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Summary record of the 356th meeting

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

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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.

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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 26 (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 26 and of the new draft submitted by Mr. Edmonds.¹

2. Mr. EDMONDS, referring to the question put to him by Mr. Spiropoulos at the previous meeting,² recalled that at that meeting he had indicated the general principles that made the listing in each article of the appropriate criteria highly desirable.³ He repeated that no State would accept arbitration unless it had prior knowledge of the issues. There was, moreover, a certain advantage in defining the criteria, for the question was linked with the technical aspect of the selection of the members of the arbitral commission. A narrowing of the issues always led to greater clarity of decision.

3. More specifically, it was desirable to state the criteria in each article because of the different circumstances of the particular cases. In his article 26, for instance, the first question was the necessity for the conservation measure. When that had been decided in the affirmative, the second point was their appropriateness and the last whether the specific measure was discriminatory. In his article 27, a dispute under paragraph 2 would require the same criteria as in article 26, but those criteria would not apply to a dispute under paragraph 3. In article 28, the same criteria would apply as in article 26. In article 29, however, which related to unilateral action by a coastal State prior to a settlement by arbitration, there was an additional criterion of urgency. There was sufficient variation in the scope of the articles to justify a separate set of criteria for each one, and in view of the advantage of that approach the small amount of duplication involved was insignificant.

4. In reply to Mr. Spiropoulos, who had asked whether the criterion of discrimination would apply in all cases, he would say that each criterion would not be applicable in every case. In one case, there might be no urgency; in another, the conservation measure might not be necessary. In each case, the arbitral commission might have to determine an appropriate set of criteria.

5. Mr. SPIROPOULOS said that there seemed to be two alternative methods; either to accept Mr. Edmonds' proposal or to take the criteria in article 29 one after another and examine whether they could be applied to the other articles.

6. Mr. PAL said that his remarks had already been anticipated by Mr. Spiropoulos.

7. At the previous meeting he had commented adversely on Mr. Edmonds' proposed paragraph 2 for article 26.⁴

but now realized that it was quite in keeping with the principle the Commission had adopted in article 32. The Commission would remember that he had himself suggested that the criteria in article 29, paragraph 2, should be made applicable to all conservation measures,⁵ not merely to those adopted by a coastal State, for, to some extent, all conservation measures contemplated in articles 25, 26 and 29 were unilateral.

8. Mr. Edmonds' proposal gave at least partial effect to that suggestion, and he could accordingly support it in principle.

9. The CHAIRMAN, speaking as a member of the Commission, said that he was increasingly convinced that the draft articles should be confined to a general outline of a system for the conservation of the living resources of the high seas; technical details were not within the Commission's competence, which was restricted to the juridical field. If the Commission adopted detailed provisions that were alien to its true functions, not only would it be straying outside its competence, but it would leave itself open to criticism by technical and scientific bodies in the field of fisheries conservation. The ideal, of course, would be to set up a code of conservation so that a set of regulatory provisions for fishing would be available and applicable to all possible cases. That, however, was not the task before the Commission.

10. In view of the fact that Mr. Edmonds' proposal was really only a more detailed version of the provisions adopted at the previous session, and that the Commission had already in article 32 provided for the application in specific cases of the same criteria to both coastal and non-coastal States, he wondered whether Mr. Edmonds wished to press his proposal with regard to article 26.

11. Mr. SPIROPOULOS, endorsing the Chairman's view, said that adoption of Mr. Edmonds' proposal would imply a concern with technical details, which for the Commission would be inappropriate. He feared that the insertion of criteria dealing with technical matters—in which most of the members of the Commission had not the advantage of technical advice—would result in the rejection of the system by governments at any international conference that might be subsequently convened.

12. Mr. SANDSTRÖM said that at the previous meeting he had considered the provisions of article 32 to be adequate as guidance for the arbitral commission. A comparison of article 29, to which article 32 referred, with Mr. Edmonds' proposal showed that there was one common criterion, that of necessity. Article 29 went farther than Mr. Edmonds' article 26 in stressing the aspect of urgency, but that was due to the fact that article 29 envisaged unilateral provisional measures of the coastal State. On the other hand, article 26 in Mr. Edmonds' proposal contained directives to the effect that the merits of the different proposals made in the dispute should be compared.

13. He would therefore repeat his proposal to add to paragraph 1 of article 32, at the end of the first sentence, the words "in so far as they are applicable, taking into

¹ A/CN.4/SR.355, para. 75.

² *Ibid.*, para. 99.

³ *Ibid.*, para. 81.

⁴ *Ibid.*, para. 87.

⁵ A/CN.4/SR.352, para. 13.

consideration the relative value of the different proposals put forward".⁶

14. Mr. EDMONDS, in reply to Mr. SPIROPOULOS, pointed out that the criteria he had proposed in paragraph 2 of article 26 were not exclusive, but indicative, being intended rather as a guide to the parties concerned. His proposal was merely a broader statement of the issues involved than that formulated in the draft text. Clarity of expression was more important than the saving of a few words. He failed to see the objection to a clarification of the text which could result only in improving its practical application.

15. Mr. ZOUREK wondered whether Mr. Edmonds' point could be met by embodying the criteria in paragraph 2 of article 29 in a separate article. It would not affect the structure of the system and would clarify it by indicating that the criteria would apply in all cases covered by the articles. To take a concrete case: if, under article 26, the nationals of two or more States were engaged in fishing in any area of the high seas, under the present draft there was no obligation, in the case of agreed measures of conservation, to apply the criteria of article 29. Indeed, the measures adopted might even be in contradiction with those criteria. Such a situation would be avoided if the criteria in article 29 had general application and were embodied in a separate article.

16. Mr. HSU, concurring, said that repetition of criteria in several articles should be avoided, since it tended to confusion.

17. Mr. EDMONDS said that, while maintaining his opinion of the benefits of his proposal, if the Commission so desired, he would be prepared to consolidate all his proposed criteria in one text for general application.

18. Mr. SPIROPOULOS, expressed his surprise at Mr. Edmonds' change of attitude; previously Mr. Edmonds had maintained that different criteria were needed for different situations and that that was the reason why he proposed a separate list of criteria for each article.

19. Mr. EDMONDS explained that he had by no means abandoned his position; his willingness to incorporate the criteria in a single article was merely a compromise solution.

20. Mr. AMADO said that the Commission seemed to be in danger of overlooking the vital distinction between the provisions of articles 26 and 29. Article 26 contemplated negotiations between two or more States. Since it could be assumed that States were perfectly capable of deciding what was in their own interests, it had not been found necessary to lay down that the adoption of conservation measures must conform with specific requirements. Article 29, however, dealt with the adoption of unilateral measures by the coastal State alone. Since in that case there were other interests at stake, some restrictive provisions were necessary. The arbitral commission of technical experts would apply the appropriate criteria in each case.

21. Mr. SCELLE favoured the retention of article 29 practically as it stood. The only modification he would like to see was some mitigation of the criterion in subparagraph (a) of "an imperative and urgent need". In practice, the situation might develop so rapidly that the conservation measure contemplated might no longer be effective if it were unduly delayed. He would prefer some such phrase as "certain" or "imminent" need.

22. Mr. AMADO pointed out that such an amendment raised a question of substance.

It was agreed to refer Mr. Scelle's suggestion to the Drafting Committee.

23. Mr. SANDSTRÖM said he interpreted Mr. Scelle as meaning that the criterion in paragraph 2 (a) of article 29 would not apply in ordinary cases—for example, to situations such as those covered by article 26—and that article 29 dealt with cases of unilateral measures, which could be regarded as out of the ordinary.

24. The CHAIRMAN suggested that the Commission should vote on the question of principle, whether article 26 should embody specific criteria for the adoption of conservation measures.

25. Faris Bey el-KHOURI said that it would be preferable to decide whether general criteria applicable to all cases of conservation measures should be laid down in a separate article. Such criteria should be accepted by any State, irrespective of whether it was coastal or non-coastal; he understood that paragraph 2 of article 29 was in fact applicable to all States.

26. Sir Gerald FITZMAURICE pointed out the danger of confusing two quite separate questions. Faris Bey el-Khoury and Mr. Zourek had in mind a general article, the provisions of which would be applicable to all States prescribing conservatory regulations, even when the States concerned agreed on the regulations. Mr. Edmonds' point, however, was the inclusion in the different articles of specific criteria for the guidance of the arbitral commission, in case of dispute.

27. The CHAIRMAN recalled that the Commission's original intention had been that the criteria should be applicable to the coastal State only. Consequent upon a proposal by Faris Bey el-Khoury at the seventh session,⁷ on which article 32 was based, those criteria had been extended to other States. As things stood, therefore, the criteria, established for the coastal State were now applicable to all other States, subject to the circumstances of each case. Mr. Edmonds' proposal offered a new solution, that of sets of criteria for the different cases that might arise. The Commission should vote on the question of whether to adopt that principle for article 26.

28. Mr. PADILLA-NERVO agreed that under article 32 the provisions of paragraph 2 of article 29 would have general application. He saw no intention in Mr. Edmonds' proposal to amplify the criteria listed in article 29. He was in the difficulty, however, that if the Chairman's procedure were followed, a vote against the principle of including

⁶ A/CN.4/SR.355, para. 84.

⁷ A/CN.4/SR.302, para. 49.

criteria in article 26 might imply opposition to their extension under the last sentence of paragraph 1 of article 32 to cases dealt with under article 26. It must be stressed that the criteria laid down were directives for the guidance of the arbitral commission.

29. The CHAIRMAN said that that point could be met by voting on Mr. Edmonds' concrete proposal.

30. He then put to the vote Mr. Edmonds' proposed paragraph 2 of article 26.

Mr. Edmonds' proposal was not adopted, 7 votes being cast in favour and 7 against, with 1 abstention.

Article 26 was accordingly adopted as amended at the previous meeting.⁸

31. Mr. SPIROPOULOS said that, basing his decision on the opinion of Mr. Edmonds and Sir Gerald Fitzmaurice, the two members of the Commission who had technical advice at their disposal, he had voted for the proposal. The technical aspects of the question would need further study, however, before the system could be made acceptable to governments.

32. Mr. SANDSTRÖM said that he had abstained from voting, not because he was opposed to the criteria, but because the issue at stake was a problem of drafting and the question as put did nothing to solve that problem.

33. Mr. KRYLOV said that he had voted against Mr. Edmonds' proposal despite the fact that much of what it contained was quite sound. He had already expressed doubts regarding the nature of the proposed arbitral commission. However, if such a solution was to be adopted, it was clear that the arbitral commission must have a certain competence. Its members, who would be experts, would have enough common sense to know how to deal with specific cases. A draft containing some sixty or seventy articles was far too voluminous. The Commission should not try to work on so large a scale, but should produce as brief and simple a draft as possible, without attempting to lay down all the criteria to guide the arbitral commission in every case.

34. Mr. PAL said that he had voted for the proposal because he fully agreed that article 26 required a special set of criteria. The article was essentially concerned with the settlement of disputes between States engaged in fishing. In the case of article 26, the actual merit of the measures adopted was not so important since those measures, whether adopted by agreement or after the intervention of the arbitral commission, could be challenged by other States under the terms of article 27 and when so challenged would have to stand the test in accordance with article 29, paragraph 2, together with article 32, paragraph 1. Thus, by adopting specific criteria for the purposes of article 26, the Commission would in no way be prejudicing the application of the general criteria set out in article 29, paragraph 2. Special guidance was required for the settlement of disputes of the nature contemplated in article 26.

35. Mr. AMADO said that he had voted against the

proposal, partly for the reasons he had already outlined⁹ but also because article 26 envisaged the settlement of disputes by experts on the subject who would know what technical criteria to apply. The Commission, with the exception of a few members, had no special knowledge of the subject.

36. A further consideration was the need to avoid provisions conflicting with article 29, which laid down the criteria for unilateral action by a coastal State, and article 32, which specified that the criteria should be applied according to the circumstances of each case.

37. The CHAIRMAN, speaking as a member of the Commission, said that he had no objection to the substance of the proposal and had voted against it for considerations alien to the question of the validity of the criteria. Like Mr. Krylov, he did not consider it the task of the Commission to go into such detail on matters on which its members could not normally be expected to be well informed. The proper task of the Commission was to lay down the fundamental legal principles for the conservation of the living resources of the sea.

38. He had also been prompted by the consideration put forward by Mr. Amado in his first statement that, whereas it was essential to furnish criteria in article 29 since it dealt with measures taken unilaterally by a coastal State, such criteria were not required in article 26 where it was a question of collective regulation by the States concerned.

39. An exhaustive code giving clear guidance on all possible cases would, of course, be an ideal instrument. The Commission was not competent, however, to draft such a code.

Article 27

40. The CHAIRMAN invited Mr. Edmonds to introduce his proposal for article 27.

41. Mr. EDMONDS proposed the following text for article 27:

1. If, subsequent to the adoption of the measures referred to in articles 25 and 26, nationals of other States engage in fishing the same stock or stocks of fish in any area or areas of the high seas, the measures adopted shall be applicable to them.

2. If the States whose nationals are so engaged in fishing do not accept the measures so adopted and if no agreement can be reached within a reasonable period of time, any of the interested States may initiate the procedure provided for in article 31, in which case the arbitral commission shall make one or more of the determinations stated in paragraph 2 of article 26 of these articles, depending upon the nature of the disagreement. Subject to the provisions of paragraph 2 of article 32, any measure adopted shall be obligatory pending the arbitral decision.

3. Where, within reasonable limits, the maximum sustainable yield under current conditions of any stock of fish is already being obtained and the maintenance and further development of such yield is dependent on the conservation programme, including research, development and conservation being carried on by the State or States whose nationals are substantially fishing such stock, States not so fishing or

⁸ A/CN.4/SR.355, para. 106.

⁹ See para. 19, above.

which have not done so within a reasonable period of time, excepting the coastal State adjacent to the waters in which this stock is found, shall abstain from fishing such stock. In the event of disagreement as to whether a particular stock meets the above qualifications for abstention, the matter shall be referred for arbitration as provided in article 31.

4. The arbitral commission shall reach its decision and make its recommendations under paragraph 3 of this article on the basis of the following criteria:

(a) Whether by reasonably adequate scientific investigation it may be determined that certain conservation measures will make possible the maximum sustainable yield;

(b) Whether the stock is under reasonable regulation and control for the purpose of making possible the maximum sustainable yield, and whether such yield is dependent upon the programme of regulation and control; and

(c) Whether the stock is, within reasonable limits, under such exploitation that an increase in the amount of fishing will not reasonably be expected to result in any substantial increase in the sustainable yield.

42. The abstention principle enunciated in the third paragraph of the article had, he said, been discussed at length at the Rome Conference, which had decided that it was essential for the conservation and increase of fishery resources. Briefly, the principle was that States which had devoted funds, time and effort to conserve and develop certain fishery resources should be able to reap a return for their efforts in the form of increased yield and other benefits. To that end, whenever the resources were so fully exploited that more intensive fishing would not increase the yield, States, other than coastal States, which had not fished in the area in recent years should refrain from fishing there. The principle was analogous to that of "unjust enrichment" in United States municipal law.

43. Mr. PADILLA-NERVO said that he wished to make some observations on the abstention principle as enunciated in Mr. Edmonds' draft article. The United States comment maintained that when the yield of a fishery was kept at a high level by the efforts and investment of one or more States and by scientific management, it was only logical and fair that other States, with the exception of coastal States, whose special interest was acknowledged, should refrain from fishing in the area.

44. The principle in question had been embodied in the North Pacific Treaty of 1953 between the United States, Japan and Canada for the protection of salmon fisheries in the hydrographical area of the River Fraser. Since the United States and Canada had taken measures to improve the fishery, and had even refrained from building dams at suitable sites, it was natural that the stock of salmon due to those measures and sacrifices, on reaching the high seas, should not be fished by other countries which had not contributed to its conservation. Japan was bound by that treaty.

45. It was interesting to note, however, that as early as 1937 the United States had put forward the same thesis in a note to Japan, which contained the following statement: "The United States Government believes that the safeguarding of these resources involves important principles of equity and justice. It must be taken as a sound principle of justice that an industry such as described, which has been built up by the nationals of one country,

cannot in fairness be left to be destroyed by the nationals of other countries."

46. What Mr. Edmonds was now proposing was that the thesis be made a general rule of law. In that connexion it should be stressed that the United States regarded the abstention of foreign fishers from fishing in such circumstances as justified in itself and not merely by the fact that a State, in a treaty, had waived a right normally enjoyed by its nationals.

47. As the Chairman had recently pointed out, there was a difference between measures for the conservation of resources which applied equally to nationals and foreigners, and the sole right of exploitation of resources, which involved the exclusion of foreign fishermen. Mr. Edmonds' proposal belonged to the second category, and what was euphemistically called the "abstention principle" should really be termed "the principle of justified exclusion of third parties". The object of the exclusion was, admittedly, the conservation of a species which was being fished to the permissible maximum. Were the measure, however, really one of conservation, the proper course would be to divide the maximum exploitable yield amongst the fishermen of all countries wishing to fish the area, giving all an equal opportunity without discrimination, instead of reserving it for nationals of a few States and excluding the rest. The abstention principle, being clearly discriminatory, could not be regarded as a measure of conservation.

48. The purpose of his remarks was not to criticize the principle put forward by Mr. Edmonds, with which he was, in fact, in agreement, but simply to reveal its true nature. It seemed much more just, though perhaps not entirely in accordance with the traditional and negative concept of the principle of the freedom of the seas, that the sole right of exploitation of a limited stock of fish should be granted to those who had a good claim to it in virtue of their expenditure of funds and effort, to the exclusion of those who had made no contribution to the conservation and improvement of the stock.

49. The United States thesis showed that it was neither absurd nor an *aberratio juris* to grant in certain cases, when it was justified, exclusive rights of exploitation. But if that thesis were accepted, all the logical and juridical inferences must be drawn from it. Mr. Edmonds had merely picked out one from the many possible cases in which it might be desirable to grant exclusive rights of exploitation. There might be other special cases, however, as when a species spent its early life in the internal waters of a State before taking to the high seas, or when an important economic activity within a State was clearly dependent on a certain species inhabiting the neighbouring waters. The interesting biological cycle "anchovy-guano-fertilizer-agricultural produce" to be observed in Peru and part of Chile was one such case. He was sure that a large number of countries in similar circumstances would consider that a coastal State should have the exclusive right of exploitation, in cases such as those he had mentioned.

50. Mr. SANDSTRÖM said that he could not regard the abstention principle merely as a development of the principle of "unjust enrichment". If it were so regarded,

a difficult situation would arise when a new State offered to pay its share of the outlay of the States claiming exclusive rights. He regarded the principle more as a product of the conflict between the fundamental principle of the freedom of the sea, on the one hand, and the interest of all States not to discourage the adoption of measures of conservation on the other. The second consideration ought, in his opinion, to take precedence over the first. He considered that there was a considerable amount of justice in the proposal, and he would support it.

51. He would not, however, go so far as Mr. Padilla-Nervo and grant exclusive right of exploitation to coastal States. There was a difference between the two cases: under Mr. Edmonds' proposal, States which had already fished in the area would not be excluded, whereas in the instances supported by Mr. Padilla-Nervo, one State would be granted sole rights.

52. Sir Gerald FITZMAURICE said that, while he fully understood the reasons and the special case which had led Mr. Edmonds to make his proposal, he had some doubts regarding its acceptability as a general principle. The proposal was, in fact, out of place in a set of articles on conservation of resources, since it was concerned rather with the distribution of the catch than with the conservation of a stock of fish. He realized, of course, that indirectly the proposal was designed to serve the purpose of conservation, but the main questions at stake was equitable participation in the exploitation of certain fishery areas.

53. His chief concern was whether the proposal was compatible with the spirit of the other articles in the draft, which enunciated as a fundamental principle that measures of conservation should be non-discriminatory and should not have the total exclusion of fishermen from other countries as their aim or result. However strong the argument in favour of the abstention principle might be in special cases such as the North Pacific salmon fisheries, the principle was undoubtedly in conflict with the general spirit of the draft. It might, moreover, easily lead to abuses whereby a group of States might attempt to exclude nationals of other countries from a particular fishing ground by plausibly but incorrectly claiming that it had been worked up to a particular level by their sole efforts. Hence, though viewing the proposal sympathetically in relation to the special circumstances which had given rise to it, he regretted that he was unable to support it.

54. Mr. EDMONDS pointed out that exclusive rights would not be granted beyond appeal. If the claim to exclusive rights were challenged the matter would be referred to an arbitral commission.

55. Sir Gerald FITZMAURICE replied that he had not overlooked that provision. Undoubtedly it made the proposal more acceptable, but he still entertained doubts regarding the advisability of its adoption as a general rule.

56. Mr. SCELLE said that he feared that the Commission, in attempting to convert the results of diplomatic negotiations between States into a general rule, was

exceeding its proper role—which was to lay down general rules representing the absolute minimum that States could claim in the matter of regulating fisheries in their contiguous zones.

57. If a State wished to establish what was, to all intents, a monopoly of fishing in a certain area, its claim should be referred to the arbitral commission as the crucial point in a set of regulations.

58. Mr. AMADO wondered whether the exceptional case dealt with in paragraph 3 of Mr. Edmonds' proposal could not be regarded as one of the measures necessary for conservation within the meaning of article 26, and accordingly referred to the arbitral commission.

59. Like Mr. Scelle, he was reluctant to enunciate the abstention principle as a general rule. The principles governing the conservation of fisheries were a comparatively new subject of discussion and the Commission should not be too hasty in formulating general rules.

60. Mr. SALAMANCA considered that the abstention principle could be applied either unilaterally or by two or more States, in the same manner as other measures contemplated in other articles of the draft. It would be recalled that he had referred on a number of occasions in the past to the anchovy fisheries in the Pacific Ocean as an example of the special interest which a State might have in applying conservation measures affecting its own nationals as well as foreign fishermen, in order to preserve stocks of fish essential to its coastal economy and agriculture. The sole difference between the application of the abstention principle unilaterally on the high seas and its application in the adjacent waters of the State lay in the fact that different criteria would have to be adopted for the solution of the problems involved.

61. The question was of great importance. The Commission normally tended to think in general terms, but in the present case it was dealing with a specific issue. He was in favour of basing the law, where possible, on concrete cases such as those just described. If paragraph 3 of Mr. Edmonds' proposal were not adopted, he hoped that it would at least be stated in the commentary that the abstention principle could be applied in special cases where its application was shown to be technically justified.

62. Mr. ZOUREK said that, though appreciating the reasons prompting Mr. Edmonds' proposal, he believed that the principle it contained related rather to the exploitation or the possibility of exploitation of fisheries by States and thus went beyond the question of regulating the conservation of the living resources of the sea.

63. His main objection to the proposal was that it established a kind of monopoly and one of unlimited duration. Such a provision was incompatible with the freedom of fishing on the high seas and ignored the rights of coastal States regulated by other provisions in the draft. It would, moreover, be unjust to many States. Newly established States, for instance, or those which, like the under-developed countries, had only recently acquired the possibility of exploiting more distant fisheries, would be excluded from fishing in certain areas.

64. Precisely because the cases cited were exceptional ones, he felt that the principle involved should not be

embodied in the articles of the draft, which dealt with general principles. So general a provision, which could give rise to frequent abuse, was out of place in the draft. Problems of that nature could be regulated as between the States themselves by international agreements on the lines of the International Convention of 1946 for the Regulation of Whaling.

65. Mr. FRANÇOIS, Special Rapporteur, agreed that it would be a case of unjust enrichment if newcomers were allowed to exploit resources conserved and developed by the efforts of other States. The abstention principle, it was true, infringed the principle of the freedom of the seas, of which he was generally a firm adherent. But principles of law must be viewed in their proper setting. The Commission had in the past accepted other restrictions on the freedom of the seas. If the abstention principle was applied, no injustice would be done to the States thereby excluded, since, had the measures not been taken by the State claiming exclusive rights, there would have been no stocks for them to exploit.

66. If the Commission wished to encourage measures of conservation it should include Mr. Edmonds' proposal in the draft, especially as it contained the safeguard that the measures might be referred to an arbitral commission.

67. He could not agree with Mr. Amado that the case was already covered by article 26. That article related to measures adopted by common agreement for the conservation of fisheries. Abstention from the exploitation of stocks was quite a different matter.

68. Sir Gerald FITZMAURICE did not think the case was as simple and straightforward as the Special Rapporteur's remarks would seem to suggest. The fact that as a result of certain action a specially high degree of productivity had been attained did not mean that the stock would otherwise not have been conserved. Moreover, the State wanting to come in might be fully prepared to observe the already established measures.

69. He did not consider that Mr. Edmonds' proposal, though it might be legitimate in another context, related to conservation as such, but was rather concerned with the equitable exploitation of certain fisheries. He could however, support Mr. Salamanca's suggestion that the proposal should be mentioned in the comment with an explanation that, as the Commission considered that it fell outside the scope of the present draft, no provision on the subject had been included.

70. Mr. EDMONDS could not agree that his proposal was unrelated to conservation, since that concept embraced not only the protection of existing resources from waste and harmful use, but also means of increasing those resources. His proposal had been based on the conclusion of the Rome Conference that: "Where opportunities exist for a country or countries to develop or restore the productivity of resources, and where such development or restoration by the harvesting State or States is necessary to maintain the productivity of resources, conditions should be made favourable for such action."¹⁰

71. The Commission was not only engaged in codifying, but was also laying down rules for the progressive development of international law, and acceptance of the principle he had proposed would foster efforts to increase productivity. He had not proposed that States should be allowed to claim absolute rights not subject to appeal over certain stocks of fish, since the measures proposed could be challenged before an arbitral commission which would decide whether other States were entitled to enrich themselves at the expense of those that through their own efforts and expenditure had improved the yield. It was in the interests of mankind as a whole to encourage States to invest in such measures rather than to allow the depletion of certain stocks by permitting unrestricted fishing.

72. In conclusion he observed that the Canadian Government favoured the inclusion of a provision on the lines he had suggested largely for the same reasons as his own.

73. Mr. SCALLE, wishing to correct an erroneous impression given by the Special Rapporteur and Mr. Sandström, both of whom had based their argument on a concept of private law, emphasized that in the domain of public property there could be no question of trying to balance investment against gain. If that were not so, many States would be heavily indebted to their peasants, who for many centuries in the past had been compelled to maintain public highways when there had been no commensurate burden upon townsmen. Any State whose nationals were engaged in fishing should contribute something towards conservation measures without considering what it would obtain in return. It was quite sufficient to empower an arbitral expert body to determine whether any particular measure was appropriate.

74. Mr. SALAMANCA pointed out that the enactment of any conservation measures was bound to create some degree of monopoly, but since the measures proposed by Mr. Edmonds could be taken by more than one State the fears expressed by some members were groundless.

75. One way or another the matter raised by Mr. Edmonds must be mentioned somewhere, and once the Commission had decided on the principle, the question should be referred to the Drafting Committee.

76. Mr. KRYLOV observed that, since an important matter of principle was at stake, the decision must be taken by the Commission itself.

77. Mr. AMADO said that at the outset he had thought that Mr. Edmonds' proposal might be covered by the provisions of article 26, but the Special Rapporteur's remarks had now convinced him that the proposal brought up an entirely separate question.

78. Mr. ZOUREK said that the Special Rapporteur's argument about the position of newcomers—namely, that if no conservation measures had been taken, there would have been no stocks for them to exploit, was not decisive, because they in their turn could contend that if the stock in a certain area had not already been fished by nationals of the more developed States it would have been left intact for them.

¹⁰ A/CONF.10/6, para. 61.

79. He then asked for what length of time States would be entitled to prevent others from fishing a certain stock.

80. Mr. EDMONDS replied that it was for the arbitral commission to decide that question when the measures were challenged.

81. The CHAIRMAN, speaking as a member of the Commission, said that the principle of abstention was vitally important at the present stage of development of international law. Under article 27, paragraph 1, conservation measures already adopted for a certain area would be applicable to nationals of other States which had not taken part in their preparation. The same held good of measures adopted unilaterally by a coastal State by virtue of article 29.

82. Mr. Edmonds was now proposing to go much farther and to enable States in certain circumstances to prevent others from fishing altogether, which, as Mr. Padilla-Nervo had pointed out, was not a conservation measure at all, but an effort to establish rights of exclusive exploitation analogous to those enjoyed in the territorial sea or internal waters. In the Declaration of Santiago, of August 1952, the need for conservation had been given as the ground for claiming exclusive rights in a certain area. In that connexion it was significant that the Icelandic Government had expressed the view that the draft articles on conservation would not reduce the importance of exclusive coastal fisheries jurisdiction.

83. Hitherto the Commission had never studied the question of exclusive rights of exploitation outside the territorial sea and internal waters. If it wished to do so he would have no objection, but the present draft, dealing as it did with conservation, was not the proper place for a provision on that subject. After careful examination it might be established that in certain circumstances coastal States were entitled to claim exclusive fishing rights in certain areas. The point had been considered at the Rome Conference, but no conclusion had been reached as to what conditions should be laid down to justify such rights.

84. Thus, while not rejecting the possibility of exclusive rights in a certain area, he considered that it should be examined in an entirely different context.

85. Mr. EDMONDS said that in view of the understandable differences of opinion on a new and progressive principle, he would be satisfied with an appropriate statement in the comment and would not press for a vote on his proposed new text for article 27.

86. Mr. SALAMANCA, pointing out that the whole draft on conservation was *de lege ferenda*, said that Mr. Edmonds' proposal was in line with the object of the whole draft and must be taken into account. He agreed that if it could be proved that the economic life of a State depended in great measure on certain stocks of fish, other States as well as the State immediately affected should abstain from fishing in the area concerned. Such a measure, moreover, would be taken in conformity with the conditions laid down in the draft.

87. Mr. PAL said he was unable to follow Mr. Sandström in accepting the third paragraph of Mr. Edmonds' proposal as innocent, but apprehended that it was merely

an attempt to secure a monopoly for vested interests. If Mr. Edmonds really had in view only a conservation measure, then articles 25 and 26 would amply cover his case, but when any other States challenged the measures adopted, those measures would have to face the tests laid down in article 29, paragraph 2. If, on the other hand, Mr. Edmonds had something else in view, it should not be presented in the guise of an innocent-looking conservation measure. Such a measure could be discussed and decided on only if properly presented in its appropriate place.

88. Mr. AMADO observed that the Commission's task had been greatly simplified by Mr. Edmonds' readiness to have his point dealt with in the comment. The principle of abstention itself would undoubtedly be discussed at length at some future stage, but in the absence of data the Commission could not at present reach any constructive conclusions.

89. Mr. SCALLE observed that the Hague Conference for the Codification of International Law of 1930 had failed to reach agreement on a contiguous zone where the coastal State could exercise exclusive fishing rights. The Commission's efforts had also come to nothing, and that was precisely why he believed that it would be unprofitable to discuss Mr. Edmonds' proposal.

90. The CHAIRMAN proposed that the Special Rapporteur be requested to prepare, for the Commission's consideration, a statement concerning the principle of abstention, also mentioning other analogous principles, for inclusion in the comment.

The Chairman's proposal was adopted and Mr. Edmonds' proposal was referred to the Drafting Committee.

91. Mr. SANDSTRÖM drew the attention of the Drafting Committee to the need for making clear that paragraph 2 in article 27 referred to States whose nationals were newcomers to fishing in the area for which measures had been adopted under articles 25 or 26.

92. The CHAIRMAN, speaking as a member of the Commission, considered that it should be made clear, either in the comment or in the text of the article itself, that the measures were binding only on those States which began large-scale fishing operations in the area for which conservation measures were already in existence.

Subject to the decision concerning the comment, article 27 was adopted.

Article 28

93. Mr. FRANÇOIS, Special Rapporteur, said that the Government of India had proposed the deletion of article 28 (A/CN.4/99) and the Netherlands Government had expressed uncertainty about the relationship between the article and article 29 (A/CN.4/99/Add.1). He reminded the Commission that Mr. Spiropoulos had proposed a new text¹¹ combining the provisions of articles 28 and 29 and his proposal had been substantially accepted. Personally, he did not think that the modi-

¹¹ A/CN.4/SR.351, para. 5.

fications introduced in article 29 had altered the position to any great extent and he therefore favoured the retention of article 28, so that the coastal State would still have the choice of either negotiating with others concerning the regulation of fisheries or taking unilateral action. That would meet Sir Gerald Fitzmaurice's contention¹² that when regulations agreed upon between two or more States existed in an area contiguous to the coast of another State, only in case of emergency could the last State promulgate other regulations without first trying to reach agreement with the signatories to the existing regulations.

94. Mr. SPIROPOULOS explained that when he had originally moved his proposal combining articles 28 and 29 he had omitted the requirement contained in article 29, paragraph 2 (a), but now that it had been reinstated he was no longer in favour of deleting article 28.

95. Mr. SANDSTRÖM agreed that article 28 should be retained, but did not entirely share the Special Rapporteur's opinion that articles 28 and 29 presented the coastal State with two alternative procedures; the latter article had a narrower application and the rights it conferred could be exercised only if there was urgent need for conservation.

96. Faris Bey el-KHOURI considered that the Drafting Committee's attention should be drawn to the inaccuracy of the expression "an area of the high seas contiguous to a coast". The high seas could only be contiguous to the outer limit of the territorial sea.

97. Mr. FRANÇOIS, Special Rapporteur, agreed that the expression was an unfortunate one. The Drafting Committee should also be requested to substitute throughout the whole draft on conservation some other word for "contiguous", so as to eliminate any possibility of confusion with "the contiguous zone". Perhaps the word "adjacent" might serve.

98. Mr. SCALLE agreed that two different words were necessary for the articles on conservation and for the provisions relating to the contiguous zone.

99. Mr. ZOUREK reaffirmed his opinion¹³ that since the expression "contiguous zone" had acquired a definite technical connotation, some other term was needed for the present draft.

It was agreed to refer the points raised by Faris Bey el-Khouri and the Special Rapporteur to the Drafting Committee.

Article 28 was adopted.

Article 29 (resumed from the 353rd meeting)

100. Mr. SANDSTRÖM proposed that the Drafting Committee be requested to consider the possibility of deleting the word "scientific" in paragraph 2 (a).

The meeting rose at 1.5 p.m.

¹² A/CN.4/SR.355, para. 56.

¹³ A/CN.4/SR.349, para. 84.

357th MEETING

Thursday, 31 May 1956, at 9 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 SCALLE, 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 invited the Commission to consider a number of outstanding points arising out of the draft articles relating to the conservation of the living resources of the sea.

2. Speaking as a member of the Commission, with reference to the point made by Mr. Sandström at the previous meeting regarding the different applications of articles 28 and 29,¹ he said he interpreted article 28 as being intended to meet the normal non-urgent case where the coastal State, in view of its special interest, was allowed to take part in any system of research and regulation in an area of the high seas contiguous to its coast even though its nationals did not carry on fishing there; article 29, on the other hand, dealt with the special case where the parties had failed to agree and there was urgent need for conservation measures.

¹ A/CN.4/SR.356, para. 95.