Document:-

A/CN.4/SR.360

Summary record of the 360th meeting

Topic:

Law of the sea - régime of the high seas

Extract from the Yearbook of the International Law Commission:-

1956, vol. I

at the fifth session. The dominant idea, when dealing with the continental shelf, had been that the freedom of the high seas should be left unaffected; and sedentary fisheries were already covered by the freedom of fishing, one of the aspects of the freedom of the high seas. He could not see on what principle it was now proposed to take them out of the freedom of fishing and give them to the present owner of the continental shelf. To do so would be an encroachment on the freedom of the high seas.

72. In reply to a question by Mr. AMADO, Mr. FRANÇOIS, Special Rapporteur, explained that the article dealing with sedentary fisheries had not been retained in the draft prepared at the fifth session as the Commission had overlooked fisheries regarded as sedentary because of the equipment used—e.g., stakes embedded in the sea floor—and had paid attention only to the fishing of species permanently attached to the bed of the sea.

73. Mr. SANDSTRÖM said that he assumed that the phrase " provided that non-nationals are permitted to participate in the fishing activities on an equal footing with nationals" in paragraph 42, sub-paragraph 1, of the Special Rapporteur's report (A/CN.4/97) was intended to imply that nationals of States other than the coastal State might use equipment at places where they would not disturb the nationals who had been fishing there for a considerable time.

74. Mr. ZOUREK observed that conflicts might arise between the coastal State and other States when nationals of the latter tried to fish by means of stakes embedded in the sea-floor of the continental shelf at places where nationals of the coastal State already used similar equipment.

75. The CHAIRMAN, speaking as a member of the Commission, doubted whether regulation was properly in context, since the proposal about the continental shelf referred only to exploration and exploitation. Regulation might be more properly referred to in connexion with conservation.

76. Mr. FRANÇOIS, Special Rapporteur, said that the subject was related to the question of the natural resources of the continental shelf, but he had proposed to include it as an article in the series concerning fisheries rather than in those concerning the continental shelf.

77. The CHAIRMAN suggested that article 2, with the Special Rapporteur's proposal relating to sedentary fisheries, be referred to the Drafting Committee.

It was so agreed.

Article 3

78. Mr. FRANÇOIS, Special Rapporteur, drew attention to the comment by the United Kingdom Government on articles 3 and 4 (A/CN.4/99/Add.1, page 71). He himself believed that the point raised by the United Kingdom Government had been stated as clearly as possible in the commentary.

79. Sir Gerald FITZMAURICE was inclined to agree with the Special Rapporteur. The reason for the United Kingdom comment had undoubtedly been a dislike of the tendency to extend the rights of coastal States in the continental shelf to claims to exclusive rights in the superjacent waters and a belief that, in view of that danger, the stipulation should be made clearer.

80. Mr. SCELLE said that the wording of the article and the Commission's intentions were entirely clear. Difficulties might, however, arise in course of time, because it was difficult to see how freedom of navigation could be maintained over the continental shelf if exploitations became very numerous and closely spaced.

81. The CHAIRMAN said that that danger was covered by article 6.

82. Mr. SCELLE maintained that the wording of article 6, particularly the phrase " unjustifiable interference ", was practically meaningless.

83. Mr. AMADO said that it would be very difficult to prevent States, which naturally wished to increase their wealth, from trying their utmost to increase their power too.

84. Mr. SCELLE doubted whether a small State would obtain the same treatment as a large one. There was only one safeguard: the article on arbitration. Even if that were accepted, it might give dubious satisfaction.

It was decided to refer article 3 to the Drafting Committee.

The meeting rose at 6.30 p.m.

360th MEETING

Tuesday, 5 June 1956, at 9.30 a.m.

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

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2456, A/CN.4/97, A/CN.4/99/Add.1) *(continued)*

The continental shelf (continued)

Article 4

1. The CHAIRMAN invited the Commission to consider article 4 of the draft articles on the continental shelf.

Article 4 was adopted without comment.

Article 5

2. Mr. FRANÇOIS, Special Rapporteur, said that the United Kingdom Government had suggested that article 5 should mention pipelines as well as submarine cables (A/CN.4/99/Add.1). The omission of any reference to pipelines, however, had been deliberate, and the reason for it was to be found in paragraph 76 of the comment on the text (A/2456). If Sir Gerald Fitzmaurice pressed the point, a reference might more appropriately be placed in the comment than in the article itself. It would be to the effect that the same rules would apply to pipelines as to submarine cables, but that the Commission had thought that, owing to the difficulties which might arise, coastal States might impose even more stringent conditions than they were authorized to impose for cables.

3. Sir Gerald FITZMAURICE said that he would be perfectly satisfied with a reference in the comment.

4. Mr. PAL observed that article 34, paragraph 2, of the articles concerning the regime of the high seas adopted in 1955[1] dealt with the same subject, and the same language might be used. Paragraph 1 of that article had been taken from article I of the 1884 International Convention for the Protection of Submarine Telegraph Cables. Paragraph 2 had been added to make it quite clear that the coastal State was obliged to permit the laying of cables and pipelines on the floor of its continental shelf, but that it could impose conditions as to the track to be followed, in order to prevent undue interference with the exploitation of the natural resources of the sea-bed and the subsoil.

5. The CHAIRMAN suggested that a passage to that effect should be included in the comment on article 5.

It was so agreed.

6. Mr. FRANÇOIS, Special Rapporteur, said that there was a further suggestion by the United Kingdom (A/CN.4/99/Add.1) to the effect that the words " or exploration in the waters above the shelf " be added at the end of the article. In his own opinion, that question had already been disposed of by the Commission's decision with regard to scientific research.[2]

7. Sir Gerald FITZMAURICE agreed with the Special Rapporteur.

It was decided to refer article 5 to the Drafting Committee.

Article 6

8. Sir Gerald FITZMAURICE said that the United Kingdom Government had commented (A/CN.4/99/Add.1) that the phrase, in paragraph 2, " a reasonable distance " for safety zones was rather vague. Since the margin of safety for shipping must at all times be generally the same, regardless of whether the installation concerned was in an open stretch of sea or in a narrow strait, it was proposed that the words " at a reasonable distance " should be followed by the words " not exceeding 400 metres ". The idea, therefore, was that a distance of 400 metres was about the maximum required to establish a margin of safety for ships passing installations. The distance should be specified, so that the masters of ships would know that everything outside the zone would not be affected by the terms of article 6.

9. Mr. FRANÇOIS, Special Rapporteur, explained that the stipulation had originated from a report submitted to the International Law Association, in which the need for a safety zone had been indicated for the first time; expert opinion had then proposed 500 metres. The Commission had been in favour of including a stipulation, but had been unable to agree that the distance should be exactly 500 metres; it had preferred to use the phrase " at a reasonable distance " in the article and to refer to the precise figure of 500 metres in the comment. As the members of the Commission had no expert knowledge of the subject, that figure might be retained. There seemed no reason for inserting in the article the figure of 400 metres suggested by Sir Gerald Fitzmaurice; in fact, if any figure were to be inserted in the article, that of 500 would be preferable, since the Commission had already twice accepted it in the comment. A reference to 400 or 500 metres in the comment, however, would still be the better course.

10. Sir Gerald FITZMAURICE thought that it was of no great importance whether 400 or 500 metres was the figure used; indeed, he would prefer 500 metres. The experts had probably felt that some fixed distance was required. It should be remembered that, although legal experts would of course be familiar with the comment, the average mariner was unlikely to study it. Furthermore, there might be a number of installations in a certain area, and masters of ships should know how close they might sail. A specified distance was therefore desirable, and there would be some merit in embodying it in the article.

11. Mr. AMADO said that he had always opposed vague phraseology. Who was to define " a reasonable distance ", and how? On the other hand, it might be dangerous to fix a specified limit, and it had been for that reason that the Commission had originally accepted the vaguer phrase. While he would not press the matter, he favoured the inclusion of the reference to 500 metres.

12. Mr. SPIROPOULOS thought that the matter was being given more importance than it deserved. The Commission had already discussed it and had decided not to incorporate the reference to 500 metres in the text, since it was a somewhat arbitrary figure. The distance for the safety zones around installations would probably depend

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[1] *Official Records of the General Assembly, Tenth session, Supplement No. 9* (A/2934), p. 13.

[2] A/CN.4/SR.359, para. 59.

largely on their size. The issue should, however, preferably be referred to in the comment, as it would be dangerous at the present stage of international law to refer to it in the text of the article.

13. Sir Gerald Fitzmaurice was certainly right in saying that the masters of ships would wish to know how close to installations they might sail, but, as in the case of the regime of the territorial sea, each State might be left to fix the safety zone in its own regulations. The evolution of international law would undoubtedly enable a more precise reference to be embodied in the article at a later stage. The text should therefore be retained as it stood; the phrase " about 500 metres " might be included in the comment.

14. Mr. SANDSTRÖM agreed with Mr. Spiropoulos. The disadvantage of specifying a maximum distance for the safety zones was that States would almost always adopt the maximum. If the reference were included in the comment, States would probably accept a narrower safety zone.

15. Another argument against specifying the distance in the text of the article was that installations might be of different kinds and might accordingly require different safety zones.

It was decided that a reference to the specific distance for the establishment of safety zones around installations of the continental shelf should be included in the comment.

16. Mr. FRANÇOIS, Special Rapporteur, said that the United Kingdom Government had proposed the insertion of a new paragraph to read: " If such installations are abandoned or disused, they are to be removed entirely " (A/CN.4/99/Add.1). He himself did not think that such a new paragraph was necessary, as its substance was already covered in article 6, paragraph 1. Obviously the abandonment or disuse of installations would constitute unjustifiable interference with navigation and fishing. A reference to the United Kingdom suggestion might be included in the comment.

17. Sir Gerald FITZMAURICE could not agree that the point was obviously covered by paragraph 1, but admitted that it was implicit in it. Installations did not interfere with navigation only if they were in use. They were troublesome to remove, and might readily be abandoned, but would still be dangerous to navigation. In that case, some special provision was surely desirable, perhaps at the end of paragraph 4 rather than in a new paragraph. He would not, however, press the point if the Commission agreed with the Special Rapporteur's objection.

18. The CHAIRMAN suggested that the United Kingdom proposal should be mentioned in the comment on paragraph 1.

It was so agreed.

19. Mr. FRANÇOIS, Special Rapporteur, said that the United Kingdom Government had suggested that in paragraph 5 the words " or where interference may be caused in " be inserted before the words " sea lanes ", since the present wording might prove too restrictive. He opposed that suggestion, since it was a fact that installations did in every case cause some interference with navigation. The passage in paragraph 77 of the commentary for the fifth session (A/2456), which had been drafted by Mr.—now Sir Hirsch—Lauterpacht, brought out the point very clearly and should therefore be retained in the new commentary.

20. Sir Gerald FITZMAURICE explained that the suggestion did not involve the deletion of the phrase " narrow channels ", but would make the article read as follows:

> Neither the installations themselves, nor the said safety zones around them, may be established in narrow channels or where interference may be caused in recognized sea lanes essential to international navigation.

The reason for the suggestion was that some sea lanes were very wide and often lay near the continental shelf of a coastal State precisely where that State would wish to construct installations. While the construction of installations should obviously not be prohibited altogether, they should not be permitted where they caused interference with navigation. He would not, however, press the point.

21. Mr. SPIROPOULOS supported the proposed insertion, since the comment would be inconsistent with the text if it were not inserted. According to the text, installations might not be established on recognized sea lanes. That being so, it was hard to see how it should be stipulated in the comment that installations must not result in interference with shipping. The confusion seemed to have arisen from the omission of the word " étroits " after " chenaux " in the French text. The French and English texts ought to be brought into line. The insertion suggested by Sir Gerald Fitzmaurice should be accepted, because, if the sea lanes were very wide, the installations would not cause interference, and if they were narrow, the installations would be logically excluded.

22. The CHAIRMAN suggested that the French and English texts be referred to the Drafting Committee for collation.

It was so agreed.

23. Mr. PADILLA-NERVO asked whether Sir Gerald Fitzmaurice's suggestion had been accepted. He himself supported it.

24. The CHAIRMAN replied that it was his understanding that the suggestion had been accepted.

25. Mr. FRANÇOIS, Special Rapporteur, said that he had wondered whether some provision should be made for coastal States to enforce customs measures on the continental shelf, but would leave that point until the Commission had dealt with the relation between the continental shelf and the contiguous zones.

It was decided to refer article 6 to the Drafting Committee.

Article 7

26. Mr. FRANÇOIS, Special Rapporteur, drew attention to the comment by the United Kingdom Government and the revised draft suggested by it (A/CN.4/99/Add.1). The gist of the comment was that it was very

often difficult to establish an exact median line and that States should therefore be given a certain amount of latitude. The application of an exact median line was a matter of considerable technical complexity, and the most satisfactory course therefore would be to apply only the principle. The revised draft amounted to the insertion, in the fourth line of paragraph 1, of the words " usually determined ", after " such States is ", and of the words " by the application of the principle of " before " the median line ", with the addition of a third paragraph, dealing with the marking of the lines on large-sca'e charts. He himself believed that the first insertion would be superfluous, in view of the proviso " unless another boundary line is justified by special circumstances ". The second insertion would be acceptable, though it might be preferable to retain the existing text and incorporate the idea in the comment, since it would always be difficult to determine the median line exactly, and States might prefer to rely on negotiation. The additional paragraph would be acceptable.

27. Mr. SPIROPOULOS agreed that the word " usual " was pleonastic. Either the phrase "unless another boundary line is justified by special circumstances " or the word " usually " would be superfluous, and so the present text should be retained.

28. Sir Gerald FITZMAURICE was inclined to agree that the insertion of the word " usually " would be superfluous and that the phrase Mr. Spiropoulos had quoted, and which was already in the text, covered the point raised by the United Kingdom Government. What that government had in mind, however, was the fact that special circumstances would be the rule rather than the exception, owing to the technical difficulty of applying an exact median line and to the possibility that such application would be open to the objection that the geographical configuration of the coast made it inequitable, because, for example, the low-water mark, which constituted the baseline, was liable to physical change in the course of time by silting. The point should be made in the comment that exceptional cases were liable to arise fairly frequently.

29. Mr. ZOUREK said that the United Kingdom Government's comment and Sir Gerald Fitzmaurice's remarks brought out the defects in the present text of article 7. In practice, the principle of the median line would always be applied unless another boundary line was justified by special circumstances, if no State took the initiative in negotiations or if the other party to the negotiations did not accept an agreement. The main emphasis should therefore be laid on negotiations between the States.

30. As Sir Gerald Fitzmaurice had pointed out, geographical factors would very often determine the median line between the continental shelves of adjacent States. Although it was unlikely that negotiations between such States would be unsuccessful, as both had an interest in settling the matter, the principle should always be applied unless other circumstances justified some departure from it. The article should therefore stipulate, first, the principle that the delimitation of the boundary should be determined by agreement between the parties concerned, and, secondly, that only if negotiations broke down should the principle incorporated in article 7 be applied.

31. Mr. FRANÇOIS, Special Rapporteur, remarked that the text as it stood met Mr. Zourek's point precisely.

32. Mr. AMADO agreed with Mr. Zourek that the main emphasis should be on negotiation between the States concerned; but that was clearly implicit in the text of the article as it stood.

33. Mr. ZOUREK agreed, and observed that he was not suggesting any change in the basic principle. On the other hand, the emphasis on negotiation, taking due account of geographical circumstances, as Sir Gerald Fitzmaurice had stressed, should be brought out strongly.

34. Mr. SPIROPOULOS suggested that the Commission was splitting hairs. Mr. Zourek's point would be valid only if the article laid stress on possible disagreements between States; that might be referred to in the comment.

35. Mr. SANDSTRÖM agreed, and suggested that Mr. Zourek's point might be met by inserting a sentence in the comment, beginning: " In the absence of agreement, the median line shall be . . ."

36. The CHAIRMAN thought that the passage might be drafted to start with a proviso that, in case of dispute, the boundary of the continental shelf should be settled by agreement; and thereafter the remainder of the statement.

37. Mr. ZOUREK supported the Chairman's suggestion.

38. The CHAIRMAN thought that the same might be done with the comment on paragraph 2.

39. Mr. PADILLA-NERVO asked whether paragraph 2 prohibited directional borings at the boundary line of the continental shelf appertaining to two adjacent States. In other words, was the boundary determined by a line perpendicular to the base?

40. The CHAIRMAN said that directional boring might be undertaken only by agreement between the States concerned.

41. Mr. SANDSTRÖM said that fixing a perpendicular line would not solve the difficulty, but the Commission had already agreed that directional boring might be undertaken by agreement between the States concerned.

42. Mr. FRANÇOIS, Special Rapporteur, pointed out that the State which owned the sea-bed also owned its subsoil, and another State could therefore not enter the former's continental shelf without mutual agreement.

43. The CHAIRMAN observed that that was the very purpose of delimiting the boundary line.

44. Sir Gerald FITZMAURICE, reverting to the United Kingdom's proposal for the addition of a third paragraph to article 7, said that it would usefully reproduce article 14, paragraph 2, of the draft articles on the regime of the territorial sea, which dealt with the delimitation of the territorial sea of two States whose coasts were opposite each other.[3]

[3] *Official Records of the General Assembly, Tenth session, Supplement No. 9* (A/2934), p. 19.

45. Mr. SPIROPOULOS agreed, although he was not wholly convinced. In territorial waters, masters of vessels needed to know exactly where they were, but that did not necessarily apply to the continental shelf, as the superjacent waters were the high seas, except where there were installations and fisheries.

46. Mr. PADILLA-NERVO also supported the addition of the paragraph suggested by the United Kingdom Government.

47. Mr. SANDSTRÖM asked what purpose would be served by marking the lines on officially recognized charts.

48. Sir Gerald FITZMAURICE replied that the lines would be useful for fishermen engaged in sedentary fisheries, for oil boring and for placing installations.

49. Mr. SANDSTRÖM observed that he had asked his question because in the case of the territorial sea the matter of sovereignty arose; in the case of the continental shelf, however, there seemed to be no practical value in marking the lines.

50. Mr. SPIROPOULOS replied that marking had some importance for adjacent States, but they might well determine the boundary by mutual agreement. He would not, therefore, press for the adoption of the United Kingdom Government's proposal.

51. Sir Gerald FITZMAURICE pointed out that the lines might be of use to foreign fishermen who were allowed, under licence, to participate in sedentary fisheries and would therefore need to know where the continental shelf of one State ended and that of another began. If, however, the Commission really felt that the proposal had no practical utility, he would not press it, although he was not convinced that that was so.

52. Mr. FRANÇOIS, Special Rapporteur, proposed that a passage be incorporated in the comment to the effect that it might perhaps be useful if the lines were marked on the largest-scale charts available and officially recognized.

It was so agreed.

It was decided to refer article 7 to the Drafting Committee.

Article 8

53. Mr. KRYLOV, without desiring to reopen the discussion on compulsory arbitration, wished nevertheless to stress, in view of the misconceptions of the author of a letter to *The Times* of 2 June, that he was not always opposed to compulsory arbitration, which in certain cases was perfectly justifiable. Indeed, some treaties concluded by the Government of the Soviet Union, for instance those concerning narcotic drugs, contained an arbitration clause. With narcotic drugs, the eradication of a recognized evil called for strong measures, but the issues in the case of fisheries and the continental shelf were quite different; there the remedy of compulsory arbitration was out of proportion to the issues at stake.

54. The Special Rapporteur had apprehended the danger of the compulsory arbitration provisions,[4] while other members too at the fifth session had doubted the appropriateness of compulsory arbitration as a solution to disputes over the continental shelf.[5] It must not be forgotten that fisheries and the continental shelf were subjects that were new in the field of international law.

55. There was bound to be a long debate on compulsory arbitration in the sixth committee of the General Assembly so he supported Mr. Spiropoulos' view [6] that the Commission ought not to take any decision on the subject in connexion with the continental shelf. He would vote against article 8.

56. Mr. SPIROPOULOS shared Mr. Krylov's view, but for rather different reasons. The provision in the article was a vague formula, similar to that to be found in many international conventions, and had little to do with arbitration in the true sense of the word, for the application of the principle depended entirely upon mutual consent. It might be argued that the provisions contained an obligation, but it was by no means watertight, because nothing in the draft text could compel an unwilling party to accept the arbitral procedure. Unlike the optional clause of Article 36 of the Statute of the International Court of Justice, article 8 was purely decorative; it looked well, but had no practical value. In the draft articles on fishing the Commission had set up a balanced system which would work well in practice. The present draft article, however, was in a different category.

57. He failed to see how the inclusion of the article could affect the issue in any dispute. It presumed the good faith of the parties, and if good faith were lacking, the article would simply be non-operative.

58. Mr. KRYLOV suggested that Mr. Spiropoulos was exaggerating, for, as he himself had pointed out, there were cases when compulsory arbitration was of proved value.

59. Mr. LIANG, Secretary to the Commission, said that, in view of its importance—as instanced by its length—the comment to the article should not be overlooked (A/2456, paras. 86-90). It was there stated (para. 86) that the article represented " a general arbitration clause, providing that any disputes which may arise between States concerning the interpretation or application of the articles should be submitted to arbitration at the request of any of the parties ". It was further stated (para. 87) that the Commission did not propose the adoption of a convention on the continental shelf. It was therefore erroneous to suggest that the article imposed compulsory arbitration. That issue would arise only if the article were adopted together with the others dealing with the continental shelf. What was certain, however, was that the Commission's decision at its fifth session was the establishment of the principle of arbitration.

60. A study of the substance of the article in the light of the comment showed that compulsory arbitration was not the sole and exclusive method recommended for the settlement of a dispute. In the final result, compulsory arbitration might be adopted, but it would not be by

[4] A/CN.4/SR.203, para. 10.

[5] *Ibid., passim.*

[6] *Ibid.*, paras. 13-15.

the exclusion of other procedures. Those considerations led him to suggest that, once the text of the article had been adopted, the comment should be brought into line with it, and that the Commission's attitude to the issue, whether it stood on its 1953 position or whether it envisaged the insertion of the draft acticles in a convention on the continental shelf, should be clearly defined.

61. Mr. SANDSTRÖM deprecated any denigration of the draft. Its basis was obviously the presumption of the parties' good faith. Difficulties might arise, but a compulsory arbitration clause would exert a beneficial influence. A further reason for the inclusion of such a clause was the fact that the Commission was engaged in defining new rights in a field where there was a considerable conflict of rights.

62. Mr. Spiropoulos had exaggerated the grounds for his opposition. The draft articles on the continental shelf should be completed by an arbitration clause, just as in the case of those on fisheries.

63. Faris Bey el-KHOURI said that the Secretary's remarks had done little to dissipate his doubts with regard to the article. The Commission had no concern with cases where the parties to a dispute agreed upon means for a settlement. The problem arose only in the absence of such agreement, and experience had shown that ways of settling their differences could always be found by the States concerned.

64. He had always held that a single compulsory solution could not be imposed upon States, save that of recourse to the International Court of Justice, an international body created for that very purpose, which by its composition was immune from external, non-juridical pressure. Arbitral procedure could be applied only on the basis of mutual consent. It was by no means the only possible solution, and suffered from the drawback that the members of the arbitral commission could not possibly enjoy the same independence of judgment as the members of the International Court of Justice.

65. Mr. SCELLE, replying to the Secretary and to Mr. Sandström, said that in the existing state of affairs the provisions of article 8 had no practical value whatever. Since there was no intention of proposing the adoption of a convention on the continental shelf—for which he was thankful—the article amounted to nothing more than a simple desideratum, the enforcement value of which was precisely nil. That being so, governments were at complete liberty to adopt whatever measures they pleased in respect of the exploration and exploitation of the shelf.

66. The draft articles would allow the more powerful States freely to exploit the weaker ones—granting perhaps, if they felt generous, a small consideration. In the meantime, the high seas were being whittled away and before long, enormous areas of them would be exploited at will by the large, powerful States. In the case of Australia and Japan, no draft convention could possibly affect the outcome if the former country were to claim sovereign rights over the whole of the continental shelf off its coasts. The Commission had taken the wrong road and he declined to follow it. He had noticed from a perusal of the record of the debates in the Australian Parliament that some members, basing themselves on the Commission's recommendations, had claimed such sovereign rights as he had mentioned. That, no doubt, was a great honour to the Commission. Nothing the Commission had done, however, justified such claims. All it had done was to codify certain desiderata.

67. The existing situation was that the concept of the continental shelf was being interpreted by each State as it pleased. It might be that he and the Commission contemplated the future with a different eye; in any event, he had no hope of persuading it to recognize the truth of his contention. All he could do was regretfully to dissociate himself from the decisions it had taken on the subject of the continental shelf.

68. Mr. ZOUREK said that the provisions of the article would undoubtedly raise difficulties in the way of its acceptance by governments. In his view, the draft articles on the continental shelf should not include any statement of principle on compulsory arbitration, for without an agreement on its implementation between States parties to a dispute it could have no practical value.

69. On the other hand, States willing to accept the principle of compulsory arbitration were faced with a wide choice of method; he need only mention the General Act for the Pacific Settlement of International Disputes of 1928, revised in 1949, the optional clause in Article 36 of the Statute of the International Court of Justice, or the numerous bilateral conventions for the peaceful settlement of international disputes. In such circumstances no difficulties would arise for those States which were prepared to accept compulsory arbitration, but he was convinced that parties to a dispute who were unwilling to adopt any such solution for a settlement would not accept the provisions of article 8. The question of acceptability was of great importance, for the Commission's recommendations would pass into the corpus of international law only if accepted by States. He accordingly proposed that the article be deleted.

70. Mr. EDMONDS said that he was unable to follow the argument of those who considered that draft article 8 provided for compulsory arbitration. The text merely stated that " any disputes . . . should be submitted to arbitration "; in other words it made a suggestion. That interpretation was borne out by the comment on the draft article (A/2456, paras. 86-90). Furthermore, the absence of any detailed provisions, such as those contained in articles 31-33 on the conservation of the living resources of the high seas,[7] to govern the composition of the arbitral body and the criteria that it should adopt, strengthened the impression that the Commission was not thinking in terms of compulsory arbitration when it framed draft article 8. The draft article did not do much more than express a pious wish that States should resort to arbitration.

71. Mr. AMADO said that it was possible to find support for almost any argument in the commentary quoted by Mr. Edmonds. For instance, in paragraph 87

[1] *Official Records of the General Assembly, Tenth session, Supplement No. 9* (A/2934), pp. 12 and 13.

the provision for arbitration was presented as essential if the principle of the freedom of the seas and peaceful relations between States were not to be threatened. In the very next paragraph, however, the view of certain members was quoted to the effect that such a provision would increase the possibility of certain States' putting pressure on weaker States and in effect curtailing their independence. Again, while article 8 provided only that disputes concerning the interpretation or application of the articles should be submitted to arbitration, paragraph 90 of the commentary appeared to go much further.

72. It was only with great reluctance that he, a jurist of a country which had embodied the principle of compulsory arbitration in its very constitution, opposed the retention of draft article 8. There was, however, no point in it. The most that had been said in its favour was that it expressed a desideratum and could do no harm. He could not vote for its retention.

73. Mr. SANDSTRÖM pointed out that the words " should be submitted " in the English text of the draft article did not mean the same thing as the words " seront soumis " in the French text, which expressed a clear intention to establish compulsory arbitration. That arbitration was intended to be compulsory also appeared from the penultimate sentence in paragraph 87 of the commentary, where it was stated that States " should be under a duty " (in the French text " soient tenus ") to submit any disputes to arbitration.

74. The Commission had made considerable progress since it had stated in the report covering the work of its fifth session that it did not propose the adoption of a convention on the continental shelf (A/2456, para. 87). He thought it was now the view of the Commission that such a convention should be adopted. The Commission's task was to submit proposals and it should not concern itself unduly with the question whether those proposals would be acceptable to certain States. In his opinion, it was essential to make provision for compulsory arbitration in the draft, and he would shortly submit a formal proposal that the Commission make detailed provisions for arbitration on the lines of articles 31-33 on the conservation of the living resources of the sea.

75. Mr. HSU said that when the regime of the continental shelf had been raised as a preliminary question, the Commission, acting on the assumption that it was called upon to recommend new law and realizing that an extension of the privileges of the coastal State was involved, had felt that a system of arbitration must be established to protect the rights of the countries using the high seas. But when the question had come formally before the Commission, the general impression had been that it had merely to codify and elaborate a body of rules which were already established law. Later, however, when confronted in its draft report with the implications of that impression, the Commission had been unable to accept them and had deleted whole passages from the draft, though leaving certain vestiges, such as the term " sovereign rights " and the idea that it was not necessary to adopt a convention on the continental shelf. That explained why the draft articles, in their present wording, could be taken either as principles recommended to the General Assembly for incorporation in a convention, or merely as an elaboration of existing law.

76. The Commission could either revise and expand the text on arbitration on the lines of articles 31-33 on the conservation of the living resources of the high seas —a task which would take far too long—or could state in the commentary that the draft articles constituted recommendations and not a codification of established law. If article 8 were recommended with a view to the adoption of a convention, there would be no need to redraft it, since the convention, when adopted, would provide for compulsory arbitration. As the article stood, however, it did not provide for compulsory arbitration and its opponents were quite justified in claiming that it could be conveniently deleted. At all events, the Commission should make clear in its report whether the draft articles were intended as recommendations or as codification of existing law.

77. Mr. SALAMANCA observed that the commentary lent itself to various interpretations of the meaning of the draft articles. Mr. Edmonds had submitted one interpretation, while Mr. Sandström had rightly pointed out that unless clear criteria were laid down, the concept of arbitration contained in draft article 8 would be very imprecise and general. In paragraph 88 of the commentary, the members of the Commission had apparently had in mind Article 33 of the Charter of the United Nations, and in paragraph 89, the draft on arbitral procedure which it had submitted to the General Assembly.

78. There were three courses open to the Commission. It could either delete article 8 altogether, as Mr. Zourek had proposed, or supplement it with more detailed provisions governing the machinery and procedure of arbitration, as Mr. Sandström proposed. The third alternative, which he himself wished to propose, was to replace the reference to arbitration by a reference to the various means of settlement enunciated in Article 33 of the Charter, and at the same time to indicate in the commentary that compulsory arbitration was desirable if all the parties to the dispute had agreed thereto in a convention regulating arbitration procedure with regard to the continental shelf.

79. As Mr. Spiropoulos had already pointed out,[8] draft article 8 was vague and gave no indication of the type of arbitration to be adopted. He was prepared to accept its deletion, but would prefer the solution he had just proposed.

80. Mr. PADILLA-NERVO said that, before voting on draft article 8, the Commission must be perfectly clear as to whether the article established compulsory arbitration or merely urged countries to resort to arbitration. Before hearing the debate, he had gained the impression from the commentary on draft article 8 that the Commission had in mind a compulsory system of arbitration. The last two sentences of the Spanish text of paragraph 87 of the commentary certainly appeared to make arbitration compulsory, and paragraph 88

[1] See para. 56, above.

confirmed that impression. The fact that no provision was made for the machinery and procedure of arbitration, as in draft articles 31-33 on the conservation of the living resources of the high seas, did not necessarily mean that the Commission had not had compulsory arbitration in mind when framing draft article 8. Moreover, although the need to seek a solution by other means was not explicitly stated in draft article 8, as it was in draft article 31, the idea was implicit that if the parties to a dispute agreed to seek other means of peaceful settlement, arbitration should be regarded as the last resort and, in that sense, would be compulsory.

81. Sir Gerald FITZMAURICE agreed that the English text was misleading. The article was intended to establish compulsory arbitration, although it did not go into details regarding the machinery and procedure for arbitration.

82. Such detailed provisions were always useful, but were not essential. A large number of treaties signed during the last forty years merely contained a provision that disputes would be submitted to arbitration, it being implied that the parties to the dispute were bound to co-operate in making the appropriate arrangements. While detailed provisions made the process of arbitration more certain, he did not think that their absence necessarily affected the obligatory character of arbitration.

83. Since the greater part of the draft relating to the regime of the high seas did no more than codify existing law, the Commission had previously agreed that it was not necessary to make general provision for arbitration in the whole of the draft. Where, however, the articles could be said to be creating new law, there might be some ground for providing for compulsory arbitration. The articles on the conservation of the living resources of the sea were a clear case of that kind. The proposals were completely new and were designed to serve as a basis for an international convention. The articles on the continental shelf, on the other hand, were a borderline case. Though they clearly did not form an entirely new system, they did deal with a comparatively new subject and one which was particularly open to misuse. Rights over the continental shelf were already serving as a basis for illegitimate claims to areas of the high seas. It would therefore be useful to retain draft article 8 or at least the principle of compulsory arbitration, subject to drafting changes. Such a step would facilitate general acceptance of the articles by certain States.

84. It had, however, been claimed that retention of the article would equally impede acceptance of the draft by other States. He failed to appreciate the cogency of that argument unless the States in question wished to be in a position to take unilateral action on a new matter without the risk of others resorting to arbitration.

85. It had also been argued as a reason for not retaining the article that countries were always free to resort to arbitration if they wished. Experience showed, however, that it was precisely those countries that were unwilling to accept an obligation to arbitration that were also unwilling to resort to arbitration voluntarily. If no provision on the lines of draft article 8 were included, he feared that States would resort to arbitration very rarely indeed.

86. Mr. FRANÇOIS, Special Rapporteur, said that it was clear that the reason for the difference of opinion was the discrepancy between the French and English texts. It was obvious from the French text that the Commission had intended to establish compulsory arbitration; indeed, the commentary was comprehensible only on that understanding. He did not consider it essential for all details regarding machinery and procedure to be included. In other cases, the Commission had been content to indicate the general course to be followed, leaving the details to be elaborated by a conference.

87. Though he would probably vote for the retention of draft article 8, he was less enthusiastic than Sir Gerald Fitzmaurice as to its value. The Commission was generally agreed that provision for arbitration should be made only in quite special cases, such as that of the conservation of the living resources of the high seas. He doubted, however, whether the continental shelf constituted such a special case and, though resort to arbitration in disputes regarding it, as also in other disputes, was undoubtedly desirable, it was not necessary to state the fact in an article. The Commission could, for instance, omit all mention of arbitration in the draft articles in cases other than the quite special ones, pointing out in the commentary that it had not dealt with the question because it regarded it as a matter to be handled by an international conference when establishing a convention.

88. Faris Bey el-KHOURI said that draft article 8 clearly provided for compulsory arbitration, while not excluding prior recourse to other means of peaceful settlement. He would have preferred the article to mention arbitration only as a last recourse giving priority to other means of settlement, and in particular to reference of the dispute to the International Court of Justice. The efficacy of such a procedure had been demonstrated by the recent judgment of the International Court of Justice in the fisheries case between the United Kingdom and Norway, which had been generally accepted as a rule of law. He therefore proposed that article 8 provide for reference of disputes to the International Court of Justice.

89. Mr. SPIROPOULOS said that his earlier remarks had been misinterpreted. As a Greek jurist, he could not fail to support the principle of compulsory arbitration. Unfortunately, draft article 8 on the continental shelf, unlike draft article 31 on the conservation of the living resources of the sea, established an imperfect system of arbitration in that it provided no means of compelling States, whether acting in bad or in good faith, to resort to arbitration. Although the system of arbitration provided for by the article was undoubtedly a compulsory one, very few States would resort to arbitration as a result of it.

90. He was willing to retain the draft article as an enunciation of a principle of law, on the understanding that when States drew up a convention on the continental shelf, they could adopt provisions governing the machinery and procedure for arbitration on the lines of those contained in article 31 on the conservation of the living

resources of the high seas. Incidentally, reference of disputes to the International Court of Justice might be regarded as included in very broad terms in " arbitration ".

91. Mr. EDMONDS agreed that his case was not supported by the French and Spanish texts of article 8. He could not, on the other hand, agree that the statement in paragraph 87 of the commentary that " States... should be under a duty to submit to arbitration any disputes arising in this connexion " necessarily meant that arbitration was compulsory. As a judge, he would be most reluctant to place such an interpretation on the text. He fully agreed, however, with Mr. Padillo-Nervo that the Commission must be quite clear as to whether draft article 8 was to contain mere guidance or a legal requirement. In any case, the commentary on the draft article should be brought into line with the article itself.

92. Mr. SANDSTRÖM said that, although there was a difference between the case of the continental shelf and that of the conservation of the living resources of the high seas, it was merely a difference of degree. The need for expert opinion was not so great in the first case as in the second.

93. He supported Faris Bey el-Khouri's proposal that disputes be referred to the International Court of Justice. If that proposal were rejected, he would vote in favour of retaining draft article 8 as it stood.

94. The CHAIRMAN, speaking as a member of the Commission, said that the obligation to resort to arbitration as contemplated in draft article 8, though not as essential as in the case of disputes concerning the living resources of the high seas, was none the less necessary, since the rights granted to the coastal State over the continental shelf were liable to affect other rights of other States. It was with that consideration in mind that he had included in the last paragraph of his proposal for a preamble to the draft articles on the continental shelf the qualification " without prejudice to the rights of other States in accordance with the principle of the freedom of the sea ",[9] thereby recognizing the duality of the law where the continental shelf was concerned.

95. Those who opposed the inclusion of draft article 8 had good ground for their view—namely, that they were against any system of arbitration in the regime of the high seas. On the other hand, those who supported arbitration in disputes over the conservation of the living resources of the high seas should logically be in favour of it in disputes concerning the continental shelf, since in both cases the coastal State enjoyed rights which might affect the rights of other States. If the Commission had had more time at its disposal, he would have liked to complete the article by the addition of detailed provisions governing the machinery and procedure for arbitration, similar to those in articles 31-33 on the conservation of the living resources of the high seas, in place of a mere statement of principle. He would not, however, press that point, though as it stood the system of arbitration established was imperfect.

96. Speaking as Chairman, he said that the Commission had before it the following proposals: the first and farthest removed from the substance of the original, by Mr. Zourek, that draft article 8 be deleted,[10] the second, by Sir Gerald Fitzmaurice, that it be retained substantially as it stood,[11] the third, by Faris Bey el-Khouri, that it be retained in amended form specifying that disputes should be referred to the International Court of Justice,[12] the fourth, by Mr. Salamanca, that it be retained in amended form referring States to the means of peaceful settlement of disputes set out in Article 33 of the Charter, the reference being amplified in the comment on the draft article.[13]

97. Mr. SANDSTRÖM proposed that the article be amended to read as follows:

> Any disputes which may arise between States concerning the interpretation or application of these articles shall, at the request of any of the parties, be submitted either to the International Court of Justice or to arbitration, unless the parties agree to seek a solution by another method of peaceful settlement.

The article would then be in harmony with article 31, paragraph 1, on the conservation of the living resources of the high seas.

98. Mr. SALAMANCA pointed out that, if the article were thus amended, arbitration would no longer be compulsory, which was what he himself had originally proposed. If Mr. Krylov and other members of the Commission accepted Mr. Sandström's amended version, he would withdraw his own proposal.

99. Faris Bey el-KHOURI remarked that Mr. Sandström's amendment could be presented in a different form, so that the article would read:

> Any disputes which may arise between States concerning the interpretation or application of these articles shall, failing agreement between the parties to seek a solution by another method of peaceful settlement, be submitted either to the International Court of Justice or to arbitration.

The drafting could, however, be left to the Drafting Committee.

100. Mr. KRYLOV said that he could accept Mr. Salamanca's proposal, since it made resort to arbitration optional. He could not accept Mr. Sandström's proposal, however, as it retained the principle of compulsory arbitration.

The meeting rose at 1.05 p.m.

[9] A/CN.4/SR.357, para. 44.

[10] See para. 69, above.

[11] See para. 83, above.

[12] See para. 88, above.

[13] See para. 78, above.