

Document:-
A/CN.4/L.51

Proposal by Mr. Scelle - incorporated in the summary record of the 283rd meeting, footnote 16

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

Extract from the Yearbook of the International Law Commission:-
1955, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

52. Mr. HSU, endorsing the previous speaker's viewpoint, said that the Commission had, on occasion, invited individuals to address it, but it had not hitherto acceded to any unsolicited request to do so.

53. The CHAIRMAN put to the vote Mr. Krylov's proposal that the observer for Poland be allowed to address the Commission.

Mr. Krylov's proposal was rejected by 6 votes to 3, with 1 abstention.

54. Mr. GARCÍA AMADOR, explaining his abstention, recalled the case of Mr. V. Belaunde mentioned by Mr. Krylov. The decision to hear him had infringed the Commission's Statute; it had nevertheless created a precedent. The Commission should adhere strictly to its own rules, and make no distinction between one individual and another.

55. Mr. HSU said that the previous speaker had misunderstood the point at issue. Mr. V. Belaunde had not asked to address the Commission; he had been invited to do so. No precedent therefore had been created on that occasion, whereas Mr. Krylov's proposal had raised an entirely new point.

56. Mr. SALAMANCA said that he had voted for Mr. Krylov's proposal because he saw no objection to the Commission's hearing Mr. Balicki on article 2. The Commission should welcome the views of governments on a specific point such as that at issue.

The CHAIRMAN declared the discussion on Mr. Krylov's proposal closed.

Régime of the high seas (item 2 of the agenda)

(A/CN.4/79) (resumed from para. 43)

DRAFT ARTICLES (A/CN.4/79, SECTION II)
(resumed from para. 43)

Article 2 [2]: Freedom of the high seas
(resumed from para. 43)

57. The CHAIRMAN put to the vote his own proposal that the phrase "without prejudice to the provisions of the articles on the continental shelf" be added to article 2.

The Chairman's proposal was adopted by 6 votes to 3, with 1 abstention.

58. Mr. SCELLE said that he had voted against the proposal because he had no very precise idea of the meaning that the term "without prejudice" was intended to convey.

59. Mr. GARCÍA AMADOR explained that, owing to a misapprehension, he had voted in favour of the proposal, which he had thereupon realized contained an inherent contradiction. The continental shelf was not the only element to be considered in the régime of the high seas: there were other related subjects such as right of pursuit, etc. If the reservation concerning the continental shelf were accepted, there would be contra-

diction with the other articles. As the articles had been drafted, the exceptions were implicit, but if one item were to be specified, all would have to be mentioned.

60. The CHAIRMAN said that he took the previous speaker's point, and suggested that further consideration of the article be deferred until the second reading.

It was so agreed.

61. After a short discussion, in which the CHAIRMAN, Mr. FRANÇOIS, and Mr. ZOUREK took part, *it was agreed* that Mr. Zourek's amendment¹³ should also be considered on a subsequent occasion.

*Further discussion of article 2 was adjourned.*¹⁴

*Article 3: Freedom of the high seas*¹⁵

62. The CHAIRMAN, supported by Mr. FRANÇOIS (Special Rapporteur), suggested the deletion of articles 3 and 4, as being superfluous in the light of the articles on the continental shelf, the Special Rapporteur adding that article 5 might similarly be deleted.

63. Mr. SCELLE said that he had already expressed his opinion on the articles on the continental shelf and had put forward a proposal, which was being circulated as document A/CN.4/L.51.¹⁶

64. Mr. KRYLOV suggested that further consideration of the point be deferred until the next meeting in order to give members time to study both proposals.

It was so agreed.

The meeting rose at 1 p.m.

¹³ Mr. Zourek's amendment (A/CN.4/L.52) read as follows:

"Add the following sentence to article 2:

"Since the high seas are open to all nations they cannot be utilized, save in the exceptional cases provided for in the following articles, for activities prejudicial to their use by the nationals of other States."

¹⁴ Resumed at the 284th meeting.

¹⁵ Article 3 read as follows:

"The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas."

¹⁶ A/CN.4/L.51 read as follows:

"Prof. J. Scelle has never been able to associate himself with the Commission's votes on the draft relating to the continental shelf, because it is simply a question of upholding governmental claims which are mutually contradictory and are not based on any rule of customary or conventional law. On the contrary the text adopted constitutes a flagrant violation of the traditional and constitutional regime of the high seas and their subsoil laboriously established during past centuries. The introduction of the concept of sovereignty in the Commission's latest draft appears, on reflection, particularly inadmissible and should be abandoned. It is calculated to multiply the causes of friction between governments and to jeopardise peaceful relations by reverting to imperialist and mercantile occupation practices.

"It is hard to understand why the International Law Commission did not follow in this field the course it adopted with regard to fisheries on the high seas, whereby the necessary power of regulation is entrusted to an international administrative authority. This method would strengthen the efforts of the international community towards integration, which are being pursued within the framework of the San Francisco charter and the United Nations."

"A brief text based on that adopted in regard to fisheries might therefore be discussed, this text to read more or less as follows:

284th MEETING

Wednesday, 4 May 1955, at 10 a.m.

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* The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Douglas L. EDMONDS, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/2456, A/CN.4/79, A/CN.4/L.51, A/CN.4/L.52) (continued)

DRAFT ARTICLES (A/CN.4/79, SECTION II) (continued)

Article 2 [2]: Freedom of the high seas (resumed from the 283rd meeting)

1. The CHAIRMAN invited the Commission to continue its consideration of item 2 of the agenda—régime

“An international administrative authority set up within the framework of the United Nations shall be competent to deal with any application from natural or juridical persons, supported by one or more governments, with a view to prospecting, investigating and exploiting the resources of the bed and subsoil of the high seas. This authority shall consider whether such application is justified and whether effect can be given to it. It may grant an international concession for this purpose, the utilization of which it will regulate, taking into consideration, if it thinks fit, the opinion of committees of experts and jurists appointed to report on applications for concessions. The Commission’s decisions shall be subject to ratification by the Economic and Social Council. Their validity may be disputed before the International Court of Justice or before a special tribunal on the grounds of illegality or misuse of power.

“The very serious and multiple reasons justifying the abandonment of the Commission’s draft, and also the above (or some similar) proposal, were developed in an article in the last number of the *Revue générale de droit international public*, an offprint of which has been circulated to all the members of the Commission.”

of the high seas—and requested Mr. Zourek to introduce his amendment to article 2 (A/CN.4/L.52).¹

2. Mr. ZOUREK recalled that at the previous meeting he had expressed his general approval of article 2, subject to a more precise definition. He had a further drafting amendment to make to his addition: in the last line, the phrase “to their use” should be replaced by “to the use of the high seas”.

3. Mr. LIANG (Secretary to the Commission) pointed out that since there was no previous mention of coastal States in the article, the word “other” in Mr. Zourek’s proposal had no application.

4. Mr. FRANÇOIS (Special Rapporteur) agreed and also doubted whether the amendment improved the text. The phrase “save in the exceptional cases provided for in the following articles” might be kept; for the rest, the only fresh element was the concept of prejudicial activities. That, however, was such a vague notion that it would be unwise to introduce it into the article.

5. Mr. SCELLE said that the proposal would be acceptable if the word “even” (*même*) were substituted for the word “save” (*sauf*). It was obvious that, despite the provision “even in exceptional... cases...”, any derogation from the right to freedom of the high seas could be settled by the injured government bringing an action for the infringement of that right. That would still apply even if the articles on the continental shelf were finally retained. He would suggest substituting for the phrase “the nationals of other States” (*les ressortissants d’autres Etats*) the term “the international community” (*la communauté internationale*).

6. Mr. ZOUREK suggested that his text might be further clarified by the insertion between the words “utilized” and “save” of the words “by any State” (*par aucun Etat*). In the light of Mr. François’ objection, the force of which he appreciated, it might be advisable to add a new article on the concept of prejudicial activities, which might appropriately come at the end of that section.

7. The CHAIRMAN, speaking as a member of the Commission, said he failed to understand Mr. Scelle’s suggestion. The contradiction with paragraph 1 of article 6 of the provisions relating to the continental shelf was a different matter entirely.

8. Mr. SCELLE urged that his proposal constituted confirmation of that article.

9. The CHAIRMAN, supported by Mr. ZOUREK, pointed out that article 6 provided for some attenuation of the right to the freedom of the seas. Any interference must not be unjustifiable; nevertheless the restriction existed.

¹ See *supra*, 283rd meeting, footnote 13.