Document:-

A/CN.4/SR.365

Summary record of the 365th meeting

Topic:

Law of the sea - régime of the territorial sea

Extract from the Yearbook of the International Law Commission:-

1956, vol. I

Norway in which a straight baseline had been drawn between two islands, one being Swedish and the other Norwegian territory. That, however, was a special case which did not affect the essential principle.

44. An article by Sir Gerald Fitzmaurice in the *British Yearbook of International Law for 1954*[10] had convinced him of the Commission's error in inserting the reference to economic interests. It was quite correct that the finding of the International Court of Justice in the Anglo-Norwegian Fisheries Case had not invoked economic considerations, save in respect of the choice of method of drawing straight baselines. The Commission had misconceived the situation, and his proposal was designed to rectify the position.

45. Upon reflexion, he would not press the amendment in his fourth paragraph to delete the last sentence of paragraph 1 of article 5. It was clear that the non-tidal conditions in the Baltic Sea tended to conceal the importance of that provision to countries bounded by tidal waters.

46. The CHAIRMAN said it appeared to be the general opinion that article 4 should be retained as drafted.

Article 4 was adopted.

47. The CHAIRMAN said that, without prejudice to Sir Gerald Fitzmaurice's proposal, which would be voted on at the next meeting, a vote could be taken on Mr. Sandström's amendment to article 5. The principle enunciated in paragraphs 1 and 3 could be taken as a point of substance, the formulation of a precise text being left to the Drafting Committee.

48. Mr. ZOUREK questioned the desirability of transferring the reference to economic interests from the first to the third sentence. The proposal was an important one of substance, for it amounted to eliminating one of the three considerations justifying the drawing of a straight baseline, with the addition of the condition of economic interests, which could be taken into account when drawing the baselines in accordance with the two remaining criteria. The finding of the International Court of Justice could not be quoted as justifying such an interpretation.

49. Mr. SANDSTRÖM, in reply to Mr. Zourek, explained that economic interests would not apply in cases where a decision had to be taken on the admissibility of the straight baseline system, but only when, that admissibility having been accepted, the question of the place where to draw the straight baselines arose. In the article by Sir Gerald Fitzmaurice that he had referred to, there was a sketch illustrating the various methods of drawing straight baselines, and it was only at the stage of choosing the most appropriate line that economic considerations would apply. The Swedish Government had stressed the identity of the geographical and juridical concepts of internal waters and had made it clear that no economic interests were of any relevance in establishing straight baselines.

[10] "*The Law and Procedure of the International Court of Justice, 1951-54: Points of Substantive Law.-I* ".

50. The CHAIRMAN put to the vote paragraphs 1 and 3 of Mr. Sandström's amendment to paragraph 1 of article 5.

Paragraphs 1 and 3 were adopted by 8 votes to 2, with 3 abstentions.

51. Mr. SANDSTRÖM suggested that paragraph 2 of his amendment should be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 6.30 p.m.

365th MEETING

Tuesday, 12 June 1956, at 9.30 a.m.

CONTENTS

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. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the territorial sea (item 2 of the agenda) (A/2693, A/2934, A/CN.4/97/Add.2, A/CN.4/99 and Add.1) (*continued*)

Article 5: Straight baselines (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 5 of the draft articles on the regime of the territorial sea. At the close of the previous meeting, paragraphs 1 and 3 of Mr. Sandström's amendment had been adopted.

2. Mr. KRYLOV, explaining his vote on Mr. Sandström's amendment, said that he had voted against it because he regarded it as an unacceptable modification of the 1955 draft, which was a much better text.

3. A re-reading of the relevant passages of the interesting article by Sir Gerald Fitzmaurice, to which Mr. Sand-

ström had referred at the previous meeting,[1] had convinced him that, in belittling the importance of economic factors as a criterion in the establishment of straight baselines, the author had gone farther than was warranted by the finding of the Court. In fact, he seemed to have been inspired rather by the dissenting opinion of Sir Arnold McNair[2] than by the opinion of the Court as a whole. The thesis of Mr. Sandström and Sir Gerald Fitzmaurice could not be sustained; economic factors were of equal weight with geographical considerations.

4. Mr. ZOUREK said that he had voted against Mr. Sandström's amendment because it conflicted both with the finding of the International Court of Justice in the Anglo-Norwegian Fisheries case and with the principles of international law. The Fisheries case was admittedly a special case. Apart from the specific considerations, however, to which he had referred at the previous meeting,[3] the Court had noted that the straight-baseline method had been applied " not only in the case of well defined bays, but also in cases of minor curvatures of the coastline where it was solely a question of giving a simpler form to the belt of territorial waters ".[4]

5. Mr. PAL said that he had abstained from voting on Mr. Sandström's amendment because, in the first place, he was not convinced that economic interests should be regarded as a criterion justifying the establishment of a straight baseline, and in the second place, the transfer of the relevant phrase from the first to the penultimate sentence of paragraph 1 of the article did not, in his view, improve the text.

6. The CHAIRMAN, speaking as a member of the Commission and explaining his abstention, said that his preference went to the article as drafted in 1955, which was more consistent with the proper presentation of the criteria involved. The proposals contained in paragraphs 1 and 3 of Mr. Sandström's amendment did not, however, effect any change of substance because the limitation introduced by the phrase " where necessary " in paragraph 3 ensured continuity in the situation. He was by no means opposed to Mr. Sandström's amendment, and in that connexion he would recall his own proposal at the previous session.[5]

7. Turning to Sir Gerald Fitzmaurice's proposal,[6] the subject of which had been discussed at the previous session,[7] he would vote for it because the grant of the right of innocent passage through waters which had newly become internal was in no way detrimental to the interests of the coastal State. That principle had been enunciated in the Anglo-Norwegian Fisheries Case and had been borne in mind when the Commission had drafted the article at its previous session. Even though the case was exceptional, a right of innocent passage through internal waters, created by the establishment of a straight baseline, which had been previously territorial waters or high seas, should certainly be recognized.

8. Mr. FRANÇOIS, Special Rapporteur, as a critic of Sir Gerald Fitzmaurice's viewpoint, welcomed the concessions that had been made in his proposal, which was now entirely acceptable, by reason of two important modifications. The first was that the right of passage was no longer general but restricted to cases where the waters in question had normally been used for international traffic or passage; the second was that the provision would not apply in cases where the straight baseline was already in operation, but only in the future.

9. Mr. AMADO questioned the appropriateness of the words " consisted of ".

10. Sir Gerald FITZMAURICE said that he would be quite willing to substitute " had the status of " or " had been considered "; it was merely a matter of drafting.

11. Mr. SANDSTRÖM, while supporting the proposal, would prefer the wording " had been considered ", rather than " consisted of ".

12. Mr. PAL said that the Special Rapporteur's suggestion that the provisions of the proposal would apply only to future cases of demarcation needed clarification.

13. The finding of the International Court of Justice in the Anglo-Norwegian Fisheries Case was declaratory only and did not effect any change in international law. It was incorrect to suggest that the straight-baseline system changed the nature of the waters enclosed, for they always had been internal waters. Without putting forward a formal proposal, he would suggest that the reference to change of status of the waters in question could be avoided by adopting the following text:

> Where the establishment of a straight baseline has the effect of enclosing as internal waters areas which previously have normally been used for international traffic or passage, a right of innocent passage through those waters shall be recognized by the coastal State.

14. Sir Gerald FITZMAURICE said that Mr. Pal's suggestion was unacceptable. The retention of the description of the newly enclosed internal waters as areas which had previously had the status of territorial waters or high seas was essential, for the right of innocent passage would arise only if those waters had previously had such status.

15. With regard to the aspect of futurity, he assumed that the Special Rapporteur had in mind cases where the establishment of a straight baseline over a long period had already effectively given the waters in question the status of internal waters. The new situation, with application in the future, was a consequence of the decision of the International Court of Justice.

16. Mr. PAL, maintaining his viewpoint, urged that the substance of the proposal would not be affected by the deletion of the words " have been regarded as territorial waters or high seas ". The essential idea was the use of the areas in question for international traffic or passage.

17. Sir Gerald FITZMAURICE supported that, if the principle of his proposal were accepted, the precise

[1] A/CN.4/SR.364, para. 44.
[2] I.C.J. Reports 1951, p. 158.
[3] A/CN.4/SR.364, para. 48.
[4] I.C.J. Reports 1951, p. 130.
[5] A/CN.4/SR.316, para. 38.
[6] A/CN.4/SR.364, para. 40.
[7] A/CN.4/SR.316, paras. 44 to 85.

formulation of the text could be left to the drafting committee.

18. Mr. KRYLOV questioned the practical effects of the adoption of the proposal. He could not accept a situation in which a vessel entering waters newly enclosed by the establishment of a straight baseline could claim the right of innocent passage simply on the ground that such an area had previously been part of the high seas.

19. Sir Gerald FITZMAURICE explained that the Court had confined itself to declaring that it was permissible to follow the straight-baseline method in certain circumstances, with the consequence that the waters behind the straight baseline became internal waters. The Court did not consider the question of the precise effects of its finding on the status of the waters in question. Since 1951, however, it had occurred to many persons interested in the question that one effect—which had perhaps been overlooked—was that the new status of certain waters in front of the coast might authorize the withholding of a right of innocent passage where that right had previously existed. The object of his proposal was merely to preserve an existing right of innocent passage through such waters.

20. Mr. KRYLOV, maintaining his opposition to the proposal, said that it amounted to an attenuation of the finding of the Court in the Anglo-Norwegian Fisheries Case, because it would weaken the status of the newly enclosed waters. It was certainly against the spirit of the Court's decision. Moreover, he had serious doubts about the practical value of the proposed provision, which would only complicate further the business of navigation.

21. Mr. FRANÇOIS, Special Rapporteur, thought that Mr. Krylov's objections were exaggerated. The proposal merely recognized a right of innocent passage through waters that had previously been territorial waters or high seas in cases where they had been used as international traffic lanes. It provided for the continued protection of a right that had previously been enjoyed. The Court had not given a ruling on the precise point, for it had not considered it. Sir Gerald Fitzmaurice's interpretation, however, was completely in harmony with the Court's decision.

22. Mr. KRYLOV still felt that in such a complex matter it would be preferable to do nothing that might disturb the decision of the Court, particularly in view of the problematical necessity for such a provision. He could not see that British shipping, for instance, had suffered through the lack of such a provision.

23. Mr. FRANÇOIS, Special Rapporteur, pointed out that the proposal was intended to provide for future contingencies.

24. Mr. SANDSTRÖM said that, although it might not be the intention of any government to withhold the right of passage for international traffic, it was perfectly reasonable that such traffic should continue to use the same waters, even though they had become internal waters.

25. Mr. SPIROPOULOS said that the areas in question had formed part of the territorial sea, in which, consequently, a right of innocent passage had been recognized. The establishment of a straight baseline had transformed them into internal waters, but it was reasonable that the right of innocent passage should continue to be recognized. The new status of the enclosed waters was not in dispute and no sacrifice by the coastal State was involved.

26. Mr. AMADO said that the situation was that a part of the territorial sea had, by the operation of the straight-baseline system, legally become internal waters. The proposal claimed that for the purposes of lawful navigation vessels should have the right of innocent passage through such waters. He could see no difficulty in accepting Sir Gerald Fitzmaurice's amendment, because the rule would apply to internal waters only in a specific case, which, by its circumstances, was entirely justifiable.

27. Mr. PAL said that the discussion was becoming confused. The establishment of the straight-baseline system had not changed the situation, which was that in some cases the normal baseline was used and in others the straight-baseline system. In respect of the status of the areas concerned, the approval by the Court of the straight baseline had merely confirmed as legal an already existing situation. There was no doubt of the existence of a state of affairs justifying a claim for the establishment of straight baselines and the only question that arose was that of certain areas that might previously have been used for international traffic or passage. The aim should be to safeguard the right of innocent passage through such an area without any reference to change of status.

28. Mr. ZOUREK said that Mr. Pal's point was extremely pertinent. The finding of the International Court of Justice, far from inaugurating a new era in international law, had merely declared the validity of two parallel systems of establishing baselines. That finding, therefore, could not be held as establishing a new system entailing a change of status of the waters concerned. Sir Gerald Fitzmaurice's proposal, however, had the disadvantage that it would create two parallel systems of internal waters, in only one of which the right of innocent passage would be recognized. Apart from access to open ports which would of course be permissible, he could see no justification for the proposal. If, however, there were cases other than access to open ports, he would favour Mr. Pal's suggestion. He could not accept the reference to areas which had previously been considered to be territorial waters or high seas.

29. Faris Bey el-KHOURI said that there were two grounds on which Sir Gerald Fitzmaurice's proposal could be supported. First, that of previous normal use of the waters for international traffic or passage and, secondly, that the areas in question had previously had the status of territorial waters or high seas. The latter was on the whole of greater weight than the former, because no question of proof would arise. Recognition of the right of passage through such waters as an act of courtesy on the part of the coastal State might give rise to difficulties.

30. Mr. SANDSTRÖM said that the confusion appeared to lie in the fact that the right of establishing a straight baseline was an abstract right. Until a straight baseline was fixed, it did not exist in reality, and could not, therefore, enclose any waters.

31. Sir Gerald FITZMAURICE observed that he agreed very strongly with Faris Bey el-Khouri and Mr. Sandström. According to the judgment of the International Court, a State had, under certain conditions, the right to draw straight baselines. Until they were drawn, however, the coast was the baseline and the waters from the coast outwards were considered as territorial waters or might even be considered, in some very rare cases, as the high seas. It was only when the State fixed straight baselines, thereby doing what it had always had the right to do but had not so far done, that the waters between the baseline and the coast, which had previously been territorial waters, became internal waters.

32. Mr. PAL, replying to an inquiry from the CHAIRMAN, said that he had not wished to move a formal amendment but had simply made a suggestion.

33. He noted that Mr. Sandström no longer adhered to his view of the effect of the decision in the Anglo-Norwegian Fisheries Case on the question of the status of the waters between the coast and the straight baseline.

34. The CHAIRMAN put Sir Gerald Fitzmaurice's proposal [8] to the vote.

Sir Gerald Fitzmaurice's proposal was adopted by 9 votes to 1 with 2 abstentions.

Article 5 was referred to the Drafting Committee.

35. Mr. KRYLOV, explaining his vote, said that he continued to consider that the proposal would have an adverse effect on the interpretation of the Court's decision.

Article 6: Outer Limit of the Territorial Sea

36. Mr. FRANÇOIS, Special Rapporteur, said there were no comments on article 6.

Article 6 was adopted.

Article 7: Bays

37. Mr. FRANÇOIS, Special Rapporteur, outlining the comments by governments on the Commission's draft article, said the Belgian Government merely drew attention to the maximum width of ten miles for the entrance fixed by the North Seas Fisheries Convention of 1882.

38. The Brazilian Government described the definition of the term " bay " as unnecessary and complicated and said that, if a definition was desired, it would prefer that proposed by the United Kingdom Government in its reply to the request for information made by the Preparatory Committee for the 1930 Codification Conference, namely, that a bay " must be a distinct and well-defined inlet, moderate in size, and long in proportion to its width ". The United Kingdom proposal had, however, been widely criticized as far too vague and had not been accepted either by the Codification Conference or by the International Court. It was clearly not enough to say that a bay must be " long in proportion to its width ". The Committee of Experts, for instance, had given a precise definition, which was, roughly speaking, that the width of a bay must be at least half its length.[9] He was afraid he could not recommend Brazil's suggestion to the Commission.

39. The Turkish Government suggested changing the title of the article to " Bays and Internal Seas " and adding the following paragraph:

> For the purpose of these regulations an internal sea is a well-marked sea area which may be connected to high seas by one or more entrances narrower than 12 nautical miles and the coasts of which belong to a single state. The waters within an internal sea shall be considered internal waters.

He did not feel that the suggested definition was a very happy one. The concept of an internal sea in the Turkish Government's suggestion appeared to correspond exactly to the Commission's concept of a bay.

40. The Government of the Union of South Africa, referring to paragraph 5 of the article, suggested that it stipulate that the provisions of paragraphs 1-4 and not merely those of paragraph 4 did not apply to " historic " bays. The suggestion was worthy of the Commission's attention.

41. The Israeli Government inquired, *inter alia*, what was the position of bays whose coast line was shared by more than one State. That problem was one of the many which the Commission, aware that it was making a first effort to codify the matter, had deliberately refrained from attempting to solve.

42. The Norwegian Government complained that the article was not clear and made the same suggestion as the Union of South Africa regarding paragraph 5. It also stated that none of the paragraphs reflected existing law. The Commission, particularly when establishing the twenty-five-mile limit for the closing line of bays, had of course realized that it was not reflecting existing international law, but dealing with *lex ferenda*. That was not, however, a reason for rejecting the article.

43. The United Kingdom Government did not consider that the interest of coastal States afforded any justification for the adoption of a twenty-five-mile rule. It also suggested that paragraph 2 of the article be clarified by the addition of a stipulation that islands fronting a bay could not be considered as " closing " the bay if the usual route of international traffic passed shoreward of them. The point, which was similar to that just dealt with in Sir Gerald Fitzmaurice's amendment to article 5, might, he thought, be taken up by the Commission.

44. The United States Government was in favour of maintaining the ten-mile rule.

45. Thus, several governments were opposed to the Commission's decision fixing the length of the closing line of bays at twenty-five miles. It would be recalled that in the course of a lengthy discussion the Commission

[8] A/CN.4/SR.364, para. 40.

[9] A/CN.4/61/Add.1, Annex, p. 2.

had agreed that the ten-mile rule had enjoyed wide support, being included in multilateral conventions such as the North Seas Fisheries Convention of 1882. Several members had, however, opposed future acceptance of the ten-mile rule. The existence of a close link between the length of the closing line and the breadth of the territorial sea having always—though perhaps incorrectly—been acknowledged, it was reasonable to assume that, as the trend was towards an extension of the limit of the territorial sea, the length of the closing line should be correspondingly extended. States which claimed a territorial sea of six to twelve miles in breadth, for instance, were not prepared to accept a ten-mile closing line for bays. A proposal that the length of the line should be twice the breadth of the territorial sea had been rejected by the Commission on the ground that such a rule would mean a closing line of only six miles in length for those countries accepting a three-mile limit for the territorial sea. The Commission, regarding it as essential to specify a definite length, had finally adopted a distance of twenty-five miles, which was acceptable to those States which regarded twelve miles as the maximum breadth of the territorial sea.

46. There were three possibilities open to the Commission. It could retain the article as it stood, despite the opposition of certain governments. It could reduce the length of the line, though that course would undoubtedly be opposed by several of its members. Or, it could take a decision on the lines of its decision on the breadth of the territorial sea. In other words, after recognizing the fact that several States regarded the length of the closing line of bays as linked with that of the breadth of the territorial sea, it could recommend that the length of the line should not exceed a distance to be determined by any diplomatic conference convened to fix the breadth of the territorial sea, adding that, in its view, the length of the line should be fixed between ten and twenty-five miles.

47. Mr. AMADO said that he agreed with the Brazilian observation that the definition of a bay was unnecessary and complicated. It contained much geographical technicality which it was difficult for a jurist to follow, and attempted to express in geographical terms a rule which had not yet been formulated in international practice. The twenty-five mile rule was opposed by many States and would undoubtedly give rise to much discussion. He would prefer a much simpler definition.

48. Mr. EDMONDS regretted that the Special Rapporteur had not repeated the recommendation which he had made, on very sound grounds, to the Commission's seventh session, that the ten-mile rule should be recognized as current international practice.[10] The article as it now stood had very few friends. Out of the nine governments which had commented on it, only one, the Chinese, was in favour of it, while five had declared that twenty-five miles was too great a distance. He formally proposed that the words " ten miles " be substituted for the words " twenty-five miles " throughout the article.

49. Mr. SANDSTRÖM, after reading out the comments by the Swedish Government, to which the Special Rapporteur had made no reference, said it was not clear whether the object of draft article 7 was to fix the limit of the internal waters or of the territorial sea. The point of the article would be clearer if paragraph 3, which appeared to be the main provision, were given greater prominence. He was unable to take any position at that stage on the length of the closing line. The compromise solution of twenty-five miles having failed to win general acceptance, it might be wondered whether the Commission should attempt to fix a length at all. One argument against fixing any length was the statement of the International Court, in its judgment in the Anglo-Norwegian Fisheries Case, that no such limit existed.[11] That statement had been dismissed as an *obiter dictum*. There were, however, a number of bays on the Norwegian coast and the question of straight baselines was undoubtedly bound up with that of bays.

50. Mr. ZOUREK said that there were two problems involved: the definition of a bay, and the conditions under which the waters in a bay were to be regarded as internal waters. With regard to the first problem, he thought that the definition given in article 7 should be retained by the Commission. It had been taxed with being too technical but there must be a certain element of technicality in any definition. It was for the General Assembly and any international conference that might be convened on the subject to decide whether or not the definition should be finally retained.

51. The other problem was a far more fundamental one. As he had pointed out at the previous session, the Commission was guilty of over-simplification in adopting a purely mathematical criterion.[12] The question whether the waters within a bay were internal waters of a coastal State or not depended on a variety of geographical, economic and historical factors.

52. In the North Atlantic Fisheries Case[13] in 1910, the Permanent Court of Arbitration had been called upon to settle the definition of a bay in connexion with a disputed clause in the Treaty of 1818. There was no reference at all to mathematical criteria but only specifically to the following factors: " the relation of the width of the bay to the length of penetration inland "; " the possibility and the necessity of its being defended by the State in whose territory it is indented "; " the special value which it has for the industry of the inhabitants of the shores " and " the distance which it is secluded from the highways of nations on the open sea ". If the Commission sought to reduce the question to one of mathematics, the limit would always be an arbitrary one whether it were 10, 25 or 30 miles. Such a solution furthermore would never obtain anything approaching the general acceptance of States.

53. Nor was Mr. Edmonds' proposal[14] any improvement. It was still a mathematical solution and would be

[10] A/CN.4/SR.317, paras. 45-47.

[11] I.C.J. Reports 1951, p. 141.

[12] A/CN.4/SR.318, paras. 69 and 95.

[13] American Journal of International Law, 1910, p. 982.

[14] See para. 48 above.

unacceptable to an even greater number of States. That the adoption of a closing line of twenty-five miles had been a premature move on the part of the Commission was shown by the fact that only five of the 71 maritime States had accepted it. The Commission should add other criteria to the purely mathematical one.

54. Sir Gerald FITZMAURICE, referring to the relation between articles 5 and 7, said that article 5 dealt merely with cases where the character of a particular coast justified the establishment of a general system of straight baselines. If there were any bays in the particular coastline, they would be dealt with as part of that baseline system. That fact was clear from paragraph 5 of article 7, and would be even clearer if the stipulation in that paragraph were extended to paragraphs 1-4 of article 7 and not just to paragraph 4.

55. Article 7 dealt with the totally different case of bays on a coast where there was no justification for the establishment of a straight baseline system, in a word, of bays to which article 5 simply did not apply. Consequently, if the suggestion of some governments were adopted and article 7 were eliminated as superfluous, it would no longer be possible to draw any closing line in bays on coasts for which a straight-baseline system had not been established.

56. As for the length of the closing line, he found the matter clear though admittedly controversial. The statement of the International Court on the matter in its judgment in the Anglo-Norwegian Fisheries Case [15] had, in his opinion, been rightly described as an *obiter dictum*. There had been no occasion for the Court to decide the question of bays in that dispute because the United Kingdom had already conceded, either on geographical or on historical grounds, that all the bays involved were in Norwegian waters. In any case, the Court had done no more than state that the ten-mile rule had not acquired the authority of a general rule of international law, and it would be going too far to deduce from that statement that the Court considered that there was no limit on the internal waters in bays.

57. In view of the existence of indentations, such as the Gulf of Carpentaria, which were of enormous width but had the configuration of bays, it was clear that, whether the ten-mile rule were correct or not, the Commission must set a limit to the internal waters in bays where no straight-baseline system existed. It was in fact for that reason that he had abstained from voting against the twenty-five-mile limit at the Commission's seventh session.[16] He agreed, however, with those governments which considered twenty-five miles excessive. Fifteen miles was ample. He would deal with other aspects of the article at a later stage.

58. The CHAIRMAN, speaking as a member of the Commission and recalling the views expressed by him at the Commission's seventh session,[17] said that the spirit, if not the letter of the judgment of the International Court in the Anglo-Norwegian Fisheries case ruled out the application of a mathematical criterion to the question of the internal waters of bays. He had on that occasion submitted a definition which was sufficiently wide to cover all cases.[18] Since, however, the Commission had not adopted it, he would dwell on it no further.

59. In the same proposal, he had included a paragraph based on the Harvard Draft, stipulating that in the case of bays whose coasts were shared by more than one State, the bordering States might agree upon a division of the waters within the closing line as internal waters.[18] In making that proposal he had had in mind the Gulf of Fonseca the shores of which were shared by Honduras, Nicaragua and Salvador, and which had been the subject of an award by the former Central American Court of Justice. That paragraph had also been rejected.

60. Referring to Mr. Edmonds' statement that the majority of countries were opposed to the twenty-five-mile limit, he said that, although the Commission could obviously take cognizance only of replies received from governments, it was clear from the views which governments were known to hold on the question, that the ten-mile rule was widely regarded as obsolete.

61. The Turkish Government in its comment had wished to couple the question of bays with that of internal seas. It was true that the regime of the territorial sea was one thing and that of internal seas another, but they did have certain points of contact. He was not sure that the Turkish comment was pertinent. It would give rise to certain complications, and even if there were an analogy, the matter should not be dealt with in connexion with article 7. The point might, however, be made in the comment on article 7 or at the appropriate point in the report dealing with the regime of the high seas.

62. Mr. HSU said that he did not always agree with the comments made by the Chinese Government. He himself felt that the twenty-five-mile line would be excessive, but it depended entirely on the view taken on the breadth of the territorial sea. The two questions were closely related. The ten-mile line was somewhat arbitrary; it might be interpreted as a restriction based on undue insistence on the three-mile limit for the territorial sea. Since the question of the breadth of the territorial sea had not yet been decided, the question might very well be referred to the proposed international conference; but he would not press that as a proposal.

63. Mr. FRANÇOIS, Special Rapporteur, said that it would be going too far to maintain that only one Government—the Chinese—favoured the Commission's draft. True, only that government had explicitly stated its approval, but some fifteen of the score or more governments which had sent comments had not referred to that specific point, and their silence might be construed as assent, or at least as an absence of serious objection on their part.

64. Sir Gerald FITZMAURICE proposed that the

[15] I.C.J. Reports 1951, p. 131.

[16] A/CN.4/SR.318, para. 88.

[17] *Ibid.*, paras. 90-91.

[18] A/CN.4/SR.317, para. 52.

word " fifteen " should be substituted for the word " twenty-five " in paragraphs 3 and 4 of article 7.

65. Faris Bey el-KHOURI agreed that the twenty-five-mile line was excessive and suggested that a twelve-mile line might be accepted, as that limit had been virtually accepted for the breadth of the territorial sea.

66. Mr. KRYLOV endorsed Sir Gerald Fitzmaurice's proposal as a practical one. The twenty-five-mile line had met with universal misgiving, and he himself would not be disposed to accept a ten-mile line, because it had been criticized by the International Court of Justice in the Anglo-Norwegian Fisheries Case. The Commission was entirely free to choose a completely arbitrary figure.

67. Mr. ZOUREK asked whether the Special Rapporteur or the Commission itself would be prepared to supplement the arithmetical criterion laid down in the draft of article 7 with other criteria—geographical, historic or economic.

68. Mr. FRANÇOIS, Special Rapporteur, replied that he would prefer not to make any such proposal, as it would merely complicate matters. The arithmetical method of measuring bays had been used for at least seventy years. The introduction of the other criteria suggested by Mr. Zourek would mean that each bay would become a matter of controversy.

69. Mr. SANDSTRÖM drew Mr. Zourek's attention to the geographical criteria set forth in paragraph 1 of article 7.

70. Mr. ZOUREK objected that those criteria had been used merely in the definition of bays. He had intended that such criteria should be used also for the determination of the limit of the internal waters.

71. Mr. SANDSTRÖM replied that he had at one time made an attempt to introduce the criteria advocated by Mr. Zourek and they had been incorporated to some extent in paragraph 5.

72. Mr. ZOUREK said that he had not as yet any specific proposal to submit, but would appreciate a vote on the principle that the purely arithmetical criterion should be supplemented by geographical, historical and economic considerations.

73. Mr. SANDSTRÖM proposed that the vote should be deferred until the next meeting, in order to give Mr. Zourek an opportunity to draft a specific proposal.

74. The CHAIRMAN agreed that the vote might be deferred until the next meeting pending the submission of Mr. Zourek's amendment.

Further consideration of article 7 was postponed until the next meeting.

Article 8: Ports

75. Mr. FRANÇOIS, Special Rapporteur, observed that the United Kingdom Government had again drawn attention to its comment of the previous year (A/2934, p. 44) that some qualification of article 8 might be necessary in view of the construction of piers running far out into the high seas. At the previous session, Sir Gerald Fitzmaurice[19] had stated that he would not press the objection as it dealt with somewhat exceptional cases. If he wished to do so now, a reference to the point might be made in the report.

76. Sir Gerald FITZMAURICE said that the question was not one of primary importance. It might be compared with that of artificial islands and the erection of installations on the continental shelf. It was recognized that such constructions did not generate territorial waters. Piers projecting from the land up to a certain point might reasonably be regarded as part of the land, but if they extended several miles into the high seas, their situation would be similar to that of artificial constructions in the sea, and it was arguable that they should not be regarded as part of the coast, but as erections in the high seas. Admittedly, the situation was at present exceptional, but, with the advance of science, it might not always be so. It would be undesirable to admit that countries might extend their territorial waters merely because such piers were connected with the land; at the most, they would be entitled to safety zones. He would be satisfied if a reference were made in the commentary to the fact that new situations might arise which would require reconsideration of the article, should the practice of building such erections become widespread.

It was agreed that a reference to the United Kingdom Government's comment be included in the report.

Article 8 was adopted.

Article 9: Roadsteads

77. Mr. FRANÇOIS, Special Rapporteur, said that the Brazilian Government maintained its view that roadsteads should be subject to the regime of internal waters. The Commission had decided against that concept.[20]

Article 9 was adopted without change.

Article 10: Islands

78. Mr. FRANÇOIS, Special Rapporteur, observed that the Brazilian Government still held that the position of islands would, under the Commission's draft article, be inferior to that of drying rocks and drying shoals. He himself maintained that such an opinion was erroneous, since islands were always endowed with their own territorial sea, whereas rocks and shoals did not possess one. He had elaborated that view in the addendum to his report[21] and saw no reason for reopening the discussion.

79. The Government of the Union of South Africa put forward the view that States should be permitted to take the surfline to the seaward of a drying rock or shoal, which lay within the territorial sea, as the point of departure for measuring the territorial sea, rather than the rock or shoal itself. That view could not be accepted by the Commission.

80. The question of groups of islands or archipelagos had been raised by the Philippine Government in connexion with the definition of the high seas, and by the

[19] A/CN.4/SR295, para. 71.

[20] *Ibid.*, para. 81.

[21] A/CN.4/97/Add.2, para. 74.

Yugoslav Government in connexion with article 5: Straight baselines. The Hague Codification Conference of 1930 had experienced some difficulty with regard to groups of islands, and had suggested that the line for the territorial sea should be the line linking the outermost islands of the group so that all waters within that line would be internal waters. The main question was what should be the maximum length of such lines, because the extent of waters whose status had been changed from that of high seas to that of internal waters naturally depended on that length. The Hague Conference had proposed ten miles, the same as for bays. In 1953 the Committee of Experts had limited the length of such lines to five miles. The Commission had not given much time to the question, but after a brief discussion had decided that no special clause was needed for groups of islands.[22] It must be realized what were the consequences of that decision, namely, that in an archipelago each island would have its own territorial sea, but that the Commission did not accept the idea of a stretch of closed waters embracing all the islands of an archipelago and which must be regarded as the territorial waters of the archipelago and thus also the territorial waters of a State, such as the Philippines, wholly composed of such islands.

81. The United Kingdom Government approved the omission of any clause dealing with groups of islands, as it favoured the fullest possible freedom of the high seas. The Commission should decide whether it wished to maintain its decision to omit such a clause.

82. Mr. SPIROPOULOS said that a form of law relating to archipelagos was already in force, because the Hague Conference had accepted certain principles relating thereto and they had been embodied in the literature. The question of the distance between islands was still a controversial point, but he could not accept the United Kingdom Government's suggestion. If the Commission failed to draft an appropriate clause it would leave the problem in mid-air. Some such clause should be included in the rules, either in connexion with article 10 or elsewhere. Certain restrictions had already been placed on the full freedom of the high seas, notably in connexion with bays. The rule should recognize the special conditions of groups of islands, particularly since law relating thereto was already in force. If the territorial seas of two islands were almost contiguous, a small area of the high seas might be completely enclosed; it would be illogical to have a stretch of the high seas surrounded by territorial waters.

83. Mr. SANDSTRÖM observed that in the main the general rule of straight baselines should be applied, but the question was rather different where States consisted exclusively of islands. At the present stage, however, the Commission lacked sufficient expert information on the geographical configuration of such States. It obviously could not go so far as to create a uniform territorial sea for States with enormous distances between their islands, such as Indonesia, even if a more liberal use of straight baselines might be justified in certain cases.

84. Sir Gerald FITZMAURICE said that Mr. Sandström's observation was pertinent. The real difficulty was to know what a group of islands was; the islands might be widely scattered and the total interior distance very great. A special regime might be established for cases where islands were sufficiently closely grouped to constitute both a geographical and a political unity, but a maximum distance between the islands and also between the interior lines would have to be established.

85. With regard to Mr. Spiropoulos' point about a rule of law already being in force, the position had been that no very serious proposals for a special regime for groups of islands had been advanced prior to the 1930 Hague Conference. Each island had had its own territorial waters, and, if they were situated close enough together, those waters would overlap. At the Hague Conference proposals had been made for drawing a baseline round the outer edges of the islands, and the controversy had turned on the length of the baseline. As no agreement had been reached, no clause had been embodied in a draft convention, but certain States had agreed to the drawing of such baselines, with the sole proviso that the waters within the lines would not be internal waters, but territorial sea, in order to preserve the right of passage. The law, therefore, had always remained unsettled.

86. The Commission should consider whether it wished to establish a regime for groups of islands, how it could do so, how it should define such a group, and what would be the status of the waters inside the baselines. He agreed with Mr. Spiropoulos that it would be absurd for a stretch of high seas to remain within the line, but, from a practical point of view, such waters should be regarded as territorial sea rather than internal waters. Such waters were, after all, outside, not inside, the individual islands.

87. Mr. SPIROPOULOS agreed with Sir Gerald Fitzmaurice that difficulties might arise if a chain of islands were given internal waters. A clause dealing with groups of islands could be applied only in cases where islands constituted a geographical unit and the distance between them was not too great. A similar problem arose in relation to straits with the territory of two different States on each side, where the breadth of each entrance was not greater than double the territorial seas, but where the strait widened out between the entrances. The waters in the wider part would not be high seas, but would be assimilated to territorial seas. He suggested that the Rapporteur should embody the ideas expressed in the discussion in a working paper.

88. Mr. ZOUREK observed that the Commission had not gone deeply into the question of groups of islands. There should, however, be a clause relating to them. The use of the straight baseline would be a practical solution only for islands close in to the coast. Where groups of islands were far from the coast and formed a geographical, economic and political unit, special provision should be made for them. It would be unfair to States composed exclusively of islands if the Commission admitted off-shore islands within the system of straight baselines, incorporating the waters between the islands and the shore in internal waters, and omitted to draft

[22] A/CN.4/SR.319, para. 56.

a similar clause for archipelagic States, for if there were no such clause, such States would never have any internal waters.

89. Mr. FRANÇOIS, Special Rapporteur, replying to Mr. Spiropoulos, said that he had already drafted an article on groups of islands[23] in his third report on the regime of the territorial sea. The Commission had, however, been unable to adopt an article based on that draft for, like the Hague Conference of 1930, it had failed to overcome the difficulties, which had since been aggravated. He rather doubted whether the Commission would have time at that late stage to deal with the matter in detail. It should preferably be left to the proposed diplomatic conference, especially since the question was closely related to that of the breadth of the territorial sea. He would therefore, if the Commission so agreed, include in his report a passage to the effect that the Commission had recognized the need to deal with the question, but had lacked time and the requisite assistance of experts, and had therefore decided to leave the decision to a diplomatic conference.

90. Mr. PAL accepted that proposal. Normal cases of islands were covered by the provisions already made, but if the distance between them was far greater than twice the breadth of the territorial sea—and even that breadth had not yet been decided—and if the configuration of the archipelago was not known, the Commission could hardly discuss the matter to any purpose.

91. The CHAIRMAN, speaking as a member of the Commission, observed that the Commission would undoubtedly accept the Special Rapporteur's proposed passage for his report, as it reflected the facts. He suggested, however, that he should add an additional passage from the comment accepted at the seventh session, reading: " Moreover, article 5 may be applicable to groups of islands situated off the coasts, while the general rules will normally apply to other islands forming a group " (A/2934, p. 18). In other words, archipelagos would be governed by analogy by the same general principle as that laid down in article 5.

92. Mr. SANDSTRÖM suggested that reference be also made in the report to the difficulties arising from the great variety of situations with regard to groups of islands.

It was agreed that the Special Rapporteur should include in his report a passage along the lines suggested by himself, the Chairman and Mr. Sandström.

Article 10 was adopted.

Article 11: Drying rocks and drying shoals

93. The CHAIRMAN pointed out that article 11 had already been disposed of at the previous meeting in connexion with articles 4 and 5.

Article 11 was adopted.

The meeting rose at 1.10 p.m.

[23] A/CN.4/77.

366th MEETING

Wednesday, 13 June 1956, at 9.30 a.m.

CONTENTS

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. Radhabinod PAL, 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/2693, A/2934, A/CN.4/97/Add.2, A/CN.99 and Add.1-3) (*continued*)

Article 7: Bays (resumed from the previous meeting)

1. The CHAIRMAN, inviting the Commission to resume its consideration of article 7 of the draft articles on the regime of the territorial sea, drew attention to the amendments submitted by Mr. Sandström and Mr. Zourek.

Mr. Sandström's amendment was as follows:

1. The waters of a bay shall be considered as internal waters if:

(*a*) By reason of the depth of penetration of the bay, or by its configuration generally, its waters are closely linked to the land domain;

(*b*) The line drawn between the points marking the entrance of the bay at low water does not exceed *x* miles;

(*c*) The area of the bay is as large as or larger than that of the semi-circle drawn on this line, and

(*d*) The coasts belong to a single State.

2. [Paragraph 4 of the 1955 text (A/2934), substituting *x* miles for twenty-five miles.]

3. [Paragraph 2 of the 1955 text.]

4. The line drawn across the entrance of the bay shall serve as the base-line for delimitation of the territorial sea.

5. [Paragraph 5 of the 1955 text.]

2. Mr. Zourek's amendment was as follows:

In paragraph 3 replace the clause beginning " if the line