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Summary record of the 363rd meeting

Topic:
Law of the sea - régime of the territorial sea

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of the territorial sea depended on international practice, not on subjective or on objective rules of international law. That was a fact that no eloquence could demolish, and one which could not prejudice any interests. He proposed, therefore, that a new paragraph should be added to his previous text, to the effect that international practice recognized the right of coastal States to determine the breadth of their territorial sea within fixed minimum and maximum limits.

68. Faris Bey el-KHOURI remarked that, under its terms of reference, the Commission was called upon to codify international law and to promote its progressive development. After all the Commission's discussions, consultations with governments and reading of their observations, it had found that there was nothing to codify with respect to the breadth of the territorial sea. It could not adopt the three-mile limit as a uniform standard, because it was not generally accepted, and, indeed, a majority of States had claimed a greater breadth and had not been challenged. The Commission could take any figure—three, six or twelve miles—as a basis, purely as guidance for the General Assembly, but it obviously could not impose its opinion on States which regarded themselves as sovereign and independent in the matter unless they bound themselves by a convention. The Commission might limit itself to giving a picture of the situation, as had been done in the text submitted by Mr. Amado at the seventh session and by the Special Rapporteur at the present one. Or the Commission could give a specific figure, which might lead the General Assembly to convene a diplomatic conference to determine a precise limit. He suggested tentatively, as a basis for discussion, a breadth of six miles.

69. Mr. SALAMANCA observed that he had supported Mr. Amado's original proposal at the seventh session, but when Mr. Amado had accepted the Special Rapporteur's amendment, he had voted against the final text. That text had been purposely adopted in order to elicit comments from governments. The situation had now completely changed, and had become one *de lege ferenda*.

The meeting rose at 1.05 p.m.

363rd MEETING

Friday, 8 June 1956, at 9.30 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, Mr. Shuhsi HSU,

Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. L. PADILLA-NERVO, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the territorial sea (item 2 of the agenda) (A/2934, A/CN.4/97/Add.2, A/CN.4/99 and Add.1-7) (continued)

Article 3. Breadth of the territorial sea (continued)

1. The CHAIRMAN, inviting the Commission to continue its consideration of article 3, drew attention to the text submitted by Mr. Amado,¹ which read as follows:

1. The Commission recognizes that international practice is not uniform as regards limitation of the territorial sea to three miles.

2. The Commission considers that international practice does not authorize the extension of the territorial sea beyond twelve miles.

3. International practice accords to the coastal State the right to fix the breadth of its territorial sea between these minimum and maximum limits.

2. Mr. KRYLOV said that the question Mr. Hsu had asked him at the previous meeting² had been virtually answered by other speakers. Any further information that Mr. Hsu might wish he would give to him personally, in order not to hold up the Commission's proceedings.

3. Mr. SALAMANCA said that he could see very little difference between Mr. Spiropoulos' proposal and the text adopted at the seventh session. He asked wherein the difference lay.

4. Mr. SPIROPOULOS replied that there were very important differences.

5. In paragraph 1 he had deleted the words "traditional" and "to three miles", because they were unnecessary, as all members were now agreed on the ideas implicit in those phrases. His own text was therefore more general.

6. In paragraph 2 the words "does not permit" had been substituted for the words "does not justify". That small change had been made because the new wording was more accurate.

7. In paragraph 3 the phrase beginning "considers that international law..." had been deleted and a new text substituted reading "notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less". That was the important change. The reference to international law had been deleted and the simple fact stated that many States did not recognize a breadth greater than three miles when that of their own territorial sea was less. In other words, he had deleted the somewhat hazardous statement of international law and replaced it by a statement of fact.

8. Paragraph 4 was a new one, required to complete the text. It implied that the Commission did not wish

¹ A/CN.4/SR.362, para. 67.

² A/CN.4/SR.362, para. 17.

to offer a solution at the present stage, but preferred to leave it to an international conference.

9. Sir Gerald FITZMAURICE observed that all the texts submitted, except those by Mr. Spiropoulos and the Special Rapporteur, had a similar tendency, which caused him a good deal of concern in relation to the scheme of the Commission's work as a whole.

10. Mr. Sandström's text was skilfully drafted and seemed at first sight to be eminently reasonable. On further analysis, however, the proposal would be seen to tend in practice and, in fact, almost inevitably to lead to an extension of the breadth of the territorial sea to twelve miles. The first two paragraphs were tantamount to an invitation to States to extend their territorial sea to the maximum. It was well known that States, like individuals, had a tendency to claim the maximum rights available to them. If States were told that they might not exceed a breadth of twelve miles, the general effect would be that they would all claim the twelve miles.

11. Mr. Sandström might seem to have provided some safeguards against such claims in his third and fourth paragraphs, but those safeguards would undoubtedly prove quite illusory. They hinged on satisfying the "justifiable interests" of States. Mr. Spiropoulos had rightly pointed out³ that any court asked to place a construction on a criterion which was entirely unsuited to legal analysis would be in a very difficult position. The criterion might be political, economic or social, but it would certainly not be legal. Justifiable interests would in most cases be economic; in particular, the needs of fisheries. But there was hardly any maritime State that did not have a considerable proportion of its population dependent on fisheries, and most States had an interest in fish as part of their food supply. Thus, every State would be able to show a "justifiable interest".

12. Mr. Spiropoulos had also correctly pointed out⁴ the dangers inherent in the phrase "the breadth generally applied in the region". If one or more States in a certain region claimed a breadth of twelve miles for their territorial sea and the remainder followed suit, the International Court of Justice would be faced with claims based on the plea that the breadth of twelve miles was generally applied in the region.

13. The question also arose of how the International Court of Justice was to distinguish between the needs of one State and those of another. If it granted one claim, it was hard to see on what basis it could deny another. It would be placed in a most invidious position. True, there might be a very few cases where there was a very great need for an extension of the territorial sea—for example, for countries totally dependent on fishing—but in general there would be no reason why one State should have a greater need than another. No State in South America or Asia would be likely to admit that it had less need for such an extension than another State in the same region. The International Court of Justice would therefore very speedily have to grant to a great

many States what it had granted to one State. Thus, there would be a tendency towards a general recognition of the twelve-mile maximum and the safeguards would prove illusory in practice.

14. If any proposal such as Mr. Sandström's were adopted it would have repercussions on the Commission's entire scheme of work in that domain. That work must be considered as a balanced whole. The acceptance of rules for fisheries and for unilateral measures of conservation largely depended on the other parts of the scheme being equally reasonable. He could foresee the effect on opinion connected with fisheries, even if not on governments, if the twelve-mile limit were accepted. The opinion would be that if all States received a breadth of twelve miles with exclusive fishing rights, they should have no right to impose unilateral conservation measures outside their territorial waters. The work regarding the contiguous zone would also be frustrated, since such a zone would not be accepted over and above the twelve miles of territorial sea. Even the articles on the continental shelf would be regarded as an example of a tendency towards taking over continually wider stretches of water, since there was a tendency to seek to assert exclusive rights to the waters over the continental shelf.

15. Mr. Pal had said that this must presume good faith on the part of States in the exercise of their claims.⁵ No one questioned that, but good faith was really an irrelevant issue. States acted in accordance with their interests, and if they were able to plead a plausible doctrine for asserting exclusive rights they would do so. Thus, if the tendency to extend the territorial sea were accepted, many countries would contemplate a further step with regard to the continental shelf.

16. In such circumstances it would be preferable to refer the matter to the General Assembly as a question still open. He agreed that the Commission could codify only what existed in international law; some members of the Commission believed that a definite rule of international law concerning the breadth of the territorial sea did exist, but others believed that States might take whatever they wished. If the Commission could not agree, it would do better to inform the General Assembly that it could not state what the rule was. Mr. Spiropoulos' text, subject to some drafting changes, should be preferred, as it correctly depicted the situation and did not prejudice any other views.

17. He doubted whether Mr. Amado's attempt to depict the situation was quite accurate, particularly his paragraph 3. It was possible to say that, in accordance with the practice followed by many States in recent times, the breadth of the territorial sea was fixed between the minimum and maximum limits. Mr. Amado's text, however, implied the somewhat debatable point that international law accorded a right to fix the breadth of a territorial sea at more than three miles. It was true that some members of the Commission did believe that, but others did not. Mr. Spiropoulos' text gave a truer picture of the situation.

³ A/CN.4/SR.362, para. 61.

⁴ A/CN.4/SR.362, paras. 62-64.

⁵ A/CN.4/SR.362, para. 31.

18. Mr. HSU, after thanking Mr. Krylov for his offer of further information, said Mr. Sandström had made an honest effort to solve the problem. The proposal in his paragraph 4 came close to the suggestion he himself had made at a previous meeting.⁶ He still preferred arbitration to reference to the International Court of Justice, because when a dispute arose arbitrators could be chosen who were familiar with the situation.

19. Though he had no strong objection to reference to the International Court of Justice, it did introduce the question of criteria, and there Mr. Sandström's draft was disappointing. The phrase "justifiable interests" was far too vague and merely postponed the issue. If the Commission should ever reach any conclusions about the criteria, it should specify them.

20. A more serious weakness in Mr. Sandström's text was the introduction of the terms "long usage" and "breadth generally applied in the region". Many countries would find them extremely difficult to accept, and if it departed too far from the text adopted at the seventh session (A/2934) the Commission would have to reopen the whole question. Mr. Sandström's text, if adopted at all, would require a great deal of revision.

21. Mr. Amado's proposal in part reflected the position which he, Mr. Hsu, had taken at the previous session.⁷ He would therefore have liked to support it. The whole question had, however, been reopened by paragraph 3 in Mr. Amado's text. It raised an issue that the Commission would never be able to settle unless it enforced its decision by a majority of one or two voters. That, however, was not the best course to adopt at the present stage.

22. Mr. Spiropoulos' text, too, introduced new matters which would require almost interminable discussion.

23. The Commission should do its best to find a solution of the problem by proposing recourse either to arbitration or to the International Court of Justice; it should not confess failure by referring the problem to the General Assembly. If the idea of referring the matter for solution by juridical methods on the basis of the text adopted at the seventh session were not accepted, the only alternative would be that suggested by Mr. Spiropoulos—namely, that States should be allowed to decide for themselves. That, however, was merely a lesser evil.

24. Mr. SCALLE supported Mr. Sandström's text. It was hard to understand the misgivings it had apparently inspired. At the previous session the Commission had come near to the truth by noting that the territorial sea could not have a fixed and uniform breadth. It had been recognized that, quite legitimately, to meet the needs of States, the breadth might vary between three and twelve miles. It had also been recognized that the contiguous zone was simply a device for multiplying the breadth of the territorial sea and that the continental shelf, which might run for hundreds of miles, was another similar device. The territorial sea could not, therefore, have any fixed limit.

⁶ A/CN.4/SR.361, para. 76.

⁷ A/CN.4/SR.308, paras. 60-64.

25. Sir Gerald Fitzmaurice had expressed the fear that all States would claim the maximum breadth, but twelve miles was quite insignificant in comparison with the hundreds of miles to which the continental shelf might in some cases extend.

26. The idea of giving the International Court of Justice final jurisdiction with regard to the breadth of the territorial sea had been criticized. It was wrong, however, to imagine that there would be any abrupt change. The Court would have to intervene only after a long period—namely, after a convention had come into force; and, as yet, that was a very remote prospect. Even when a convention had been prepared, there would be a period for the discussion of reservations. The Court would come into play only at a third stage, when governments which had chosen that method of pacific settlement of disputes under Article 33 of the United Nations Charter referred claims to it under the convention.

27. No jurist could suppose for one moment that disputes with regard to the territorial sea would not be political, at least in part. And in that case, the Security Council would undoubtedly intervene. Article 33 of the Charter gave a whole list of means for the pacific settlement of disputes. The Security Council had an undoubted right to influence the choice of means and to give its advice as to which should be used. Article 35, paragraph 1, of the Charter provided that any Member of the United Nations might bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or the General Assembly. Thus, there were no fewer than three articles in the Charter showing that the Security Council would always have a right to intervene. That implied that the Security Council should always intervene whenever there was a political aspect to a dispute referred to the International Court of Justice. Mr. Sandström's text certainly gave the Court the right to intervene immediately, but that was not what would actually occur whenever a serious dispute had political aspects. The political organ would consider it before there was any judicial intervention. Any dispute would thus have to pass through many stages before the Court intervened.

28. Mr. Sandström's text left the right amount of latitude. The Commission was not called upon to impose rules, but merely to give the General Assembly advice on the best solutions. He was not wholly in agreement with the wording of Mr. Sandström's proposal, but in substance it was by far the best of those before the Commission. The other proposals seemed to evade the Commission's responsibilities.

29. Mr. SALAMANCA maintained the position that he had taken at the seventh session,² that the three-mile rule was not a part of international law. Most States had departed from it and had adopted distances of four, six, nine, twelve or more miles. Each State had fixed the breadth of its territorial sea for itself and that expansion constituted present international practice.

30. The twenty powers supporting the three-mile limit had assumed a *de facto* jurisdiction with regard to any

⁸ A/CN.4/SR.313, para. 51.

other breadth. They had constituted themselves the sole legislators for the breadth of the territorial sea and the remaining fifty maritime States should, in their opinion, have no right to fix distances exceeding three miles.

31. Even if the three-mile limit had ever been part of customary international law, that law had been amended by the international practice of more than fifty States. All the members of the Commission had noted that fact and all the proposals before the Commission recognized it. The twelve-mile limit was referred to in paragraph 2 of the Commission's original draft; there was a reference to a limit of between three and twelve miles in Mr. Zourek's proposal; the Special Rapporteur's draft accepted the twelve miles as did those of Mr. Hsu, Mr. Amado and Mr. Sandström. The twelve-mile limit seemed to be the reasonable maximum. In the Special Rapporteur's proposal that distance might or might not be recognized. In Mr. Sandström's proposal conditions were placed upon the right to extend the limit to twelve miles, and in Mr. Zourek's no claim could lie against the declaration of the breadth, whatever it might be. In Mr. Hsu's proposal the twelve-mile limit would be valid, subject to recognition by States maintaining a narrower belt.

32. If the Commission accepted twelve miles as a reasonable distance, it should state as much explicitly. The Commission could not recognize qualified rights for one or more States. If a State had jurisdiction over a breadth of three miles, similar jurisdiction should be recognized for others over any breadth between three and twelve miles. The claims to the continental shelf and to fisheries and the opportunity for having recourse to all methods of pacific settlement should be taken into account.

33. In fact, neither the General Assembly nor the suggested diplomatic conference could actually solve the problem; time alone would bring the solution. If a State refused to accept the three-mile limit and extended its territorial sea to a breadth of twelve miles, the only thing that it need do to impose that limit would be to apply continuous police measures. If a coastal State had sufficient power, it would finally impose the limit it had chosen. Every means of peaceful solution might be used for States to establish or reconcile opposing interests in accordance with their needs. The right to extend the territorial sea had been and continued to be an attribute of the State, a right unilateral by origin, based on the maxim cited by Mr. Zourek at the seventh session:⁹ "terrae potestas finitur ubi finitur armorum vis". In accordance with that maxim, the coastal State established its *de facto* jurisdiction over the territorial sea.

34. The two groups of States—the twenty maritime Powers which recognized the three-mile limit and the fifty or more States which recognized a limit exceeding three miles—must reconcile their interests; but, in order to do so, a maximum distance to which a coastal State might be entitled must be recognized.

35. Turning to the more recent proposals before the

Commission, he observed that he had not been completely satisfied by Mr. Spiropoulos's reply to his inquiry about the difference between his text and that adopted by the Commission at its seventh session. His strongest objection at the seventh session had been that the Commission could not impose an obligation on any State, and all that it could in fact do was to say that the problem was insoluble. Mr. Amado's proposal was the most conciliatory, but the most likely to attract amendments. If it were not amended, Mr. Amado's proposal would be acceptable, but it would undoubtedly be changed by the reintroduction of paragraph 3 of the draft article adopted at the seventh session, and that would mean simply returning to the impasse reached at that session. The draft adopted by the Commission at its seventh session had been intended to elicit comments from governments to help the Commission prepare a final draft. Unfortunately, the comments had been of little help, since no government had been able to make any constructive suggestion in response to what had merely been a description of the existing situation.

36. If the Commission accepted the idea that the twelve-mile limit was not contrary to international law, he did not see why, when the Commission was required to come to a decision, it could not state explicitly: "Every State is entitled to extend the breadth of its territorial sea to twelve miles". He would move that as an amendment.

37. In his opinion, the right to extend the breadth of the territorial sea to twelve miles would carry the day in the General Assembly, despite the influence of the twenty Powers which recognized the three-mile limit. The General Assembly would undoubtedly be convinced by actual practice, which the Commission in fact recognized but was unwilling to state.

38. There could be no exceptions to positive law except "abus de droit", which had been implicitly provided for in Mr. Sandström's draft. Sir Gerald Fitzmaurice had objected that if a maximum of twelve miles were fixed, all States would claim it. That argument was irrelevant, because the limits were in fact already fixed. If a State extended its territorial sea to more than three miles and, in so doing, infringed upon an established interest, that would undoubtedly be an *abus de droit*, but, as Mr. Pal had pointed out,¹⁰ the bad faith of a State which claimed a wider limit should not be presumed. It was very possible that peaceful solutions would be reached and that the extension of the territorial sea would not infringe on any really well-established interest, and it was inconceivable that a small State would extend its territorial sea with the deliberate purpose of infringing the interests of other maritime powers.

39. The Commission should therefore take an explicit decision. If it refused to recognize the right to extend the territorial sea to twelve miles, it should simply state that it was unable to solve the problem. Paragraph 4 of Mr. Spiropoulos' draft was tantamount to a criticism of the whole of it. Rather than adopt that paragraph, the Commission should simply take no decision whatever.

⁹ A/CN.4/SR.309, para. 15.

¹⁰ A/CN.4/SR.362, para. 31.

40. Mr. AMADO said that the discussion was carrying the Commission back to the position in which it had found itself at the previous session, when the text adopted had simply been a reflection of existing international practice. On that occasion his proposal had been accepted after amendment by the special Rapporteur.¹¹

41. The question to be resolved was the fixing of the maximum and minimum territorial limits within which international usage recognized the jurisdiction of the coastal State. Sir Gerald Fitzmaurice had urged that the three-mile limit was an inviolable rule of international law. That assertion, however, was rejected by many States, which advanced claims for various distances up to twelve miles. It had to be remembered that the original limit was four miles and that the three-mile limit had been instituted by powerful States whose nationals wished to engage in fishing as close as possible to the coast of other States. That delimitation, by promoting the development of fisheries, had certainly been of practical value to the human race. The situation had changed, however, and the facts of the existing situation could not be disregarded.

42. He had been quite unable to understand Mr. Hsu's criticism of his proposal; he seemed to have entirely misconceived the whole situation. While appreciating the attitude of those, like Sir Gerald Fitzmaurice, who in all sincerity were opposed to any extension of the three-mile limit, it had to be admitted that—without going so far as to recognize any right that could be upheld under international law—the actual situation was that international practice did recognize that a coastal State was entitled to fix the breadth of its territorial sea between a minimum of three miles and a maximum of twelve miles. No State had ever contested the right of the Mediterranean countries to fix the limit of their territorial sea at six miles or that of the Soviet Union to a limit of twelve miles.

43. Paragraph 3 of his proposal simply stated what was an incontestable truth. He had not attempted to go any farther than a strictly factual statement of the existing situation. He was not prepared to amend the text of that paragraph, although it would admittedly be less categorical if it read "International practice recognizes the existence of the fixing by the coastal State," etc. Paragraph 2 of Mr. Spiropoulos' proposal made, in effect, the same provision as his (Mr. Amado's) paragraph 3, but went even farther in implying that international law permitted an extension of the territorial sea up to twelve miles.

44. He was regretfully forced to conclude that once again the Commission would find itself unable to submit to the General Assembly a general formula in respect of the breadth of the territorial sea which would be both satisfactory and acceptable.

45. Mr. PAL said that in the course of the discussion some reference had been made to the contiguous zone.¹² That seemed to him irrelevant, for if the contiguous zone were regarded as an area extending to a distance of twelve

miles from the baseline from which the breadth of the territorial sea was measured, then if the territorial sea were extended to twelve miles the contiguous zone would disappear.

46. With regard to the proposals of Mr. Amado and Mr. Spiropoulos, he preferred the former's paragraph 1, for it was advisable to retain the mention of the numerical limit of three miles for the territorial sea. Despite lack of uniformity, its deletion would amount to disregard of what was a main trend in the practice of international law. Paragraph 2 of both Mr. Spiropoulos' and Mr. Amado's proposals was identical with paragraph 2 of the draft article.

47. As regards paragraph 3 his preference went to Mr. Amado's proposal, although the use of the word "accords" implied the admission of the right in question. It must not be forgotten that in origin the three-mile limit was also based on the claim of a coastal State, which had in the course of time received recognition by other States.

48. There was a need for some such provision as that contemplated in Mr. Spiropoulos' paragraph 4. It should, however, be modified to read "The Commission considers that the breadth of the territorial sea should, if possible, be fixed at a uniform breadth by an international conference." It could not be denied that there ought to be uniformity in that respect, but since there was apparently no chance of the nations' agreeing on a uniform breadth, a provision on those lines ought to be included in the draft.

49. Mr. ZOUREK said that, after studying the various proposals before the Commission in the light of the two basic principles, the interest of the coastal State and the freedom of the high seas, he had reached the conclusion that if the claim of the coastal State to fix an arbitrary limit to its territorial sea could not be sustained, it was equally erroneous to suggest that a claim to a six-mile or twelve-mile limit would constitute an infringement of the principle of the freedom of the high seas.

50. Some proposals introduced other specific numerical limits and, while appreciating the possible advantage of a uniform limit, he would regard such a provision as dangerous, for, as Sir Gerald Fitzmaurice had pointed out, the establishment of a maximum would amount to an invitation to States to claim that maximum as the breadth for their territorial sea. Moreover, a fixed limit had the disadvantage that it precluded any flexibility of application in the face of future contingencies, such as an imperative and urgent need of the coastal State.

51. Mr. Sandström's proposal, which tended to stress the legislative aspects of the question, suffered from the inadequacy of its paragraph 3. In the first place, it would be extremely difficult to provide a satisfactory legal definition of "long usage"; he had only to remind the Commission that the concept of the continental shelf, which was only ten years old, was described by some writers as already part of international law.

52. The main drawback to paragraph 3, however, was that it tended to disqualify limits greater than three miles. The three-mile limit having been established on a legal basis in paragraph 1, paragraph 3 put other numerical

¹¹ A/CN.4/SR.315, para. 79.

¹² See para. 24 above.

limits on a quite different footing, since it placed them in a lower category as mere claims and stated that any claims within three and twelve miles must satisfy certain criteria. But a breadth of six, nine or twelve miles was just as much a part of international law as a breadth of three miles.

53. The discussion showed that the Commission was inclining towards a solution similar to that adopted at the previous session—namely, the adoption of a text that would simply reflect the existing international situation. That was noticeable in the proposals of Mr. Amado and Mr. Spiropoulos. As to the former, he had some doubts with regard to the specific mention of the limitation of the territorial sea to three miles, for the reason that there was no unanimity of practice in respect of either a four-, a six- or a twelve-mile limit. Mr. Pal's preference for the retention of the reference to the three-mile limit was not based on solid fact; despite the figures quoted by Mr. Edmonds at the previous meeting,¹³ an analysis of the Special Rapporteur's report (A/CN.4/97/Add.2) showed that only eleven States rigidly applied the three-mile limit and that six adopted the three-mile limit while claiming a larger contiguous zone. The practice of seventeen out of seventy-one States could hardly be described as general international usage.

54. Paragraph 2 in the proposals of both Mr. Amado and Mr. Spiropoulos suffered from the fact that it restricted future freedom, although the former's text was less unacceptable. With regard to paragraph 3, Mr. Spiropoulos seemed to have taken a definitely pessimistic attitude, for he had made no attempt to suggest a solution of the problem. Moreover, the last part of the paragraph was incorrect. It was not true that many States did not recognize a breadth greater than three miles when that of their own territorial sea was less, for a four-mile limit, for example, was not contested by States that had fixed the breadth of their own territorial sea at three miles. Nor did he think there were many States which would contest a limit of six or twelve miles. Since his own view was that there was no difference in legal validity between any of the various limits claimed, he favoured paragraph 3 of Mr. Amado's proposal.

55. The CHAIRMAN drew attention to the protracted nature of the discussion on article 3 and urged the desirability of disposing of it at that meeting.

56. Mr. KRYLOV proposed that after the Chairman had stated his own views, the general discussion on article 3 should be closed.

It was so agreed.

57. The CHAIRMAN, speaking as a member of the Commission, said that the problem of the breadth of the territorial sea was complicated by the fact that the purpose of the coastal State in extending its territorial sea beyond the three-mile limit was the exploitation and conservation of the living resources of the adjacent sea. That led to his first basic conclusion that the problem should not be treated in isolation, but in relation to the other areas of the sea and in the light of the rights that

had been recognized as appertaining to the coastal State in respect of exploitation and conservation of living resources.

58. Until recently, there had been no recognition either of the exclusive rights of the coastal State over the resources of the sea-bed and subsoil of the continental shelf and other submarine areas, or of the right of the coastal State to adopt conservation measures unilaterally in view of its special interest in the maintenance of the living resources in the areas of the high seas adjacent to its territorial sea. Now, however, if the claim of the coastal State to an extension of its territorial sea were based on one of those State rights, its claim would be recognized. That opinion had been reflected in several replies from governments.

59. Recognition of those rights, of course, would solve the problem only in the two cases he had referred to. There was, however, a third situation, in which the coastal State claimed an exclusive right in respect of the living resources outside the traditional limits of the territorial sea. That was the only case that raised serious difficulties, and it had been considered by the Commission. The difficulties, however, were not insuperable. The extension of the territorial sea was not a question falling within the exclusive competence of the coastal State. That principle, based on a recent finding of the International Court of Justice, was not only the starting point for any study of the problem, it was also the key to its solution.

60. In specific circumstances international law recognized the validity of claims by the coastal State for the extension of its territorial sea. The validity of a claim based on "historic rights" was indisputable, as had been shown in the Anglo-Norwegian Fisheries case¹⁴ with reference to the Scandinavian countries. Moreover, the fixing by the States in one and the same region of a common territorial breadth of the sea, without objections being raised, as in the case of the Mediterranean countries, also seemed to be a circumstance that those States could rely upon as against other States.

61. There were two further situations which gave rise to no difficulties. The first was where States had mutually agreed to recognize a specific extension of their territorial sea; the second was where a State was obviously bound to recognize the breadth fixed by another State for its territorial sea, if it claimed an equal or greater breadth itself.

62. In all other cases, the validity of an extension of the territorial sea beyond the traditional limit had to be examined in the light of the two major interests involved, the interest or special needs of the coastal State and the interest or acquired rights of other States.

63. As to the first, there was no doubt that the existence of an interest or national need justified a claim of that kind by the coastal State. In reality, the "historic rights" of certain States that were recognized as justifying the extension of their territorial sea originated as interests or special needs of those States. It was logical to grant the same rights to States which, unable to invoke

¹³ A/CN.4/SR.362, para. 14.

¹⁴ I.C.J. Reports, 1951, p. 116.

“historic rights”, nevertheless had interests that were vital for their economy or for the nutritional needs of their populations. Those ideas had been discussed by the Commission, which had accepted them in principle.

64. The problem in respect of the interests and rights of other States was not so simple, but could be solved according to the principles of international law. There again, there were two criteria—that of the general interest in the utilization of the living resources of the sea, and that of the right acquired by a State other than the coastal State to the exploitation of specific zones of the high seas. The first was the only one that might raise serious difficulties. A balance had to be struck between the two interests involved, the special interest of the coastal State and the general interest in the utilization of the living resources of the area in question. That problem could be solved in accordance with the circumstances of each particular case or else by fixing a reasonable maximum limit, beyond which no claim would be valid.

65. The second criterion did not give rise to such difficulties. Where a coastal State extended its territorial sea beyond the traditional limit and appropriated areas of the high seas which had been exploited by a State other than the coastal State, or by nationals of that State, from time immemorial and without interruption, the other State would hold an historic right or title of the same kind and validity as that relied upon in some cases by the coastal State itself for the extension of its territorial sea.

66. It would be recalled that at the previous meeting Mr. Padilla-Nervo had referred¹⁵ to the individual opinion of Judge Alvarez, of the International Court of Justice, that although the right of a State to determine the extent of its territorial sea must undoubtedly be recognized, that right was limited by certain fundamental principles, such as *abus de droit* and historic rights. Thus the criterion was perfectly in accordance with international law, which not only recognized the historic right of States to extend their territorial sea, but also recognized the right of other States to prevent the coastal State from extending its territorial sea in those parts of the high seas where other States had been engaged in fishing from time immemorial.

67. In brief, the problem of the breadth of the territorial sea was complex, but not insoluble. Recognition of the rights of a coastal State over the continental shelf and in the contiguous zone was a contribution to its solution. The latter two hypotheses alone still required solution, or, in the final analysis, only the former. But recourse to, and the procedures of, international law for the peaceful settlement of any disputes that might arise between States was still available for that purpose. He would vote in accordance with those ideas.

68. Speaking as CHAIRMAN, he proposed that Mr. Zourek's text¹⁶ be voted on first as farthest removed in substance from draft article 3 adopted by the Commission at its seventh session. Since the proposals of Mr.

Amado and Mr. Spiropoulos differed from the others in that they were not couched in the form of articles enunciating rules of law, but were rather descriptions of the legal situation, he thought that they should be voted on after all the other proposals.

69. Mr. PADILLA-NERVO could not agree that the proposals of Mr. Amado and Mr. Spiropoulos fell into a separate category. That of Mr. Amado, for instance, could be expressed in the form of an article by deleting the words “The Commission considers that” from the beginning of paragraphs 1 and 2 of the proposal.

70. Mr. SPIROPOULOS pointed out that the Assembly's rules of procedure referred merely to proposals or amendments and drew no distinction between articles and other types of proposal. There was no reason why a proposal should not be a simple statement of facts. Both his and Mr. Amado's texts could be regarded as amendments to draft article 3. Since amendments were voted on before the proposals to which they related, it would avoid confusion and the danger of abuse if all the texts before the Commission were treated as amendments to draft article 3.

71. Mr. LIANG, Secretary to the Commission, said that the nature of the proposals made by Mr. Amado and Mr. Spiropoulos lent support to the Chairman's view that they fell into a different category from the others. It was clear from the commentary on draft article 3 (A/2934, footnote 14, page 16) that it had been the Commission's intention to draft an article in the accepted sense of the term. The proposals or amendments—since in the General Assembly's rules of procedure the distinction between the two for purposes of voting was rather hazy—put forward by the Special Rapporteur, Mr. Hsu, Mr. Zourek and Mr. Sandström were in article form. As the discussion proceeded, however, a different approach had developed and Mr. Amado and Mr. Spiropoulos had submitted proposals which were more on the lines of draft article 3. It would be difficult to vote on both categories of proposals at once. The Commission might first try to frame an article and, failing that, content itself with expressing an opinion.

72. Mr. KRYLOV agreed with Mr. Padilla-Nervo.

73. Mr. HSU suggested taking the various proposals in the order in which they had been submitted, in accordance with rule 93 of the Assembly's rules of procedure.

74. Mr. AMADO said that if the Commission wished to vote only on texts couched in the form of articles, he would resubmit his proposal in the following amended form:

1. International practice is not uniform as regards limitation of the territorial sea to three miles.
2. International practice does not authorize the extension of the territorial sea beyond twelve miles.
3. The coastal State may fix the breadth of its territorial sea between these minimum and maximum limits.

75. After a short discussion, the CHAIRMAN proposed that the texts of Mr. Zourek, Mr. Amado, Mr. Salamanca, Mr. Sandström, Mr. Hsu, the Special Rapporteur and finally Mr. Spiropoulos, be put to the vote in that order.

¹⁵ A/CN.4/SR.362, para. 51.

¹⁶ A/CN.4/SR.361, para. 68.

It was so agreed.

76. The CHAIRMAN invited the Commission to vote on Mr. Zourek's proposal.¹⁷

77. Faris Bey el-KHOURI moved that each paragraph be voted on separately.

It was so agreed.

78. The CHAIRMAN put paragraph 1 of Mr. Zourek's proposal to the vote.

Paragraph 1 was rejected by 8 votes to 6, with 1 abstention.

79. The CHAIRMAN put paragraph 2 of Mr. Zourek's proposal to the vote.

Paragraph 2 was adopted by 9 votes to 2 with 4 abstentions.

80. Mr. SANDSTRÖM, explaining his abstention, said that, while he had nothing against the principle enunciated in paragraph 2, it was difficult to vote either for or against it without knowing in what context it would come.

81. The CHAIRMAN put paragraph 3 of Mr. Zourek's proposal to the vote.

Paragraph 3 was rejected by 7 votes to 3, with 3 abstentions.

82. The CHAIRMAN put Mr. Zourek's proposal as a whole to the vote.

Mr. Zourek's proposal as a whole was rejected by 8 votes to 3, with 3 abstentions.

83. Mr. PADILLA-NERVO said that he had voted in favour of the individual paragraphs and the proposal as a whole because it recognized the right of a coastal State, in the exercise of its sovereign powers, to fix the breadth of its territorial sea, and placed no limit on the territorial sea beyond what it was reasonable to claim.

84. Mr. ZOUREK explained that his proposal had been based on two fundamental principles, that of the sovereign powers of the coastal State over a belt of sea washing its shores and that of the freedom of the high seas. Once paragraph 1 had been rejected, however, the sense of the proposal was completely destroyed, and he had therefore been compelled to vote against his own proposal as a whole.

85. Mr. KRYLOV said that he had voted for the proposal for the same reasons as Mr. Padilla-Nervo.

86. Mr. FRANÇOIS, Special Rapporteur, said that, although in agreement with the principle enunciated in paragraph 2 of Mr. Zourek's proposal, he had been obliged to vote against the proposal as a whole since otherwise it might have been adopted as the Commission's draft article 3 on the territorial sea over the head of all the other proposals.

87. Mr. KRYLOV moved that Mr. Amado's revised proposal¹⁸ be voted on paragraph by paragraph.

After some discussion, *it was agreed* that Mr. Amado's revised proposal should be put to the vote as a whole.

88. The CHAIRMAN put Mr. Amado's revised proposal to the vote.

Mr. Amado's revised proposal was rejected by 8 votes to 7.

89. Mr. SALAMANCA withdrew his proposal.¹⁹

90. Mr. KRYLOV moved that paragraph 3 of Mr. Sandström's proposal²⁰ be voted on separately.

It was so agreed.

91. The CHAIRMAN put paragraphs 1 and 2 of Mr. Sandström's proposal to the vote.

Paragraphs 1 and 2 were adopted by 11 votes to 2, with 2 abstentions.

92. Mr. PADILLA-NERVO said that he had had no alternative but to vote against the two paragraphs together because he considered that every coastal State, in the exercise of its sovereign powers, had the right to fix the breadth of its territorial sea.

93. The CHAIRMAN put paragraph 3 of Mr. Sandström's proposal to the vote.

Paragraph 3 was rejected by 9 votes to 3, with 3 abstentions.

94. Mr. SANDSTRÖM said that paragraph 4 of his proposal was meaningless when divorced from paragraph 3; he accordingly withdrew it.

95. The CHAIRMAN put to the vote Mr. Sandström's proposal as a whole.

Mr. Sandström's proposal as a whole was not adopted, 7 votes being cast in favour and 7 against, with 1 abstention.

96. Mr. ZOUREK moved that paragraph 1 of Mr. Hsu's proposal,²¹ as far as the words "three and twelve miles", be voted on separately.

97. The CHAIRMAN pointed out that the substance of the first paragraph, as far as the words "three and twelve miles", was practically identical with the text already rejected. To vote upon it separately would therefore be tantamount to reconsidering a vote of the Commission.

It was agreed that Mr. Hsu's proposal should be put to the vote as a whole.

98. The CHAIRMAN put Mr. Hsu's proposal to the vote.

Mr. Hsu's proposal was rejected by 9 votes to 3 with 2 abstentions.

99. The CHAIRMAN put the Special Rapporteur's proposal²² to the vote.

The Special Rapporteur's proposal was rejected by 7 votes to 5, with 2 abstentions.

100. Mr. SALAMANCA moved that Mr. Spiropoulos' proposal²³ be put to the vote paragraph by paragraph.

It was so agreed.

¹⁹ See para. 36, above.

²⁰ A/CN.4/SR.362, para. 33.

²¹ A/CN.4/SR.361, para. 76.

²² A/CN.4/SR.361, para. 65.

²³ A/CN.4/SR.362, para. 66.

¹⁷ A/CN.4/SR.361, para. 68.

¹⁸ See para. 74, above.

101. The CHAIRMAN put paragraph 1 of Mr. Spiropoulos' proposal to the vote.

Paragraph 1 was adopted by 11 votes to 1, with 3 abstentions.

102. The CHAIRMAN put paragraph 2 of Mr. Spiropoulos' proposal to the vote.

Paragraph 2 was adopted by 9 votes to 3, with 1 abstention.

103. The CHAIRMAN put paragraph 3 of Mr. Spiropoulos' proposal to the vote.

Paragraph 3 was adopted by 9 votes to 3, with 3 abstentions.

104. The CHAIRMAN put paragraph 4 of Mr. Spiropoulos' proposal to the vote.

Paragraph 4 was adopted by 9 votes to 1, with 5 abstentions.

105. The CHAIRMAN put Mr. Spiropoulos' proposal as a whole to the vote.

Mr. Spiropoulos' proposal was adopted by 9 votes to 2, with 4 abstentions.

106. Mr. AMADO said that he had voted for the proposal because it had become clear that the Commission could not frame an article enunciating rules of law, since by doing so it would be running ahead of the times. The only alternative was to return to a simple recommendation.

107. Mr. SALAMANCA said that he had voted against the proposal because it was contradictory and solved nothing.

108. Mr. ZOUREK said that he had voted for paragraph 1 of the proposal. Having then voted against paragraphs 2 and 3, for reasons which he had previously made clear, he had abstained from voting on the proposal as a whole. The statement in paragraph 3, in particular, was not entirely correct.

109. Mr. SCALLE said that he had adopted a negative attitude towards the proposal because its adoption constituted an abandonment by the Commission of the role that it ought to fulfil.

110. Mr. SANDSTRÖM said that he had voted for the proposal because the only course that remained open to the Commission was to acknowledge its inability to recommend any solution.

111. Mr. KRYLOV said that he had voted for the proposal because he believed that when one could not have what one wanted, one had to make the best of what was left.

112. Mr. SPIROPOULOS said that the only merit he could claim as author of the proposal was that of having foreseen the defeat of the other proposals. His text was, in fact, based on Mr. Amado's original proposal at the Commission's seventh session, as adapted by the Special Rapporteur.²⁴

113. Faris Bey el-KHOURI said that the Commission's

decision confirmed the opinion he had already expressed that it was impossible for the Commission to agree on the text of an article.

114. Mr. EDMONDS said that it was impossible to maintain that a law could not be codified because the prevailing rule was not observed by every jurisdiction or party. He believed that there was a rule of international law on the subject, and that the Commission, by refusing to recognize that law and leaving the breadth of the territorial sea to be fixed by an international conference, had forsaken its duty of codifying international law.

115. Mr. HSU said that he had abstained from voting on the proposal, not because he was opposed to it in substance, but because he regretted that the Commission had to make a confession of failure.

116. The CHAIRMAN, speaking as a member of the Commission, said that he would not explain his vote, as he had not voted on anything affecting the substance of the question.

117. Speaking as CHAIRMAN, he did not feel that the Commission need have any apprehension concerning the general reaction to its failure to reach a final solution after studying the problem of the territorial sea for five years. The responsibility for such failure lay not with the Commission itself, but with the anarchy that reigned on the subject among the various Members of the United Nations. The Commission had, in fact, shown a greater sense of responsibility than other bodies which had made categorical pronouncements on the breadth of the territorial sea that did not correspond to any generally accepted view.

The meeting rose at 2 p.m.

364th MEETING

Monday, 11 June 1956, at 4.50 p.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, Mr. Shuhsi HSU,

²⁴ A/CN.4/SR.315, para. 79.