the necessity of conservation but reject the measures hitherto suggested? Should they or should they not take a further decision as to the appropriate conservation measures? Would the disagreement be settled without such further decision? If such decision were permissible it would be a binding decision, though presented in the form of a recommendation.

The meeting rose at 6.30 p.m.

355th MEETING

Tuesday, 29 May 1956, at 9 a.m.

CONTENTS

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. 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 33 (continued)

1. The CHAIRMAN said that it was necessary to settle the substantive question of whether the arbitral commission had power only to take decisions of a judicial kind on points in dispute, or whether its power extended to laying down regulations. The question might be settled without prejudice to the actual wording of article 33 or to the question of the arbitral commission's power to make recommendations.

2. Mr. HSU said that if the arbitral commission's recommendations were merely intended to facilitate the enforcement of its decisions, there was no need to refer to them in the text of the article. If, however, its recommendations were to deal with broader problems not strictly legal in character, the article must contain a separate sentence specifying that the arbitral commission had the power to make such recommendations.

3. Mr. ZOUREK observed that he had already expressed his opposition to compulsory arbitration as a method for the settlement of disputes in that field. He had several times made it clear that arbitration in the ordinary sense of the term was not involved and practically all the members who had spoken had admitted that that was correct. In that case, it would be wiser not to describe the body in question as " an arbitral commission " but to give it some other name, such as its original title of " board of experts ".[1]

4. Since States would wish to be clear as to its exact powers, it was essential to decide whether the arbitral commission should have the power to make recommendations, or rather, to propose solutions, in the absence of a request from the parties to the dispute. The United States Government in its comments had opposed such a suggestion, considering that the arbitral commission should have no power to initiate proposals unless requested to do so.

5. Faris Bey el-KHOURI said that the conservation of the living resources of the sea was a matter not of private rights but of public property rights of concern to all. Since arbitration in municipal law was reserved for disputes involving private rights, disputes regarding public property rights being settled solely in courts of law, he still considered that disputes relating to the conservation of the living resources of the sea should be referred to the International Court of Justice. Such a solution could meet with no objection from States and would avoid all the difficulties arising out of the complexity of arbitral procedure. He feared that the adoption

[1] A/CN.4/SR.300, para. 1.