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**Summary record of the 304th meeting**

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

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*The Special Rapporteur's proposal that the new draft articles on fisheries be referred back to the sub-committee was rejected by 7 votes to 6.*

85. The CHAIRMAN invited members to submit concrete proposals with a view to facilitating the discussion at the next meeting.

The meeting rose at 1.10 p.m.

### 304th MEETING

Friday, 3 June 1955, at 10 a.m.

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

*Chairman* : Mr. Jean SPIROPOULOS

*Rapporteur* : Mr. J. P. A. FRANÇOIS

*Present* :

*Members* : Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, 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/CN.4/79, A/CONF.10/6) (continued)

##### NEW DRAFT ARTICLES ON FISHERIES (continued) Article 6 [5, paras. 2 and 3] (continued)

1. Sir Gerald FITZMAURICE recalled that at the previous meeting he had formulated the issue on which the Commission was to vote in principle, to the effect that all measures taken to ensure the conservation of the living resources of the sea should be governed by some criteria, and that the criterion common to all cases and to all States, whether coastal or non-coastal, should be that the measures must be based on valid scientific findings and that they must be non-discriminatory.<sup>1</sup> But in view of the observations then put forward by Mr. García Amador, he now proposed that the vote be

taken on that formula without the final words that referred to the principle of non-discrimination, on the understanding that the sub-committee should decide as to the proper place and manner in which that principle should be expressed.

2. His proposal would then read :

“Subject to drafting and to seeing a final text, the Commission accepts the principle that all measures of conservation should be governed by some criteria, though not necessarily the same in all cases, except that the criterion in common to all cases should be that the measures be based on valid scientific findings.”

3. Mr. EDMONDS enquired whether the reference was to one or to several criteria.

4. The CHAIRMAN said that the central idea was that all measures be based on valid scientific findings, an idea which could conceivably give rise to a number of more specific criteria.

5. Faris Bey el-KHOURI said he would have preferred to vote separately on the inclusion in Sir Gerald Fitzmaurice's text itself of a reference to the principle of non-discrimination, but was prepared to accept the latter's revised text on his understanding that the principle of non-discrimination would be dealt with elsewhere in the draft articles.

6. Mr. GARCÍA AMADOR said that he could fully support any clause laying down the principle of non-discrimination in general terms. What he did not think advisable was that such a reference should be inserted in the particular place suggested. He therefore agreed to Sir Gerald Fitzmaurice's revised proposal.

*Sir Gerald Fitzmaurice's statement of principle was adopted unanimously.*

7. The CHAIRMAN said that the sub-committee would consider how best a proposal by Mr. Zourek, along similar lines to that on which the vote had just been taken, could be taken into account. Mr. Zourek's proposal read :

*Principe de l'article premier.*

*L'objectif principal de la conservation des ressources biologiques des mers consistant à obtenir le rendement optimum constant de façon à porter au maximum les disponibilités en produits marins alimentaires et autres, tous les règlements visant la conservation desdites ressources doivent être fondés sur des conclusions scientifiques valables.*

8. He recalled that the Commission had yet to vote on another principle which had been elucidated in the course of the discussion, namely, that any conservation measures adopted by two or more States under article 2 would be binding on other States until challenged by invocation of the procedure laid down in articles 7-10.

9. Mr. ZOUREK said that the matter was made clear by article 3 ; the case was that of nationals of States

<sup>1</sup> 303rd meeting, para. 48.

newly engaging in fishing in an area in respect of which States whose nationals had been fishing there earlier had adopted conservation measures: either the newcomers' State accepted such regulations, or it resorted to the procedure provided in articles 7-10.

10. The CHAIRMAN called for a vote on the principle in the light of Mr. Zourek's elucidation.

*Mr. Zourek's statement of principle was adopted unanimously.*

11. Mr. GARCÍA AMADOR considered that the discussion on article 6 was now mature enough for a vote to be taken on the article itself.

12. Mr. SCELLE, referring to sub-paragraph (a) of paragraph 1, pointed out that the onus would not be on the coastal State to prove that there was an imperative and urgent need for measures of conservation; it would rather be for any other State disputing that fact to demonstrate that such need did not exist.

13. Mr. EDMONDS recalled that Mr. Scelle had earlier made a proposal for the addition of a sub-paragraph (d) to paragraph 1. Subsequently he had withdrawn his proposal in favour of an amendment to article 5 suggested by Mr. García Amador which did not, however, have the same implications.<sup>2</sup>

14. Mr. SCELLE admitted that he preferred his own original proposal, mainly because it contained not merely the idea that the measures adopted by the coastal State should be in the area in which its special interest existed, an idea which had now been included in the text of article 5, but also the concept of a proper balance between the extent of high seas affected by the measures and the legitimate needs invoked by the coastal State.

15. Mr. ZOUREK said that the Commission had agreed to include a reference to spatial limitation in article 5, but had taken no decision on the notion of balance or proportion.

16. Mr. GARCÍA AMADOR said that he would have no objection to the inclusion in article 5 of a reference to the notion of balance or proportion as just described by Mr. Scelle.

17. Mr. EDMONDS could not agree to Mr. García Amador's suggestion. The matter was not simply one of drafting; it was one of principle, namely: whether the concept embodied in Mr. Scelle's proposed sub-paragraph (d) was to be included in article 6 as one of the criteria by which the validity of conservation measures must be judged.

18. Mr. GARCÍA AMADOR pointed out that article 6 did not specify all the criteria of validity. The most fundamental criterion—that the coastal State should have a special interest in the productivity of the resources of the high seas contiguous to its coast—was laid down in article 5.

19. The CHAIRMAN said that it would appear that, following the adoption of Sir Gerald Fitzmaurice's proposal, paragraph 1 of article 6 would be reduced to sub-paragraph (a). Perhaps the article had been rendered pointless.

20. Sir Gerald FITZMAURICE said that article 6 continued to exist, because it laid down the criteria on which any unilateral action taken by the coastal State had to be based.

21. Mr. SCELLE maintained that article 6 was fundamental to the entire text.

22. Mr. AMADO pointed out that article 6 referred only to the actual content of the measures adopted by the coastal State, whereas article 5 laid down the fundamental principles governing the competence of the coastal State to adopt such measures.

23. Mr. SANDSTRÖM said that the whole article should be referred to the sub-committee for final revision in the light of the various proposals adopted by the Commission.

*Article 6 was accepted in principle, and referred to the sub-committee for final drafting.<sup>3</sup>*

#### *Articles 7 and 8 [7]<sup>4</sup>*

24. Faris Bey el-KHOURI opposed the idea that disputes should be submitted to a board of experts, and proposed that this be referred to the International Court of Justice unless the parties could agree on an independent arbitral procedure. There was no need to set up special arbitration boards when there was a well established institution like the International Court of Justice at hand to dispose of any disputes which the parties could not agree to settle otherwise. Moreover, only the International Court was in a position to create a body of consistent and centralized jurisprudence in the comparatively new subject of fisheries conservation.

25. Mr. SCELLE supported Faris Bey el-Khoury's proposal that disputes in the matter of fisheries conservation be settled by arbitration or, where the parties could not agree on arbitration, by reference to the International Court of Justice.

26. He fully appreciated the necessity for taking expert advice in fishery conservation disputes. But he could not agree to the unheard of system of turning a body of experts into an arbitration court, as was proposed in the sub-committee's draft articles 7, 8 and 9. Such a system was open to a number of serious objections.

27. All courts, whether international or municipal, had at times to deal with cases the factual issues of which involved technical problems, in which event they sought expert advice; but they did not leave the judicial decision to the experts. When at an Assize Court a plea

<sup>2</sup> 302nd meeting, paras. 30 to 43.

<sup>3</sup> See *infra*, 321st meeting, para. 49.

<sup>4</sup> See *supra*, 300th meeting, para. 1.

of insanity was entered on behalf of a person accused of murder, the issue was decided by the Court itself after hearing expert witnesses, whose opinions were often contradictory. No one could entertain for a moment the suggestion that the Court should delegate to a body of experts the power to decide the issue whether or not the accused was responsible for his actions.

28. Again, the board envisaged was to include experts appointed by the several parties to the dispute. While that provision would give rise to no great difficulty when only two clear-cut interests were involved, it might necessitate an unwieldy board where the various States involved in a dispute had divergent interests: the board might then well number 8, 10 or 15 members, in which case it would resemble a general meeting rather than a court of law. It was most unlikely that such a body would ever be able to reach any definite conclusions. That was particularly so in view of the fact that the members of the board were to be experts, for gatherings of experts were notorious for their inability to reach unanimous conclusions. The Commission itself was a body of experts in international law, and many of its decisions had been taken by very narrow majorities.

29. Experts usually felt it their duty to uphold the point of view of their respective governments. Moreover, the experience of maritime conferences showed that experts were not infrequently influenced also by the interests of shipping and other commercial concerns. There was therefore abundant reason why the Commission should not approve the extraordinary system of leaving the settlement of disputes to a board of experts.

30. He disapproved of the proposal in paragraph 1 of article 8, that the Secretary-General of the United Nations should be saddled with the task of appointing, in consultation with the Director-General of the Food and Agriculture Organization, the president of the board and, failing agreement by the parties, the other members as well.

31. A better procedure would be to entrust such appointments to the President of the International Court of Justice in consultation with the Director-General of the Food and Agriculture Organization. Powers of that nature had been given to the President in other drafts drawn up by the Commission.

32. The Charter of the United Nations conferred upon the Secretary-General much more extensive powers than had been enjoyed by the Secretary-General of the League of Nations before him. Those powers were essentially political: in all his actions, the Secretary-General of the United Nations had to take into account the political situation, and the power and influence of the various States and groups of States; he had also to give the weight to the principle of geographical distribution, which was one of the cornerstones of the United Nations. But in the choice of the president and members of any arbitration board that might be set up to settle disputes relating to fisheries conservation, the essential consideration was what was the best procedure to reach a proper legal decision based on scientific con-

clusions? There was no room in such a system for the appointment of the president and members of the board in the light of such political considerations as, for instance, the desire to secure in the General Assembly the approval of a majority of States Members of the United Nations.

33. The disputes that would arise in the matter of fisheries would usually entail in the first instance scientific and technical issues, and only ultimately legal problems. He therefore proposed that the following system be adopted:

(a) States to be under an obligation to refer a dispute to a board of qualified experts—the latter to give its opinion within a specified period;

(b) The President of the International Court of Justice, in consultation with the Director-General of the Food and Agriculture Organization, to appoint the president of the board of experts and, in case of disagreement between the parties, the members thereof;

(c) The actual dispute to be settled by arbitrators or, failing agreement on arbitration, by the International Court of Justice. The Court or the arbitrators would take into consideration the report of the board of experts but, in accordance with the established practice concerning experts, would not necessarily be bound to accept its findings.

34. Mr. AMADO said that all members of the Commission were agreed on the principle of arbitration. Differences of opinion had arisen only with regard to article 8. If the Commission were to suggest that the International Court of Justice should give rulings on matter relating to fisheries conservation, it would be entrusting it with a very difficult task indeed. First, there appeared to be little or no existing rules of international law which the Court would be able to apply in accordance with Article 38 of its Statute. Moreover, the Court had been set up to solve problems of a purely technical legal nature.

35. The Secretary-General was an important organ of the United Nations, having a vital constitutional role. He agreed with Mr. Scelle's objection to imposing upon the Secretary-General the task of appointing the president, and, on occasion, the members of the board of experts.

36. He did not fully concur with the analogy drawn by Mr. Scelle concerning the position in municipal courts when judges heard expert opinion or evidence.

37. Mr. GARCIA AMADOR said that the jurisdiction of the International Court of Justice, as set out in Article 36 of its Statute, was exclusively of a legal nature. If the Commission were to suggest that disputes concerning such technical details as the width of mesh and the size of catch of fish be referred to the International Court, that would be tantamount to seeking to amend the Court's Statute.

38. The admittedly somewhat original system proposed in article 8 was based on the peculiar character of the

disputes that might arise in connexion with fisheries conservation. Hitherto, States entering into arbitration agreements had almost invariably appointed international law specialists as arbitrators, because the problems referred to the arbitrators had been essentially legal ones. Article 8 provided a flexible system, in that it did not specify that the "qualified experts" to be chosen by the parties, or possibly by the Secretary-General, must necessarily be fishery experts. If, as would more often than not be the case, the dispute concerned purely technical or scientific issues, the choice would fall upon conservation experts or marine biologists. But where legal problems arose, the "qualified experts" chosen would be jurists.

39. In that respect article 8 drew its inspiration from the general conclusions reached by the Rome International Technical Conference on the Conservation of the Living Resources in the Sea reproduced in chapter VII, paragraph 79 of its report (A/CONF./10/6).<sup>5</sup> There the Conference recommended that disputes concerning fisheries conservation be referred to "suitably qualified and impartial experts chosen for the special case by the parties concerned".

40. The Rome Conference had based its conclusions on past experience in the matter of fisheries conservation. Thus, the International North Pacific Fishery Commission had, under the treaty by which it had been set up, powers to give rulings on conservation issues.

41. The actual powers of the arbitration board were a much more important and vital issue than its composition or the name given to it. As set out in articles 7 to 10, the powers of the board were those of a court of arbitration.

42. Finally, he had been much impressed by Mr. Scelle's remarks about the desirability of entrusting the President of the International Court of Justice rather than the Secretary-General of the United Nations with the task of appointing the president of the board and, on occasion, members thereof. He would like to hear whether other members of the sub-committee favoured Mr. Scelle's proposal on that point as he himself did.

43. Mr. SANDSTRÖM said that the only essential point was that the draft articles should provide for disputes to be referred to a body empowered to give decisions from which no appeal could lie. Although it was not unimportant whether the disputes should be decided by the International Court of Justice or by an arbitration court, the question was a secondary one by comparison with the more vital one.

44. It would be an exaggeration to suggest that a court composed of experts was an unheard-of institution. He could quote a number of examples from Sweden of tribunals of a judicial character composed of experts and presided over by a jurist, and no doubt similar bodies existed in other countries too.

45. It would also be an exaggeration to suggest that judges could not deal with technical issues. In all countries, courts were dealing with such issues every day; they heard expert advice, but decided the issues themselves.

46. The choice between the International Court of Justice and an *ad hoc* arbitration board was a matter of expediency more than anything else, and for his part he had no marked preference for either. The main arguments for and against appeared to be as follows: first, the International Court of Justice had the advantage of being a permanent body, whereas an arbitration board would have to be set up in each specific case; secondly, the International Court of Justice was certainly in a better position than *ad hoc* bodies to create a consistent body of case-law; thirdly, the International Court's procedure would probably be more lengthy and cumbersome than that of an arbitration board; and lastly, the fact that legal problems might arise in connexion with disputes relating to fisheries conservation was no bar to the setting up of *ad hoc* arbitration boards under article 8. The reference to "qualified experts" implied that fishery experts could be chosen where technical problems arose, but it also meant that jurists could be appointed if a dispute was primarily concerned with legal questions.

47. Mr. SCELLE said that Mr. Sandström's example of tribunals composed of experts and presided over by a judge was not very germane to the issue under discussion. Such tribunals were presided over by a jurist, and his (Mr. Scelle's) criticism of the provisions of article 8 was that they could lead to a legal issue being submitted to a board of fishery experts.

48. A more serious matter was the size of the board envisaged: as he had already pointed out where several divergent interests were involved in a dispute, an unmanageable body could result. And the second sentence of article 10 implied that, where the board was unable to give a decision, it should make a recommendation. Such a feeble ending to a dispute would be most undesirable, and would lead in practice to complete *carte blanche* being given to the coastal State in the matter of introducing conservation measures.

49. Faris Bey el-KHOURI said that the International Court of Justice had jurisdiction, under sub-paragraphs (a) and (b) of Article 36, paragraph 2, of its Statute, to decide any fishery conservation problem which involved the interpretation of treaties on the subject or any question of international law generally; fishing in the high seas was essentially a matter of international law.

50. He reiterated his proposal that the system provided in article 8 be replaced by one providing in the first instance for arbitration where the parties agreed thereto, or, in default of such agreement, for the compulsory jurisdiction of the International Court of Justice. Arbitration would thus be optional, but the jurisdiction of the International Court of Justice would be mandatory.

<sup>5</sup> United Nations publication, Sales No.: 1955.II.B.2.

51. Finally, he pointed out that an arbitration procedure could be just as lengthy as proceedings before the International Court of Justice, especially where several parties were involved in the dispute submitted to arbitration.

52. The CHAIRMAN said that the question of fisheries could give rise to both legal and technical disputes. Where a State impugned another State's authority to adopt conservation measures in a given area of the high seas, such a dispute would certainly be of a purely legal nature. But disputes between States about actual conservation measures themselves would be technical or scientific in character. The Commission must bear those facts in mind and endeavour to find an appropriate method of settlement, or, perhaps, provide for more than one method.

53. Mr. LIANG (Secretary to the Commission) said that as the Commission had not yet taken a decision in the matter, the time was not ripe to ascertain the Secretary-General's views about the function which might be conferred upon him under article 8. There had been some misunderstanding because it had not been fully appreciated that, as envisaged by the draft articles, the Secretary-General would be called upon to appoint members of the board of experts only as a last resort after the parties had failed to agree.

54. There was a precedent for that, namely, the provision for the constitution of arbitral tribunals contained in the peace treaties concluded after the Second World War between the Allied and Associated Powers on the one hand and Bulgaria, Hungary and Rumania on the other. Article 36 of the treaty with Bulgaria, to which corresponded *mutatis mutandis* article 40 of the treaty with Hungary and article 38 of the treaty with Rumania, stipulated that any dispute referred to the Heads of Missions acting under article 35 and not resolved by them within a period of two months should be referred at the request of either party to the dispute to a commission composed of one representative of each party and a third member selected by mutual agreement from nationals of a third country. Failing such agreement, the Secretary-General of the United Nations might be requested by either party to make the appointment. The interpretation of that provision had formed the subject of an advisory opinion asked of the International Court of Justice by the General Assembly.<sup>6</sup> Furthermore, in its final draft on arbitral procedure, the International Law Commission had provided that, should the parties fail to make provision for the effective constitution of the arbitral tribunal, or should a party refuse to co-operate in that constitution, the President of the International Court of Justice should have the power to make the necessary appointments.<sup>7</sup>

55. No very clear picture of the machinery for the settlement of disputes emerged from articles 7 and 8.

Article 7 referred to arbitration, but the board of experts provided for in article 8 did not possess any of the special features of an arbitral tribunal, features which the Commission had stressed in its draft convention on arbitral procedure. When preparing the draft the Commission had sought to distinguish legal arbitration, which, according to The Hague Peace Conference of 1907, was a process for the settlement of disputes on the basis of respect for law, from technical and commercial arbitration. If that distinction was sound, there was great merit in Mr. Scelle's arguments that fishery experts alone could not appropriately constitute a tribunal dealing with legal questions, and the status of international arbitration would suffer if non-legal experts were entrusted with the task of adjudicating in legal disputes.

56. Turning to another question, he said that, far from being excluded, recourse to the International Court of Justice would be perfectly possible under the terms of article 7, which expressly referred to "another manner of peaceful settlement", and cogent arguments could be adduced to show that, by virtue of its Statute, the Court was perfectly competent to take up such cases. He would not substantiate his argument by reference to article 36, paragraph 2 (a) of the Statute, because he was uncertain of its implications, nor by reference to paragraph 2 (b), because it might be argued that disputes arising out of fishery regulations could not be settled *de lege lata*, but would base it on paragraph 2 (c). If the draft articles became part of an international convention, signatory States would accept the obligation to conform to the criteria laid down in sub-paragraphs (a) and (b) of article 6 which might require the establishment of certain scientific facts. Accordingly, if a State held that certain conservation measures were not based on valid scientific findings, it would be able to bring the matter before the Court under article 36, paragraph 2 (c)<sup>8</sup> of the latter's Statute, provided that compulsory jurisdiction had been accepted in advance by the parties to the convention. He did not think that the argument that the Court was not capable of handling highly technical matters was sustainable.

57. Every reading of article 8 confirmed the impression that the board of experts had the characteristics of a commission of enquiry or a fact-finding body as envisaged at The Hague Convention of 1907. That, coupled with the provision that its decisions would be final, seemed to indicate some conceptual confusion. If it were intended to provide for arbitration, then the language used was quite unsuitable. On the other hand, if a fact-finding body was contemplated, then its deci-

<sup>8</sup> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

"(a) . . .

"(b) . . .

"(c) The existence of any fact which, if established, would constitute a breach of an international obligation;

"(d) . . ."

<sup>6</sup> *I.C.J. Reports 1950*, p. 73.

<sup>7</sup> "Report of the International Law Commission covering the work of its fifth session" (A/2456), para. 57, in *Yearbook of the International Law Commission, 1953*, vol. II.

sions could not have binding effect; otherwise the Commission would be proposing some hybrid organ which would fail to inspire confidence.

58. He was inclined to agree with Mr. García Amador that, unlike the draft articles on the continental shelf, the draft articles on fisheries must constitute a separate instrument in the form of an international convention, if the articles on implementation were to be properly understood.

59. The CHAIRMAN, speaking as a member of the Commission, considered that it would be perfectly feasible to draw up a special draft convention on the regulation of fisheries which provided for arbitration, and also to insert the articles not concerned with the settlement of disputes in the draft on the régime of the high seas to which they properly belonged.

60. Mr. HSU thought that article 7 could be accepted as it stood, since it was not restrictive either as to machinery or as to the form of settlement, since the parties could choose conciliation rather than arbitration, and were free to refer a dispute to the International Court. As methods of settlement were fundamentally similar, so far as competence was concerned there was little to choose between the various possibilities. Though in the past arbitration had contained some element of uncertainty, he hoped that that weakness might be overcome if the Commission's draft convention on arbitral procedure found practical application. Perhaps, in view of the special features of the arbitral process, arbitration would be preferable, but other means of settlement would not be excluded. In his view, the real choice lay between a standing arbitral tribunal and one established by the parties. If the latter solution were adopted it would in no way preclude the tribunal from taking expert advice. Indeed, the parties might choose arbitrators qualified in the technical rather than in the legal field. In the interests of flexibility, therefore, it might be advisable not to refer explicitly to "qualified experts".

61. In case of disagreement between the parties over the appointment of arbitrators, he doubted whether it would be advisable to entrust the task to the Secretary-General of the United Nations who, having already certain important functions, might be liable to exceed his powers.

62. Mr. ZOUREK considered that articles 7 and 8 constituted a sound basis for discussion, as a result of which the Commission might be able to devise an acceptable text. He welcomed the sub-committee's decision to entrust the settlement of disputes to a board of experts, a decision which would be consistent with the conclusions reached at the Rome Conference, since only qualified experts would be competent to judge whether regulations were based on valid scientific findings. He was also pleased to note that the board would be constituted *ad hoc*, in view of the great range and variety of problems, which would relate to widely differing regions and species. That aspect of the matter was illustrated by the large number of agreements and

bodies concerned with fisheries problems. Some of those bodies were concerned exclusively with scientific research, while others were responsible for framing recommendations.

63. Nevertheless, the procedural articles did give rise to certain difficulties. In the first place, it was most unusual to stipulate that the findings of experts should be final and without appeal, in other words, that they should have the status of an arbitral decision. The Commission must not lose sight of the fact that such a provision would not facilitate the acceptance by governments of new rules whose practical implications could not easily be foreseen. Governments would be cautious about committing themselves to compulsory arbitration in matters which it could hardly be claimed belonged to the sphere of international disputes as at present understood. The board of experts would in fact be concerned with the creation of rules rather than with their interpretation. For example, if a dispute under article 2 were submitted to arbitration, the board would be empowered to create new rules of international law binding upon States. In exceptional cases it could make recommendations similar to those drawn up by the arbitrators in the case between Great Britain and the United States of America concerning seal fishing in the Behring Sea. The board would thus possess a legislative function going far beyond the normal concept of arbitration. Such a development was open to grave theoretical objections, but at the present time the Commission should concern itself more with the practical consideration of whether governments would be willing to accept such an innovation.<sup>9</sup>

64. Perhaps it would be wiser to entrust the board of experts with the task of drawing up the regulations, but there would be little hope of States accepting them as binding. However, the board might still usefully deal with the detailed aspects of regulation, as was done by the International Commission on Whaling. The recommendations of the Rome Conference closely followed the present practice of submitting technical problems to experts for an advisory opinion. Though such recommendations were not binding, it would nevertheless be difficult for States to reject them, and any dispute could be dealt with by the procedure agreed upon in advance or by that provided for in the Charter of the United Nations. The advantage would be that States could choose whatever machinery was appropriate for the settlement of a given dispute. Despite the respect in which he held the International Court of Justice, he contended that it might not be able to fulfill a legislative function on some highly technical question, which could be more quickly and economically solved by experts. Any important cases involving legal issues could, however, be submitted to the Court. The principal object was to eliminate disputes, and the question of machinery was a secondary issue.

65. Mr. FRANÇOIS (Special Rapporteur) maintained his original view that disputes should be referred to the

<sup>9</sup> See *infra*, 306th meeting, para. 3.

International Court of Justice; but that seemed to have met with strong opposition, and it was indeed regrettable that there was a marked tendency for States not to have recourse to that body.

66. In support of Mr. Sandström's remarks rebutting Mr. Scelle's contention that arbitral tribunals were never composed of experts only, he pointed out that in the Netherlands many arbitral tribunals, particularly in the commercial field, consisted entirely of experts. Differences in the wheat trade, for example, were never submitted to the courts, but always settled by experts.

67. He also firmly rejected Mr. Scelle's affirmation that experts were never independent, but were always to some extent vulnerable to political influence. Experts were less subject to government pressure than tribunals composed entirely of lawyers, and less susceptible to political opinion. On the international plane, he would point to the highly satisfactory results achieved by bodies composed exclusively of experts. He did not, therefore, share Mr. Scelle's misgivings; nor did he think that persons unversed in law were always incapable of judging on the basis of law.

68. It had been argued that arbitration was impossible unless the arbitrators were chosen by the parties themselves, but it should be noted that in cases of disagreement the Commission had also provided in its draft convention on arbitral procedure for the tribunal to be appointed by some impartial person. He was not so apprehensive as other members about the Secretary-General's being open to political pressure, because his onerous responsibility towards all States should ensure his absolute objectivity in the important matter of selecting arbitrators. However, he would have no particular objection to the function being performed by the President of the International Court of Justice. Either solution was acceptable, and in either case expert opinion would have to be sought concerning the appointments. Nor did he consider the Secretary's argument that an arbitral decision must be based on law as absolutely valid, since an arbitral tribunal could also render its judgment *ex aequo et bono*.

69. Mr. Scelle's suggestion concerning a procedure in two stages, whereby the experts would first deliver an opinion and an arbitral tribunal would then render its decision, seemed to him the worst possible solution since it would probably displease all parties.

70. He had not been at all surprised by Mr. Zourek's views, since his opposition to compulsory arbitration was well known. Though he had considerable sympathy for those views, he did not believe that it was always possible to avoid providing for implementation. In the present instance, the Commission was drawing up draft articles conferring new rights which would be exercised by States on the high seas, and he could not agree with Mr. Zourek that it should be left to States to deal with any possible differences. Such new rights could only be recognized on condition that they were accompanied by provisions for compulsory arbitration. Without such a guarantee the draft would be totally unacceptable.

71. Mr. SCELLE strongly repudiated the Special Rapporteur's interpretation of his remarks. He had not suggested that experts were never independent, but had only sought to show that experts called upon to give an opinion in any case in which national interests were involved must inevitably be influenced by the attitude of their governments. As for the tribunals which Mr. François and Mr. Sandström had mentioned, he would point out that their members ceased to be experts and became judges. In that connexion, it was pertinent to note that more and more cases were being referred to the arbitral tribunal of the International Chamber at Paris, where the arbitrators were designated in advance according to a procedure similar to that used for the Permanent Court of Arbitration. In drawing up the draft convention on arbitral procedure, the Commission itself had never excluded the appointment to the tribunal of specially qualified persons, but had taken the greatest care to ensure that, once appointed, their status should be assimilated to that of judges.

72. Further, he had never claimed that the arbitral tribunal should consist solely of lawyers, but had merely demonstrated the absurdity of empowering a conference of some 40 to 50 experts, as distinct from a tribunal of three to five judges, to render a decision binding on States.

73. Finally, he must make clear that he had never suggested that there should be two successive decisions, the first by the experts and the second by the tribunal. All he had claimed was that the latter should take expert advice before rendering its decision.

The meeting rose at 1.5 p.m.

### 305th MEETING

Monday, 6 June 1955, at 3 p.m.

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

Chairman : Mr. Jean SPIROPOULOS

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

Members : Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA