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Summary record of the 378th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
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be viewed as a whole. The present text was based on expert fisheries opinion which the Commission had received to the effect that, if too much time were allowed to elapse between the date when the unilateral measures were put into effect and the date when the arbitral commission rendered its award, one, or in some cases even two, entire fishing seasons might be lost, with disastrous consequences for fishermen. The constitution of the Commission might well entail considerable consultation and correspondence, but there was no reason why the parties should not be preparing their cases meantime so as to be ready to submit them to the commission as soon as it was constituted. The important thing was that the total period to which he had referred should not be extended, and in order to meet the objections made to the present text of paragraph 5 he suggested that the words " five " and " three " be transposed and that the word " absolute " be deleted before the word " necessity ".

Sir Gerald Fitzmaurice's amendment was adopted, with a corresponding change in the comment.

78. Replying to a question by the CHAIRMAN, Mr. ZOUREK said that he did not insist on a vote on the revised text of article 31, but that he maintained his opposition to it, for the reasons which he had already indicated.[3]

79. Mr. KRYLOV said that he was also opposed to the revised text of article 31, for the same reasons as had led him to the former text.[4]

Article 32

80. Mr. KRYLOV said that in general he saw little point in referring in the comment to proposals on which the Commission had for one reason or another taken no action. In the case of article 32, he recalled that Mr. Edmonds had submitted proposals which, though of great interest in themselves, had been considered by the Commission to be too detailed for inclusion in the article itself. Those proposals now appeared in the comment on the article, where they were set out at considerable length. Since the Commission had not adopted those proposals, or even examined them in detail, he did not understand why it was felt necessary to incorporate them in the comment.

81. Mr. FRANÇOIS, Rapporteur, and Mr. EDMONDS recalled that the Commission had formally decided[5] that Mr. Edmonds should prepare a text of his proposals for inclusion in the comment, and the CHAIRMAN added that that had been done on his proposal, because he had felt it was desirable to illustrate the criteria listed in article 29.

82. Mr. KRYLOV said that the fact remained that according to the comment " the Commission wished to state " certain principles which in fact it had neither examined in detail nor approved. He did not, however, wish to press the matter further.

83. Replying to observations by Mr. ZOUREK and Mr. SANDSTRÖM, Mr. FRANÇOIS, Rapporteur, agreed that the intention of paragraph 4 of the comment could perhaps be expressed more clearly both in the English original and in the French translation. He suggested that he revise the wording with Mr. Edmonds.

It was so agreed.

Article 33

There were no observations on article 33 or the comment thereto.

The meeting rose at 1.05 p.m.

[3] A/CN.4/SR.352 paras. 72-74 and A/CN.4/SR.353, paras. 2 and 3.

[4] A/CN.4/SR.352, paras. 42-45.

[5] A/CN.4/SR.357, para. 18.

378th MEETING

Friday, 29 June 1956

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Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

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

Chapter II: Law of the sea

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

Article 33 A: Fisheries conducted by means of equipment embedded in the floor of the sea

1. The CHAIRMAN invited the Commission to continue its consideration of the part of the report on the law of the sea dealing with the high seas.

2. Replying to questions by Sir Gerald FITZMAURICE and Mr. KRYLOV, Mr. FRANÇOIS, Rapporteur, pointed out that the text of the article and the third

and fourth paragraphs of the comment had been taken from the draft articles on the continental shelf and related subjects adopted by the Commission at its third session.[1] As he had already pointed out at the 359th meeting,[2] the article had been omitted from the draft articles approved at the seventh session, in consequence of the decision to substitute the words " natural resources " for " mineral resources " in the draft articles on the continental shelf; at the time the Commission had thought that that change made retention of an article on sedentary fisheries unnecessary. In the observations to which the text had given rise, however, it had been pointed out that sedentary fisheries were of two kinds, those where the species caught were attached to the bed of the sea and those where the equipment used was embedded in the floor of the sea, and that the second type was not covered by the 1955 draft. As he regarded that observation as justified, he had proposed, and the Commission had agreed,[3] that the article which had appeared in the draft articles adopted at the third session should be re-inserted in the text, its scope, however, being limited to fisheries which were sedentary by virtue of the equipment used.

3. Sir Gerald FITZMAURICE suggested that it should be briefly indicated in the comment that the text had already been approved, in a slightly different form, at the Commission's third session. He also suggested the addition of the following words at the end of the article itself: " and must not interfere with other fisheries ".

4. Mr. FRANÇOIS, Rapporteur, said that although he had no objection to the suggested addition to the comment, the suggested addition to the text of the article raised the question whether it was right that other fisheries should, as it were, be placed in a privileged position *vis-à-vis* the fisheries referred to in article 33 A.

5. Sir Gerald FITZMAURICE felt that the Rapporteur had misunderstood his suggestion, the sole purpose of which was to make plain that although a State could regulate fisheries conducted by means of equipment embedded in the floor of the sea in an area of the high seas adjacent to its territorial sea, in doing so it could not enact any measures which would have the effect of regulating other fisheries in the same area.

6. Mr. PAL suggested that article 33 A should contain the same kind of provision as article 27, whereby States whose nationals had not previously engaged in sedentary fisheries of the type referred to in a particular area, but wished to do so after the coastal State had enacted regulations governing that type of fisheries in the area, could if they wished appeal against such measures to the arbitral commission provided for in article 31.

7. Mr. FRANÇOIS, Rapporteur, said that the aim of article 33 A was to codify an existing situation. Fisheries of the type referred to were mainly confined to the North African littoral. They were engaged in almost exclusively by the local population, and the eventuality envisaged by Mr. Pal seemed most unlikely ever to arise. To provide for it was in his view unnecessary; moreover, to give non-coastal States the right suggested might be said to run counter to the historic rights of the coastal State.

8. Mr. ZOUREK presumed that by the phrase " the regulation of fisheries ", the Rapporteur was not in article 33 A referring simply to conservation measures, since otherwise articles 25 to 33 of the draft would have sufficed.

9. Mr. FRANÇOIS, Rapporteur, agreed that he had more than conservation measures in mind. The purpose of the regulations might, for example, be to maintain order in the area.

10. Mr. AMADO wondered whether the article was really necessary in view of the fact that it would apply in only a very few special cases; it could well be deleted.

11. Mr. SANDSTRÖM, referring to Sir Gerald Fitzmaurice's suggestion that the words " and must not interfere with other fisheries " be added at the end of the article, warned the Commission against taking away with one hand what it gave with the other. Sedentary fisheries of the type referred to would inevitably interfere with other fisheries, and to say that they must not was tantamount to banning them altogether.

12. Sir Gerald FITZMAURICE said that Mr. Sandström's remarks made him fear that unless some proviso such as he suggested were added, other types of fishery might be totally eliminated from the areas in question, which, even if few in number, were often considerable in extent. The proviso that non-nationals should be permitted to participate in the fisheries on an equal footing with nationals was without any practical value, since by the nature of the case non-nationals were unlikely to engage in fisheries conducted by means of equipment which had to be embedded in the floor of the sea.

13. Mr. SANDSTRÖM said that whatever regulations were enacted by the coastal State, they could not help interfering with other fisheries from the mere fact of their permitting sedentary fisheries of the type referred to. In the territorial sea off southern Sweden, for example, posts were embedded in the floor of the sea as part of the equipment used for catching eels; there were regulations governing the minimum distance between such posts and so on, but whatever regulations were enacted could not alter the fact that the placing of such posts made it impossible to carry out trawling in the area, for fear of damage to the nets.

14. Sir Gerald FITZMAURICE said that his concern was only increased by what Mr. Sandström had said. It was true that in the cases referred to the area concerned was part of the territorial sea, but adoption of the text which the Commission was now considering could, it seemed, clearly result in trawling being made impossible over what were, as he had already pointed out, quite considerable areas of the high seas.

15. Mr. SANDSTRÖM said that if the Commission recognized the coastal States' historic right to regulate

[1] *Official Records of the General Assembly, sixth session, Supplement No. 9* (A/1858), chapter VII and annex.
[2] A/CN.4/SR.359, paras. 61 to 77.
[3] A/CN.4/SR.359, paras. 69 and 77.

sedentary fisheries in the areas in question it must accept the consequences which derived therefrom.

16. Sir Gerald FITZMAURICE agreed that where there was a genuine historic right the Commission could only recognize it and accept the consequences therefrom. His fears would be considerably lessened if he could be sure that the article would never be used as the basis for claiming a new right, on the pretext of thirty or forty years' practice.

17. Mr. KRYLOV drew attention to the word " long " in the phrase " where such fisheries have long been maintained and conducted by its nationals ".

18. Sir Gerald FITZMAURICE withdrew his suggestion, but requested that the Rapporteur insert in the comment a statement to the effect that the article applied only in the case of a genuine, long-established historic right.

19. Mr. FRANÇOIS, Rapporteur, agreed to make such an insertion. With regard to Mr. Amado's suggestion that the whole article could be deleted, he pointed out that writers devoted a good deal of attention to the question, which was of some importance.

20. At the request of Mr. ZOUREK, the CHAIRMAN put article 33 A to the vote, as the text had not yet been approved at the present session.

Article 33 A was adopted by 10 votes to none, with 2 abstentions.

Sub-section C: Submarine cables and pipelines (articles 34-38)

Article 34

There were no observations on article 34 or on the comment thereto.

Articles 35-37

There were no observations on these articles or on the comments thereto.

Article 38

21. Mr. ZOUREK and Mr. KRYLOV proposed deletion from the comment of the words " although perhaps superfluous ".

22. Mr. FRANÇOIS, Rapporteur, said he had no objection to deleting them, as he had merely inserted the words in question in an attempt to reflect the fact that although the Commission had apparently approved the inclusion of the phrase, it had done so without enthusiasm and many members had expressed the view that the phrase was superfluous.

The proposal to delete the words " although perhaps superfluous " was adopted.

Article 39: Contiguous zone

23. The CHAIRMAN, speaking as a member of the Commission and referring to paragraph 2 of the article, pointed out that the contiguous zone was recognized for the purpose of preventing or punishing infringements of the law within the territorial sea. That being so, the internal limit of the contiguous zone should logically be the external limit of the territorial sea. In view of the fact that the rights conferred on the coastal State in the contiguous zone were very limited, he did not think there could be any valid objection to amending article 39, paragraph 2, in the interests of logic, to read as follows: " The contiguous zone may not extend beyond twelve miles from the outer limit of the territorial sea." Although he had no wish to reopen the whole discussion on the contiguous zone, he recalled that the question of its maximum breadth had been reserved in the Commission and discussed only in the Drafting Committee.

24. Faris Bey el-KHOURI pointed out that the Commission had, however, agreed that the total breadth of the territorial sea and the contiguous zone should not exceed twelve miles. Adoption of the text suggested by the Chairman would open the way, in present circumstances, to exactly doubling that figure.

25. Mr. SPIROPOULOS agreed that some Member States would probably criticize article 39, paragraph 2, for the reason mentioned by Mr. García-Amador. That paragraph, however, was by no means the only one in the draft which would provoke criticism and comment. Such criticisms and comments could be made, and answered, in the proposed diplomatic conference. As far as the Commission was concerned, it would, in his view, be extremely undesirable to reopen discussion of the contiguous zone.

26. Mr. ZOUREK felt that in logic there was much to be said for the Chairman's suggestion. The information contained in the Special Rapporteur's previous reports on the subject showed that many States already claimed a contiguous zone extending more than twelve miles from the inner limit of the territorial sea.

27. Sir Gerald FITZMAURICE said that although he appreciated the logic of the Chairman's remarks, another, and in his view higher, logic pointed the other way. The whole concept of the contiguous zone had derived from and was bound up with the three-mile limit, which some States had felt was insufficient for certain special purposes. If a State claimed a breadth of territorial sea exceeding three miles, it seemed logical to argue that it no longer needed a contiguous zone at all.

28. Mr. PAL pointed out that governments had already had an opportunity to comment on the clause to which the Chairman objected, since it had figured in the Commission's report on its fifth session, but that none of them had in fact commented.

29. The CHAIRMAN said that he appreciated the force of all that had been said and would therefore not press his suggestion. He had only wished to draw the Commission's attention to the fact that the paragraph was, in his view, certain to come in for serious criticism.

30. Mr. ZOUREK referred to the last two sentences of the fourth paragraph of the comment, which read as follows: " In so far as measures of self-defence against an imminent and direct threat to the security of the State are concerned, it is clear that the right to take protective measures belongs to States *ipso jure*, not only in the

contiguous zone, but also outside it. These rights of self-defence have been generally recognized in the United Nations Charter; it would be unnecessary and even undesirable to grant them specially for the contiguous zone." He pointed out that the United Nations Charter referred only to the right of self-defence in the event of armed attack and said nothing about the much more difficult question of the right of self-defence against other forms of aggression. Moreover, a mere threat to the security of the State did not authorize resort to force. To contend the contrary would mean approving preventive war and would be a breach of the Charter. In any event, that question did not fall within the Commission's programme, but was rather one for the special committee for a definition of aggression. He accordingly suggested that the two sentences in question be omitted.

31. Mr. KRYLOV supported Mr. Zourek's suggestion.

32. The CHAIRMAN agreed that the specific reference to the United Nations Charter was perhaps inappropriate, but felt the Commission would be justified in saying that the right in question was generally recognized by international law.

33. Mr. SALAMANCA said he would have no objection to deleting the two sentences, although he was not convinced that the reference to the Charter was inappropriate. Article 51 was not the only one which was relevant.

34. Mr. SPIROPOULOS suggested that the last two sentences of the fourth paragraph of the comment be replaced by a single sentence reading as follows:

In so far as measures of self-defence against an imminent and direct threat to the security of the State are concerned, the Commission refers to the general principles of international law and the principles of the United Nations Charter.

35. Mr. ZOUREK said he could accept that text, in favour of which he withdrew his suggestion. What he could not accept was the idea that a State could attack another State on the mere ground that its security was threatened. The measures taken must be proportionate to the threat.

Mr. Spiropoulos' amendment was adopted.

36. Mr. ZOUREK, referring to the second sentence in the eleventh paragraph of the comment on the article, said that he saw no reason for the explanation it contained. It was quite clear from the article that the breadth of the contiguous zone was to be measured from the low-water line when the coastal State adopted that as its baseline, and from the line drawn by the straight baseline method when the coastal State had adopted that method. There was no need to say any more.

37. Mr. FRANÇOIS, Rapporteur, said that he had been asked to include some such statement in order to prevent the articles from being misunderstood by persons who automatically associated the term " baseline " with " straight baselines ". He could express the idea differently, if Mr. Zourek wished.

38. Mr. SANDSTRÖM pointed out that he had interpreted the sentence in quite another sense.

It was agreed to delete the second sentence of the eleventh paragraph of the comment.

Section III: The continental shelf

39. Mr. SALAMANCA, referring to the second paragraph of the introductory comment, said that he found the words " and it rejected any claim to sovereignty or jurisdiction over the superjacent waters " far too categorical. If a State established installations for the exploitation of the mineral resources of the continental shelf, it would clearly have to take some measures to ensure their safety and to keep order. He proposed the deletion of the clause in question.

40. The CHAIRMAN pointed out that the limited rights which the coastal State must enjoy in order to protect its installations were adequately safeguarded by article 6. The words to which Mr. Salamanca objected were included to make it quite clear that the Commission rejected all general claims to sovereignty and jurisdiction over the so-called " epi-continental sea ".

41. After some further discussion Mr. SALAMANCA said that he would not press his proposal.

42. Mr. EDMONDS, referring to the third sentence in the fourth paragraph of the introductory comment, said that the existing wording did not sufficiently emphasize the fundamental importance importance of the freedom of the seas to the international community.

43. *It was agreed,* on the proposal of Mr. SPIROPOULOS, to substitute the words " is of paramount importance " for the words " is one of the principles whose maintenance is of the greatest value ", in the last part of the sentence.

Article 40

44. The CHAIRMAN, speaking as a member of the Commission, proposed the inclusion in the fourth paragraph of the comment of a reference to the fact that the Inter-American Specialized Conference on Conservation of Natural Resources, held during the period between the Commission's seventh and eighth sessions, had reached the same conclusions as those reached by the Commission at its third session regarding the delimitation of the submarine areas over which the State enjoyed exclusive jurisdiction and control for the purpose of exploring and exploiting the natural resources of the sea-bed and subsoil. He did not of course intend the reference to imply that the Conference's decision had led the Commission to revert to its former views. If his proposal were accepted, he would submit a brief draft text.

It was so agreed.

45. Mr. EDMONDS, referring to the text of the article and to the fifth paragraph of the comment, wondered whether the words " 200 metres " were really preferable to the words " 100 fathoms ". Since it was unlikely that the text would be read by persons not familiar with the nautical term" fathom ", the reason given by the Commission for its choice was hardly valid.

46. Mr. FRANÇOIS, Rapporteur, pointed out that 100 fathoms being only 182.9 metres, the two terms were

not strictly speaking interchangeable. While the limit of 100 fathoms had the advantage of being already marked on marine charts, the limit of 200 metres had the advantage of being the depth accepted by geologists as that at which the slope from the continental shelf into deep waters generally began.

47. Mr. SANDSTRÖM, supported by Sir Gerald FITZMAURICE, pointed out that the United Kingdom in its comments had expressed a preference for the term " fathom " because the 100-fathom line and not the 200-metre line was the one already marked on the ocean charts of those countries that produced charts covering the whole world.

48. Mr. EDMONDS proposed that the text of the article be amended to read : " to a depth of 200 metres (approximately 100 fathoms) ".

49. Mr. SPIROPOULOS said that since 100 fathoms was the shorter measurement of the two, he would prefer that the text of the article be amended to read " to a depth of 100 fathoms (approximately 200 metres) ". He did not, however, wish to make a formal proposal.

Mr. Edmonds' proposal was adopted.

50. Sir Gerald FITZMAURICE, referring to the first sentence in the tenth paragraph of the comment, suggested the insertion, before the words " the Commission ", of the words: " and also in view of the inclusion of exploitable areas beyond a depth of 200 metres ", as an additional reason why the Commission, at its eighth session, had considered the possibility of adopting a term other than " continental shelf ".

51. Mr. FRANÇOIS, Rapporteur, pointed out that the text as it stood had already been included in the comments on the draft articles in the Commission's report covering the work of its fifth session.[4] At that time it had been the decision that shallow submarine areas were not excluded from the concept of the continental shelf, rather than the idea of including exploitable areas beyond a depth of 200 metres, that had caused the Commission to consider the possibility of adopting another term.

Sir Gerald Fitzmaurice's proposal was adopted.

52. The CHAIRMAN, referring to the second sentence in the same paragraph, proposed the inclusion of a reference to the use of the term " submarine areas " in national laws and some international instruments, in addition to the existing reference to the opinion expressed in certain scientific works.

It was so agreed.

Article 41

53. Mr. AMADO, referring to the last sentence in the second paragraph of the comment, wondered whether there was any justification for its inclusion. The sentence read: " There is no reason to fear that, as a consequence, rich mineral deposits, the exploitation of which is technically possible and economically justified, will remain unexploited; a State which has not the means to carry out the exploitation itself may be expected to grant concessions for others to do so under its control."

54. Mr. FRANÇOIS, Rapporteur, said that he had included the sentence because the Commission had been reproached with showing undue favour to coastal States, it having been argued by Mr. Scelle in particular that, under the provisions of the article, rich oil deposits might lie unexploited, simply because the coastal State was unable to carry out the exploitation itself.

55. Mr. Ceccato, a remarkable young Brazilian jurist, had also commented unfavourably on the article, saying that he was not sure whether, in order to retain its sovereign right to exploit the natural resources of the continental shelf, a coastal State might not be obliged actually to exploit those resources.

56. Mr. SALAMANCA remarked that the Commission could take only the comments of governments into account. In his opinion, the sentence was quite out of tune with the strictly juristic nature of the rest of the comment. He proposed that the sentence be deleted.

57. Mr. SPIROPOULOS pointed out that the idea conveyed in the last sentence of the paragraph was already implicit in the previous sentence. It might perhaps meet Mr. Amado's and Mr. Salamanca's objections if the last sentence were deleted and the previous sentence amended to read:

> The rights of the coastal State are exclusive in the sense that, if it does not exploit the continental shelf, another State may do so only with its consent.

Mr. Spiropoulos' proposal was adopted.

58. The CHAIRMAN urged that the penultimate sentence in the third paragraph of the comment, which read " This question should be settled later in the light of expert opinion on the subject ", be deleted. He could not recall the Commission's having decided that the question of defining natural resources other than mineral resources of the sea-bed and subsoil of the continental shelf be settled later in the light of expert opinion. Since such a statement represented a change of attitude on the part of the Commission, it was in direct contradiction with the assertion in the previous sentence that the Commission had decided not to amend the text of the article or of the comment.

59. Mr. FRANÇOIS, Rapporteur, said that he had understood Mr. Padilla-Nervo to have suggested that the matter be settled later by experts. Deletion of the sentence in question would give the impression that the Commission accepted no qualification whatsoever of the condition that the resources must be permanently attached to the bottom. He had not interpreted the discussion in that sense.

60. Sir Gerald FITZMAURICE said that Mr. Padilla-Nervo had made a number of suggestions in his statement but, so far as he could remember, had concluded by saying that, since the question was a controversial one which could probably only be settled by experts, it would be better to leave the article unchanged. He could recall

[4] *Official Records of the General Assembly, eighth session, Supplement No. 9* (A/2456), p. 13, para. 65.

no decision of the Commission that the matter should be settled by experts.

61. Mr. KRYLOV observed that such discussions pointed to the desirability of taking formal decisions more often. In his opinion, the text was a fair reflection of the attitude taken by the Commission.

62. The CHAIRMAN recalled that he had made a proposal [5] which was tantamount to including a portion of the comment in the article itself. He had later withdrawn that proposal [6] on the understanding that the text of the article and the comment would remain unchanged.

63. Mr. SALAMANCA thought that the difficulty could be overcome by deleting the sentence to which the Chairman objected and introducing the previous sentence by a statement on the following lines: " While some members of the Commission believed it possible in the present state of knowledge to draw a distinction between marine flora and fauna permanently attached to the bottom and those attached to the bottom for part of their life cycle only, other members took the opposite view. The Commission accordingly decided not to amend—— ".

64. The CHAIRMAN and Mr. KRYLOV supported Mr. Salamanca's proposal.

Mr. Salamanca's proposal was adopted.

Mr. Zourek, First Vice-Chairman, took the chair.

65. Sir Gerald FITZMAURICE pointed out an omission from the first sentence of the last paragraph of the comment, in which the words " and on the shelf itself " should be inserted after the words " above continental shelves ".

Articles 42 and 43

66. Sir Gerald FITZMAURICE proposed that articles 42 and 43 be combined to read: " The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas or of the airspace above the superjacent waters."

Sir Gerald Fitzmaurice's proposal was adopted.

Article 44

There were no observations on the substance of article 44 or on the comment thereto.

Article 45

67. Mr. KRYLOV suggested that some more easily comprehensible term might be found to replace the words " fish production " in paragraph 1 of the article.

68. Mr. FRANÇOIS, Rapporteur, pointing out that the term had also been used in the text adopted at the fifth session, explained that the object was to ensure that the exploration of the continental shelf and the exploitation of its natural resources did not destroy stocks of fish.

69. Mr. SANDSTRÖM proposed the substitution of the words " conservation of living resources " for the words " fish production ".

Mr. Sandström's amendment was adopted.

Article 46

There were no observations on the substance of article 46 or the comment thereto.

Article 47

There were no observations on the substance of article 47 or the comment thereto.

70. The CHAIRMAN announced that, apart from the points left in abeyance, consideration of chapter II, part II, of the draft report was concluded.

Chapter II: Introduction (A/CN.4/L.68/Add.1) (resumed from the 375th meeting)

71. The CHAIRMAN invited the Commission to consider the new text proposed by the Rapporteur to replace paragraphs 20 to 24 in the introduction to chapter II of the draft report. The new text read as follows:

20. In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the very clear distinction established in the Statute between these two activities can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already "sufficiently developed in practice", but also several of the provisions adopted by the Commission, based on a "recognized principle of international law", have been framed in such a way as to place them in the "progressive development" category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either.

21. In these circumstances the Commission takes the view that the proposed provisions should be sanctioned by international treaty.

22. The Commission recommends, in conformity with article 23, paragraph 1 (*d*) of its Statute, that the General Assembly should summon a diplomatic conference to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate.

23. The Commission is of the opinion that the diplomatic conference should deal with the various parts of the law of the sea covered by this report. Judging from its own experience, the Commission considers—and the comments of governments have confirmed this opinion—that the various sections of the law of the sea hang together, and are so closely interrelated that it would be extremely difficult to deal with only one part and leave the others aside.

24. The Commission considers that such a conference has been adequately prepared by the work the Commission has done. The fact that there have been . . . etc.

72. Mr. LIANG, Secretary to the Commission, observed that the words " very clear " in the first sentence of the new text for paragraph 20 were not strictly accurate, since the Statute failed to draw any sharp distinction between the codification and the progressive development of international law.

[5] A/CN.4/SR.358, para. 78.

[6] A/CN.4/SR.359, para. 34.

It was agreed to delete the words " very clear " from the first sentence of paragraph 20.

73. Sir Gerald FITZMAURICE proposed the deletion of paragraph 21, which was open to certain objections. Paragraph 22, with the insertion of the word " accordingly " before the word " recommends " would follow logically from paragraph 20.

74. The CHAIRMAN, speaking as a member of the Commission, was uncertain whether paragraph 21 could be omitted without loss, since nothing was said in paragraph 22 about the character of the Commission's proposals.

75. Sir Gerald FITZMAURICE argued that once the point had been made in paragraph 20 that the Commission had been unable to decide to which categories the various articles belonged, it was then enough to pass to the recommendation concerning a diplomatic conference.

76. Mr. KRYLOV agreed with Sir Gerald Fitzmaurice.

77. Mr. FRANÇOIS, Rapporteur, failed to understand Sir Gerald Fitzmaurice's objection to paragraph 21.

Mr. García-Amador resumed the chair.

78. Sir Gerald FITZMAURICE said that his main objection to paragraph 21 was that, in fact, it did not express the Commission's view, since each member had reservations about certain provisions in the draft and would be unwilling to see them embodied in an international treaty.

79. In his opinion, the articles on conservation and the continental shelf apart, the extent to which the whole draft put forward new rules of international law had been exaggerated, and the paragraph in question was misleading because it gave the impression that no customary law existed in the field covered by the draft.

80. Mr. LIANG, Secretary to the Commission, suggested that the meaning of paragraph 21 was that, since the proposed provisions contained many new elements, it was not enough for States merely to take note of them, but they would have to decide whether the proposal should be incorporated in an international treaty. Though there were grounds for objecting to the word " sanctioned ", he suggested that if the paragraph were deleted altogether there would be no link between paragraphs 20 and 22.

81. Mr. SALAMANCA wondered whether Sir Gerald Fitzmaurice's point might be met by modifying paragraphs 21 and 22 so as to indicate that the Commission considered that it had completed its work on the law of the sea, and referring to the desirability of summoning a diplomatic conference on the matter. Since the outcome of such a conference was uncertain, there was no need to mention the possibility of a treaty being drawn up.

82. Mr. ZOUREK considered that paragraphs 21 and 22 were a logical consequence of paragraph 20. While appreciating Sir Gerald Fitzmaurice's objection to the word " sanctioned ", he did not think that paragraph 21 could be interpreted to mean that all the provisions of the Commission's draft had to be incorporated in a treaty.

83. Mr. FRANÇOIS, Rapporteur, said that Mr. Zourek had correctly understood his intention.

84. Mr. SPIROPOULOS, although he agreed with Sir Gerald Fitzmaurice that paragraph 21 should be deleted, suggested that a compromise might be achieved by substituting the words " would have to take the form of an international treaty " for the words " should be sanctioned by international treaty ". His amendment took into account the fact that some of the rules contained in the Commission's draft were already part of customary international law.

85. The CHAIRMAN pointed out that international law was not created by treaties alone, as witness the declaration made at the Inter-American conference held at Mexico City in 1945.

86. Mr. AMADO pointed out that customary law was created by some rule being accepted and observed. In order to acquire the status of rules of international law, the new elements contained in the Commission's draft would have to be embodied in an international treaty.

87. He drew attention to article 15 of the Commission's statute, which he had helped to draft, and said that he was not aware of any sources of international law other than those traditionnally accepted.

88. Mr. SALAMANCA, unlike the Chairman, considered that international obligations could be imposed only by treaties.

89. Mr. KRYLOV thought it quite unnecessary to mention sources of international law other than treaties.

90. The CHAIRMAN pointed out that governments abided by the resolutions and declarations emanating from an international conference. The Statute of the International Court of Justice took into account such sources of international law.

91. Mr. SANDSTRÖM proposed that paragraph 21 read: " In these circumstances it will be necessary to resort to conventional means to give effect to the draft as a whole."

92. Sir Gerald FITZMAURICE said that Mr. Sandström's text was an improvement because it did not exclude instruments other than treaties.

93. Mr. AMADO found Mr. Sandström's amendment acceptable.

94. Mr. SPIROPOULOS said that the words " conventional means " meant treaties, so that the purport of Mr. Sandstrom's text was exactly the same as the Rapporteur's.

95. The CHAIRMAN welcomed Mr. Sandström's proposal as it would make paragraph 21 consistent with the final words of paragraph 22. The expression " conventional means ", which had already been used in the Spanish text, comprised any instrument by which a State accepted a new rule of international law or assumed international obligations.

Mr. Sandström's proposal was adopted.

The Rapporteur's new text to replace paragraphs 20 to 24 in the introduction to chapter II of the draft report was adopted, as amended.

The meeting rose at 1.05 p.m.

379th MEETING

Monday, 2 July 1956, at 3 p.m.

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Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, 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.

Tribute to the memory of Mr. Hsu Mo

1. Sir Gerald FITZMAURICE said that members would be shocked to hear of the untimely death of Mr. Hsu Mo, who, as one of the judges of the International Court of Justice since its creation, had commanded the universal respect of his colleagues as an unfailing upholder of its highest traditions. He proposed that the Commission convey to Mr. Hsu Mo's wife and family its profound sympathy.

2. Mr. LIANG, Secretary to the Commission, said that he had been deeply grieved to learn of the death of an eminent international jurist with whom he had worked in the past. Mr. Hsu Mo had acted as rapporteur of the Committee which had drafted chapter VI of the United Nations Charter, concerning the pacific settlement of disputes. He had made an outstanding contribution to the jurisprudence of the International Court and would be remembered for his notable separate opinion in the Anglo-Norwegian Fisheries case. He had always followed the Commission's work with the closest interest.

3. Mr. KRYLOV, paying tribute to his former colleague at the International Court, said that Mr. Hsu Mo was an outstanding lawyer and a man of independent judgment, who approached problems without partiality.

4. Mr. SCELLE, associating himself with the previous speakers, referred to Mr. Hsu Mo's energetic and disinterested help in the work of the Academy of International Law at the Hague.

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

Chapter II: Law of the sea

Part I: The territorial sea (A/CN.4/L.68/Add.2)

5. The CHAIRMAN invited the Commission to consider chapter II, part 1, of its draft report containing the draft articles on the territorial sea and the comments thereto.

Article 1: Juridical status of the territorial sea

6. There were no observations on the substance of article 1 or on the comment thereto.

Article 2: Juridical status of the airspace over the territorial sea and of its bed and subsoil

7. Sir Gerald FITZMAURICE proposed the deletion of the somewhat cryptic last sentence of the comment, the full implications of which had not been fully discussed. The last sentence read as follows: " Consequently, the provisions of the articles concerning passage which follow are not applicable to air navigation."

8. Mr. PAL agreed with Sir Gerald Fitzmaurice. The last sentence of the comment seemed to suggest that the Commission had taken a decision concerning the right of passage of aircraft in the air space above the territorial sea, whereas in fact, as stated in the second sentence of the comment, that question had been reserved.

Sir Gerald Fitzmaurice's amendment was adopted.

Article 3: Breadth of the territorial sea

9. Mr. EDMONDS reaffirmed his opposition to article 3. In respect of that article the Commission had failed in its task, which was not only to state universally recognized rules of international law, but also to codify those upheld by the majority.

10. Mr. SANDSTRÖM suggested that, as article 3 differed from the others in more than form, it should be prefaced by a statement to the effect that the Commission had failed to reach agreement about the breadth of the territorial sea and that the text which had secured a majority simply enunciated the one principle that international law did not permit extensions of the territorial sea beyond twelve miles and recommended that the breadth within that limit should be fixed by an international conference.