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Summary record of the 303rd meeting

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

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structure of the draft articles. He himself had interpreted article 2 as meaning that two or more States might negotiate an agreement on conservation measures which need not necessarily be wholly based on the requirements of article 6 pertaining to regulations promulgated unilaterally by the coastal State. He urged the Commission not to adopt the amendment without giving the most careful consideration to its ultimate effect on a draft which dealt differently with regulations promulgated by two or more States and with those promulgated unilaterally.

72. Faris Bey el-KHOURI did not consider that an agreement on conservation measures concluded between several States should confer a monopoly over a certain area of the high seas for the purpose of excluding foreign fishing vessels therefrom. They had only the right to regulate fisheries in the general interests and must therefore be bound by the provisions of article 6.

73. Mr. GARCÍA AMADOR agreed with Faris Bey el-Khourri that multilateral regulations under article 2 and unilateral regulations under article 1 must both be subject to the conditions of article 6, which circumscribed the full freedom of action both of the coastal and of other States. It would then be impossible for agreements between several States, prompted by motives of gain rather than concern for the maintenance of the maximum sustainable yield in the general interest, to be promulgated, since they would be contrary to article 6, paragraph 1(a); nor would States be entitled to initiate measures which were neither imperative nor urgent, owing to the provisions of paragraph 1(b). Since the purpose of all conservation measures must be to protect the general interest, they should fulfil the conditions set out in article 6, and particularly that of paragraph 1(b).

74. Mr. FRANÇOIS (Special Rapporteur) said that despite Mr. García Amador's remarks, he was still doubtful about the need for Faris Bey el-Khourri's amendment, since the conditions laid down in article 6 could not apply to regulations instituted by virtue of articles 1 and 2, where there could be no question of their being obligatory on a third party: the case of third States was provided for in article 3, when it would be for the board of experts to decide whether the terms of article 6 had been complied with.

75. Mr. SCILLE found the Special Rapporteur's argument unconvincing, because under the terms of articles 1 and 2 it would be possible for States to monopolize fishing in certain areas of the high seas, thereby violating a major principle of international law. At the outset, it had seemed that the amendment went too far, but he now realized that his first impression had been mistaken, since the notion of challenging a treaty or international agreement was not a new one, and had in fact been put into practice by Germany between the wars. Violation of the overriding principle of the freedom of the seas, or discrimination against foreign fishing vessels, could constitute grounds for declaring regulations null and void. Once the Commission had introduced the concept of the "special interest", it must

allow other States a right of appeal, but such a provision would be better placed in a general article dealing with the freedom of the seas, to make sure that States were precluded from invoking the requirements of conservation as a pretext for frustrating the fishing of others. However, for the time being he would be prepared to accept Faris Bey el-Khourri's amendment to article 6, on the understanding that he could later revert to the general principle involved.

76. The CHAIRMAN, speaking as a member of the Commission, observed that if the general principle implicit in the amendment were accepted, the Commission would reverse all its previous decisions on the draft before it, and would, in effect, be returning to article 32 in the Special Rapporteur's sixth report (A/CN.4/79) on the régime of the high seas.

77. Mr. KRYLOV said that the issue before the Commission was whether the three conditions laid down in article 6 must always be complied with, or whether they applied solely to measures adopted unilaterally by the coastal State.

78. Mr. SANDSTRÖM said that the Commission was faced with a very important issue which required further reflection. He himself was uncertain whether, given the present structure of the draft articles on fisheries, Faris Bey el-Khourri's amendment was appropriate. He accordingly moved that the decision be postponed until the following meeting.

The motion was carried.

The meeting rose at 1.10 p.m.

303rd MEETING

Thursday, 2 June 1955, at 10 a.m.

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

Chairman : Mr. Jean SPIROPOULOS

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

Members : Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCILLE, Mr. Jaroslav ZOUREK.

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

Régime of the high seas (item 2 of the agenda)
(A/CN.4/79, A/CONF.10/6) (continued)

NEW DRAFT ARTICLES ON FISHERIES (continued)

Article 6 [5, paras. 2 and 3] (continued)

1. The CHAIRMAN invited the Commission to consider the amendment to article 6 submitted orally by Faris Bey el-Khourî at the previous meeting.¹
2. Mr. FRANÇOIS (Special Rapporteur) said that, having reflected on Faris Bey el-Khourî's amendment, he had decided that the obligation imposed in the opening sentence of paragraph 1 of that article should be made general. He therefore proposed a new article 1, the introduction to which would read: *Toutes les mesures que les Etats prendront en haute mer pour réglementer et contrôler la pêche en vue de la conservation des ressources biologiques de la mer doivent satisfaire aux conditions suivantes*. Sub-paragraphs (a), (b) and (c) of article 6, suitably modified, would follow.
3. Paragraph 2 of article 6 would be transposed to form the second paragraph of article 5, to which provision it had always related, and articles 7 to 10 renumbered accordingly.
4. The new article 1 would dominate the entire draft, and the requirements laid down therein would guide the board of experts in determining whether regulations against which an appeal had been made were valid. The transposition of paragraph 2 to article 5 would also make it clear that States not engaged in fishing in a particular area would not be entitled to challenge regulations solely on the ground that they failed to meet the conditions listed in article 1.
5. Mr. SANDSTRÖM assumed that the Special Rapporteur had not intended that conservation measures should be binding on States not parties to an agreement concluded under article 2.
6. Mr. FRANÇOIS (Special Rapporteur) confirmed that that assumption was correct.
7. Mr. EDMONDS said that the Special Rapporteur's proposal did not meet the fundamental objection he had raised at the previous meeting against Faris Bey el-Khourî's amendment, namely, that if it were adopted the same criteria would apply to regulations promulgated as the result of an agreement between two or more States as to regulations promulgated unilaterally by a coastal State. Personally, he did not consider that the same criteria should be applied in the case of regulations flowing from a multilateral agreement: criteria relating to the latter might be inserted in one of the provisions dealing with arbitration, and he would at the appropriate moment indicate what they might be.
8. Mr. HSU considered that the Special Rapporteur's new proposal could provide a working basis, on the assumption that the Commission had already accepted the principle that States promulgating conservation measures must conform to certain rules whatever the circumstances. He was personally not opposed to such a solution, but urged the Commission to be quite clear about what it was doing.
9. Faris Bey el-KHOURI had been perfectly right to draw attention to the gap in article 3, which provided no criteria for use if an agreement concluded under article 2 were challenged by a third party. Unless that omission were made good the whole system of regulation provided for in the draft articles might in many cases prove inoperable. However, Faris Bey el-Khourî had gone even further and had introduced an idea entirely new in international law, namely, that all regulations would be equally subject to the conditions laid down in article 6. Again he was not necessarily opposed to that development but wondered whether the Commission was in fact willing to go so far as to empower any State to challenge any conservation regulations. If it were not, it should confine itself to the real purpose of Faris Bey el-Khourî's amendment: the filling of the gap in article 3. That, he submitted, could easily be done by making a separate article of sub-paragraphs (b) and (c) of article 6, prefaced by some such words as "The Board shall take into consideration whether the following requirements have been fulfilled..." Those two requirements should clearly be applicable to all regulations, whereas that laid down in sub-paragraph (a) related solely to regulations instituted unilaterally by the coastal State.
10. Mr. KRYLOV shared the Special Rapporteur's views, because in fact the Commission was in process of providing for an exception to the fundamental principle of the freedom of the high seas by allowing States to regulate fisheries for purposes of conservation. The nature of the exception must therefore be most precisely defined for the guidance of States, which were not entirely free to regulate fisheries on the high seas as they pleased. It would not be unduly audacious to transfer the fundamental element in article 6 to a new article 1; indeed, that would be consistent with the conclusions adopted at the Rome International Technical Conference on the Conservation of the Living Resources of the Sea. He was accordingly inclined to agree with the general idea underlying Faris Bey el-Khourî's amendment and to support it in the form proposed by the Special Rapporteur.
11. Sir Gerald FITZMAURICE, while agreeing in principle with Faris Bey el-Khourî's view, had some doubts, for reasons analogous to those adduced by Mr. Edmonds and Mr. Hsu, about whether the solution offered by the Special Rapporteur was the best. Mr. Hsu had been perfectly correct in pointing out that some of the criteria in article 6, while appropriate to unilateral regulations, ought not to be applicable to those promulgated by multilateral agreement. For example, in the case of the former, the requirement laid down in

¹ 302nd meeting, para. 49.

sub-paragraph (a) was perfectly reasonable, and was indeed both necessary and desirable. But there was no reason why the same requirement should be imposed in the case of multilateral regulations. Certain measures might well be considered desirable without there necessarily being any imperative or urgent need for them.

12. Sub-paragraph (c) raised the same point, but that involved a question of drafting rather than of substance. It was clearly inappropriate to refer to "foreign fishermen" in connexion with regulations reached by agreement between the States by which those regulations had been drawn up. Hence, although article 2 must be made subject to the requirement set out in sub-paragraph (c), those words would have to be replaced by some phrase prohibiting discrimination against the nationals of "States not parties to the agreement". He hoped the foregoing arguments would have demonstrated that the criteria laid down in article 6 were not equally applicable to all cases. There was much to be said for Mr. Hsu's suggestion, which had been adumbrated by Mr. Edmonds, that the criteria should be laid down in one of the articles pertaining to the settlement of disputes by the board of experts.

13. Faris Bey el-KHOURI observed that there appeared to be general agreement in the Commission, as there had been at the Rome Conference, that measures of conservation were necessary and that the coastal State or States engaged in fishing in a particular area were entitled to promulgate appropriate regulations. It remained to decide what criteria such regulations should meet — a matter to which insufficient attention had been paid at the Rome Conference. He therefore paid tribute to the wisdom of Mr. García Amador in making good that deficiency, though article 6 as it stood might need to be amplified.

14. There would be no problem if regulations were to be binding solely upon the parties to the agreement, but, in order to protect the freedom of the high seas, he was anxious to make certain that only regulations fulfilling certain conditions could be universally binding. He considered that that would be achieved by the Special Rapporteur's proposal. Matters of drafting could be left to the sub-committee.

15. Mr. AMADO was unable to associate himself with Faris Bey el-Khour's views, and considered that the original text was more realistic and would have a greater chance of acceptance.

16. The CHAIRMAN feared that the Commission was not making much headway. He did not himself regard the issue under discussion as of great significance, or very controversial. In his opinion, it was perfectly obvious that regulations must be based on valid scientific findings, and that they must not discriminate against foreign fishermen, and it was of no great moment whether those criteria were placed in an introductory article or later in the draft, since the board of experts would in any case apply them in deciding any case which had given rise to a difference between States.

17. Mr. KRYLOV considered the discussion to have been useful, inasmuch as it had revealed the crucial issue at stake.

18. Mr. ZOUREK urged the Commission to bear it in mind that the whole purpose of the draft articles was to ensure conservation, and that they must therefore set forth the general principles on which regulations should be based, whether promulgated under article 2 or under article 5. It would be peculiar, and totally inconsistent with that purpose, to impose certain conditions on the coastal State, while allowing other States full freedom in drawing up their regulations. The criterion contained in sub-paragraph (a) was certainly applicable to unilateral regulations established by a coastal State, but it should not be included in a general introductory article, which he favoured. As Mr. Krylov had so pertinently demonstrated, the draft articles provided for an exception to the principle of the freedom of the high seas, and the conditions the relevant regulations would have to fulfil must therefore be very precisely defined.

19. Mr. SCALLE said that, despite the counter-arguments adduced, he agreed in a general way with the Special Rapporteur. The Commission would have made some progress if the provisions adopted ensured that regulations were to some extent standardized because of the existence of an international authority with powers to determine whether they were scientifically, and hence legally, valid.

20. Mr. García Amador would presumably agree that there was no reason why the coastal State should be placed at a disadvantage by having to fulfil certain conditions which were not imposed on other States. He therefore welcomed Faris Bey el-Khour's proposal that all regulations should be subject to the same conditions, and did not think that the views expressed by Sir Gerald Fitzmaurice and Mr. Hsu were incompatible with that standpoint.

21. Mr. GARCÍA AMADOR said that the Commission should be grateful to Faris Bey el-Khour for raising a question which had escaped the notice of the Sub-Committee. However, he warned members against taking too hasty a decision to apply the same criteria in all cases. Regulations established unilaterally by the coastal State would differ from those promulgated under articles 1 and 2. For instance, the criterion in sub-paragraph (c) could not be applicable to articles 1 and 2, since those articles referred to regulations applying exclusively to nationals of the State or States promulgating them. On the other hand, that criterion must apply to unilateral regulations in order to avert all risk of discrimination.

22. The criterion laid down in sub-paragraph (a) was not very well defined or of general application. Moreover, any State affected, in an area where it was engaged in fishing, by conservation measures which it regarded as unjustified could exercise the right of appeal provided for in article 3.

23. The criterion in sub-paragraph (b), on the other hand, was universally applicable and should provide a

safeguard against measures prompted solely by motives of private gain. A provision of that kind was particularly necessary in order to prevent powerful fishing interests from bringing pressure to bear on their governments to carry out conservation measures which had nothing whatsoever to do with the fundamental aim of securing a constant optimum sustainable yield. He used the word "constant" advisedly, because the whole question of conservation must clearly be approached from the long-term standpoint of the general interest rather than from that of any transitory interest of the fishing industry. The criterion in sub-paragraph (b) was thus crucial, and its importance should be made as clear as possible. That said, he believed that the drafting could be left to the sub-committee.

24. Mr. SALAMANCA said that one of the most important elements in the draft articles was the recognition that the coastal State had certain special rights in regulating fisheries, subject to certain conditions which should have favourable practical results. It was extremely useful to have brought out into the open the possibility of pressure by a fishing industry on a government, thus enabling the necessary safeguards to be provided against measures prompted by commercial instead of purely scientific considerations.

25. It was essential to ensure that any regulations promulgated by a coastal State would be positive and not negative.

26. Mr. SANDSTRÖM was still uncertain whether the provisions of articles 1 and 2 should be subject to the requirements laid down in article 6, and was certainly convinced that the criterion in sub-paragraph (a), at least, could not apply generally. On the other hand, he believed that the criterion in sub-paragraph (c) must be fulfilled in the case of all regulations, since those promulgated under articles 1 and 2 might well have the effect of discriminating against foreign fishermen. On that understanding, he would be able to accept the Special Rapporteur's proposal.

27. Sir Gerald FITZMAURICE said that the last sentence made by Mr. García Amador and Mr. Sandström revealed a difference of view on the important issue of how far regulations promulgated by a coastal State, by one non-coastal State or by several States together would be *ipso facto* binding on other States. Mr. García Amador had drawn a distinction, in connexion with the question of discrimination, between unilateral regulations by a coastal State and regulations promulgated by agreement between several States, and had appeared to argue that in the case of the latter there was no need to provide against discrimination because the regulations would apply only to the nationals of the States concerned, whereas in the case of the former—where the regulations would be applicable to all other fishermen—some safeguard against discrimination was needed. Perhaps such a distinction had been intended, or was necessary, but it was not embodied in the text as it stood.

28. In fact, there were two possible systems, and which-

ever was adopted should be the same for each class of case. Either the regulations adopted by agreement between two or more States or unilaterally by the coastal State became binding on others fishing in that area, the latter having the right of appeal; or regulations adopted in either of the two instances would not *ipso facto* become binding on other States, in which case, if the latter failed to conform with the regulations, the promulgating State or States could ask the board of experts to direct that the regulations be observed. The real point at issue, therefore, was where the onus lay for approaching the board of experts.

29. It was apparent from Mr. García Amador's statement that the draft did not make clear which system was applicable.

30. The CHAIRMAN did not think it should be difficult to decide whether all regulations, once adopted, would become binding forthwith on any State fishing in the area concerned, or whether that would be contingent upon a decision of the Board.

31. Mr. SCELLE pointed out that Sir Gerald Fitzmaurice had raised the very interesting problem of the burden of proof. Surely it would be consistent with normal practice for that burden to be borne by those States which were not responsible for the regulations. The situation would then be analogous to that obtaining in municipal law, when an administrative decision remained valid unless and until an appeal against it succeeded.

32. Mr. SANDSTRÖM did not entirely agree with Mr. Scelle, because there could be cases when it would be necessary for the promulgating States to prove that the regulations were not contrary to the conditions laid down in the draft articles.

33. The CHAIRMAN observed that the Commission must decide whether, upon adoption, regulations became generally obligatory unless subsequently annulled by the board of experts.

34. The Commission had also to decide whether all regulations should conform with the same conditions.

35. Mr. EDMONDS reaffirmed his view that regulations promulgated under article 2 should be subject to certain criteria, but not necessarily to all those set out in article 6, which in their entirety were applicable to unilateral regulations only. The issue at stake seemed to him a very important one.

36. The CHAIRMAN observed that the Commission was in effect faced with two alternative proposals. Either that the coastal State alone, in enacting regulations unilaterally, must meet the requirements of article 6; or that all regulations must fulfil one general condition, namely: that they should be based on valid scientific findings and be aimed solely at the conservation of the living resources of the sea.

37. Mr. EDMONDS observed that the discussion suggested that there was general agreement that when challenged any regulations should be judged in the light

of certain criteria, but not necessarily in the light of those laid down in article 6. Mr. García Amador appeared to have admitted that those criteria were not wholly applicable in the case of regulations enacted under article 2.

38. Mr. GARCÍA AMADOR confirmed Mr. Edmonds' interpretation. Since article 1 was concerned solely with the nationals of one State, and since regulations adopted under article 2 could not be binding on States not party to the agreement, there could be no question of discrimination. Criteria other than those laid down in article 6 must therefore be applied.

39. In reply to a question by Mr. SALAMANCA, Sir Gerald FITZMAURICE explained that his earlier suggestion had been that the criteria might be inserted in a clause dealing with the law which the board of experts would have to apply.

40. Some misunderstanding persisted, and Mr. García Amador, though disclaiming any intention of drawing a distinction between unilateral regulations and regulations arrived at by agreement between two or more States, had, in fact, made such a distinction when he had stated that the former were *ipso facto* applicable to other States, but that the latter were only applicable to nationals of the States concluding the agreement. His own interpretation of article 2 had been that agreements concluded under it would be applicable *prima facie* to other States, but that the latter would have a right of appeal. Some provision was accordingly necessary to ensure that regulations promulgated under article 2 did not discriminate against States not parties to the agreement.

41. Mr. Edmonds was right in arguing that there was no simple set of criteria which would be equally applicable in all cases, and he himself doubted whether it would be possible to devise a general introductory article which would cover all regulations, apart from the common criterion laid down in sub-paragraph (b) of article 6.

42. The CHAIRMAN said that the condition that measures must be based on valid scientific findings might be generally applicable, but it would have to be differently applied, since what might be scientifically valid for one area might not be so for another.

43. Faris Bey el-KHOURI considered that any regulations must become binding on all other States as soon as adopted, otherwise they would be pointless. They should also fulfil two conditions: first, they must be based on valid scientific findings; second, they must not be discriminatory.

44. Mr. FRANÇOIS (Special Rapporteur) said that the discussion had showed that there were several points which the Sub-Committee had not fully disposed of. He therefore proposed that the draft articles be referred back to the sub-committee for revision in the light of the exchange of views that had taken place.

45. It had been suggested that a vote be taken on the

question whether the same criteria should apply to all regulations or whether different criteria should be framed for those promulgated by the coastal State and those promulgated by other States. For his part, he would be unable to take part in such a vote unless the criteria in question were actually specified.

46. Mr. ZOUREK said that there was not enough time to refer the matter to the sub-committee and then take it up again in the Commission. Besides, members had already expressed their views at length, and the Commission should be in a position to vote on the principle involved, namely, whether all conservation measures, no matter what their origin, must be based on valid scientific findings.

47. Mr. SCALLE agreed with Mr. Zourek. There were many minor points that could be left to the sub-committee, but the Commission was in a position to vote on the principle.

48. Sir Gerald FITZMAURICE thought it would be preferable to send the draft back to the sub-committee, but should the Special Rapporteur's proposal not be accepted, the principle to be put to the vote might be formulated somewhat as follows:

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

49. Mr. KRYLOV found Sir Gerald Fitzmaurice's proposal acceptable.

50. Faris Bey el-Khoury said that Sir Gerald Fitzmaurice's formulation expressed his own ideas very well.

51. Mr. AMADO had misgivings about the principles involved in the discussion. The articles under discussion did not appear to conform with the fundamental principle of international law that a treaty could not have any effect on States other than the signatories.

52. Sir Gerald Fitzmaurice's text was to some extent reassuring.

53. Mr. GARCÍA AMADOR said that he would be able to support Sir Gerald Fitzmaurice's proposal if the last five words were deleted. The three requirements laid down in article 6, paragraph 1, were designed for the case of a coastal State adopting unilateral conservation measures. The reason why requirement (c)—that relating to non-discrimination—had been stipulated was precisely that conservation measures adopted by the coastal State would be enforceable not only on its nationals but also foreign fishermen; it was therefore essential to provide that there should be no discrimination against the latter. But in the cases contemplated in articles 1 and 2 no such discrimination could possibly occur. Article 1 dealt with the case where the State whose nationals were alone engaged in fishing

in an area adopted conservation measures applicable to those nationals; clearly there could be no question of such measures being discriminatory.

54. As to the case provided for in article 2, namely, that in which the nationals of two or more States were engaged in fishing in a given area and the States concerned promulgated conservation measures by mutual agreement, a provision relating to non-discrimination would again be redundant, for the measures in question would be binding only on nationals of the States engaged in fishing in the area, and not on nationals of other States.

55. Sir Gerald FITZMAURICE said that his proposal could be voted on in parts if Mr. García Amador so wished. He felt, however, that the principle of non-discrimination should be enunciated for all States. Conservation measures had to be based on valid scientific findings, and were therefore essentially non-discriminatory in character.

56. Measures adopted by agreement on the part of all those States whose nationals were engaged in fishing in a given area would be applicable to nationals of other States, by virtue of the provisions of articles and adopted by the Commission, if those nationals too decided to engage in fishing in the area concerned. It was then open to the third-party State concerned to appeal in the manner set out in articles 7 to 10. In the circumstances, it was clear that where conservation measures were decided upon by agreement on the part of two or more States, the principle of non-discrimination must be explicitly safeguarded.

57. Mr. SCELLE agreed that it was desirable to make explicit reference to the principle of non-discrimination. But even if the Commission followed Mr. García Amador's suggestion and omitted to do so, the principle would still govern all the provisions of the draft articles on fisheries, for any State would still be entitled to appeal to the board of experts against measures of a discriminatory character.

58. Mr. GARCÍA AMADOR stressed that he was entirely in favour of the principle of non-discrimination. But that principle, which required to be explicitly stated in the case of unilateral measures adopted by the coastal State and which were to be applied to foreign fishermen, need no longer be mentioned in connexion with the cases provided for in articles 1 and 2, in which there was no possibility of discrimination.

59. It had been suggested that, pending a decision by the board of experts, regulations issued by one or more States fishing in an area would be equally applicable to fishermen belonging to a third-party State. That was clearly not the case; if the United States of America and Cuba were to agree on certain measures for regulating fishing in the Gulf of Mexico, those measures would not apply to Mexican, British or French fishermen. An even better example was provided by the Declaration of Santiago of 1952 between Ecuador, Peru and Chile on the exploitation and conservation of the

maritime resources of the South Pacific,² to which many States had objected. But if the Commission followed the line of thought of certain of its members, that treaty would apply to the nationals of all the objecting States.

60. For his part, he would not be averse to the idea of acknowledging a sort of general legislative status to the provisions of a treaty signed by a number of States: in certain instances, that could conduce to the progress of international law. But in the particular instance under discussion he could not accept it because he was sure that the General Assembly would never approve of it.

61. Mr. SANDSTRÖM said that the question under discussion raised grave issues. For his part, he did not wish to vote on the formula proposed by Sir Gerald Fitzmaurice, because the outcome of the vote would be affected by later decisions of the Commission, which would give it a tentative character.

62. Mr. SCELLE said that several members appeared still to be mesmerised by the old maxim that treaties were binding upon only the signatories thereto. He recalled that he had had occasion, in a discussion with Professor Hans Kelsen, to quote some twenty conventions which, although signed by only a small number of States, were in fact binding on all States. He would mention specifically the Convention of Constantinople of 29 October 1888, between Great Britain, Austria-Hungary, France, Germany, Holland, Italy, Spain, Russia and Turkey: that treaty was being enforced on all the States of the world, and not merely on the handful of signatories. An even more striking example was the so-called Hay-Pauncefote Treaty concluded by the United States of America and Great Britain on 18 November 1901, concerning the Panama Canal: the provisions of that treaty had been applied not merely to the two signatories, but to all States, without any difficulty.

63. Treaties such as the two he had mentioned expressed international law *erga omnes* because their provisions satisfied an international need: the States which had signed them had acted as the mouthpieces of the international community.

64. On the other hand, a treaty which violated international law had no validity, and was not binding even on the signatories. That was the opinion he (Mr. Scelle) had expressed in a recent article in connexion with the Anglo-Venezuelan Treaty of 1942 on the continental shelf of the Gulf of Paria, which violated the fundamental principle of the freedom of the seas and was therefore invalid; it did not bind even its signatories.

65. Applying those principles to the question of fisheries, the fundamental element was the necessity for

² Text in *Revista Peruana de Derecho Internacional*, No. 45 (1954), pp. 104 *et seq.* Also in *Laws and Regulations on the régime of the territorial sea* (United Nations publication, Sales No.: 1957.V.2) p. 723.

conserving the living resources of the sea. Any international agreement which did not respect that purpose was to be treated as invalid. Conversely, conservation measures adopted by certain States and based on valid scientific findings were binding on fishermen of all nationalities.

66. He therefore supported Faris Bey el-Khouri's proposal, which was constructive and progressive.

67. The objections raised by Mr. García Amador were sound in logic, but it was none the less necessary to make explicit reference to the principle of non-discrimination, although for his part he considered that even in the absence of such a reference any discriminatory measures would be invalid *erga omnes*.

68. Mr. HSU said that any States had the right to object to the measures adopted by the promulgating State or States. At that stage the best course for the Commission would be to vote on the principle of adopting general criteria for the validity of conservation measures. After that, the matter could be referred to the sub-committee.

69. Mr. ZOUREK said that Mr. García Amador had very aptly expressed the present state of international law. There were, it was true, many conventions which, after being signed by a certain number of States, had been explicitly or implicitly accepted by other States which had found them satisfactory for the solution of certain international problems. But it was equally true that unless a treaty was signed or tacitly accepted by a State, it was not binding upon that State.

70. Sir Gerald FITZMAURICE now felt that the whole matter should be referred back to the sub-committee. There appeared to be fundamental differences of interpretation concerning the articles on fisheries, and those differences must be clarified. The most serious related to the effect of measures adopted by a State, or rather to their field of application. It was clear that if the nationals of ten States were fishing in an area and two of those States entered into an agreement on conservation measures, the consequent regulations would not be enforceable on the nationals of the other eight States. What the sub-committee's draft articles provided for, however, was a different contingency: under articles 2 and 3, the States whose nationals fished in an area could adopt conservation measures by unanimous consent among themselves and those measures would then be applicable to any newcomers to the area; States whose nationals wanted to engage in fishing subsequently to the adoption of the measures concerned, but objected to those measures, could resort to the procedure laid down in articles 7-10.

71. Faris Bey el-KHOURI said that the whole purpose of the articles was to enable the authority responsible for promulgating conservation measures to regulate for all fishermen. In order that the purposes of conservation might be achieved, it was essential that those measures should be binding on all who came to fish in the area concerned.

72. In such a situation, it was necessary to assert the principle of non-discrimination, particularly as discrimination could be practised indirectly.

73. The CHAIRMAN said that three questions had been raised in the course of the discussion.

74. First, whether conservation measures—whether promulgated by the coastal State or by other States—should meet a uniform criterion.

75. Second, whether a disputed regulation should be enforceable, pending a decision by the board of experts.

76. Third, whether conservation measures promulgated by a State or States under the Commission's draft articles should apply to all States, or only to the promulgating States.

77. The Special Rapporteur had proposed that the matter be referred back to the sub-committee; that proposal implied the adjournment of the debate, and accordingly, by virtue of sub-paragraph (c) of rule 79 of the rules of procedure of the General Assembly, had precedence over all other proposals or motions before the meeting.

78. Mr. AMADO enquired what points were to be decided by the sub-committee.

79. Mr. KRYLOV asked which of the three questions formulated by the Chairman was to be referred to the sub-committee.

80. The CHAIRMAN said that all three questions would be referred to the Sub-Committee.

81. Mr. GARCÍA AMADOR said he could agree that the sub-committee should examine the issue of whether a general criterion should be laid down for all conservation measures, no matter by whom adopted; but it could not possibly take it upon itself to decide whether a convention signed by two or three States should be binding on other States that were not parties thereto. Even the Commission could not take such a decision, which would be contrary to existing international law.

82. He agreed, however, that, when examining the question of adopting a general criterion, the Commission could and should do so in the light of the general principles involved.

83. Mr. FRANÇOIS (Special Rapporteur) said that the interpretation of the text called for reference to all three questions formulated by the Chairman. He formally proposed that the draft articles on fisheries be referred back to the sub-committee for revision in the light of the discussion at that and the previous meeting.

84. Mr. GARCÍA AMADOR said that, while he would have agreed to the sub-committee's examining the problem of adopting a general criterion for all regulations relating to conservation, he was radically opposed to the Commission referring back to the sub-committee all those draft articles already adopted.

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

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

The meeting rose at 1.10 p.m.

304th MEETING

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

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

Chairman : Mr. Jean SPIROPOULOS

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

Members : Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCILLE, Mr. Jaroslav ZOUREK.

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

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CONF.10/6) (*continued*)

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

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

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

2. His proposal would then read :

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

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

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

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

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

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

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

Principe de l'article premier.

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

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

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

¹ 303rd meeting, para. 48.