Document:-

A/CN.4/SR.366

Summary record of the 366th meeting

Topic:

Law of the sea - régime of the territorial sea

Extract from the Yearbook of the International Law Commission:-

1956, vol. I

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

drawn " and continuing to the end of the paragraph by the following:

if they are linked to the land domain by reason of the configuration of the bay, the width of its entrance, its economic value to the people of the State or by reason of the distance separating the bay from international shipping lanes on the high seas.

3. In addition, Mr. Edmonds,[1] Faris Bey el-Khouri[2] and Sir Gerald Fitzmaurice[3] had proposed figures of 10, 12 and 15 miles respectively for the closing line of the entrance of a bay.

4. Mr. SANDSTRÖM said that his amendment was largely a drafting amendment and could be examined by the Drafting Committee. The only innovation was the proposal in paragraph 4 that the line drawn across the entrance of a bay should serve as the baseline for delimitation of the territorial sea, which was the same provision as in paragraph 1 of article 13.

5. Mr. PAL said that discussion of the article would be facilitated if it were realized that there were no amendments to paragraph 2 of the draft article or to paragraph 4, except to the figure " twenty-five ". In paragraph 3, only Mr. Zourek's proposal introduced a fresh qualification, that of the economic value of the bay. Paragraph 1 would require consideration, particularly in view of Mr. Sandström's proposal.

6. Sir Gerald FITZMAURICE said that Mr. Sandström's ingenious proposal, which was acceptable, would have the same practical effect as the draft article. The only minor criticism that he would make was that its opening phrase seemed to be tautologous in that " waters of the bay " made the assumption that there was a bay. Unless, however, the waters of the area in question were in fact closely linked to the land domain, they did not constitute a bay at all. The whole purpose of the definition in the draft article was to stress that relationship.

7. He had also a slight criticism to make of the wording of paragraph 4, which referred to the " line drawn across the entrance of the bay ". If the bay were more than the x miles broad, then the line would not be drawn across the entrance, but at the point where the width did not exceed the x miles. The phrase " across the entrance of the bay " therefore called for modification.

8. The same criticism of tautology could be levelled at Mr. Zourek's amendment, and far more cogently than in the case of Mr. Sandström's amendment. The statement that the waters should be considered internal waters " if they are linked to the land domain by reason of the configuration of the bay " was begging the whole question. If the waters were not linked to the land domain the indentation would not be a bay at all.

9. Referring to the other criteria, he said that his views on economic criteria were well known to the Commission. The criteria were so vague that, were they adopted, it would be impossible to determine whether a particular indentation was a bay or not. He was convinced that the only way to enable countries to settle such questions was to specify a closing line of a definite distance.

10. Mr. FRANÇOIS, Special Rapporteur, referring to the four criteria contained in paragraph 1 of Mr. Sandström's amendment, said that the last three of them were already contained in the Commission's draft article 7. It was difficult to imagine that any indentation to which the last three criteria applied could nevertheless not be a bay. The additional criterion that " the waters of a bay shall be considered as internal waters if by reason of the depth of penetration of the bay, or by its configuration generally, the waters are closely linked to the land domain" was in effect the very basis of the definition of a bay and should not therefore be treated as on the same footing as the other three. It might, however, be included in the commentary.

11. Mr. SANDSTRÖM explained that he had avoided giving any definition of a bay because he regarded it as a geographical concept. Bays might, however, exist which did not meet the first requirement in paragraph 1 of his amendment. In any case, as he had already pointed out, he left his text entirely to the discretion of the Drafting Committee.

12. Mr. ZOUREK, recalling his remarks at the previous meeting,[4] said that the whole purpose of his amendment was to avoid the adoption of a purely mathematical criterion. The criteria it contained were based on those adopted by the Permanent Court of Arbitration in 1910 in settling the dispute between the United States of America and Great Britain over the North-Atlantic coast fisheries.[5] They were admittedly less precise than a fixed distance. So precise a criterion as a fixed distance, however, would never be accepted by the majority of States, because of the extreme variety of cases to which it would have to be applied. His amendment would involve the deletion of paragraph 4 of the existing draft article.

13. Mr. KRYLOV drew attention to the fact that both amendments referred to the need for the waters to be linked to the land domain by reason of the configuration of the bay. He suggested that the Commission refer them to the Drafting Committee and retain the draft article pending the Drafting Committee's report.

14. The CHAIRMAN pointed out that Mr. Zourek's amendment, despite certain similarities to that of Mr. Sandström, involved a substantial change in the text of the draft article and would therefore require a decision of the Commission. Mr. Sandström's amendment could, however, be referred to the Drafting Committee without a decision.

15. Mr. PAL pointed out that a decision would be required on the parts of Mr. Sandström's amendment where he proposed substituting an unspecified number of miles for the words " twenty-five miles ".

16. The CHAIRMAN put Mr. Zourek's amendment to the vote.

[1] A/CN.4/SR.365, para. 48.

[2] *Ibid.*, para. 65.

[3] *Ibid.*, para. 64.

[4] A/CN.4/SR.365, paras. 51-53.

[5] American Journal of International Law, 1910, pages 982-983.

Mr. Zourek's amendment was rejected by 8 votes to 1 with 4 abstentions.

17. The CHAIRMAN, explaining his abstention, said that although, as he had pointed out at the Commission's seventh session,[6] he was opposed to a numerical criterion for determining whether the waters of a bay were internal waters, at the same time he did not consider that the criteria provided by Mr. Zourek would permit a proper determination of the limits of the internal waters.

18. Mr. PAL said that he had abstained because the Commission had already rejected similar proposals in which the concept of economic interest was put forward as a criterion. Such a concept was far too vague to serve as a basis for a decision by an arbitral tribunal or the International Court.

19. The CHAIRMAN put to the vote that part of Mr. Sandström's amendment which called for an unspecified length of the closing line.

Mr. Sandström's amendment was rejected by 6 votes to 4, with 3 abstentions.

20. Mr. SCELLE said that he had voted against the amendment for the same reason for which he had previously opposed the Commission's decision not to prescribe a specific breadth for the territorial sea.[7]

21. The CHAIRMAN put to the vote Mr. Edmonds' amendment that the length of the closing line be changed to 10 miles.

Mr. Edmonds' proposal was rejected by 8 votes to 3, with 2 abstentions.

22. The CHAIRMAN put to the vote Faris Bey el-Khouri's proposal that the length of the closing line be changed to 12 miles.

Faris Bey el-Khouri's proposal was rejected by 7 votes to 5, with 1 abstention.

23. The CHAIRMAN put to the vote Sir Gerald Fitzmaurice's proposal that the length of the closing line be changed to 15 miles.

Sir Gerald Fitzmaurice's proposal was adopted by 7 votes to 5.

It was *agreed* that the portions of Mr. Sandström's amendment unaffected by the decision on the length of the closing line should be taken into consideration by the Drafting Committee with a view to possible drafting changes in the article.

Article 12: Delimitation of the territorial sea in straits, and Article 14: Delimitation of the territorial sea of two States, the coasts of which are opposite each other

24. Mr. FRANÇOIS, Special Rapporteur, suggested that articles 12 and 14 be considered together, as several governments had commented that both dealt with the same points and might well be combined. He had accordingly drafted a composite article[8] which might, if the Commission agreed in principle on its substance, be referred to the Drafting Committee.

25. The Turkish Government had suggested that in article 12, paragraph 4, the words " except where the connexion passes through an internal sea " should be added after the words " straits which join two parts of the high seas ". The first sentence of paragraph 4 would then read:

> Paragraph 1 and the first sentence of paragraph 3 of this article shall be applicable to straits which join two parts of the high seas, except where the connexion passes through an internal sea, and which have only one coastal State in cases in which the breadth of the straits is greater than twice the breadth of that State's territorial sea.

26. He had originally stated[9] that the exact purport of that addition escaped him, as he had thought that when States were separated by an internal sea, there could be no question of a territorial sea, because no territorial waters existed in an internal sea, but on reflection he had concluded that that might be precisely the tenor of the Turkish Government's comment. There was, however, no necessity to make an exception for such cases, because when waters were an internal sea in the strict sense of the term, there could be no question of a territorial sea, so that article 12 would not apply at all; on the other hand, when waters were not an internal sea in the strict sense of the term, or were to some extent a landlocked sea, the regime of internal waters would not be applicable, and article 12 would have to apply. There was therefore no ground for making the addition requested by the Turkish Government. He would, however, include some discussion of internal waters in his report and the Commission might consider it when it came to discuss the report.

27. The Norwegian Government had drawn attention to the fact that the articles provided no solution for the case of two States which had territorial seas of different breadth. That was true, but the Commission had been unable to solve that problem, and was not now required to do so, because it was hoped that a uniform limit would be established for the territorial sea. There was a system governing disputes in similar cases in international private law, but it was not the present task of the Commission to find a solution in international public law for disputes arising in such cases.

28. The United Kingdom Government had proposed a new text to replace article 14, paragraph 1. The main differences from the existing text were the introduction of the phrase " is usually determined " and the omission of the phrase " in the absence of agreement between those States ". Sir Gerald Fitzmaurice had already agreed[10] that the word " usually " was unnecessary, since it was covered by the phrase " unless another boundary line is justified by special circumstances ", as was the phrase " in the absence of agreement between those States ".

29. The Yugoslav Government had proposed the deletion of both the phrase " in the absence of agreement

[6] A/CN.4/SR.318, para. 91.

[7] A/CN.4/SR.363, para. 109.

[8] A/CN.4/97/Add.2, para. 88.

[9] A/CN.4/97/Add.2, para. 81.

[10] A/CN.4/SR.360, para. 28.

between those States " and the phrase " unless another boundary line is justified by special circumstances ". He did not believe that the Commission was prepared to delete the latter phrase, because it attached considerable weight to it and its deletion would make the article too rigid.

30. He therefore concluded that the wording of the articles should be retained, subject to the amendment proposed by the United Kingdom Government, and that his own proposal for combining articles 12 and 14 should be referred to the Drafting Committee.

31. Mr. Krylov questioned the use of the term " baseline " in paragraph 1 of the Special Rapporteur's draft. The term " straight baseline " had been used hitherto. It was probably merely a drafting point.

32. Mr. FRANÇOIS, Special Rapporteur, explained that he had been trying to find a term to cover both the normal tide-line system and the straight-baseline system. The term might be explained in the commentary.

33. Mr. PAL suggested that, in view of the fact that the Commission had not been able to take a decision on the breadth of the territorial sea, it might be preferable to adopt the phrase used by the United Kingdom in its amendment to article 14, paragraph 1—" the principle of the median line "—rather than the phrase " the median line " in the Commission's draft. Difficulties might arise in applying the median line itself. If a strait was eight miles broad, and one coastal State claimed a territorial sea six miles in breadth and the other three miles in breadth, the former would lose two miles of territorial sea and the latter gain one mile, where the median line ran at four miles.

34. Mr. FRANÇOIS, Special Rapporteur, said that all members agreed in principle with Mr. Pal's point, but it was primarily a matter of drafting. The case might perhaps be covered by the phrase " unless another boundary line is justified by special circumstances ". The point might be left to the Drafting Committee.

35. Mr. SANDSTRÖM said that he was not certain that all members agreed in principle with Mr. Pal's point. It was open to question whether the median line could be applied when the waters of a strait between the coasts of two States were not wide enough to give to both the territorial sea which they usually claimed.

36. Mr. SPIROPOULOS thought that another case to be taken into consideration was that of a strait ten miles in breadth between the coasts of a State which claimed a three-mile limit and a State which claimed a twelve-mile limit. It might be asked whether the latter would receive only five miles of its twelve miles and the former would obtain two miles more than it usually claimed.

37. Mr. FRANÇOIS, Special Rapporteur, admitted that the question was insoluble when two States claimed different breadths for their territorial seas. There might be a solution where those claims were recognized by international law, or, in other words, were regarded as historic rights, but there seemed to be no solution where the breadth of the territorial sea was disputed. The same situation would arise with regard to many other articles and could not be solved until the question of the breadth of the territorial sea had been decided.

38. Sir Gerald FITZMAURICE observed that the Special Rapporteur's point was very pertinent. The United Kingdom Government, in a long and detailed comment on the breadth of the territorial sea submitted in 1955 (A/2934, pp. 41-43), had expressed the view that one of the most important matters to be settled was that of a uniform breadth for the territorial sea. At the present session some members had expressed views, and had reflected views expressed outside the Commission, that the breadth should not be uniform throughout the world, but that the regime might differ from region to region, or even from country to country. The point made by the Special Rapporteur illustrated the practical difficulties that resulted from such a doctrine.

39. The United Kingdom Government had made a somewhat similar proposal (A/CN.4/99/Add.1) in connexion with article 7 on the continental shelf. That proposal should be broadly applicable in the present context, although it would not cover all special cases.

40. Mr. SANDSTRÖM observed that a case in point was the Sound, between Sweden and Denmark. Sweden applied the four-mile limit for its territorial sea and Denmark the three-mile limit, but the two countries had concluded an agreement to apply the median line.

41. Mr. KRYLOV said that the Special Rapporteur was perfectly correct; the only possible solution was to conclude specific agreements. The case mentioned by Mr. Spiropoulos could not be solved in international law, although many somewhat similar cases were dealt with in civil law. The Commission should be prudent and refrain from going too far; it could not possibly decide all cases by means of the draft articles.

42. Mr. ZOUREK observed that paragraph 3 of the draft proposed by the Special Rapporteur provided, in effect, that when a State held the coasts on both sides of a strait, the waters could be deemed to be its territorial sea. Many straits, however, especially in States formed of groups of islands, were regarded as internal waters when they were not required for international navigation. The Special Rapporteur's draft excluded that possibility.

43. Sir Gerald FITZMAURICE said that there might be some justification for regarding as territorial waters an internal sea connected with the high seas by straits at each end of it, but there could be no justification for regarding such waters as internal waters if the sea were more than a certain breadth. He could see some moral justification for regarding such waters as territorial sea rather than high seas, but to regard them as internal waters would lead to an impossible situation. It would mean that there would be a right of passage from the high seas through the first strait, no right of passage through the waters into which it led, and then again a right of passage through the second strait leading out into the high seas.

44. Mr. SANDSTRÖM pointed out that the question of passage was often regulated by treaty.

45. Mr. SPIROPOULOS agreed with Sir Gerald Fitzmaurice. The question had been discussed at the

1930 Hague Conference. It would be contrary to all the fundamental rules to regard a very broad sea lying between two straits as internal waters; at most, it might be regarded as a territorial sea.

46. Mr. SCELLE observed that no absolute definition could be established to cover special cases. In the case raised by Sir Gerald Fitzmaurice the waters would be part of the high seas and could not possibly be internal waters. Such cases almost always resulted from political circumstances following a political dispute. The Commission should not enter into such details.

The combined draft for articles 12 and 14 prepared by the Special Rapporteur (A/CN.4/97/Add.2, para. 88) was adopted, subject to consideration by the Drafting Committee.

Article 13: Delimitation of the territorial sea at the mouth of a river

47. Mr. FRANÇOIS, Special Rapporteur, drew attention to a proposal by the Indian Government for an addition to article 13 (A/CN.4/99/Add.3), reading as follows:

> Provided that if there is a port situated at or near the mouth of a river or on the estuary into which a river flows, the territorial sea shall be measured from such outermost limits as may be notified by the Government or the port authority having jurisdiction over the port, in the interest of pilotage and safe navigation to and from the port.

The Commission must decide whether a State should have such extensive discretionary powers to fix the limits of its territorial sea.

48. Mr. SANDSTRÖM asked how the Indian Government's proposal differed from the provisions of article 8.

49. Mr. FRANÇOIS, Special Rapporteur, replied that it differed a great deal since article 8 dealt with permanent harbour works which formed an integral part of the harbour system. The Indian Government's proposal would mean the extension of the territorial sea to any breadth which the coastal State considered necessary in the interest of pilotage and safe navigation to and from the port. It might consider that the outermost limit required for those purposes might be as much as, for instance, four miles, and only beyond the four-mile limit would the territorial sea begin.

50. Mr. PAL said that he would not formally move the Indian Government's proposal, for which he himself was in no way responsible. So far as he understood it, that proposal dealt with the relative position of rivers and the sea, whereas article 8 dealt with the position of ports. If the Indian Government's proposal was not accepted, the territorial sea would be measured from the outermost permanent harbour works which formed an integral part of the harbour system. The Indian Government's proposal differed from article 8 in that it would measure the territorial sea from the outermost limits notified by the Government. Undoubtedly, the provisions of article 8 must have been taken into account when the proposal had been made, since it could not have been intended to confer completely discretionary powers. It might have been intended to cover special difficulties encountered with regard to pilotage on rivers in India.

Article 13 was adopted without change.

Article 15: Delimitation of the territorial sea of two adjacent States

51. Mr. FRANÇOIS, Special Rapporteur, said that the Norwegian Government had asked whether articles 14 and 15 might not be combined. He did not think that that would be possible because their subjects were quite different. Both, it was true, dealt with the median line, but in article 14 it was the median line between two coasts opposite each other, whereas in article 15 it was the delimitation of adjacent waters by application of the principle of equidistance from the nearest points on the respective baselines. The method was essentially different; to merge the two articles would create confusion.

52. The United Kingdom Government had agreed to the text.

53. The Yugoslav Government had made the same proposal[11] as in regard to article 14. The Commission had not accepted the latter proposal.

54. He therefore suggested that the text of article 15 be adopted as it stood.

55. Mr. ZOUREK proposed that paragraph 1 of the article should be re-drafted in the same way as article 7 relating to the continental shelf, subject to the approval of the Drafting Committee.[12] The article should stipulate, first, the principle that the delimitation of the boundary should be determined by agreement between the parties concerned, and, secondly, that only if negotiations broke down should the principle incorporated in article 15 be applied.

56. Mr. FRANÇOIS, Special Rapporteur, agreed with Mr. Zourek, but suggested that his amendment should be considered by the Drafting Committee before the Commission finally adopted it.

Subject to re-drafting by the Drafting Committee, article 15 with Mr. Zourek's amendment was adopted.

Article 16: Meaning of the right of innocent passage

57. Mr. FRANÇOIS, Sepcial Rapporteur, drew attention to the Government of India's proposal to add the words " except in times of war or emergency declared by the coastal State " (A/CN.4/97/Add.2, para. 96). He would point out, however, that a distinction should be drawn between a state of war and a state of emergency. With regard to the former, all the rules concerning passage would apply only in time of peace and the Government of India's point could be adequately met by a statement to that effect in the comment. The proposal with regard to a state of emergency was a different matter entirely, and the Commission would have to decide whether to approve the far-reaching decision of the admissibility of an exception for a state of emergency unilaterally declared by the State in question.

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[11] See para. 29 above.

[12] A/CN.4/SR.360, para. 30.

58. The Commission would be hardly likely to accept the contention of the Government of Israel that paragraph 3 of the draft rendered the effect of paragraph 1 completely nugatory. Paragraph 3 merely restricted the right of innocent passage to vessels proceeding on their lawful occasions; the stipulation that passage was innocent if " the vessel does not use the territorial sea for committing any acts prejudicial to the security of the coastal State..." should be maintained. The Government of Israel had raised numerous other objections of detail which, however, did not give rise to any specific proposals.

59. He was not clear as to the purpose of the United Kingdom Government's proposal for the insertion in paragraph 3, after the words " coastal State ", of the words " or for the purpose of avoiding import or export controls or customs duties of the coastal State ". He had the impression that the point was already covered by the text as it stood.

60. The Yugoslav amendment (A/CN.4/97/Add.2, para. 103), which was in the nature of a drafting change, might be left for consideration by the Drafting Committee. There was general agreement that the phrase " public order " was not satisfactory. Subject to the re-wording of paragraph 3, therefore, and to a decision on the question raised by the Government of India, the draft article could be adopted.

61. Mr. KRYLOV said the article should be retained as drafted. The Government of India's proposal could be adequately met by an explicit statement in the comment that the rules concerning passage would be applicable only in time of peace. He recalled that in the Montreux Convention of 1936,[13] Turkey had gained its point by the insertion of an article based on a state of emergency. In the light of article 33 of the Charter of the United Nations, however, any such reference were better omitted, since it might be interpreted as a misconception of the Charter. In any case, a state of emergency was extremely difficult to define.

62. Mr. SANDSTRÖM, concurring, adduced the further argument that the question was already settled by the provisions of article 18.

63. Mr. PAL pointed out that the proposal of the Government of India had already been considered by the Commission at its seventh session (A/2934, p. 30); he was not disposed to raise it again.

64. Sir Gerald FITZMAURICE understood that the United Kingdom proposal (A/CN.4/97/Add.2, para. 101) had been inspired by the consideration that a vessel entering the territorial sea for the purpose of smuggling or with the intent to avoid the import or export controls of the coastal State could not be regarded as being on innocent passage. From that angle, the case hardly seemed to be covered. Paragraph 3 of article 16 referred to " acts prejudicial to the security of the coastal State ", but it was doubtful whether an infringement of customs regulations would fall under the heading of an act prejudicial to security. Paragraph 1 of article 18 also referred to security, with the addition of " such other of its interests as it is authorized to protect under the present rules ". A rule authorizing the protection of that specific interest then had to be sought, and it was not clear where it could be found. The specific provisions (*a*)-(*e*) of article 19 did not apply, although the case might be regarded as being covered by the general phrase at the beginning of that article that "Foreign vessels exercising the right of passage shall comply with the laws and regulations enacted by the coastal State etc.". The whole process seemed rather circumambulatory. The case was an important one and the customs authorities in the United Kingdom doubted whether the article as drafted really covered it.

65. Mr. ZOUREK, while endorsing the principle behind the United Kingdom proposal, said that the point was surely already covered by the existing provisions in paragraph 3 of article 16 and the general stipulation at the beginning of article 19. He could not conceive that the " laws and regulations enacted by the coastal State " did not embrace customs regulations. If, however, the text was considered insufficiently explicit, a specific stipulation with regard to customs control could be added to article 19.

66. Mr. PAL, disagreeing, said that in a matter of such importance no room should be left for any ambiguity. Even the detailed provisions of article 19 were inadequate, and article 16 merely referred to the security aspect. The analogy of the article on the contiguous zone, which had specifically referred to the exercise by the coastal State of the control necessary to prevent and punish the infringement, within the territorial sea, of its customs, fiscal or sanitary regulations, was a useful guide and the United Kingdom proposal, which he would support, would bring article 16 into line with it.

67. Mr. SANDSTRÖM said that, since the existing draft did not meet the point raised, he would accept the proposal of the United Kingdom Government.

68. Sir Gerald FITZMAURICE said that, in view of the support given by Mr. Pal and Mr. Sandström, he would formally propose the addition in paragraph 3, after the words " coastal State ", of the words " or for the purpose of avoiding import or export controls or customs duties of the coastal State ".

69. Mr. ZOUREK, while fully supporting the principle inspiring the proposal, reiterated his opinion that the opening phrase of article 19, which was of general application, adequately covered the case in question.

70. Mr. SPIROPOULOS said that Mr. Zourek's point would be valid if it were not for the phrase continuing the article, which read: " in conformity with these rules and other rules of international law ". It was highly doubtful whether the existing rules of international law did cover the case, and in view of that uncertainty it would be advisable to make the text quite clear by accepting the proposal, either in the form of an article or as an explanation in the comment.

[13] League of Nations Treaty Series, Vol. CLXXIII, 1936-37, No. 4015—Convention regarding the Regime of the Straits. Signed at Montreux, 20 July 1936, Article 6.

71. Mr. SANDSTRÖM pointed out the difference in scope between the provisions of articles 16 and 19. The former recognized the right of innocent passage, whereas the latter laid stress on the obligations of vessels exercising that right. The distinction led to different consequences in that under article 16, in certain circumstances, a vessel could be prohibited from exercising that right. Under article 19, the action of the local authorities would be limited to measures of control over ships which were already exercising the right of innocent passage.

72. Mr. ZOUREK disagreed and urged that, in addition to the single case it was proposed to add to paragraph 3 of article 16, there were many other cases that would also remove the qualification of innocence in respect of the right of passage. For instance, sub-paragraph (*d*) of article 19 referred to rights of fishing; if a vessel entered the territorial sea of a coastal State in order to fish, would that be regarded as innocent passage? Or to take the other cases of acts prejudicial to the security or infringing other regulations of the coastal State, it was obvious that under article 19 they constituted offences. If desired, the article could be completed, although in view of the words " in particular " that was not necessary. A strictly logical approach would demand either the specification of all conceivable cases or none. There was no justification for specifying in article 16 just a single case.

73. Sir Gerald FITZMAURICE said that the situation that Mr. Zourek deprecated did in fact exist, because paragraph 3 of article 16, far from specifying all conceivable cases, referred only to acts prejudicial to the security of the coastal State as removing from the passage the qualification of innocence; in other words, even on the existing basis none of the cases under article 19 made the passage non-innocent. The mere addition of another case to paragraph 3 would in no way alter the situation in that respect.

74. Mr. Sandström had rightly pointed out that the distinction between article 16 and 19 was that in the former, irrespective of any act of the vessel in the territorial sea, passage could be refused on the grounds that it was not innocent. Under the latter article, a right of passage existed and could not be withheld, although penalties could be imposed for any infringement of the coastal State's regulations during that passage.

75. Mr. ZOUREK said that he could not accept Sir Gerald Fitzmaurice's contention that paragraph 3 of article 16 limited non-innocence of passage to cases of the commission of an act prejudicial to the security of the coastal State. The following words, " or contrary to the present rules, or to other rules of international law ", added two further conditions, making three in all. Moreover, the case was adequately covered by the obligation in article 19 to comply with the laws and regulations of the coastal State. If, however, the Commission decided than an additional specification must be inserted, it should be added to article 19 and not to article 16.

76. Mr. HSU said that there was no doubt about the soundness of the motive behind the United Kingdom proposal. The question arose, however, whether article 16 was the appropriate place to insert such a provision. The case in question was incidental to trade, and it might therefore be argued that in such a context it was a misnomer to withhold the classification of innocence from the passage. Trade in itself was an innocent occupation.

77. Mr. SANDSTRÖM, stressing the essential differences between the provisions of articles 16 and 19, said that paragraph 3 of article 16 covered the case of the whole of the passage through the territorial sea being rendered non-innocent by the commission of certain acts, whereas article 19 referred to isolated incidents during passage.

78. Mr. PAL said that the discussion showed the desirability of amending paragraph 3. Since other States were not bound to recognize the customs regulations of a coastal State, an express reference to the case quoted by the United Kingdom was required.

79. Mr. ZOUREK was not opposed to the principle of the proposal; he merely maintained that the case was covered by the phrase " contrary to the present rules ".

80. Sir Gerald FITZMAURICE explained that the United Kingdom proposal was aimed at the activities of so-called " hovering " vessels, which waited just outside the territorial limits for an opportunity to proceed inside in order to engage in smuggling. Many countries suffering from such activities had enacted legislation to put a stop to that practice.

81. Mr. HSU said that in view of Sir Gerald Fitzmaurice's explanation, he would accept his proposal.

82. Mr. SANDSTRÖM proposed that the point be met by an explicit reference to the case in the comment to the article.

83. Mr. ZOUREK, reiterating his endorsement to the principle of the proposal, said that a reference in paragraph 3 of article 16 to the provisions of article 19, thereby linking them together, would cover the case, which was only one among many possibilities. Mr. Sandström's proposal, however, was acceptable.

84. Sir Gerald FITZMAURICE said he could accept Mr. Sandström's proposal, provided that the reference was made in specific relation to article 16.

Article 16 was adopted, subject to reference to Sir Gerald Fitzmaurice's amendment being made in the comment to that article.

Article 17: Duties of the coastal State

85. Mr. FRANÇOIS, Special Rapporteur, said that the Yugoslav Government wished articles 17 and 19 to be transposed so that the interests of the coastal State would be referred to before those of navigation. It also suggested replacement of the words " principle of the freedom of communication " in paragraph 1 of the article by the words " innocent passage ".

86. He was not in favour of acting on the first suggestion, especially as it was linked with the claim that the interests of the coastal State should have precedence over those of navigation. The Commission had carefully considered the arrangement of the articles in the draft and the order it had adopted was probably the best under the circum-

stances. The second suggestion involved a relatively unimportant drafting change and might well be acted upon. The term " innocent passage " was certainly more precise than the words used in the article.

It was agreed to substitute the words " innocent passage " for the words " principle of the freedom of communication " in paragraph 1 of article 17.

Article 17, as thus amended, was adopted.

Article 18: Rights of protection of the coastal State

87. Mr. FRANÇOIS, Special Rapporteur, said that the Turkish Government doubted the advisability of formulating any rules on passage of vessels through straits. The Turkish Government's comment was clearly inspired by its concern to preserve the status of the straits of the Bosphorus and the Dardanelles as fixed by international convention. It was going rather far, however, to suggest that no general rules be enunciated for the large number of straits in the world not covered by international agreements. It should be sufficient if the Turkish Government were given the assurance that the Commission's article was not intended to affect straits whose status was governed by conventions.

88. The Turkish Government also suggested that paragraph 4 begin with the words " In peace time " and that a clause be inserted expressly reserving the rights of the coastal State in time of war, or when it considered itself under the menace of war, or when it was acting in conformity with its rights and obligations as a Member of the United Nations. The first and second suggestions were already covered by the decision of the Commission that all its rules applied to time of peace. As to the question of the menace of war, he understood it to be the Commission's view that such a concept was too vague to serve as a justification for the suspension of the right of passage. Some reference to the question might, however, be made in the comment on the article. The last suggestion dealt with a question to which Mr. Salamanca had frequently drawn attention. The Commission might consider including a clause reserving the rights of the coastal State when acting in conformity with its rights and obligations as a Member of the United Nations.

89. The Government of Israel claimed that, regardless of their position as territorial sea, straits in the geographical sense which constituted the only access to a harbour belonging to another State could under no circumstances fall under the regime of the territorial sea. It appeared to have in mind the Gulf of Aqaba, at the head of which Israel had a port to which the only access was through the territorial seas of other coastal States, the width of the gulf being never more than twice that of the territorial sea. The case was exceptional—possibly unique. He wondered whether Faris Bey el-Khouri would give his views on whether the Commission should insert a stipulation on the lines suggested by Israel, either in article 18 or in the commentary on it.

90. The Government of Norway suggested that the words " and other rules of international law " be added to the words " under the present rules " at the end of paragraph 1. It would be more consistent with the text of other articles adopted by the Commission if such an addendum were made.

91. The United Kingdom Government claimed that paragraph 1 of the article covered much the same ground as paragraph 3 of article 16. He could not agree with that claim and was anxious to retain paragraph 1. Paragraph 3 of article 16 merely defined innocent passage in general. Paragraph 1 of article 18, on the other hand, dealt with a special case in which the coastal State was granted an exceptional right which did not emerge at all from the wording of article 16.

92. The Yugoslav Government proposed the following text for paragraph 1:

> 1. A coastal State may take the necessary steps in its territorial sea to protect itself against any endangering of its security and public order, security of navigation, customs, sanitary and other interests.

The Commission did not favour references to " public order ",[14] and he could not recommend the amendment.

93. Faris Bey el-KHOURI said that the case of the Gulf of Aqaba was exceptional. Though the Commission should study the suggestion of the Israel Government he did not consider that it should formulate a general rule on the subject. To forbid under any circumstances the suspension of the innocent passage of foreign vessels through straits such as those described by the Israel Government would be unfair to the coastal States concerned. A port was not a natural feature existing from time immemorial, and if a State saw fit to establish a port at a point to which the only access was through the territorial waters of other States, it must accept the consequences. It was always open to the State in question to establish a port elsewhere or to conclude agreements with the other coastal States on the question of access to the port.

94. Sir Gerald FITZMAURICE said that it was difficult to see from the text what exactly the Israel Government had in mind. Vessels would in any case enjoy the right of innocent passage through a gulf consisting entirely of the territorial waters of coastal States to a port belonging to a third State. He wondered whether the situation envisaged by the Israel Government was not already covered by article 18.

95. He could not agree with Faris Bey el-Khouri that a State establishing a port in such a situation must accept the consequences. Under both municipal and international law, a person or State setting up a building on a river had certain rights *vis-à-vis* the persons or States controlling the flow of that river upstream. A State had a perfect right to establish a port on a gulf such as that envisaged and shipping should have normal access to it.

96. Mr. FRANÇOIS, Special Rapporteur, pointed out that paragraph 4 of article 18 related to straits between two parts of the high seas, and so did not apply to the Gulf of Aqaba which, though open to the high seas at one end, merely gave access to a port at the other.

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[14] See para. 60 above.

97. Mr. PAL said that the Israel Government appeared to consider that coastal States could not claim any territorial sea in straits constituting the only access to a harbour belonging to a third State. Such a claim called for serious consideration. He was not, however, prepared to accept it at that stage.

98. Faris Bey el-KHOURI said that he could not accept Sir Gerald Fitzmaurice's argument that a State was free to establish a port to which the only access would be through the territorial seas of other States. The case of rivers was quite different.

99. Mr. SPIROPOULOS wondered whether the problem could not be assimilated to that of bays. The right of access to a port such as that mentioned could be based on international agreements or on long usage. Strictly speaking, however, such a consideration was irrelevant, since the Commission was concerned with establishing general rules.

100. Mr. SANDSTRÖM thought that the case under consideration was governed by the provisions of article 16.

101. Sir Gerald FITZMAURICE agreed with Mr. Sandström that the case was governed by article 16 so far as the right of innocent passage was concerned. However, paragraph 3 of article 18 entitled the coastal State to suspend the right of passage under certain circumstances, while paragraph 4 stipulated that there must be no such suspension of the innocent passage of foreign vessels through straits normally used for international navigation between two ports of the high seas. The issue raised in the Israel Government's comment was whether the exception provided for in paragraph 4 could be extended to the case of straits which did not communicate with two parts of the high seas but provided the only means of access to the port of another country.

102. Mr. KRYLOV said that the question sounded far more like a case for the International Court of Justice than a matter on which the Commission could enunciate a general rule. The most that could be done would be to refer to the problem in the commentary on article 18.

After further discussion, *it was decided that the question raised by the Israel Government related to an exceptional case which did not lend itself to the formulation of a general rule.*

103. Mr. ZOUREK proposed that the Drafting Committee consider the possibility of substituting the words " straits of international interest " for the words " straits normally used for international navigation " in paragraph 4 of article 18.

Article 18 was referred to the Drafting Committee for incorporation of the addendum suggested by the Norwegian Government and consideration of Mr. Zourek's amendment.

The meeting rose at 1.10 p.m.

367th MEETING

Thursday, 14 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. 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/2693, A/2934, A/CN.4/97/Add.2, A/CN.4/99 and Add.1-2) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the draft articles on the regime of the territorial sea.

Article 19: Duties of foreign vessels during their passage

2. Mr. FRANÇOIS, Special Rapporteur, said that the Government of India suggested the addition of the following text as sub-paragraph (*a*) of the article:

The traffic in arms, ammunition and implements of war and such traffic in other goods and materials as is carried out directly or indirectly for the purpose of supplying a military establishment.

If the suggestion related to the safety of traffic, the case was covered by the existing sub-paragraph (*a*). If, however, as was more probable, it concerned intervention by a coastal State in the transport of material for the military forces of another country, it would constitute a serious restriction on the right of passage and so would require careful consideration.

3. The Government of Turkey suggested the addition of a second paragraph to read: " Submarines shall navigate on the surface." There was already such a stipulation in paragraph 3 of article 25 regarding the passage of warships, but the Government of Turkey was in favour of removing that paragraph from article 25