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A/CN.4/SR.355

Summary record of the 355th meeting

Topic:

Law of the sea - régime of the high seas

Extract from the Yearbook of the International Law Commission:-

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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.

by the Commission of a system of arbitration for public property rights would be adversely criticized by jurists all over the world. He did not wish to oppose the solution favoured by the majority of the Commission but would abstain from voting on article 33.

6. Mr. EDMONDS said that if it was the intention to put the matter to a vote at that stage, he wished to make a formal proposal to delete the last sentence of the article in the 1955 draft and in his own revised proposal, according to which the arbitral commission had the power to make recommendations.

7. Mr. AMADO considered that the various texts of article 33 should be referred to the drafting committee in the same manner as the text of previous articles, without any vote being taken. The provision regarding recommendations was not a very important one. Moreover, the phrase " they (the recommendations) shall receive the greatest possible consideration ", sounded rather weak. If so important a question as the manner in which the arbitral commission should be constituted could be simply referred to the drafting committee without a vote, surely the question of the power to make recommendations could be too.

8. Mr. HSU said that there could be only one kind of decision by an arbitral commission and that was a categorical one. A vote could however be taken on the question whether the arbitral commission should have the additional power of making recommendations. It would be quite harmless and indeed helpful to give it such a power, which would not conflict with the provisions of article 27.

9. The CHAIRMAN said that he had perhaps not made himself quite clear. The question to be decided by vote was whether the Commission should have the power merely to settle disputed points or should also be able to lay down new regulations. In both cases a decision and not a recommendation would be involved. He felt that the Commission should decide that question, regardless of whether the principle was to be included in the article or explained in the commentary.

10. Mr. FRANÇOIS, Special Rapporteur, wondered if the moment was ripe to settle the question. Mr. Edmonds, in his revised proposals, had put forward certain criteria as a basis for arbitration and it would be difficult to take any decision regarding article 33 until the Commission had reached a decision on those criteria. He therefore suggested that there should be a general discussion on articles 26 to 30, after which they could be referred not to the drafting committee, but to some other specially established committee which would frame proposals.

11. Mr. SANDSTRÖM was also opposed to voting at that stage on the nature of the arbitral commission's decisions. Article 33 in the 1955 draft was framed on the same basis as article 3 in the 1953 draft [2] and no definite proposal had been made for limiting the powers of the arbitral commission. The whole question was one of drafting and it would be for the drafting committee to decide whether the Commission's ideas were adequately expressed in either the article or the commentary.

12. Mr. SPIROPOULOS observed that, if a decision were to be deferred, there was a danger that the discussion might be repeated. The point at issue might be clarified by taking a concrete case. If a State objected to measures taken by a coastal State under article 29 and the dispute were brought before the arbitral commission in accordance with article 31, the arbitrators' first task would be to decide whether there was an imperative and urgent need for measures of conservation. If no such need were proved, the dispute would be settled in favour of the plaintiff. If, on the other hand, such need were proved, the arbitrators would then have to decide whether the measures adopted were based on appropriate scientific findings. Should the arbitrators decide that they were, their decision, in favour of the defendant, would be an ordinary judicial one. It was in the event of their deciding that the measures were not correct ones that a dilemma would arise. Should the arbitrators do no more than give a legal ruling, in the manner of the International Court of Justice, or should they go farther and dictate what measures they considered to be correct? Naturally they would not take such a course unless requested to do so by the plaintiff State.

13. Replying to Mr. Edmonds, he said that if the Commission adhered to its previous interpretation of the powers of the arbitral commission, any new regulations issued by the arbitrators would have to be binding on the States concerned. The arbitrators, after deciding that the measures were not based on appropriate scientific findings, could, of course, impose no new regulations but make recommendations based on appropriate scientific findings.

14. Mr. EDMONDS remarked that no State would be willing to resort to arbitration if there were any risk of its being presented with an entirely different set of regulations. The only decision which States would be willing to accept would be a ruling on the points actually in dispute.

15. Mr. SPIROPOULOS said that he was not stating his own opinion but merely seeking to clarify the issues involved.

16. Mr. AMADO pointed out that, whereas the authority envisaged under article 3 of the 1953 draft would have powers of regulation, no such provision was made in the 1955 draft with regard to the arbitral commission. It was quite impossible to read any powers of regulation into the provisions of article 33 as it stood.

17. Sir Gerald FITZMAURICE said that Mr. Spiropoulos' concrete illustration had helped to clarify the issue. As far as decisions were concerned, the role of the arbitral commission must be confined to deciding points at issue between disputing parties. It would, however, always have the right to make recommendations.

18. Mr. PADILLA-NERVO said that there appeared to be some confusion concerning the powers to be given to the arbitral commission which had taken the place of

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

the permanent international authority within the framework of the United Nations envisaged by article 3 of the 1953 draft. From the remarks of the Chairman and the Special Rapporteur, it appeared that the powers of regulation enjoyed by the international authority as an administrative organ were to be transferred to the arbitral commission. If members were agreed on that point, the fact would have to be clearly specified in article 33. If, however, the existing wording of article 33 were retained, it was quite clear that an arbitral commission appointed by the parties to the dispute to deal with concrete issues would have no power to impose regulations, but only to decide the question referred to it by the parties, except naturally in the case where the parties themselves expressly asked the Commission to recommend or impose conservation measures.

19. The situation envisaged by article 26 was a special one, since it was there assumed that no measures had been adopted and thus that no regulations existed. If, however, the parties were able to agree on the appointment of arbitrators, they would presumably be able to agree on the questions to be submitted to the arbitrators for decision. He would go even farther and say that when the parties submitting a dispute to arbitration requested the arbitral commission to propose new regulations if necessary, it was open to them to agree to accept the new regulations. Failing such agreement, however, the arbitral commission could do no more than pronounce a decision on the points referred to it.

20. A more serious problem was whether the decisions of the arbitral commission were to be binding on States not parties to the dispute. Article 3 of the 1953 draft had described all States as under a duty to accept as binding upon their nationals the system of regulations prescribed by the international authority. Article 33 of the 1955 draft, however, merely stipulated that the decisions of the arbitral commission would be binding on the States concerned. It was essential to be quite clear as to the meaning of the term " the States concerned ".

21. The Commission should begin by settling the fundamental question whether the arbitral commission should be given administrative powers of regulation. If it were to have such powers, the existing wording of article 33 would be inadequate. He, personally, considered that the Commission should not be given such powers. Once the Commission was quite clear as to what it wanted, the drafting of the article would be a simpler matter.

22. Faris Bey el-KHOURI inquired whether the arbitration would be based on a *compromis*.

23. Mr. SPIROPOULOS thought that it would not.

24. The CHAIRMAN said that it might be so if the parties agreed on a *compromis*. Failing such agreement, article 31, paragraph 2, would apply and would constitute the *compromis*.

25. Faris Bey el-KHOURI said that it was essential for the arbitrators to know what their terms of reference were. He wondered whether it would be the task of the Secretary-General of the United Nations to draw up the *compromis*. The complexity of the question bore out his previous contention that reference of disputes to the International Court of Justice would be the simplest solution.[3]

26. The CHAIRMAN replied that the powers of the arbitral commission would be established by the articles which the Commission was in course of drafting.

27. It emerged from the discussion that there were five points on which a decision was required: first, whether the arbitral commission should have power to make binding decisions on points in dispute—a question which could hardly be in doubt; secondly, if the parties requested the arbitral commission to lay down new regulations in the event of the regulations under dispute proving unacceptable, whether those regulations should also be binding; thirdly, whether the arbitral commission had in any case the right to make recommendations; fourthly, whether those recommendations should be binding; and fifthly, whether the decisions of the arbitral commission would be binding *erga omnes*.

28. Replying to Mr. Spiropoulos, he said that the question of the arbitral commission's power to impose regulations would be settled by the decision on the second point.

29. Mr. SPIROPOULOS observed that regulations issued at the request of the parties would obviously be binding on them. It was quite another question, however, whether the Commission had the power to make new regulations.

30. Mr. EDMONDS said that, if the Commission was to vote on article 33, he wished to move the following amendments to the article as it stood in the 1955 draft or in his own proposal: to substitute the words " binding on the parties to the arbitration " for the words " binding on the States concerned ", and to delete the last sentence of the article concerning the power of the arbitral commission to make recommendations. Should the Commission decide, however, to retain the last sentence, he would propose adding the following sentence at the end of the comment: " However, such a recommendation should not include any regulation in regard to conservation and would have no binding force."

31. The CHAIRMAN suggested that Mr. Edmonds might move his proposals as amendments when the Commission came to vote on the points he had listed.

32. Mr. EDMONDS observed that the Commission must vote on a definite text: it could not vote on interpretations.

33. The CHAIRMAN said that it was impossible to formulate a text until the question of principle had been decided. The purpose of his five points had been to facilitate that task.

34. Mr. PAL said that those members who had favoured compulsory arbitration now seemed to be retreating from that standpoint by suggesting that it was open to the parties to refer only part of a dispute to the arbitral commission.

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[3] See para. 5 above.

35. The CHAIRMAN, speaking as a member of the Commission, pointed out that compulsory arbitration ended with the settlement of the dispute, but it was now being proposed—and he could support such a move—to give legislative functions to the arbitral commission.

36. Mr. PAL emphasized that, once the principle of compulsory arbitration had been accepted, the arbitral commission must be empowered to settle the whole dispute, since otherwise there was a possibility of stalemate. If, for example, the parties submitted only the questions of, first, whether the measures proposed were at all necessary, and, secondly, whether they were adequate, and the commission decided the first question in the affirmative, but the second in the negative, it would not be entitled to go farther and decide what would be adequate measures.

37. Mr. EDMONDS disagreed with the Chairman's third point that the commission could, in addition to rendering its decision, put forward optional recommendations as to what measures would be most appropriate. He had understood from the comment that the recommendations would concern the way in which the parties could make use of their rights; in other words he had interpreted the word " recommendation " as being used in the sense of an interlocutory judgment in municipal law.

38. The CHAIRMAN said that for the time being all the Commission had to decide was whether or not the arbitral commission should be empowered to make recommendations; the subject-matter of the recommendations was a separate question.

39. Mr. EDMONDS explained that he would be satisfied either with the text of article 33 and its comment as they stood, or with the deletion of the second sentence in the article regarding recommendations or with the addition he had proposed at the end of the comment. As he saw it, any of those solutions would have the same result; his only concern was that there should be no misunderstanding of the Commission's intentions.

40. The CHAIRMAN said that there could be no doubt that recommendations would not be binding.

41. He then put to the vote the proposal that the arbitral commission's recommendations could contain proposals concerning conservation measures.

The proposal was adopted by 7 votes to 1, with 6 abstentions.

42. The CHAIRMAN, speaking as a member of the Commission, considered that there could be no question of either the arbitral commission's decisions or its recommendations being binding upon States not parties to the dispute.

43. Mr. SALAMANCA said that there was another important point to consider—namely, the position of another State whose nationals started to fish in an area where conservation measures had already been the subject of arbitral proceedings.

44. The CHAIRMAN considered that that point could be covered in the comment on article 33.

45. Mr. SPIROPOULOS believed that some provision was necessary to allow for the revision of conservation measures.

46. The CHAIRMAN then invited the Commission to revert to the discussion on article 25.

Article 25 (resumed from the 351st meeting).

47. The CHAIRMAN, observing that article 25 had already been discussed at length, invited the Commission to consider Mr. Pal's amendment for the addition of the words " unless the area in question is contiguous to the coast of another State " [4] at the end of the article.

48. Mr. PAL said that he was prepared to add some words to meet the objection that, if his amendment were accepted, a State or States vitally interested in fishing in an area contiguous to the coast of another State would be unable to adopt any conservation measures when the coastal State failed to do so. Such an addition, however, was not strictly necessary if only one State was concerned, because in the absence of conservation measures by the coastal State the former could, without adopting conservation measures, take the necessary steps to prevent depletion of stocks. The only difficulty that could arise would be if other States came to fish in the same area, and in the absence of conservation measures there were no means of putting any restraint on them. He had no objection to providing for such a contingency.

49. If non-coastal States found unilateral measures taken by a coastal State unacceptable they already had a remedy in article 29.

50. Once the special interest of the coastal State had been admitted and the safeguards contained in article 29 imposed, he believed there could be no objection to his amendment.

51. Mr. SPIROPOULOS observed that, if a coastal State did not promulgate conservation measures—and it was under no such obligation—any State, however distant, fishing in the area contiguous to its coast was entitled to do so. Of course, if the coastal State had promulgated regulations, other States were bound to respect them or to refer their case to arbitration.

52. Sir Gerald FITZMAURICE noted that Mr. Pal had recognized the justice of the argument that, if the coastal State failed to make regulations when they were needed, other States must be allowed to make regulations for their own nationals, otherwise there would be a serious gap in the whole scheme of conservation. He therefore wondered whether Mr. Pal need maintain his amendment. It would create great administrative difficulties, because there was no definition of what was meant by the area contiguous to the coast, and it would be impossible to know in which particular part of the high seas regulations could not be established by non-coastal States. In terms of conserving a particular stock of fish, the amendment was contrary to the reason of the thing and would be unworkable in practice. Moreover, it was unnecessary, because the rights of the coastal State were already safeguarded in article 29, and if the coastal State adopted no measures itself it could challenge those of others.

[4] A/CN.4/SR.350, para. 36.

53. Mr. PAL failed to understand how his amendment concerning the measures taken in an area contiguous to the coast of a State could be regarded as contrary to reason. At the moment, under article 25, a State fishing in such an area could promulgate conservation measures without being subject to any restriction, but if the coastal State then inaugurated conservation measures, as it was empowered to do under article 29, which of the two would prevail before the question had been settled by arbitration? In his opinion the provisions of article 25 were subject to the provisions of article 29, and therefore the coastal State had the prior claim to impose its regulations.

54. The CHAIRMAN wondered whether that point might not be elucidated in the comment.

55. Sir Gerald FITZMAURICE emphasized that, under articles 25 and 29, the State adopting the conservation measures could define the area in which they applied, but Mr. Pal was proposing a general prohibition on non-coastal States promulgating measures in an area which *ex hypothesi* could not be defined.

56. He was unable to subscribe to the view that the Commission had ever contemplated measures of the coastal State, adopted after the measures of another State and applicable to the same area, prevailing over the latter. What it had laid down was that the coastal State could challenge such measures before an arbitral tribunal. That was the effect of the draft as it stood at present and, if Mr. Pal's entirely different interpretation were accepted, chaos would result.

57. Mr. SANDSTRÖM said that up to a point he could agree with Sir Gerald Fitzmaurice. It a State, whose nationals alone fished in a certain area, adopted conservation measures, and the coastal State disagreed with them, the coastal State must refer the case to arbitration and could only institute other regulations provisionally if there was an imperative and urgent need as laid down in article 29.

On being put to the vote Mr. Pal's amendment was rejected by 5 votes to 1, with 8 abstentions.

58. Mr. PADILLA-NERVO explained that, despite his support of Mr. Pal's amendment during the discussion, he had not voted for it, because according to his understanding of the Chairman's remarks it would be made clear in the comment that, if the area in which a State were to take conservation measures under article 25 were to coincide with an area in which a coastal State adopted other measures under article 29, the latter would prevail.

59. The CHAIRMAN recalled, with reference to Mr. Pal's proposal, that the draft had restricted any reference to criteria for the adoption of conservation measures to article 29. Mr. Edmonds' proposals would extend such criteria to articles 26 and 27. When article 26 was taken up, it would be advisable first to settle the question of whether the provisions of that article called for the inclusion of such criteria.

60. The CHAIRMAN then invited the Commission to consider Mr. Zourek's amendment [5] to substitute the words " shall adopt " for the words " may adopt " in article 25.

61. Speaking as a member of the Commission, he pointed out that the provisions of article 25 might, even with the text as it stood at present, become mandatory if any State invoked the provisions of article 30. He therefore believed that if Mr. Zourek's amendment were to be adopted the words "when necessary " should be inserted before the words " for the purpose of conservation " in article 25, so that there should be no contradiction with article 30.

62. Sir Gerald FITZMAURICE agreed that the proviso suggested by the Chairman must be incorporated if Mr. Zourek's amendment were adopted. The change would also affect article 26, since it would be inconsistent to make it obligatory on the State whose nationals alone fished in a particular area to adopt conservation measures and not to impose the same requirement if more than one State were concerned—the case dealt with in article 26. Personally he would prefer article 25 to remain unchanged, because in the first case, if a State were fishing in an area, it could be left to that State to decide whether measures were necessary, and in the second case measures could be considered at the request of any of the States concerned.

63. Mr. SANDSTRÖM considered that Mr. Zourek's amendment went too far. He asked whose responsibility it was to ensure that the State in question did adopt the necessary measures.

64. Mr. ZOUREK, replying to Mr. Sandström's objection, said that if the provisions of article 25 were to remain permissive, that would be tantamount to condoning over-fishing or fishing in a manner prejudicial to the general interest in conservation. If the real object was to obtain the optimum sustainable yield, his amendment was necessary and would be consistent with article 30. He did not think that any State whose nationals were engaged in fishing in a certain area could fail to be concerned to protect the resources of that area from being wasted, harmed or exterminated, and it would be that State itself which would make itself responsible for seeing that the measures were complied with by its nationals.

65. Mr. SPIROPOULOS said that if the primary purpose of the draft was conservation, Mr. Zourek's amendment should be accepted. But if the primary purpose was to safeguard the interests of each State it was unnecessary because, under article 30, any State could ask for the adoption of the necessary measures of convervation, even if its nationals did not fish in the area concerned.

66. The CHAIRMAN, speaking as a member of the Commission, pointed out that the answer to Mr. Spiropoulos' question was contained in paragraph 3 of the preamble to the draft (A/2934, p. 17) from which it was clear that the aim was conservation in the general interest of mankind. Account had thus been taken of the potential interest of States in fishing grounds where their nationals did not fish at present.

[5] A/CN.4/SR.350, para. 55.

67. Considering the provisions of article 30, he did not think that Mr. Zourek's amendment would greatly alter the draft.

68. Mr. AMADO viewed Mr. Zourek's amendment, which would certainly be unacceptable without the proviso suggested by the Chairman, with some hesitation, because he disliked mandatory provisions and believed that States would, in their own interests, enact conservation measures if they were needed.

69. Mr. ZOUREK found Mr. Amado's objection unconvincing and pointed out that many of the articles in the draft concerning the regime of the high seas contained provisions which imposed obligations on States.

70. Faris Bey el-KHOURI pointed out that an obligation implied sanctions in the event of non-compliance, for which, however, no provision had been made.

71. Mr. SPIROPOULOS suggested that Mr. Zourek's proposal would entail the combination of articles 25 and 30, since under article 25 as drafted the conservation measures adopted by a State could not be challenged.

72. The CHAIRMAN put to the vote jointly Mr. Zourek's amendment to substitute the word " shall " for the word " may " and his own amendment to insert after the words " such areas " the words " when necessary ".

Both Mr. Zourek's and the Chairman's amendments were adopted by 7 votes to none, with 7 abstentions.

Article 25 as thus amended was adopted.

Article 26

73. Mr. FRANÇOIS, Special Rapporteur, referring to the comments by governments (A/CN.4/97/Add.3, paragraphs 16 to 31), said that, in view of the rejection of Mr. Pal's amendment to article 25 [6] he hoped that the Indian Government's proposal with regard to the 100-mile belt would not be pressed.

74. The Icelandic Government's comments, which covered also the other articles on conservation, rejected the proposed system because of its failure to grant the coastal States exclusive fisheries jurisdiction. He wished to draw attention to a correction to paragraph 20 of the addendum to his report, where, inadvertently confusing the Indian and the Icelandic Governments' comments, he had referred to " areas extending 100 miles from the coast "; since the Icelandic Government had not specified the breadth of the area in question, the passage should read " a great distance from the coast ". The change did not, however, affect the issue.

75. With regard to the United States Government's comments, Mr. Edmonds had submitted a new draft for the article reading as follows:

1. If the nationals of two or more States are engaged in substantial fishing of the same stock or stocks of fish in any area or areas of the high seas, these States shall, at the request of any of them, enter into negotiations in order to prescribe by agreement the measures necessary for the conservation of such stock or stocks of fish.

2. If these States do not, within a reasonable period of time, reach agreement upon the need for conservation or as to the appropriateness of a proposed conservation measure, any of the parties may initiate the procedure contemplated in article 31, in which case the arbitral commission shall make one or more of the following determinations, depending upon the nature of the disagreement:

(a) Whether a conservation measure or measures are necessary to make possible the maximum sustainable productivity of the particular stock or stocks of fish;

(b) Whether the measure or measures proposed are appropriate for this purpose, and if so which are the more appropriate, taking into account particularly:

(1) The expected benefits in terms of maintained or increased productivity of the stock or stocks of fish;

(2) The cost of their application and enforcement; and

(3) Their relative effectiveness and practicability.

(c) Whether the specific measure or measures discriminate against the fishermen of any participating State.

3. Measures considered by the arbitral commission under paragraph 2 *(b)* of this article shall not be sanctioned by the arbitral commission if they discriminate against the fishermen of any participating State.

76. He doubted the value of inserting in paragraph 1 the word " substantial " before " fishing ". " Fishing " already carried the implication of substantial, which word in itself was open to the objection of being liable to individual interpretation.

77. With regard to the proposal to introduce the qualification " the same stock or stocks " of fish, he would quote the case of two States not fishing the same stock, but where conservation measures taken by one State might threaten the interests of the other—e.g., by the use of nets of a smaller mesh. If the United States Government would agree to recognition of that case, which was by no means theoretical, it could be made clear in the comment.

78. The South African proposal, which he accepted, was a drafting point only, while the Yugoslav proposal fell as the result of the lack of support for the Yugoslav proposal in respect of article 25.[7]

79. Mr. EDMONDS said that the purpose of the proposed insertion of the word " substantial " was to restrict fishing to parties engaged in fishing regularly and substantially rather than incidentally and experimentally. He agreed that the epithet was not entirely free from vagueness; it did, however, complete the text.

80. As to stocks, the proposal was based on a conclusion in the report of the Rome Conference that a convention should cover " one or more stocks of marine animals capable of separate identification and regulation, or a defined area, taking into account scientific and technical factors, where, because of intermingling of stocks or for other reasons, research on and regulation of specific stocks . . . was impracticable ".[8] However, he would

[6] See para. 57, above.

[7] A/CN.4/SR.350, para. 31.

accept the Special Rapporteur's proposal to meet that point by a reference in the comment.

81. With regard to the listing of criteria in paragraph 2, it was important for the practical functioning of the article that its provisions should be both unambiguous and acceptable. States would inevitably wish to have prior knowledge of the scope and the competence of the arbitral commission. He had therefore proposed the criteria, first, of the necessity of conservation measures and, secondly, of their appropriateness. In that respect, he had in mind certain measures that might be put into effect, although at a cost out of all proportion to the benefits derived therefrom. There was a definite advantage in inserting in each article criteria restricting and specifying the issue, particularly in view of possible subsequent disputes.

82. Mr. SANDSTRÖM said that, although there were sound considerations behind Mr. Edmonds' proposal to insert the word " substantial ", he would nevertheless agree with the Special Rapporteur that the text as drafted was adequate, at least in the French version, which used the verb *se livrer*. The English phrase " engaged in fishing " was perhaps insufficiently explicit.

83. The question of stocks of fish was properly a matter for expert decision. The Special Rapporteur's remarks, however, were pertinent.

84. With regard to the question of criteria, Mr. Edmonds' proposals seemed to suffer from excessive detail. The point would be adequately met if paragraph 1 of article 32 were amended by the addition at the end of the first sentence of the phrase " in so far as they are applicable, taking into consideration the relative value of the different proposals put forward ".

85. Mr. PAL, while agreeing with the Special Rapporteur that the Indian proposal had no further relevance, pointed out that the distance of 100 miles for the proposed distance from the coast of a State had been based on the Commission's own decision embodied in article 2 of the chapter on fisheries adopted at the fifth session.[9] That phrase had been subsequently modified to read, as in article 28, " contiguous to its coasts ".

86. With regard to Mr. Edmonds' proposal, he preferred the text in the draft, which had the advantage of simplicity. The word " substantial " was decidedly vague.

87. Mr. Edmonds' paragraph 2 went into too much detail. Why should the Commission define the issues between the parties? The question of the criteria to be applied should be left to the arbitral commission without any restrictions.

88. Mr. SALAMANCA, referring to Mr. Edmonds' proposal in paragraph 1 to insert the word " substantial ", pointed out that the Spanish version " habitualmente ", though perhaps not inappropriate, had not the same meaning as " substantial ", the vagueness of which Mr. Edmonds had acknowledged. He feared that the word might be given a limitative interpretation.

89. If the nationals of, say, two States were engaged in fishing, conservation measures might not be required. A third party might begin fishing in the same area, however, and the question of such measures might then arise. The Commission should not overlook the principal objective of conservation, which, as stated in the report of the Rome Conference, was " to obtain the optimum sustainable yield so as to secure a maximum supply of food and other marine products." [10]

90. Mr. HSU, with regard to the comments of the Government of Iceland, said that the question had two aspects. If exclusive fisheries jurisdiction applied only to measures of conservation, the point was not of great significance, for, as he saw it, such jurisdiction would not be an obstacle to conservation. If, however, the interests of a coastal population, dependent mainly on fishing for its livelihood, has involved—a by no means uncommon situation—the question was one of considerable importance and there might be justification for claiming some kind of exclusive jurisdiction. The point, however, was more properly related to the question of the contiguous zone. In that connexion, two questions would have to be decided: first, the necessity for conservation measures, which would depend on the nature of the economy of the coastal population, and secondly, the extent of the area in question.

91. Sir Gerald FITZMAURICE, referring to Mr. Edmonds' proposals, said that, while appreciating the reasons for proposing the insertion of the word " substantial " in paragraph 1, he foresaw difficulties in the interpretation of the word. The point should be satisfactorily disposed of by an appropriate reference in the comment.

92. As to Mr. Sandström's point with regard to the appropriateness of " engaged in fishing ", the text might be improved by substituting " participating in ". That point, however, could be left to the Drafting Committee.

93. With regard to " stocks " of fish, he could not entirely endorse the Special Rapporteur's argument. Conservation measures must refer to a definite stock of fish and would vary with the differing habits of fish. He would support Mr. Edmonds in his contention that the provisions of article 26—and for that matter article 25—were too general. In accordance with the true technique of conservation, it should be made clear that it was the same stock of fish that was being fished. He believed expert opinion held that the case the Special Rapporteur had quoted was an extremely remote contingency. The essential was that conservation measures should be directed to a particular stock of fish and that the countries participating should be fishing the same kind of fish.

94. He would also support the principle of Mr. Edmonds' proposal with regard to criteria in paragraph 2. The question was admittedly difficult, for the arbitral com-

[8] A/CONF.10/6, para. 76 (*a*).

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

[10] A/CONF.10/6, para. 18.

mission might be called upon to decide what measures of conservation should be adopted. That being so, it was necessary to define with some precision the criteria on which it should base its findings. If the principle were adopted, he would submit certain amendments with regard to particular criteria.

95. Mr. ZOUREK said that Mr. Edmonds' suggestions in the first paragraph would be restrictive in their effect on fishing. Bearing in mind the provisions of article 30, he would ask whether it was Mr. Edmonds' intention to withhold from a State whose nationals were engaged in fishing, even though sporadically, in an area of the high seas a faculty that would be granted to a State whose nationals were not engaged in fishing there at all?

96. As to the word " substantial ", he shared the doubts of the Special Rapporteur; it was a term that lent itself to subjective interpretation, and as such was unacceptable.

97. With regard to the proposal to specify the same stock of fish, if the intention was to make that a condition for restricting the right of a State to request regulatory. measures, the suggestion was obviously not to the point. The point was the restriction of the right of a State requesting the adoption of conservation measures, which had a technical aspect. It would be impossible to withhold from a State whose nationals were fishing one stock in the same area as the nationals of another State the right or interest in respect of conservation measures with regard to another stock. If, for instance, one stock of fish were exhausted, as a result of over-fishing, the right to fish other stocks could not be withheld, particularly in the case of a coastal population dependent on fishing for its livelihood.

98. On the other hand, the proposals with regard to criteria in paragraph 2 were worthy of consideration, for the principle had already been incorporated in the 1955 draft, which now only needed developing. The point might best be dealt with in a separate article.

99. Mr. SPIROPOULOS asked whether, if the criteria that Mr. Edmonds had in mind were the appropriate scientific findings mentioned in article 29, paragraph 2 (B), it would not be better to list them under that article or, as Mr. Zourek had suggested, embody them in a separate article.

100. The CHAIRMAN said that that question could be deferred for the time being. The Commission should first decide the two simpler questions raised by Mr. Edmonds in paragraph 1 of his proposal, the insertion of the word " substantial " and the qualification " same stock or stocks of fish ".

101. Mr. EDMONDS, with regard to the insertion of the word " substantial ", said that if the Drafting Committee would study the English, French and Spanish texts, and if a reference clarifying his meaning were added to the comment, he would not press for a vote on that issue.

102. Mr. ZOUREK asked whether Mr. Edmonds maintained that a State whose nationals were engaged in sporadic fishing or fished another stock of fish would not enjoy the right to raise the question of conservation measures. In view of the fact that at the seventh session the Commission had in article 30 extended such a right to a State, the nationals of which were not engaged in fishing, the question of reconciling the provisions of the two articles called for careful study.

103. Mr. PADILLO-NERVO welcomed Mr. Edmonds' decision with regard to the insertion of the word " substantial ". Whatever the interpretation put on the word, it undoubtedly implied an undesirable restriction on a State engaged in fishing.

104. He would reserve his position with regard to the question of criteria in paragraph 2.

105. The CHAIRMAN thought that the proposal to meet Mr. Edmonds' point by an appropriate explanation in the comment should command general support.

It was so agreed.

106. The CHAIRMAN put to the vote Mr. Edmonds' proposal for the insertion in paragraph 1, after the word " fishing ", of the words " of the same stock or stocks of fish ".

Mr. Edmonds' proposal was adopted by 11 votes to 2, with 1 abstention.

107. Sir Gerald FITZMAURICE suggested, in the light of the conclusions of the Rome Conference, the addition after the word " fish " of " or other marine resources ".

It was so agreed.

The meeting rose at 1 p.m.

356th MEETING

Wednesday, 30 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. 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.