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Summary record of the 305th meeting

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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

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*)

Articles 7 and 8 [7] (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of articles 7 and 8 of the new draft articles on fisheries submitted by the sub-committee at the 300th meeting.

2. Sir Gerald FITZMAURICE said that Mr. Scelle's brief intervention at the end of the previous meeting, and an informal exchange of views with him, had convinced him that the Commission was more or less agreed and that the protracted discussion on the board of experts provided for in article 8 largely turned on a matter of drafting. Despite some variations in interpretation with regard to the board's function, the idea in the minds of most members was the same. For example, Mr. Scelle seemed willing to accept the possibility of the board's being composed entirely of fishery experts, and not necessarily of lawyers, though insisting that once appointed they would function as judges,[1] and he (Sir Gerald Fitzmaurice) entirely concurred, as he had never envisaged the board as a committee of experts convened, not to deliver judgment, but to try and arrive at certain unanimous conclusions. Surely the sub-committee—and he hoped that Mr. García Amador would agree—had contemplated a board of experts in fishery questions which, once constituted, would become an arbitral body taking its decisions by majority vote, such decisions being binding on the parties. If that conception tallied with Mr. Scelle's, there was agreement in the Commission.

3. There remained Faris Bey el-Khouri's proposal.[2] He fully understood the reasons for considering that all disputes should be referred to the International Court of Justice, but would point out that the draft articles related to a special type of problem and that the parties were not bound under article 7 to refer a difference to the board of experts, being free to agree upon any other manner of peaceful settlement. While holding the International Court in the greatest respect, he did not think that it was the most appropriate body for deciding the highly technical issues, fundamentally non-legal in character, which might arise under the draft articles. It would be difficult for any ordinary tribunal composed of judges to go into such problems as the size of mesh, seasonal movements of fish, currents and the like. Indeed, if they were referred to the International Court or some other judicial body, the body concerned would have to seek the advice of experts. In the circumstances, therefore, it might be simpler to have recourse to a board of experts from the start.

4. In his opinion, experts were good judges but bad witnesses. If the board were to consist of lawyers, each party would put up a fisheries expert and their views would be likely to differ widely, making it extremely difficult for the board to reach a decision based on the technical evidence. On the other hand, if the experts themselves were responsible for taking the final decision by a majority vote, they would be much more likely to reach agreement.

5. Furthermore, the Commission should bear in mind that some of the problems referred to the board might not, strictly speaking, constitute a dispute. It was conceivable, for instance, that States, having failed themselves to reach agreement on conservation measures under article 2, would ask the board to draw up a set of regulations for application in a particular area. It would then be concerned not with a point at issue between parties, but with a task for which it would be eminently fitted.

6. Mr. SANDSTRÖM proposed two amendments to article 8 paragraph 1: first, for the words "a Board of qualified experts" to substitute the words "an arbitral board", and second for the words "the Board of expert", to substitute the words "the arbitral board shall consist of two or four qualified experts in matters pertaining to the conservation of the living resources of the sea, plus one jurist and".

7. Mr. SCELLE entirely agreed with Sir Gerald Fitzmaurice that the discussion had largely centred on a question of terminology, and regretted having misunderstood the true purport of the text; an error for which, however, there was some excuse, because of a certain obscurity in the wording. In article 7 mention was made of arbitration, whereas article 8 was concerned with a board of experts, which seemed to suggest a large body with no resemblance whatsoever to an arbitral tribunal. Moreover, according to article 8, paragraph 2, the board could apparently put off rendering a decision indefinitely, while according to article 10 it could make recommendations which, in the case of an arbitral tribunal, could never form part of an award.

8. Having expressed his regret for that misunderstanding, he wished to make it perfectly clear that he had never denied to the parties the freedom to choose their arbitrators, who could well be experts and not lawyers, since he regarded that principle as fundamental. However, unless the size of the board were restricted in some such manner as that just proposed by Mr. Sandström, the Commission would be paving the way for a board of unlimited size which might never reach any decision at all, particularly if the provisions of articles 8, 9 and 10 were approved. In their present form those provisions belied the promise of real arbi-

[1] 304th meeting, para. 71.

[2] *Ibid.*, para. 24.

tration implicit in article 7, by offering a system which contained in it the undoubted seeds of failure. The articles might accordingly be referred back to the sub-committee for further consideration.

9. In conclusion, he observed that the parties would also be free to refer a difference to the International Court of Justice; in that connexion, the possibility envisaged in article 26 of the Court's Statute was particularly interesting.

10. Mr. GARCÍA AMADOR welcomed the emergence of general agreement in the Commission on the final articles of the draft. The two elements of fundamental importance were that the decisions of the board should be final, and that the parties should accept compulsory arbitration. Those two primary issues apart, other questions, though not without importance, could perhaps be referred to the sub-committee. The Commission was, in fact, using traditional terminology to describe an arbitral procedure which was essentially technical in character, unlike the judicial procedure followed in the past where a tribunal of judges was called upon to settle legal issues. Some linguistic modifications were therefore necessary.

11. He wished to point out that the title "Board of Experts" had not been selected at random, but had been taken from chapter VII of the report of the International Technical Conference on the Conservation of the Living Resources of the Sea (A/CONF.10/6). The Commission clearly had to find suitable language to clothe provisions which created a procedure hitherto unknown. However, the functions and decisions of the board would be exactly the same as those of an arbitral body.

12. Referring to Mr. Zourek's observations[3] at the previous meeting, he admitted the importance of the arguments adduced against compulsory arbitration; and the Commission would note that in his original draft he had not provided for it, but for a system similar to that for accepting the jurisdiction of the International Court. He had been induced to support the sub-committee's text because he had come to recognize that the important and special right conferred on the coastal State in the draft must be balanced by a clause requiring compulsory arbitration.

13. Faris Bey el-KHOURI considered that the Commission must select one single compulsory method for the settlement of disputes in case of disagreement between the parties. He had proposed recourse to the International Court of Justice—a procedure which could be far more easily defended by governments before their legislatures and public opinion. It would be a great deal more difficult for them to secure ratification of an international convention imposing compulsory arbitration by a board of experts.

14. Mr. ZOUREK thanked Mr. García Amador for explaining that the draft articles contained an entirely new method for the settlement of differences, since the present wording seemed to suggest an ordinary arbitral procedure. Nevertheless, the two problems he had raised at the previous meeting were still unanswered. First, why should the draft articles contain a clause on compulsory arbitration, despite the fact that no such recommendation had been made by the Rome Conference, which had been attended by forty-five maritime powers? Secondly, why should the traditional concept of arbitration be extended to accommodate new rules? At the previous meeting[4] he had sought to expound the reasons why States might be reluctant to accept the draft articles, stressing first and foremost the unlikelihood of their accepting compulsory arbitration by a body which, in effect, would be exercising a legislative function when no agreement could be reached on conservation measures, which would be a complete transformation of the arbitral function. There lay the whole crux of the matter. The discussion had done nothing to convince him that such a solution would command the support of governments.

15. The Special Rapporteur had argued that such extensive rights as those conferred upon States in the draft articles must be made conditional upon compulsory arbitration, but at first sight there did not seem to be any striking innovation, with the sole exception of the right conferred on the coastal State to regulate fisheries in the high seas. The possibility of that State's nationals not being engaged in fishing in the area concerned should not be exaggerated. He did not, therefore, consider that the consequences of such a provision were serious enough to require compulsory arbitration as a *sine que non*.

16. The CHAIRMAN, speaking as a member of the Commission, asked whether article 7 applied solely to articles 3 and 6.

17. Mr. FRANÇOIS (Special Rapporteur) replied in the negative, indicating that article 7 required modification to make the point clear. If, under article 2, two or more States failed to reach agreement on conservation measures, it would be tantamount to a difference between them, and the board might then be called upon to frame the regulations.

18. Mr. AMADO, while fully understanding Mr. Zourek's point of view, welcomed the fact that the Commission was moving towards agreement. He stressed the need, however, for deciding the vital question of the composition of the board.

19. The CHAIRMAN observed that the board would be appointed by the parties or, in the event of their disagreement, by the Secretary-General of the United Nations in consultation with the Director-General of the Food and Agriculture Organization.

20. Mr. SCELLE proposed as an amendment that the function which the sub-committee sought to entrust to the Secretary-General should be discharged by the Pre-

[3] *Ibid.*, para. 63.

[4] *Ibid.*, paras. 62–64.

sident of the International Court of Justice, acting in consultation with the Director-General of FAO.

21. Mr. FRANÇOIS (Special Rapporteur) observed that it would be unprecedented to require the President of the International Court to consult an official of some other institution.

22. Mr. KRYLOV said that he was unable to support Mr. Scelle's amendment, and would prefer the function to be entrusted direct to the Director-General of FAO.

23. Mr. SCELLE said that he could accept that solution, though it pleased him less.

24. Mr. GARCÍA AMADOR considered that, in view of the vital importance of the board of experts' functions, the problem at issue was of great moment. Perhaps the ideal solution would be to choose the President of the Court need not preclude him from seeking in the case of disagreement between the parties. If that were not acceptable, it should be the Secretary-General of the United Nations, who occupied a more exalted position in the hierarchy than did the Director-General of FAO.

25. In the case of the first alternative, he did not believe that the Special Rapporteur's objection was a valid one. The undeniable legal authority of the President of the Court need not preclude him from seeking the advice of the specialized agency most intimately concerned, though that did not mean that he would be bound to make the appointments in consultation with FAO.

26. The CHAIRMAN observed that if the President of the Court were selected he would be free to seek information from FAO.

27. Mr. SCELLE pointed out that the President of the Court would in any event consult the Director-General of FAO. However, perhaps an express provision to that effect was advisable, since technical questions would be at stake.

28. Mr. SANDSTRÖM observed that the Director-General of FAO would not necessarily be an expert in fisheries matters, and there was therefore no reason why he should be better qualified than the President of the Court to make the appointments.

29. Sir Gerald FITZMAURICE wondered whether Mr. Scelle would be prepared to withdraw his amendment, since the discussion had confirmed his (Sir Gerald's) original view that the most appropriate procedure would be for the Secretary-General to appoint members of the board after the appropriate consultations. The President of the Court was normally asked to designate arbitrators in cases involving some legal dispute, when he had at least some idea of whom to select; that, however, would not be the case with the board of experts, when he would be obliged to seek advice. The Director-General of FAO, while possessing the technical knowledge, or having it near at hand, might be in some difficulty owing to the fact that he was the head of a world-wide organization the aim of which was to increase the total world food supply. In any difference of opinion arising between coastal States and countries with a big fishing interest, absolute impartiality was essential and would be better assured if appointments were made by the Secretary-General of the United Nations, who would pay due regard to all the interests involved.

30. There was ample, precedent, for example, in the treaties of peace concluded after Second World War, for designating the Secretary-General for such a task. Those who had any knowledge of the present Secretary-General or his predecessor would have not a moment's hesitation in that regard, knowing that he would discharge his responsibility with absolute impartiality and in the general interest, without allowing himself to be influenced by political considerations.

31. Mr. SCELLE regretted that he could not associate himself with Sir Gerald Fitzmaurice's views. The question at issue was not a legal one, but one of expediency. He failed to see how the Secretary-General could be more competent than the President of the International Court in appointing members of the board, since he had no special knowledge at all of fisheries or conservation. There was far more chance of the President making the appointment with absolute impatiality, and the precedent established by treaties of peace, which would give rise to political disputes, was not relevant in what was an essentially technical field. He was therefore prepared to accept Mr. Krylov's suggestion, since the Director-General of FAO could obtain the requisite technical advice from his staff. The Secretary-General of the United Nations, on the other hand, would inevitably be tempted to treat the appointments as a political matter and would seek not to offend the States concerned.

32. Faris Bey el-KHOURI formally moved the substitution in article 7 of the words "the International Court of Justice, unless the parties agree to have their differences settled by arbitration as provided for in article 8 or by any other way of peaceful settlement" for the words "arbitration as provided for... of peaceful settlement".

The amendment was rejected by 9 votes to 1, with 3 abstentions.

33. Mr. ZOUREK proposed, since the articles purported to deal with a new type of procedure, that the words "by arbitration" should be deleted from article 7.

34. Sir Gerald FITZMAURICE said that he could accept that amendment, which would not affect the substance.

Mr. Zourek's amendment was rejected by 7 votes to 4, with 2 abstentions.

35. Mr. GARCÍA AMADOR, referring to Mr. Sandström's amendment[5] to article 8, suggested that it might be referred to the sub-committee, or even to the Drafting Committee.

[5] See para. 6 above.

36. Mr. KRYLOV saw no reason for departing from the terminology used in the report of the Rome Conference.

37. Mr. SCELLE observed that the Rome Conference had not been concerned with legal questions, and an arbitral tribunal was something very different from a board of experts. He would have preferred the former title, but if some more neutral expression, such as "board", were chosen, then its nature and functions would have to be made clear in the comment.

38. Mr. SANDSTRÖM observed that names did not affect functions, but it would, of course, be preferable to select an appropriate one.

39. Mr. GARCÍA AMADOR said that if Mr. Sandström's first amendment to article 8 were put to the vote, he would suggest it be amended to read: "technical arbitration board composed of qualified experts", which was the expression he had used in his original draft.[6]

40. Mr. ZOUREK said that, in the light of Mr. García Amador's affirmation that the draft articles related to an entirely new procedure, he failed to see why they should refer to "an arbitration board", since those words already bore a definite connotation in international law.

41. Mr. SCELLE observed that such a new type of body was analogous to the chambers which the International Court was entitled to set up for dealing with a particular case, under Article 26 of its Statute.

42. Sir Gerald FITZMAURICE proposed the addition of the words "consisting of qualified experts" to Mr. Sandström's first amendment, because in his view, though the board would have arbitral functions, the essential point was that it must consist of qualified experts.

43. The CHAIRMAN observed that that point was covered by Mr. Sandström's second amendment to article 8.

44. Mr. FRANÇOIS (Special Rapporteur) pointed out that Mr. Sandström's second amendment should be voted upon first, since it would affect the fate of the other.

45. Mr. AMADO observed that Sir Gerald Fitzmaurice's amendment would, in effect, restore Mr. García Amador's original text.

46. Mr. GARCÍA AMADOR agreed.

47. Mr. SANDSTRÖM said that the essence of his proposal was embodied in his second amendment, which referred to a board of two or four qualified experts plus one jurist. He agreed that a vote on that amendment would more or less automatically decide the fate of the first.

48. Sir Gerald FITZMAURICE did not insist on his amendment to Mr. Sandström's amendment. The latter could therefore be voted on in the form proposed by Mr. Sandström.

49. Mr. FRANÇOIS (Special Rapporteur) said that two experts would not be enough; it would be better to make provision for four. Moreover, he suggested that the jurist member of the board should serve as its president.

50. Mr. SANDSTRÖM agreed that the number of experts should be fixed at four. As to the question of who should be president of the board, the Special Rapporteur could deal with that matter in conjunction with the final sentence of article 8, paragraph 1.

51. Mr. GARCÍA AMADOR said that the question of the composition of the board of experts had been discussed at length in the sub-committee. The text adopted for article 8 was somewhat vague, because the members of the Committee had come to the realization that, given the complexity and multiplicity of interests that might be involved in a fisheries dispute, it would be impossible to lay down a rigid stipulation concerning its size. Some equitable criterion for the purpose would have to be found, and he had suggested a system similar to that governing the composition of the Trusteeship Council.

52. If the Commission fixed a definite number of members, the system was unlikely to function well in practice.

53. Mr. KRYLOV preferred Sir Gerald Fitzmaurice's amendment, which, in view of the latter's withdrawal of it, he formally took up. It was a flexible formula, and appeared to him to meet Mr. García Amador's suggestion that the number of members of the board of experts should be decided by considerations similar to those governing the membership of the Trusteeship Council.

54. Mr. HSU said that there were invariably two sides, not several, to a dispute. If an attempt were made to provide for the representation on the board of all the States involved in a dispute, the board would be made inordinately large, and would resemble a conciliation committee rather than a proper tribunal.

55. He favoured Mr. Sandström's amendment, except for the stipulation that only one of the members of the board should necessarily be a jurist. It was equally conceivable that the parties might wish to have more than one jurist or no jurist at all on the board. The Commission should simply adopt a rule which did not preclude the appointment of jurists. He could not approve of Mr. García Amador's suggestion that the Commission revert to the term "technical arbitration board", because the implication of the word "technical" was that the board should be composed exclusively of fishery experts.

56. Mr. SANDSTRÖM recalled that, under the terms of his amendment, where the parties were in agreement they would be completely free to choose as arbitrators any persons they pleased. The rules concerning the choice of members of the board related solely to the

[6] 297th meeting, para. 28.

case where the members had to be appointed by the Secretary-General of the United Nations. The Secretary-General would plainly choose independent and neutral experts.

57. Finally, some limitation of the size of the board was necessary if the cost of maintaining it was to be kept within reasonable bounds.

58. Mr. SCELLE agreed with Mr. Sandström that a maximum number of members should be laid down. Moreover, the number must be uneven, unless the president was to have a casting vote.

59. Faris Bey el-KHOURI said he intended to abstain from voting, because he felt that the parties to a dispute should be entirely free to choose the members of the board. It was neither desirable nor practicable to impose conditions on their choice. The most that could be done by way of reference to the qualifications of the experts was to assert in the comment to the article the desirability that members of the board should be chosen from among qualified experts.

60. Mr. HSU suggested to Mr. Sandström that, instead of a hard and fast rule that one of the members of the board must be a jurist, some such form of words as "preferably a jurist" or "normally a jurist" might be used. Cases might occur where the presence of a jurist on the board would not be absolutely necessary, and others where a board composed exclusively of experts would be quite appropriate.

61. Mr. SANDSTRÖM was sorry that he could not accept Mr. Hsu's amendment. To leave the matter vague would place the Secretary-General of the United Nations in a position of considerable embarrassment; before he could decide whether the presence on the board of a jurist was really necessary, he would have to go into all the facts of the dispute—a procedure that would be both cumbersome and undesirable.

62. Mr. KRYLOV formally proposed that all reference to the presence of a jurist on the board be deleted from Mr. Sandström's amendment.

63. Mr. GARCÍA AMADOR said that he would have no objection to Mr. Sandström's amendment if a proviso were added to it along the following lines:

> "provided always that with that number of members, an equitable representation of all the interested States shall be obtained."

64. Such a proviso would avert the possibility of the amendment resulting in an impracticable formula, or in one which could be exploited to the detriment of an interested State. He had in mind the case where a coastal State was in dispute with a number of other States, which would not necessarily share identity of interest; it was necessary to give the Secretary-General sufficient latitude to enable him to ensure fair representation of all the divergent interests involved.

65. The CHAIRMAN, replying to Mr. García Amador, said that the implication of Mr. Sandström's amendment must be that the Secretary-General would choose the members of the board from nationals of States which were not concerned, either directly or indirectly, in the dispute. The Secretary-General would choose experts on their individual merits, and those experts would give their decision according to their consciences and in their personal capacity, without reference to the divergent interests involved.

Mr. Krylov's amendment was rejected by 5 votes to 3, with 5 abstentions.

66. Mr. GARCÍA AMADOR inquired how, under Mr. Sandström's amendment, the Board would be constituted if the coastal State were in dispute with three other States fishing in the sea area concerned.

67. Mr. SANDSTRÖM said that, where the parties to the dispute were in agreement concerning the choice of experts, there would be no difficulty. If no agreement were reached, and the Secretary-General of the United Nations were called upon to appoint all the members of the board, he would necessarily choose impartial persons of "neutral" nationality, that was, persons unconnected with any of the States parties to the dispute.

68. Mr. SCELLE said that he did not share Mr. Sandström's opinion as regards recourse to the Secretary-General for the choice of impartial arbitrators.

69. Sir Gerald FITZMAURICE thought that the matter was, perhaps, more complex than the discussion suggested. It was not simply a question of adequate representation of the divergent interests of the States parties to a dispute. A difficulty relating to the regulation of fisheries might well have a number of somewhat unrelated aspects, such as the biological and other interests involved in conservation. Bearing that in mind, it would not always be easy to appoint the members of the board in such a manner as to do justice not only to all the parties, but also to all the scientific interests which might be affected by the dispute.

70. For all those reasons, he proposed that the board should consist of one jurist and not more than six, but not less than four, expert members.

71. Mr. SANDSTRÖM accepted Sir Gerald Fitzmaurice's amendment.

72. Mr. GARCÍA AMADOR also accepted Sir Gerald Fitzmaurice's amendment, and withdrew his own.

73. Mr. KRYLOV said that the provision for the maximum was the really important consideration, and the one which was always laid down in texts of that type both in constitutional law and elsewhere. It was a very rare thing to stipulate a minimum number of members for arbitral boards.

74. Mr. SCELLE said that the Commission was wavering between the concept of a proper arbitration tribunal and that of a mere board of experts. The essential point was to lay down the maximum number of members.

75. The CHAIRMAN put to the vote Mr. Sandström's second amendment as amended by Sir Gerald Fitzmaurice that the words "Board of Experts" in the second sentence of article 8, paragraph 1, be replaced by the phrase: "Board composed of not less than four, and not more than six, qualified experts, plus one jurist".

The amendment was adopted by 9 votes to 2, with 2 abstentions.

76. Mr. SANDSTRÖM suggested that his first amendment, namely, that the Board should be described as an arbitral board, should be left to the Drafting Committee.

It was so agreed.

77. The CHAIRMAN put to the vote Mr. Scelle's amendment that the references to the "Secretary-General of the United Nations" in article 8, paragraph 1, be replaced by references to the "President of the International Court of Justice".

The amendment was rejected, by 5 votes to 5, with 3 abstentions.

78. The CHAIRMAN observed that the reference to consultation with the Director-General of FAO remained. Furthermore, it was clear that the Secretary-General of the United Nations, in consultation with the Director-General of FAO, could well appoint as president of the board a person who was not a jurist.

79. Mr. GARCÍA AMADOR said that it would be as well to include in article 8 a reference to the desirability of the Secretary-General's choosing the members of the board in such a manner as to ensure fair representation of the interests of all parties.

80. Mr. SCELLE pointed out that the proper place for a recommendation of that kind was in the comment; no useful purpose would be served by including it in the article itself. The Commission clearly could not suggest that the recommendation should be of a kind that would make it possible for interested parties to impugn the validity of the Secretary-General's choice of arbitrators.

81. Mr. HSU said that he would vote against article 8, because it was inadvisable to involve the Secretary-General of the United Nations in the appointment of members of the board of experts.

82. Mr. KRYLOV said that he had originally agreed to the text adopted by his colleagues on the Sub-Committee on the understanding that the board for which provision was being made would be a technical board. Following the adoption of Mr. Sandström's amendment, as modified by Sir Gerald Fitzmaurice, it would be a hybrid body including a jurist. In these circumstances, he would have to vote against article 8.

83. The CHAIRMAN drew the attention of members to the fact that unless article 8 as a whole were adopted the entire draft articles might be imperilled.

84. Mr. ZOUREK said that he would vote against article 8 for the reasons he had given in the course of the discussion. If the article were rejected, that would not mean the end of the whole draft on fisheries conservation. In the first place, it would be possible to substitute another text for the one he urged the Commission to reject. Again, it was not indispensable that the Commission should adopt an article on the practical enforcement of the rules it advocated in articles 1 to 6. Even without such a measure of implementation, the articles were capable of standing firmly on their own feet. The Commission had not infrequently adopted regulations without provisions for their enforcement.

85. The CHAIRMAN pointed out that the Commission had yet to adopt article 7 as a whole. So far it had only rejected the two amendments proposed to the article.

Article 7 was adopted by 10 votes to 2, with 1 abstention.

86. Mr. SCELLE suggested, but without pressing the point, that separate votes be taken on paragraphs 1 and 2 of article 8, since paragraph 2 seemed to hold the possibility that the board might extend indefinitely the time-limit for its decision.

87. Mr. FRANÇOIS (Special Rapporteur) said that the board must be trusted not to do so.

88. The CHAIRMAN put to the vote article 8 as a whole, subject to drafting changes, particularly in connexion with Mr. Sandström's suggested amendment of the board's title. The article, as amended, read:

"Article 8

"1. The method of settlement referred to in the preceding articles shall be by reference to a board of qualified experts, to be chosen by agreement between the parties. Failing such agreement within the period of three months from the date of the original request, a board composed of not less than four, and not more than six, qualified experts, plus one jurist, shall, at the request of any of the parties, be appointed by the Secretary-General of the United Nations in consultation with the Director-General of the Food and Agriculture Organization. The president of the board shall equally be appointed by the Secretary-General of the United Nations.

"2. The board shall in all cases be constituted within five months from the date of the original request for settlement, and shall render its decision within a further period of three months unless it decides to extend that time limit."[7]

Article 8 as a whole was adopted by 8 votes to 3, with 2 abstentions, subject to drafting changes.

89. Mr. SCELLE explained that, although in fact he disapproved of the role being thrust upon the Secretary-General of the United Nations, he had not voted against the article but had merely abstained from voting because he did not wish to hamper the work of the Commission.

[7] These paragraphs later became paras. 2 and 3 of article 7.

90. Mr. GARCÍA AMADOR suggested that reference be made in the Commission's report to the desirability of the members of the board being chosen with a view to ensuring the fair representation of all the interests involved, along the lines he had already suggested.

91. Mr. FRANÇOIS (Special Rapporteur) undertook to include in the report some reference of the kind, which, he hoped, would satisfy Mr. García Amador. He could not, however, use the term "representation", because the members of the board would be impartial arbitrators chosen precisely because of their independence of the parties to the dispute.

92. Mr. SANDSTRÖM pointed out that the question of representing in a fair manner the various interests involved could only arise where the members of the Board were to be chosen by the parties to the dispute themselves.

Article 9 [8, para. 2][8]

93. Mr. SCELLE recalled that the Commission had already decided at the previous meeting that conservation measures adopted by two or more States fishing in an area would be binding on other States unless challenged by them under the procedure laid down in articles 7 to 10.

94. Mr. AMADO said that the term "decision" was perhaps preferable to the term "award". He would suggest the term *laudo arbitral* for the Spanish text.

95. Sir Gerald FITZMAURICE agreed that the term "decision" was better than "award".

96. With regard to the validity of conservation measures pending the board's decision, he wished to place on record the fact that he had urged in the course of the discussions in the sub-committee a point of view which was that of an important group of States at the Rome Conference concerning the specific case of conservation measures adopted by the coastal State in virtue of the unilateral powers granted to it, rather than the more normal case of measures adopted in concert by a number of fishing States.

97. It had been the considered opinion of that important group of States that, if the exceptionally wide power of adopting conservation measures unilaterally was to be recognized to the coastal State, it was preferable that that State should be required to secure the approval of an independent technical board before actually putting any such measures into force.

98. Had the viewpoint of that group of States been accepted, all need for recourse to arbitration would have disappeared *ipso facto,* since conservation measures adopted unilaterally by the coastal State would have received due sanction before actual enforcement. But it was thought that such a system would delay the enforcement of conservation measures, the need for which might perhaps be urgent.

99. The general feeling in the sub-committee had been that, in view of the rather strict criteria to which unilateral action on the part of the coastal State had been made subject by articles 5 and 6, and provided also that a strict time-table were adhered to, it was unnecessary to require a coastal State to secure the prior approval of an independent authority before adopting the measures concerned. It would be sufficient to give the board powers to suspend the unilateral measures if it deemed it necessary.

100. Article 9 as drafted by the sub-committee reflected that consensus of feeling. The solution adopted by the Committee might commend itself to the important group of States he had mentioned, though of course that might not be so.

101. Mr. SCELLE said that any conservation measures in dispute would in any event remain valid for a certain length of time, namely, the minimum time required for the board to meet and decide whether the application of the measures should be suspended. Such delay might well interfere with a whole fishing season. As an illustration, he quoted the case of the sedentary fisheries dispute between Japan and Australia, from which it was apparent that the disputed measures would in practice be enforced for an appreciable time before any action could be taken by the competent court.

102. The CHAIRMAN pointed out that any violation on the part of the coastal State of the strict criteria laid down as the prior conditions to unilateral action would, as a matter of course, engage that State's liability for damages in respect of injured parties.

103. Mr. GARCÍA AMADOR pointed out that Mr. Scelle had spoken with an eye to the interests of the fishing industry and probably to those of the consumer, also. But from the point of view of the conservation of species, it was clear that unless the coastal State had the power to adopt measures which would remain valid until the board took an appropriate decision, complete depletion of stocks in a particular area and loss of productivity might ensue.

104. It was essential to bear in mind that, in accordance with the terms of article 6, the interest the Commission had had in view in drafting the present regulations was first and foremost that of conservation. The prerequisite for the unilateral adoption of conservation measures by any coastal State was "an imperative and urgent need" for such measures.

105. Mr. SCELLE said that a coastal State might be led to proclaim the complete prohibition of fishing out of a desire to conserve species.

106. Mr. SANDSTRÖM pointed out that any such prohibition would have an effect on the nationals of the coastal State, as well as on foreign fishermen.

107. The CHAIRMAN put article 9 to the vote. It read:

[8] See *supra*, 300th meeting, para. 1.

"Article 9

"The board may decide that pending its decision the measures in dispute shall not be applied".

Article 9 was adopted by 9 votes to none, with 4 abstentions.[9]

Article 10 [9] [10]

108. Mr. FRANÇOIS (Special Rapporteur) said that there appeared to be some misunderstanding about the second sentence of article 10. It was not suggested that the board should make recommendations instead of taking decisions. The sentence in question simply meant that, when giving a decision on an actual dispute, it would be open to the board to make what recommendations it considered appropriate concerning suitable conservation measures.

109. Mr. ZOUREK said that it might well happen that the board would be unable to arrive at a decision, because it could find no rule of international law on the subject in dispute. It would appear that in that case, under the second sentence of article 10, the board would merely make a recommendation.

Further discussion of article 10 was deferred.[11]

Programme of work

110. The CHAIRMAN said that, on completing the discussion on fisheries the Commission would first take up Mr. Scelle's proposed general arbitration clause relating to all the draft articles on the régime of the high seas. It would then go on to deal with the territorial sea, particularly the breadth of the territorial sea, in which connexion he urged members not to re-open the general discussion, but to submit concrete proposals.

111. Mr. LIANG (Secretary to the Commission) said it was desirable that at its next meeting but one the Commission should discuss the question of the time and place of its next session, as well as proposed amendments to its Statutes.

112. The CHAIRMAN announced that those topics would be discussed in private at the next meeting but one.

The meeting rose at 6.10 p.m.

[9] See *infra*, 306th meeting, para. 2.

[10] See *supra*, 300th meeting, para. 1.

[11] See *infra*, 306th meeting, para. 8.

306th MEETING

Tuesday, 7 June 1955, at 10 a.m.

CONTENTS

* 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).

** The number within brackets indicates the article number in the draft contained in Chapter III 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) (*resumed from the 305th meeting*)

NEW DRAFT ARTICLES ON FISHERIES
(resumed from the 305th meeting)

1. The CHAIRMAN invited the Commission to resume its discussion of the new draft articles on fisheries.