

Document:-  
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**Summary record of the 334th meeting**

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

Extract from the Yearbook of the International Law Commission:-  
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18. Mr. LIANG, Secretary to the Commission, recalling that the matter of publication of the Commission's documents had been discussed at the tenth session of the General Assembly, which on 3 December 1955 had adopted resolution 987 (X), based largely on the Commission's recommendations, said that the question had two aspects—current and future documents, and those relating to previous sessions. The General Assembly, while discussing the question of the languages in which the documents should be printed, had adopted a different solution for each part of the problem. It had finally been decided, first, that the current and future documents of the Commission should be published in English, French and Spanish, and, secondly, that documents other than summary records pertaining to previous sessions, such as special reports and principal draft resolutions, should be printed in their original language, while summary records should be printed initially in English only.

19. There were also certain technical questions that the Commission might care to discuss. He had in mind, in particular, the form of publication. The Secretariat's proposal contemplated a yearbook consisting of three parts: Part 1, containing preparatory documents—for example, special rapporteurs' reports, comments of governments and the like; Part 2, the summary records of the Commission's meetings; and Part 3, the Commission's report to the General Assembly. It would be impossible to print all the relevant documents of previous sessions in one year, and it was proposed to liquidate the backlog of the period 1949-1955 in three years.

20. He suggested that detailed discussion of the question should be deferred until the document to be submitted by the Secretariat had been distributed.

21. On the proposal of Mr. KRYLOV, *it was decided to defer further consideration of item 9 of the provisional agenda.*

#### **Regime of the high seas; Regime of the territorial sea (items 1 and 2 of the provisional agenda) (A/CN.4/97)**

22. Mr. FRANÇOIS, Special Rapporteur, explaining the issues connected with Section I: Order of chapters, of the special report (A/CN.4/97) he had prepared, said that the question of the order of chapters might appear relatively insignificant, but in view of the necessity for integrating the several questions treated into a systematic whole, it was of some importance. Of the two possible approaches described in paragraphs 5 and 6 of the report, his own preference was for the second—that of dealing with the topics in order of diminishing state sovereignty. If that method were adopted, the order of items would be, after an introduction, the territorial sea, the continental shelf, the contiguous zones and, lastly, the high seas. The Commission itself must decide that question of presentation.

23. In that connexion, he mentioned a letter received from Professor Böhmert, of Kiel, criticizing the fact that the Commission seemed to give equal consideration

to the continental shelf and to chapters dealing with the other parts of the sea, and making the point that such treatment created an erroneous impression that what was in fact only *lex ferenda* was *lex lata*. He himself did not attach great importance to that objection, and would not favour the exclusion from a report to the General Assembly on the provisions governing the various parts of the sea of a chapter giving the continental shelf its rightful place, but pointing out, of course, that much still remained controversial in that matter. He therefore preferred the order of chapters set out in paragraph 8.

*Further consideration of item 1 of the provisional agenda was deferred.*

*The meeting rose at 11.10 a.m.*

## **334th MEETING**

*Thursday, 26 April 1956, at 10 a.m.*

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*Chairman:* Mr. F. V. GARCÍA-AMADOR.

*Rapporteur:* Mr. J. P. A. FRANÇOIS.

*Present:*

*Members:* Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Jaroslav ZOUREK.

*Secretariat:* Mr. LIANG, Secretary to the Commission.

#### **Regime of the high seas; Regime of the territorial sea (items 1 and 2 of the provisional agenda) (A/CN.4/97) (*continued*)**

1. The CHAIRMAN, inviting the Commission to continue its consideration of the Special Rapporteur's report (A/CN.4/97) on the regime of the high seas and the regime of the territorial sea, called for comments on Section 1.

#### *Section 1. Order of chapters*

2. Mr. EDMONDS thought that, although the order of chapters was not of great importance, it would be more logical to start with the general principles relating to the freedom of the high seas and then to continue with the provisions on the territorial sea, the continental shelf and the contiguous zone as derogations from the general

rule. Such an arrangement would conform with that followed in legal codes.

3. Sir Gerald FITZMAURICE, while recognizing the largely practical reasons for which the Special Rapporteur had suggested inverting the order of chapters, also considered that in presenting a work of codification to the General Assembly, the Commission should follow the normal practice of starting with a statement of general principles, which would be followed by the special rules constituting the exceptions. However, for the time being, no final decision need be taken and the Commission could discuss the different sections of the report in whatever order was most convenient.

4. Mr. ZOUREK found the reasons given by the Special Rapporteur for the order he had suggested convincing, but considered that the articles on the continental shelf and the contiguous zone should be incorporated in the chapter on the high seas. The report would then consist of three parts: introduction, territorial sea and high seas. He made that suggestion because, internal waters apart, the sea was traditionally regarded by international lawyers as being divided into the territorial sea and the high seas and he feared that the Special Rapporteur's suggested arrangement might be interpreted as tending to separate the continental shelf and contiguous zone from the high seas. That that had never been the Commission's intention was demonstrated by the wording of articles 3 and 4 of the draft articles on the continental shelf adopted at the fifth session<sup>1</sup> where it was explicitly stated that the rights of the coastal State over the continental shelf did not affect the legal status of the superjacent waters as high seas or of the airspace above them. Since those rights of the coastal State were a restriction on the freedom of the high seas of the same nature as, for example, the right of pursuit, the relevant provisions must belong to the regime of the high seas.

5. Mr. PAL considered that the discussion on the order of chapters could be left till last, particularly as a number of members had still not arrived.

6. Mr. AMADO agreed with Mr. Zourek that the articles on the continental shelf and the contiguous zone, both of which were part of the high seas, could not be treated in separate chapters. He had no definite view as to whether the chapter on the high seas should come before that on the territorial sea and believed that the decision could be taken only after thorough examination of the various considerations involved.

7. Mr. SANDSTRÖM said it would be difficult to arrive at a perfectly logical order: the question should be left open till the end of the discussion. If the Commission met the view expressed by Mr. Edmonds and Sir Gerald Fitzmaurice, it would be faced with the difficulty of defining the high seas, as that could not be done without reference to the territorial sea. He was therefore inclined to favour the Special Rapporteur's order as modified by Mr. Zourek.

8. Mr. FRANÇOIS, Special Rapporteur, said that he had no very rigid opinion on the question of order except that, to be intelligible, the articles on the continental shelf and the contiguous zone must follow those on the territorial sea. He recognized the force of Mr. Zourek's arguments and found his suggestion perfectly acceptable. In the meantime, the decision could be postponed until the conclusion of the discussion.

9. Sir Gerald FITZMAURICE, while agreeing with Mr. Zourek that rules for the continental shelf and the contiguous zone formed part of the law of the high seas, pointed out that there were two possible methods of classification—either according to the status of the waters or according to the rights to be exercised therein. If the latter approach were adopted it would be necessary to start with the articles dealing with common rights, and then to proceed with those special rights enjoyed by the coastal State over the territorial sea, the continental shelf and the contiguous zone.

10. The CHAIRMAN suggested that, pending a final decision, the Commission might provisionally accept the order proposed by the Special Rapporteur as modified by Mr. Zourek.

11. Mr. FRANÇOIS, Special Rapporteur, said that he would have no objection to that procedure provided it were understood that the order of discussion would be dictated solely by practical considerations. For instance, owing to delay in receipt of the French translation of some of the governments' comments, he had had to start his supplementary report with the comments on the articles concerning the high seas.

*Subject to that proviso, the Chairman's suggestion was adopted.*

*Section 2. Establishment of a central authority empowered to make regulations*

12. Mr. FRANÇOIS, Special Rapporteur, said that the Commission had to decide whether the time had come to establish a central authority to deal with all questions relating to the sea and whether that authority should be invested with legislative functions with the power to render binding decisions, or whether it should act solely in an advisory capacity. The Commission had already proposed the creation of an international authority for the regulation of fisheries and it must now consider the problem in a wider context. In his report he had enumerated the various objections to a central authority and personally felt that at the present time the idea was impracticable.

13. The CHAIRMAN said that, if the Commission were to decide in favour of a central permanent authority with legislative, executive and quasi-judicial powers of the kind described in the Special Rapporteur's report, it would have to reconsider articles 31, 32 and 33 relating to the conservation of the living resources of the sea in the draft concerning the regime of the high seas, adopted at the previous session.<sup>2</sup> On the other hand, the establish-

<sup>1</sup> *Official Records of the General Assembly, Eighth session, Supplement No. 9 (A/2456), para. 62.*

<sup>2</sup> *Official Records of the General Assembly, Tenth session, Supplement No. 9 (A/2934), pp. 12-13.*

ment of a purely advisory body to co-ordinate the work of all existing bodies in the field would be entirely compatible with earlier decisions. It would be desirable for the Special Rapporteur to submit as a basis for discussion some more definite proposal about the structure and functions of the authority.

14. Mr. ZOUREK pointed out that, while it was true that the Commission, at its fifth session, had proposed the establishment of an international authority within the framework of the United Nations for the purpose of regulating fisheries, the provisions for the settlement of differences concerning the conservation of the living resources of the high seas, agreed upon the previous year, ran counter to that decision.

15. The Special Rapporteur had admirably summarized the objections to the creation of a central authority, but he must, in addition, draw attention to the fact that, apart from the question of expense, it could not be set up without encroaching upon the competence of the Food and Agriculture Organization (FAO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), as well as on that of a number of specialized intergovernmental organizations.

16. Finally, the reception given by the General Assembly to the draft on arbitral procedure had been very instructive. The Commission should bear in mind that a proposal to institute a new organ with functions which States regarded as falling within their own province would undoubtedly meet strong opposition. With such powerful considerations militating against the creation of a central authority, he believed the Commission should explain in the commentary that, after mature consideration, the conclusion reached was that it would be inopportune.

17. Sir Gerald FITZMAURICE said that it was necessary to distinguish between creating a central authority as an integral part of any set of rules, as had been done in the case of the articles on the conservation of the living resources of the sea, which would be inoperable without that central authority, and making some form of quite separate general provision concerning the machinery for the settlement of disputes. From the purely theoretical point of view, the establishment of enforcement machinery was not part of the work of codification and should be left to the General Assembly or a diplomatic conference. At the present stage, it would be inappropriate for the Commission to include in its draft any such general provision concerning the settlement of disputes. It would be a different matter to propose the establishment of a purely advisory body, but even so he hardly thought the necessary provision could suitably be included in a code of rules; it should rather form the subject of a separate recommendation.

18. Mr. KRYLOV observed that the specialized bodies dealing with certain maritime problems had encountered difficulties even over matters affecting only one of the oceans. How much greater would be the difficulties of a central authority, the need for which was in any case very questionable. He strongly advised the Commission against embarking upon what might prove to be

a fruitless discussion of a very complex question which could hardly be settled at the present juncture.

19. Mr. LIANG, Secretary to the Commission, agreed with the Special Rapporteur that the question raised in Section 2 must be discussed early in the proceedings, in order to enable the Commission to reach a decision. In view of the nature of the substantive provisions in the draft on arbitral procedure and in the two draft conventions on statelessness, it had been appropriate to include in them provisions concerning implementation. In the present case the question could be settled only by reference to specific articles, and the decision must therefore be postponed until those articles had been discussed in substance.

20. Mr. SANDSTRÖM stressed the importance of the distinction drawn by Sir Gerald Fitzmaurice, though he recognized that the articles on the conservation of the living resources of the sea would have been incomplete without machinery for implementation. Elsewhere in the draft the Commission must exercise the greatest caution before going too far in the direction of what, in his study entitled *Plateau continental et droit international* (1955), Mr. Scelle had called "functional federalism". At all events, before taking any decision, the Commission must first review all the draft articles.

21. Mr. PAL saw no useful purpose in holding a theoretical discussion. The moment to consider whether a central authority was needed would come when the Commission examined the draft article by article. He further pointed out that the provisions concerning settlement of disputes were not at present under discussion. That question was dealt with in Section 3, which would come up for consideration shortly.

22. Faris Bey el-KHOURI, contending that the Commission could not consider the question in the abstract, expressed the hope that the Special Rapporteur would present some definite proposal as a basis for discussion.

23. Mr. AMADO detected a note of irony in paragraph 9 of the Special Rapporteur's report. Indeed, only the most ardent idealist could envisage the possibility of establishing at the present time a central authority of the kind described in Section 2. The Commission must adopt a more realistic standpoint and concentrate on those immediate and practical problems concerning which States looked to it for guidance.

24. Mr. FRANÇOIS, Special Rapporteur, said that Faris Bey el-Khoury's suggestion that he should submit a definite proposal seemed to be based on a misunderstanding of the nature of his task. That was perhaps understandable in view of the fact that concrete proposals had been put forward in some of his previous reports and would in fact also be found in the supplementary report he was now preparing. It was, however, unreasonable to expect a rapporteur to adopt that as a general practice, because new topics might arise on which the Commission's opinion would be essential before he could attempt to draft a text. In any event, in paragraph 18—to which he also invited Mr. Amado's attention

—he had expressed his view quite categorically. He was not in favour of the establishment of a “maritime office”, and he had indicated obstacles in the way of such a course. During the discussion, that solution had not been defended. The general opinion seemed to be against the establishment of an authority with legislative powers, although the views concerning an advisory body were less clear-cut. The idea might be put forward in the comment to the relevant provisions.

25. The distinction drawn by Sir Gerald Fitzmaurice was valuable, but he could not go all the way with him. In any case, the question would be examined further under Section 3: Settlement of disputes. It would perhaps be wiser to say no more than that, for certain members, the establishment of a body or the designation of a *modus procedendi* for the settlement of disputes was an essential condition. In the case of a legislative body, no suggestion had been made that a centralized organ was a pre-requisite for the adoption of the various provisions. Before deciding, however, whether a body with consultative functions should be mentioned in the report, certain aspects of the question would need to be reviewed.

26. Mr. AMADO welcomed the Special Rapporteur’s statement and hoped his remarks had not given the impression that he had in any way under-estimated the objective realism of Mr. François’ previous reports.

27. Faris Bey el-KHOURI wished to make it clear that he had not intended to suggest that the Special Rapporteur should draft definite proposals as a general practice, but only when dealing with the items under consideration, where his views, which carried great weight, would provide invaluable guidance for the Commission.

28. Mr. SANDSTRÖM pointed out, with regard to the provisions for arbitral procedure in Section 5: Regulation of fisheries, that the question was one of regulation and not of the interpretation of a treaty. The arbitral authority was not a centralized organ, for it could be chosen by the parties themselves.

29. At the suggestion of the CHAIRMAN, a *decision on Section 2 was deferred*.

### *Section 3. Settlement of disputes*

30. Mr. FRANÇOIS, Special Rapporteur, said there was some discrepancy between the different texts adopted by the Commission in respect of the different parts of the sea. In some articles provision was made for compulsory jurisdiction or arbitration, whereas in others no such procedure had been proposed. The Commission would have to take a decision on that situation. For instance, with regard to the high seas, the question arose whether arbitration should be compulsory in the case of disputes over the conservation of living resources only, or be extended to other matters. Pending ascertainment of the Commission’s view, he had not prepared any specific texts.

31. Sir Gerald FITZMAURICE said that the distinction he had drawn in respect of Section 2 also applied to

Section 3. It had been made clear in the comment on the article on the continental shelf, quoted on page 9 of document A/CN.4/97, that in the case of the continental shelf there were elements which necessitated setting up arbitral machinery for the interpretation of the articles where the rules were rather vague. That, however, was a special case and it did not necessarily follow that similar machinery must be set up for the code as a whole. In any case, such a task did not lie within the Commission’s purview, but was properly the concern of the General Assembly.

32. Mr. SANDSTRÖM agreed that there might be certain cases arising out of new topics, such as the continental shelf, where, owing to the vagueness of the provisions, some form of compulsory arbitration would be called for. It should not be regarded as the general rule, however.

33. Mr. ZOUREK also agreed, and added that the Commission should not concern itself with general provisions for the settlement of disputes, for they were a matter for the body which might be called upon to prepare a draft convention on the basis of the Commission’s recommendations. In specific cases, such as questions of the conservation of the living resources of the sea or the continental shelf, where the Commission might regard it as necessary to include provisions for compulsory arbitration, it would be essential to devise a formula that would allow States some latitude in selecting the most appropriate procedure. If only one approach were specified, such as recourse to the International Court of Justice, in practice any alternative, however desirable, would be excluded.

34. Mr. FRANÇOIS, Special Rapporteur, admitted that that point of view was defensible but felt it would create a very odd impression if the Commission were to deal only with the settlement of disputes in respect of the continental shelf, omitting the territorial sea and contiguous zone; questions might well be asked on the reason for such a distinction.

35. In the case of the territorial sea and contiguous zone, no stipulation with regard to arbitration had been included, because the question had never been raised. The relevant articles should be reviewed, however, and the necessity for extending the principle of compulsory arbitration to those provisions examined. As indicated in sub-paragraph (1), on page 11 of his report, a cautious approach would be necessary when the Commission came to express a final opinion on the question of comprehensive stipulations for compulsory arbitration.

36. It was true that the absence of such provisions in respect of the high seas, for instance, would undoubtedly stimulate criticism from certain quarters in the legal world, and certain governments might urge the insertion in the regulations of a compulsory jurisdiction or arbitration clause in respect of questions that the Commission had not yet considered. The different provisions should be reviewed, bearing in mind the decidedly vague nature of some of them. An immediate decision was not called for, but there was some force in the argument that, in dealing with certain other items,

the Commission should follow the same line as it had taken on the continental shelf.

37. Mr. ZOUREK thought it might be advisable to take a provisional decision in order to avoid subsequent reopening of the discussion. He suggested that there should be no provision for comprehensive compulsory arbitration, but that the procedure should be determined by the nature of each specific case. For instance, certain provisions with regard to the arbitration machinery applicable to disputes on fishing would not govern cases relating to the continental shelf.

38. At the suggestion of the CHAIRMAN, *further discussion of Section 3 was deferred.*

39. Mr. ZOUREK asked to what extent articles already adopted by the Commission would need revision in the light of replies from governments, and whether the Special Rapporteur had contemplated reopening the whole question of the continental shelf irrespective of government comments.

40. Mr. FRANÇOIS, Special Rapporteur, in reply, said that the Commission had a twofold task. In the first place, it had to examine the replies from governments in order to decide whether any modification of the Commission's original standpoint was called for. Secondly, it had to bring into line various provisions—even those upon which there were no government comments—in order to smooth out possible inconsistencies in the texts—for instance, in the article quoted in paragraph 24 of his report, which Mr. Scelle contended raised a question of discrepancy. He did not accept that contention, but the issue must be decided by the Commission. That, of course, did not imply revision of the text of every article, in particular those which had been adopted after a second reading. There was obviously no time to re-examine every question of principle. Texts already adopted should be reviewed only if uniformity of approach required such a course.

41. The CHAIRMAN, endorsing the Special Rapporteur's opinion, said that a distinction must be drawn between the two types of article: those that had been definitely adopted, such as the provisions on the continental shelf and contiguous zone, and those that had been provisionally approved at the seventh session and subsequently submitted to governments for comment, such as the articles on the territorial sea and the conservation of the living resources of the sea. Provisionally approved articles must be given detailed consideration and, where appropriate, amended. Definitely adopted articles must, as the Special Rapporteur recognized, be brought into line in the final report.

42. There was, moreover, a further reason for reviewing at least some aspects of those articles. The Inter-American Specialized Conference on Conservation of Natural Resources, which had recently met at Ciudad Trujillo, had studied not only the legal, but also the scientific and economic aspects of the subject and had adopted a resolution on the continental shelf very similar to the articles adopted by the Commission at its third session which had, in fact, inspired the Conference's

recommendation. The new data on many technical aspects of the whole subject made available by the Conference would materially assist the Commission in its work, while fresh elements arising out of government replies must certainly be taken into account.

43. He himself intended to submit a proposal amending the definition of the continental shelf contained in the draft adopted by the Commission at its fifth session and providing a definition of the term "natural resources" used in the same draft.

*The meeting rose at 1.05 p.m.*

## 335th MEETING

*Friday, 27 April 1956, at 10 a.m.*

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*Chairman:* Mr. F. V. GARCÍA-AMADOR.

*Rapporteur:* Mr. J. P. A. FRANÇOIS.

*Present:*

*Members:* Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Jaroslav ZOUREK.

*Secretariat:* Mr. LIANG, Secretary to the Commission.

### Regime of the high seas; Regime of the territorial sea (items 1 and 2 of the provisional agenda) (A/CN.4/97) (*continued*)

*Section 7, sub-section A: — Right of passage in waters which become internal waters when the straight baseline system is applied*

1. The CHAIRMAN, inviting the Commission to continue its consideration of the Special Rapporteur's report on the regime of the high seas and the regime of the territorial sea (A/CN.4/97), requested the Special Rapporteur to introduce Section 7, sub-section A.

2. Mr. FRANÇOIS, Special Rapporteur, outlined the historical background of the question as set out in paragraphs 43-48 of his report.

3. Sir Gerald FITZMAURICE said it was an important question and should certainly be considered by the Commission.