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Summary record of the 337th meeting

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

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pointed out that articles 29 and 32 would require further study before an opinion could be reached as to whether an acceptable formulation could be devised for what was fundamentally a new principle.

The meeting rose at 5.50 p.m.

337th MEETING

Tuesday, 1 May 1956, at 10 a.m.

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Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/99 and Add.1-5) (*continued*)

Conservation of the living resources of the high seas (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the comments by governments on the draft articles relating to conservation of the living resources of the high seas.
2. Mr. PAL, recalling that in article 2 of the provisional articles concerning the regime of the high seas the Commission had in part defined freedom of the high seas, including freedom of fishing, said that in the comment on that article it was pointed out that any freedom exercised in the interests of all entitled to enjoy it must be regulated. Articles 24 to 30 were accordingly regulating articles, while article 24 in addition reaffirmed the freedom of fishing. The Government of India had no quarrel with the drafting of that article. Articles 25 to 30 were regulating articles proper, while articles 31 to 33 dealt with the settlement of disputes, and—as he understood the position—the main concern of the Government of India was with the regulating articles proper.
3. The Commission, in its comment, had recognized the special interests both of the coastal State and of all other States interested in fishing on the high seas, and the Indian Government had proceeded on that basis. The coastal State, however, had not been defined in articles 25 to 30, and the Indian Government, in its amendment

to article 26, had therefore proposed a limitation of the contiguous sea area to a belt of a hundred miles from the coast.¹ The Indian proposal concerning article 25 amounted to a qualification of the area of the high seas concerned by granting regulatory powers of the coastal State. In other areas of the high seas, of course, freedom of fishing would be enjoyed by the nationals of all States. Where the three conditions—the hundred-mile belt, engaging in fishing by nationals of the coastal State, and the fact that nationals of other States were not so engaged—were fulfilled, the coastal State with its special interests had a perfectly legitimate claim. In article 26 again, the Indian proposal would limit the contiguous area to a belt of one hundred miles from the coast, within which the coastal State would have regulatory powers, while beyond that belt the general provisions of the article would apply. It would be seen, therefore, that in both articles 25 and 26, the Indian Government proposed that in the contiguous zone—which was defined—regulatory powers would be granted to the coastal State. That fundamental idea also underlay its amendments to the other articles which, however, should not raise any difficulty.

4. With regard to articles 31 to 33, he understood that the Government of India would reserve its position until a decision had been reached on the subject of arbitral procedure. He wished to reserve his right to revert to the Indian proposals in the light of the discussion.

5. Mr. SANDSTRÖM said that, if a balanced view were to be obtained on the articles on the conservation of the living resources of the high seas, they should not be taken separately; for instance, if article 25 were read in relation to articles 28 and 29, a very different light would be thrown upon it. Paragraph 1 of article 28 was also applicable to cases covered by article 25, and under articles 28 and 29 the coastal State was granted what he might call its natural rights; it would, moreover, always have the opportunity of taking the initiative in making conservatory regulations. It would be inappropriate further to extend those rights to the detriment of those of other States interested in fishing in the same waters.

6. The only possibility that might be considered was a stipulation that a single State whose nationals were engaged in fishing in the area in question should approach the coastal State prior to initiating such conservation measures.

7. Sir Gerald FITZMAURICE said that the main impression he had received from reading the comments by governments on the provisional articles was one of optimism, tempered, however, by a certain sense of disappointment. On the whole, no serious objections had been raised, so it might be inferred that there was substantial acceptance of the provisions; that was all to the good. On the other hand, comments by some governments raised doubts as to whether the essential objectives of the Commission could be achieved.

8. The question of fisheries was linked with the problem of the limits of the territorial sea. Appreciating that many claims to a wide belt of territorial sea were inspired by

¹ A/CN.4/99.

fishery considerations, the Commission had hoped that the approach by means of the articles on the conservation of living resources might be successful in obtaining a modification of such claims and, subsequently, a large measure of agreement on the proper extent of the territorial sea. Unfortunately, the prospects of that hope being realized did not seem bright, for there was no indication that the governments in question were likely to regard the Commission's fishery proposals as sufficient. In fact, to judge from its comments, which seemed to represent a certain school of thought, the Government of Iceland appeared to regard the Commission's articles not as a substitute for exclusive coastal fisheries jurisdiction, but as merely additional. If that were so, the Commission would have to admit failure in that respect. That would not justify withdrawal of the provisional fishery articles, which were of considerable value, but it would be likely to increase the difficulties of reaching eventual agreement on generally acceptable regimes of the high seas and of the territorial sea.

9. Turning to the amendments of the Chinese and Indian Governments (A/CN.4/99), he pointed out that the former related solely to the specific case of a country with only potential fishing interests in any contiguous zone. Pending clarification of the Chinese attitude, he would have thought that that position was adequately covered by article 28.

10. As to the Indian amendments, he would agree with Mr. Sandström that the desiderata of the Indian Government had already been granted. In article 25 there had been a deliberate intention not to restrict the sea area to a coastal zone; on the other hand, the article certainly applied to an area contiguous to the coast, which surely met the Indian point.

11. In granting the coastal State a specific right up to a distance of a hundred miles from its coast, the Indian amendment to article 26 went farther than was desirable. He wondered whether the Indian Government appreciated that article 29 really satisfied all its requirements. Fisheries experts had expressed the opinion that, owing to the movements of fish, it would be extremely difficult to define any limitation of the area in which measures of conservation might be applicable and it was for that reason that no particular limit had been specified. He was convinced that article 29 provided a better system than one which granted the coastal State the right to take conservation measures within specific limits.

12. Mr. PAL explained that the Indian amendment to article 25 was based on the view that it would be undesirable to grant a State the right to take conservation measures in areas contiguous to the coast of another State merely because nationals of the former State had engaged in fishing in such areas in the past. That was a situation which the Indian Government wished to avoid, and its proposals therefore had a twofold objective: to prohibit a State engaged in fishing in a sea area contiguous to the coast of another State from initiating conservation measures; and to grant such regulatory powers to the coastal State.

13. Mr. ZOUREK said that some governments, such as the United Kingdom Government, had stressed the

need for a definition of the term "conservation of the living resources of the high seas". That point should certainly be considered.

14. Other governments, such as that of Norway, had raised the question of whether the articles proposed by the Commission should also apply to whaling and sealing, which were already governed by international conventions. Whaling had been placed under control at the world level. That point, which raised the question of the relationship between the new convention and former conventions, certainly deserved consideration.

15. Another important question which had been raised in the comments by governments was the settlement of disputes. At the previous session he had opposed the proposal to entrust the settlement of disputes to a so-called arbitral commission, whose decisions would be binding on the parties. That was not really arbitration, the object of which, as generally understood, was the settlement of disputes between States on the basis of law, by judges chosen by the parties concerned. The conservation of the living resources of the sea generally entailed making new regulations, which was a matter for States. To entrust such a task to arbitral commissions would be equivalent to surrendering part of the sovereign powers of States to an international commission.

16. Again, several governments had drawn attention to the necessity of defining the rights of a coastal State. That, indeed, was the core of the matter, and the Commission was fully justified in basing its discussion of the regime of the high seas on the question of the conservation of living resources because, failing a solution of that question acceptable to coastal States, there would be no widespread support for a system covering the whole range of high seas, territorial sea and continental shelf. Some governments, in particular that of India, held that the draft articles did not give adequate protection to the coastal State in the matter of conservation. Mr. Pal's detailed statement on the Indian proposals was compelling, particularly when account was taken of the changing situation of as yet under-developed areas, for which the exploitation of marine products was not an opportunity for making substantial profits, but often the only means of feeding their very dense populations. It would be equitable, therefore, to give the coastal State greater prerogatives, as suggested by the Indian proposals, the acceptance of which would in no sense entail any discrimination against other States whose nationals engaged in fishing in that area.

17. The CHAIRMAN said that the discussion had thrown light on two particular aspects of the question. With regard to the first, the nature and the extent of the Indian Government's proposals, he welcomed Mr. Pal's clarification, which had dissipated the apprehension caused by the comment of the Indian Government on articles 24 to 30, to the effect that a coastal State should have exclusive conservation rights in an area of the high seas contiguous to its coast. He was glad to note that the proposals reflected no such claims, and Mr. Pal's third condition—that the area concerned would be one in which the nationals of other States were not engaged

in fishing—went far towards making the Indian proposals acceptable.

18. The other aspect was the claim by certain governments, such as those of Iceland and Brazil, to exclusive conservation rights. He pointed out that a distinction had to be drawn between the right to initiate regulatory measures of conservation and the right to exclude other States from fishing in the area. The Commission was at present concerned only with the former right; the latter was not a question of conservation, but pertained to the regime of the territorial sea. In that connexion, he pointed out that the comment of the Government of Iceland did not raise any objection to the Commission's proposals for areas of the high seas beyond what it regarded as a contiguous zone.

19. Mr. Zourek's point with regard to the definition of the term "conservation of the living resources of the high seas" was pertinent; it must not be overlooked, however, that under its terms of reference the Commission should eschew the study of technicalities, particularly bearing in mind that its report would be submitted to the General Assembly.

20. Mr. SALAMANCA said that the basic issue with regard to the proposed new conservation rights was their extent. The absence of any reference by Mr. Pal to arbitration seemed to imply a specific contiguous zone over which the coastal State would enjoy exclusive conservatory jurisdiction. In that connexion, he recalled the Chairman's (Mr. Garcia-Amador's) proposal at the seventh session,² which had been largely embodied in article 29.

21. With regard to the definition of the term "conservation of the living resources of the high seas", he agreed that the Commission was not competent to examine technical details. Its aim was to achieve agreement on the whole problem of providing effective protection for the living resources of the sea adjacent to the shores of a coastal State and in that respect some progress had been made.

22. Stress had since been laid on the special position of the under-developed countries. There was no doubt that the Commission should give full attention to that aspect of the problem, always bearing in mind that the principles adopted should be general in nature, particularly as developments in technical and scientific research could not be foreseen. The fundamentals of the existing draft articles, therefore, should be retained.

23. Mr. FRANÇOIS, Special Rapporteur, said that, despite Mr. Pal's clarification, his doubts regarding the real extent of the Indian Government's proposals, still remained, for the general point of view expressed in its comments on articles 24 to 30 was, as the Chairman had pointed out, hardly compatible with its amendments to articles 25 and 26 as interpreted by Mr. Pal. What had aroused apprehension was the claim in the former that a coastal State should have "the exclusive and pre-emptive right of adopting conservation measures for the purpose of protecting the living resources of the sea

within a reasonable belt of the high seas contiguous to its coast"; that apprehension was hardly dissipated by the vagueness of the Indian attitude towards the arbitral procedure proposed in articles 31 to 33. It might be advisable for a small sub-committee to be set up in order to examine in more detail the precise consequences of acceptance of the Indian amendments which, of course, were more important than any general comment. It might thus be possible to go some way towards meeting the Indian point of view by according a greater measure of protection to a coastal State without giving it any exclusive rights to take measures of conservation.

24. Mr. PAL, while accepting that proposal, suggested that the proposed sub-committee should not restrict its examination to the Indian amendments, but that all suggested modifications be considered.

25. Mr. FRANÇOIS, Special Rapporteur, urged that the sub-committee should not examine other amendments unless they raised similar doubts, and so far that had not been the case. The sub-committee should for the time being confine itself to the issue raised by the Indian amendments while the general discussion was proceeding in the Commission. Any other doubtful points could be referred to the sub-committee as they arose.

26. Mr. KRYLOV regarded the Special Rapporteur's proposal as premature. The general discussion was still proceeding and he agreed with Mr. Pal that, if a sub-committee were to be set up, it should not be restricted to discussing the amendments of only one government. On the whole, the draft articles stood up well in the light of the comments by governments, and the Commission should certainly not give a physical delimitation to the area of the high seas in question without further close study.

27. He had been interested by the Indian Government's reservation of its attitude on articles 31 to 33 pending a final decision on the subject of arbitral procedure. During his six years' service as a member of the International Court of Justice he had come to appreciate the value of that supreme tribunal and had also realized the importance, in such matters as fisheries, of the expert advice, made available to the Permanent Court of Arbitration, in the work of which the Soviet Union had decided to participate. He pointed out that articles 26 to 30 all contained a proviso referring to arbitration. Difficulties arising out of the contingencies contemplated in those articles should be left to the Permanent Court of Arbitration, and the Commission should confine itself to the questions of principle that it had considered at its previous session.

28. The CHAIRMAN agreed that at a subsequent stage it might be helpful if a sub-committee were to consider all the amendments proposed by governments and any other relevant issues.

29. Mr. ZOUREK said that a sub-committee could do useful work; he agreed with Mr. Krylov, however, that it would be premature to set it up at that moment.

30. Sir Gerald FITZMAURICE said that the Commission must bear in mind that the articles adopted at

² A/CN.4/SR.296, para. 16.

the previous session were the outcome of a compromise between two schools of thought, one of which had strongly defended the interests of the coastal State and the other those of States with a large overseas fishing industry. The Commission had gone far—indeed, farther than ever before—towards achieving what had been its prime object of meeting the special needs of the coastal State by conceding to it considerable powers of unilateral action.

31. But the condition by which the whole scheme was made acceptable to other States was the provision of arbitration machinery as an essential element in the whole project, so that other countries which found the measures instituted by the coastal State unacceptable could have some means of appeal. There had been general agreement that the arbitration provisions were indispensable, and the main point on which controversy had centred had been whether or not the coastal State should be required to submit any proposed conservation measures to the arbitral commission before putting them into operation. The Commission had finally decided against such a requirement in order to safeguard the interests of the coastal State. That being the position, any suggestion of dropping the arbitration provisions would largely destroy the value of the whole draft, with which, in the main, all could agree.

32. Turning to the question of procedure, he said it would be preferable for the Commission not to enter into details at the present stage, but to reserve them for the time when it came to examine the whole draft on the high seas, article by article. Members could then put forward their amendments for discussion along with those suggested by governments.

33. Mr. SANDSTRÖM said that it would be very helpful to have an analysis of the replies from governments.

34. Mr. SPIROPOULOS agreed that it would be useful if the Special Rapporteur could summarize all government comments on each article, stating whether or not they should be taken into account and giving reasons.

35. Mr. LIANG, Secretary to the Commission, explained that that was precisely what the Special Rapporteur had done in his report, which would be available in a few days' time.

36. Mr. FRANÇOIS, Special Rapporteur, said that the second part of his report would not deal with the articles on the conservation of the living resources of the sea, because he did not wish to analyse the comments of governments before the Commission had expressed its views on certain general principles. Once he had been given some guidance in that regard he would be prepared to draw up an additional section on those articles.

37. The points which he considered the Commission must examine before entering into a detailed consideration of the articles themselves were the following. First, the United States' suggestions (A/CN.4/99/Add.1, page 76) to insert the word "substantial" before the word "fishing" in article 26, paragraph 1; to substitute the words "substantial fishing of the same stock or stocks of fish in any area or areas of the high seas" for the words "fishing in any area of the high seas"; and to substitute the words "conservation of such stock or stocks of fish" for the

words "conservation of the living resources of the high seas" in the same paragraph. All those amendments raised matters of principle. Secondly, the United States' additional comments (page 80), particularly the proposition that where States had energetically increased and maintained the productivity of stocks of fish, and where more fishing was not likely to increase the sustainable yield, other States which had not in recent years exploited those stocks should be required to abstain from doing so. Thirdly, there was the question of principle, raised by both the Belgian and the Swedish Governments, whether unilateral measures instituted by a coastal State should be maintained while a dispute between two States regarding them was under arbitration.

38. Finally, the Commission should consider the composition of the arbitral commission. Members would have noted that the United States Government had proposed something very different from what had been agreed on by the Commission at its previous session.

39. Mr. SPIROPOULOS declared himself satisfied with the procedure suggested by the Special Rapporteur.

40. The CHAIRMAN thought that once the general discussion on conservation had been concluded, the Commission, while waiting for the Special Rapporteur's report, could open the general discussion on the draft articles on the contiguous zone and the continental shelf.

41. Mr. EDMONDS said that he had not anticipated questions of detail being raised at the present stage. Judging from the previous session, not very much was accomplished during general discussions, when the Commission was prone to vote on matters of principle, leaving it to a drafting committee to express its decisions in a precise text; that procedure had sometimes led to both unexpected and unsatisfactory results. He therefore urged the Commission to pass as quickly as possible to detailed examination of actual texts. If it could not take up the draft articles *seriatim* because the Special Rapporteur's report was not yet ready, perhaps it could usefully consider a number of amendments, whether proposed by governments or by members.

42. Mr. ZOUREK felt it would be a waste of time for the Commission again to interrupt the discussion while waiting for the Special Rapporteur's report, particularly as the latter would not deal with the conservation articles. The Commission could consider the general points enumerated by the Special Rapporteur, and subsequently amendments proposed by governments and members.

43. The CHAIRMAN pointed out that the Commission must decide what it could take up while waiting for the Special Rapporteur's report, once the general discussion had been concluded. He had suggested proceeding with the articles on the contiguous zone and the continental shelf because, generally speaking, governments had not commented on them.

44. Mr. FRANÇOIS, Special Rapporteur, said that the United Kingdom was the only Government to have included observations on those two topics in its reply. His personal preference would have been to take up the draft articles on the high seas and the territorial sea first.

45. Mr. KRYLOV said that there was no reason why the Commission should not discuss the articles on the contiguous zone, particularly in the light of the Icelandic Government's comments.

46. Sir Gerald FITZMAURICE considered that the Commission must discuss the points referred to it by the Special Rapporteur in order to enable him to prepare an analysis of government comments on the conservation articles. Such analyses had proved valuable in the past.

It was agreed to continue at the next meeting the general discussion on the articles concerning the conservation of the living resources of the high seas.

The meeting rose at 1 p.m.

338th MEETING

Wednesday, 2 May 1956, at 10 a.m.

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Chairman: Mr. F. V. GARCÍA-AMADOR.

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Present:

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Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/99 and Add.1-5) (*continued*)

Conservation of the living resources of the high seas
(*continued*)

1. The CHAIRMAN invited the Commission to continue its general discussion of the draft articles relating to the conservation of the living resources of the high seas.

2. Mr. EDMONDS said that, in considering the subject at its previous session, the Commission had been guided by the following five principles. First, that within its territorial sea, the coastal State had full jurisdiction over fisheries; secondly, that outside that area the nationals of each State enjoyed equal rights to fish; thirdly, that the coastal State had a special interest in the living resources of the sea in the area contiguous to its coast and that that interest should be recognized and protected by international law; fourthly, that for practical purposes fishing in areas where nationals of

more than one State operated could be carried on only if the rights of each were protected by bilateral or multilateral agreement; and fifthly, that it was important to settle disputes about fishing rights on the high seas by arbitration. Those principles, which were essentially those recognized and formulated at the International Technical Conference on the Conservation of the Living Resources of the Sea,¹ were the basis of the draft articles adopted by the Commission at its previous session.²

3. In order to achieve greater clarity and to state a number of additional principles omitted from the draft he had prepared a new text, reading as follows:

Article 24

All States have the right to engage in fishing on the high seas, subject to their treaty obligations, to applicable principles of international law, and to the provisions contained in the following articles concerning conservation of the living resources of the high seas.

Article 25

1. A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged may adopt measures for regulating and controlling fishing activities in such areas for the purpose of the conservation of the living resources of the high seas.

2. For the purposes of this and succeeding articles the conservation of the living resources of the sea is to be understood as the conduct of fishing activities so as:

(a) Immediately to increase or at least to maintain the average sustainable yield of the living resources of the sea;

(b) Ultimately to obtain the optimum sustainable yield so as to maintain a maximum supply of food and other marine products; and

(c) To develop the yield of various species through selectivity and control of that particular species.

Article 26

1. If the nationals of two or more States are engaged in substantial fishing of the same stock or stocks of fish in any area or areas of the high seas, these States shall, at the request of any of them, enter into negotiations in order to prescribe by agreement the measures necessary for the conservation of such stock or stocks of fish.

2. If these States do not, within a reasonable period of time, reach agreement upon the need for conservation or as to the appropriateness of conservation measures proposed by any of them, any of the parties may initiate the procedure contemplated in article 31, in which case the arbitral commission shall make one or more of the following determinations depending upon the nature of the disagreement:

(a) Whether conservation measures are necessary to make possible the maximum sustainable productivity of the concerned stock or stocks of fish;

(b) Whether the specific measure or measures proposed are appropriate for this purpose, and if so which are the more appropriate, taking into account particularly:

(i) The expected benefits in terms of maintained or increased productivity of the stock or stocks of fish;

(ii) The cost of their application and enforcement; and

(iii) Their relative effectiveness and practicability.

¹ Hereinafter referred to as the "Rome Conference".

² *Official Records of the General Assembly, Tenth session, Supplement No. 9 (A/2934), pp. 10-13.*