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Summary record of the 381st meeting

Topic:
Other topics

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56. Faris Bey el-KHOURI also supported that suggestion. If it were borne in mind that the ship had to carry a certificate of registry, which was not made out by the master but by the competent authorities, the amended text did, in his view, appear to provide complete protection against the possibility of fraud.

Sir Gerald Fitzmaurice's suggestion was adopted, and it was agreed that the Rapporteur should prepare an appropriate redraft of the comment for consideration at the next meeting.

Articles relating to the continental shelf (articles 40-47) (resumed from the 378th meeting)

Article 41 (resumed from the 378th meeting)

57. Mr. FRANÇOIS, Rapporteur, proposed the following new text to replace the passage underlined in the third paragraph of the comment on article 41:

At the eighth session it was proposed that the condition of permanent attachment to the sea-bed should be mentioned in the article itself. At the same time the opinion was expressed that the condition should be made less strict; it would be sufficient that the marine fauna and flora in question should live in constant physical and biological relationship with the sea-bed and the continental shelf; examination of the scientific aspects of that question should be left to the experts. The Commission decided, however, to leave the text of the article and the commentary as they stood.

The Rapporteur's proposal was adopted.

Chapter IV: Other decisions of the Commission (A/CN.4/L.68/Add.5)

There were no observations on Chapter IV.

Chapter III: Progress of work on other subjects under study by the Commission (A/CN.4/L.68/Add.4)

There were no observations on the substance of Chapter III.

Chapter I: Organization of the session (A/CN.4/L.68)

There were no observations on Chapter I.

The meeting rose at 1.30 p.m.

381st MEETING

Wednesday, 4 July 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. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Consideration of the Commission's draft report covering the work of its eighth session (*concluded*)

Chapter II: Law of the sea

Part II. The high seas (A/CN.4/L.68/Add.3)

Article 5: Status of ships (resumed from the previous meeting)

1. The CHAIRMAN invited the Commission to consider the new text proposed by the Rapporteur to replace the last paragraph of the comment on article 5, which had been amended at the previous meeting by the insertion at the end of the article of the words "save in the case of real transfer of ownership or change of registry". The last paragraph would now read:

The Commission is aware that changes of flag during a voyage are calculated to encourage the abuses stigmatized by this article. The Commission also realizes that the interests of navigation are opposed to total prohibition of change of flag during a voyage or while in a port of call. In adopting the second sentence of this article the Commission intended to condemn any change of flag which cannot be regarded as a *bona fide* transaction.

The Rapporteur's new text was adopted.

Article 32: Conservation

2. The CHAIRMAN invited the Commission to consider the new text proposed by the Rapporteur to replace sub-paragraphs 3 and 4 of the comment on article 32. The new text read as follows:

3. In the case of article 30, the State requesting the fishing State to take necessary measures of conservation would be a non-adjacent and non-fishing State. Such a State would be concerned only with the continued productivity of the resources. Therefore, the determination involved would be the adequacy of the overall conservation programme.

4. Article 29 contains a criterion which is not included in the other articles: that of the urgency of action. Recourse to unilateral regulation by the coastal State prior to arbitration of the dispute can only be regarded as justified when the delay caused by arbitration would seriously threaten the continued productivity of the resources.

3. Mr. FRANÇOIS, Rapporteur, said that he had modified the original text in order to meet Mr. Sandström's objection that the statement in sub-paragraph 4 to the effect that article 29 included a unique criterion was not true. The modifications he had proposed involved no change of substance.

The Rapporteur's new text was adopted.

4. Mr. ZOUREK said that before the Commission concluded its consideration of chapter II, part II, of its draft report he would like to suggest that, in sub-section B of section 1, in the thirteenth paragraph of the introductory comment on the draft articles on conservation, the penultimate sentence, which read "In thus recasting them the Commission did not wish to imply that the 'special' interest of the coastal State would take precedence *per se* over the other States concerned." be modified so as to reflect more accurately the Commission's intention. The Commission's intention was to imply that the special interest of the coastal State would not exclude the interests of the other States concerned. That did not mean that the coastal State's special interest could not, in certain conditions, override the interests of the other States concerned. He favoured some wording which would avoid balancing the two sets of interests against each other. He proposed that the sentence in question be modified to read: "In thus recasting them, the Commission did not wish to imply that the special interest of the coastal State would exclude the interests of the other States concerned."

5. Mr. FRANÇOIS, Rapporteur, doubted whether such a modification would be justified.

6. Mr. SCELLE said that it was possible to argue that the special interest of the coastal State might potentially take precedence in every case. Mr Zourek's preoccupation might be met by stating that in certain circumstances that interest would take precedence.

7. Mr. KRYLOV observed that Mr. Scelle's suggestion would be consistent with the thesis defended by Mr. Padilla-Nervo.

8. Though there might be some objection to the words "*per se*", he did not believe that in the present context they carried much weight or excluded the interests of other States.

9. Sir Gerald FITZMAURICE said that it was obvious that the special interest of the coastal State did not exclude the interests of other States, but a change on the lines suggested by Mr. Zourek would suggest that the former interest took precedence, and for that he could see no justification since the coastal State might not be engaged in fishing at all in the area concerned and its special interest was only recognized by reason of its geographical position. In such cases the coastal State could not do more than expect to be treated on a footing of equality.

10. Mr. ZOUREK said that, since the coastal State had other interests than those resulting from proximity, his suggested change would bring the comment closer into line with the text of article 28 as well as with the draft adopted at the previous session.

11. He appreciated Sir Gerald Fitzmaurice's point concerning those cases where the coastal State was not engaged in fishing at all but he (Mr. Zourek) had not suggested that in such very special instances the coastal State's interest was always the preponderant one.

12. Sir Gerald FITZMAURICE pointed out that at its previous session the Commission had not recognized that the coastal State necessarily had a special interest,

whereas at the present session the Commission had decided that that was invariably the case, and that other States had to demonstrate their interest. That change of position seemed to him to be faithfully reflected in the Rapporteur's text. However, he would be prepared to accept the substitution of the word "exclude" for the words "take precedence over", provided the words "whether or not" were inserted after the word "imply".

13. Mr. ZOUREK found Sir Gerald Fitzmaurice's suggestion acceptable.

14. The CHAIRMAN put to the vote Mr. Zourek's amendment as modified by Sir Gerald Fitzmaurice.

Mr. Zourek's modified amendment was not adopted, 3 votes being cast in favour and 3 against, with 5 abstentions.

Part I: The territorial sea (A/CN.4/L.68/Add.2)
(resumed from the previous meeting)

Article 21: Arrest of ship or the purpose of exercising civil jurisdiction

15. The CHAIRMAN invited the Commission to consider the Rapporteur's proposed new text to replace the last three sentences in the penultimate paragraph and the concluding paragraph of the comment on article 21.

The text read as follows:

The majority of the Commission were of opinion that the 1954 text should be restored. They did not feel it advisable to leave the question in abeyance, as certain members had suggested, for they considered that the proposed rules would then be marred by a gap detrimental to international navigation. Even admitting that the authors of the 1952 Brussels Convention had wished to increase the number of cases in which the coastal State is entitled to exercise its civil jurisdiction over foreign ships merely passing through the territorial sea without entering a port, the existence of divergent rules on this point could hardly be regarded as a bar to the adoption of the above-mentioned provision, since the Brussels Convention would bind only the Contracting Parties in their mutual relations.

If, on the other hand, a foreign vessel lies in the territorial sea or passes through it after leaving the internal waters, the coastal State has far wider powers. It is then entitled, in accordance with its laws, to levy execution against or to arrest the ship for the purpose of any civil proceedings.

16. Mr. FRANÇOIS, Rapporteur, said that his new text was designed to explain the change made in paragraph 1 of the article by the adoption at the previous meeting of Mr. Zourek's proposal.

The Rapporteur's new text was adopted.

Article 24: Passage of warships

17. The CHAIRMAN invited the Commission to consider the new text proposed by the Rapporteur to replace the penultimate paragraph of the comment on article 24. The text read as follows:

The Commission relied on that judgment of the Court when inserting in the 1955 draft a second paragraph worded as follows:

"It may not interfere in any way with innocent passage through straits normally used for international navigation between two parts of the high seas."

It was pointed out at the eighth session that this second paragraph was unnecessary, as the fourth paragraph of

article 17, which forms part of sub-section A entitled "General Rules", was applicable to warships. The majority of the Commission supported the view that the second paragraph of the article included in 1955 was not strictly necessary. In deleting this paragraph the Commission, in order to avoid any misunderstanding on the subject, nevertheless wishes to state that article 24, in conjunction with paragraph 4 of article 17, must be interpreted to mean that the coastal State may not interfere in any way with the innocent passage of warships through straits normally used for international navigation between two parts of the high seas; hence the coastal State may not make the passage of warships through such straits subject to any previous authorization or notification.

18. Mr. FRANÇOIS, Rapporteur, said that he had submitted his new text in response to Mr. Krylov's proposal at the previous meeting¹ to delete paragraph 2 of article 24 on the grounds that it was superfluous and to incorporate the necessary explanation in the comment.

19. Sir Gerald FITZMAURICE said that the text proposed by the Rapporteur would be acceptable as a passage in the comment but it demonstrated more clearly than ever that the omission of paragraph 2 of article 24 would be pointless, because the comment was now even more explicit than the paragraph itself. He could not agree that the proposal to delete that paragraph had been solely inspired by drafting considerations, and an objective examination of paragraph 1 in the article would show clearly that without paragraph 2 the former could give rise to considerable doubts, and particularly that the meaning and effect of the second sentence in paragraph 1 would be open to question. Since, as far as he knew, that fact was generally admitted, he failed to see the object of deleting paragraph 2 and of inserting a very long and explicit explanation in the comment, a procedure which could only serve to render the article more unacceptable than ever to naval opinion.

20. Mr. KRYLOV regretted that Sir Gerald Fitzmaurice was unable to see that he had proposed the deletion of paragraph 2 in article 24 purely for reasons of drafting, in the belief that it was inadmissible to say the same thing twice over in a legislative text.

21. Sir Gerald FITZMAURICE said that he would not insist upon the Rapporteur's new text being put to the vote.

The Rapporteur's text was adopted.

22. The CHAIRMAN, declaring that the Commission had concluded its consideration of the draft report, said that during the past seven sessions it had done intensive work on the law of the sea and its aim had been to reconcile all the interests involved. He believed that when the report came to be examined in the General Assembly, and perhaps eventually in an international conference, it would be recognized that the Commission, particularly in the draft articles relating to the conservation of the living resources of the sea, had not only taken into account the special interest of coastal States but had also adequately safeguarded the interests of other States. He then put to the vote the draft report covering the work of the

Commission's eighth session (A/CN.4/L.68 and addenda thereto).

The draft report was adopted unanimously.

23. Mr. PAL said it was clear from the vote that members found that the report gave an accurate account of the Commission's work and of the views of the majority. He would have therefore thought it unnecessary for members to enter reservations to particular articles.

24. The CHAIRMAN said that nevertheless members might wish to do so. A note of any reservations they might wish to have included in the report could be handed in to the Secretariat.

Closure of the session

25. The CHAIRMAN, on behalf of the Commission, thanked the Rapporteur for his valuable and exhaustive work on the law of the sea. He also thanked members for their collaboration throughout the session.

26. Mr. SCELLE thanked the Chairman and the Rapporteur for all that they had done to make it possible for the Commission to accomplish its task at the present session.

27. Faris Bey el-KHOURI applauded the Chairman's able conduct of the discussions and expressed admiration for the way in which the Rapporteur had elaborated the final report on a difficult and intricate subject.

28. Sir Gerald FITZMAURICE, after stating that he would communicate to the Secretariat for inclusion in the report his abstentions and dissent concerning certain articles, paid tribute to the successful way in which the Chairman had discharged his functions and to the outstanding work of Mr. François as Special Rapporteur.

29. Mr. EDMONDS said that he had learned to appreciate more and more the Special Rapporteur's patience, perseverance and high intellectual integrity. What the Commission had accomplished was in large measure due to his scholarship, guidance and capacity to reconcile different views. He also thanked the Chairman for the friendly spirit in which the discussions had been conducted.

30. Mr. PAL, associating himself with the remarks of Mr. Scelle and Mr. Edmonds, said that he had greatly benefited from working with his learned colleagues. It was a matter of particular satisfaction to him that in the Commission, unlike some other international gatherings, national interests were not pushed to the fore.

31. Mr. KRYLOV joined other members in paying tribute to the Chairman and in expressing admiration for the Special Rapporteur's work.

32. Mr. SANDSTRÖM thanked the Chairman for his successful efforts to bring about agreement, and the Special Rapporteur for everything he had done to facilitate the Commission's task.

33. Mr. AMADO said that coming from the Latin American continent, he had been particularly gratified by the Commission's election as its Chairman of a young jurist from Cuba who, in that high office, had given further proof of his ability. He agreed with Mr. Edmonds

¹ A/CN.4/SR.380, para. 32.

that intellectual integrity and the disinterested pursuit of learning were among Mr. François' outstanding qualities.

34. Mr. FRANÇOIS, Rapporteur, thanking members for their kind words, said that it was a pleasure and a privilege to work for the Commission where there existed a rare spirit of friendship, collaboration and good will. He also wished to thank the Secretariat for its valuable help, without which he could not have carried out his task.

35. Mr. ZOUREK joined with other members in expressing his gratitude to the Chairman and the Special Rapporteur.

36. The CHAIRMAN declared the Commission's eighth session closed.

The meeting rose at 11.40 a.m.
