

Document:-
A/CN.4/SR.119

Summary record of the 119th meeting

Topic:
Law of the sea - régime of the high seas

Extract from the Yearbook of the International Law Commission:-
1951 , vol. I

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body where the States had not been able to reach agreement.

125. Mr. CORDOVA observed that the members of the Commission were unanimously agreed that the United Nations Food and Agriculture Organization should be empowered to act in the matter.

126. Mr. AMADO said it was clear that, as regards the high seas, its resources did not belong to anyone. They were not considering the continental shelf, nor fishing, but the conservation of the resources of the sea. On the high seas the States were free to do as they liked and their nationals could engage in fishing. But the coastal States, which had no rights over the high seas, maintained that the fishing was exterminating the fauna, and that that affected the resources of their territorial waters. That was the problem in a nutshell: on the one side the high seas and on the other the coastal States. Mr. François took his stand on the principle that the coastal State should be the first to be consulted. Mr. Hudson, on the other hand, laid emphasis on the importance of industrial exploitation. An endeavour should be made to reconcile those two formulae, and it was for that reason that he had voted for Mr. Hudson's latest proposal. The resources of the sea had to be protected, but it was also necessary to consider the interests of the coastal State to whom a legal title should be given, a thing it did not have at the moment. Actually, the sea off the coasts of a State did not belong to it. If they wished to find an answer to the question, they had to vote for Mr. Hudson's text.

127. Mr. CORDOVA said that the notion of freedom of the high seas had its counterpart in the rights of coastal States which had their own special interests. The position was as follows: the freedom of the high seas might, in itself, have been a good system, but fishing on the high seas had to be regulated in the interests of the States themselves, or its resources would be exhausted. It was necessary to modify the regime of the freedom of the high seas, in so far as resources of the sea were concerned, as it led to abuse. The course advocated by Mr. François was to give the right of regulation to the coastal State. Mr. Hudson proposed to give it to those who were exploiting those resources and had shown an inclination to exhaust them. For that reason he could not accept the latter's text.

128. Mr. FRANÇOIS remarked that the main point of divergence between Mr. Hudson and himself was the question as to who was to have the last word. It was not enough to say that the States should come to an agreement. In his proposal the last word belonged to an international organization. If Mr. Hudson could accept that solution, the difference between them would not be very great.

129. In reply to a remark by Mr. Sandström, Mr. HUDSON read out the following text:

"The FAO should confer competence on a permanent body to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them, and such body should make recommendations of conservatory measures to be adopted by the States

whose nationals are engaged in fishing in various particular areas".

130. Mr. FRANÇOIS would have liked to substitute "decisions" for "recommendations", but realized that it was impossible to do so.

131. Mr. CORDOVA said that if Mr. Hudson would substitute "decisions" for "recommendations", his text would be approved unanimously.

132. Mr. Hudson then proposed the following text:

"The FAO should confer competence on the permanent body to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them and such body should have power to notify to the States whose nationals are engaged in fishing in various particular areas the conservatory measures to be adopted in each area. Any notification should come into force in the area to which it relates within 6 months provided no such State makes objection within that period."

The meeting rose at 1 p.m.

119th MEETING

Friday, 6 July 1951, at 9.45 a.m.

CONTENTS

	<i>Page</i>
Régime of the high seas: report by Mr. François (item 6 of the agenda) (A/CN.4/42) (<i>continued</i>)	
Chapter 7: Resources of the Sea (<i>continued</i>)	311
Chapter 10: Sedentary fisheries	316

Chairman: Mr. James L. BRIERLY

Rapporteur: Mr. Roberto CORDOVA

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

Régime of the high seas: report by Mr. François (item 6 of the agenda) (A/CN.4/42) (*continued*)

CHAPTER 7: RESOURCES OF THE SEA: (*continued*)

1. The CHAIRMAN announced that the Commission had before it the text proposed by Mr. Hudson as a substitute for the regulations drafted by Mr. François (p. 37, (A/CN.4/42, mimeographed English text; para. 80, printed French text): Mr. Hudson's text, which included the paragraph adopted at the previous meeting (para. 91) read as follows:

"1. The States whose nationals are engaged in fishing in any area of the high seas may regulate and control fishing activities in such area for the purpose of conserving its resources against extermination. If only the nationals of a single State are thus engaged in an area, that State may take such measures in that area. If the nationals of several States are thus engaged in an area, such measures shall be taken by those States in concert. In any case, however, no area may be closed to the entry of nationals of other States to engage in fishing activities.

2. If any part of an area is situated within X miles of the territorial waters of a coastal State, that State is entitled to take part in any concert adopted, even though its nationals are not engaged in fishing in the area.

3. The FAO should confer competence on a permanent body to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them, and such body should make recommendations of conservatory measures to be adopted by the States whose nationals are engaged in fishing in various particular areas."

1a. As an alternative text for paragraph 3, Mr. Hudson proposed the following:

"3. The FAO should confer competence on a permanent body to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them and such body should have power to notify to the States whose nationals are engaged in fishing in various particular areas the conservatory measures to be adopted in each area. Any notification should come into force in the area to which it relates within X months, provided no such State makes objection within that period."

He did not know whether the Commission could arrive at an agreed solution.

2. Mr. HUDSON pointed out that he was not proposing a text, but only principles which would require more precise drafting.

3. He had been thinking over the discussion which had led him to submit paragraph 2 of his proposal. If the X miles referred to were a short distance, the situation contemplated in paragraph 2 would doubtless never arise, since all coastal communities engaged in fishing, and thus coastal States as well came within the scope of paragraph 1. Paragraph 2 was perhaps unnecessary.

4. The CHAIRMAN observed that that was a secondary matter and that the most important points were dealt with in paragraphs 1 and 3.

5. Mr. HUDSON had understood that Mr. François could accept the substance of paragraph 1, but disagreed regarding paragraph 3. To meet Mr. François' objection, he had drafted an alternative text for paragraph 3, which was based on the convention concluded between the United States and Mexico.

The convention for the establishment of an International Commission for the Scientific Investigation of Tuna, signed by the United States and Mexico, (*American*

Journal of International Law, vol. 45, (1951), Official Documents, p. 51) contained, in article 1, paragraph 9, which had been supplemented by a subsequent exchange of notes, provisions similar to those which he had drafted as an alternative text for paragraph 3; but in the convention, the scope of those provisions was limited to the conduct of meetings and the performance of the functions and duties of the commission established in accordance with the convention.

6. Mr. HSU said that at the previous meeting he had opposed Mr. Hudson's proposal. He doubted whether it was advisable to rely on the particular régime established by the convention for the protection of fisheries in the north-west Atlantic. His doubts had been confirmed when he had referred to President Truman's proclamation. The rules it established were, indeed, closer to the proposal of Mr. François than to that of Mr. Hudson. The proclamation stated that: "In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale." The proclamation went on to state that: "The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded. That proclamation was certainly in conformity with Mr. François' proposal.

7. He recognized that, for certain situations, Mr. Hudson's proposal was well founded; but the general rules adopted should be those proposed by Mr. François, which had been established by President Truman.

8. Mr. CORDOVA observed that the second paragraph of the preamble of President Truman's proclamation fully supported Mr. François' view. He emphasized that the proclamation did not limit the zone in which a coastal State could exercise such powers, whereas Mr. François prescribed a limit of 200 sea miles. He did not see why the Commission should adopt Mr. Hudson's proposal, which went beyond existing international law.

9. Mr. KERNO (Assistant Secretary-General) thought that the texts proposed by Mr. Hudson and Mr. François were both in conformity with President Truman's proclamation. Indeed, the latter stated that: "The right of any State to establish conservation zones off its shores... is conceded"; that referred to coastal States, but the words "in accordance with the above principles" were included, and those principles applied where only the nationals of the coastal State engaged in fishing and that State alone had regulatory powers. But if nationals of other States were also engaged in fishing, regulation must be by agreement; that was what Mr. Hudson had proposed.

10. Mr. SANDSTRÖM pointed out, in connexion with President Truman's proclamation, that if a State took measures to safeguard its interests in the absence of any provisions of international law, that did not imply that the Commission should incorporate those provisions in international law.

11. There was a very important difference between the proposals submitted by Mr. Hudson and Mr. François, namely, that Mr. François only solved the problem of conservation of the resources of the sea in areas close to the coast. He entrusted that task to the coastal State. But it was necessary to go further and to consider the whole problem that could better be done on the basis of Mr. Hudson's proposal.

12. Mr. Hudson's text provided two solutions for cases in which States could not agree. In paragraph 3 it was provided that the international body should only make recommendations, whereas in the proposed alternative text that body could, in certain circumstances, take decisions which would enter into force provided that no objections were made within a certain period. He was in favour of giving wider powers to the international body. He thought that there was one case in which that should be done, namely, where there was an obvious duty and where technical rather than political problems were involved.

13. Mr. SPIROPOULOS recalled that, at the beginning of the previous meeting,¹ he had said that the best way to solve the problem was to set up an international organization. He did not think it advisable to rely on President Truman's proclamation, for a perusal of that document showed that it was the lack of regulation of fishing on the high seas which had obliged the President of the United States to issue such a proclamation. The proclamation stated that: "The Government of the United States regards it as proper to establish...". That Government had considered it proper because there were no other rules: it was not a question of law, but of action by a State. If the law were to be codified, it was necessary to seek the best solution. In the case of the high seas, which were not placed under the sovereignty of any particular State, the best solution was regulation by an international body. He preferred Mr. Hudson's system; rules would first be established and there would then be set up an international institution which, in the last resort, could take decisions in case of dispute.

14. Mr. SCALLE fully supported the views of Mr. Spiropoulos and Mr. Sandström, for there was no essential difference between their respective positions. Action by a coastal State was better than no action at all; even admitting that such a State was not necessarily interested, it might enact regulations because it considered that international interests would thus be served. There then arose what he had described as "dissociation of functions". That situation arose, for instance, when, in the absence of government, those holding power took the place of the government. It was not a solution to be recommended, for it was the method of feudalism or anarchy. There could be better solutions, such as that proposed by Mr. Hudson. Still better was the solution of an international organization, which constituted the third stage; that was an excellent result, which he thought the Commission should achieve. But there was even a fourth stage. In a specialized agency it was very rare for an organ to have power to take final decisions;

nevertheless, that was the case with the International Commission for Air Navigation established under the Convention relating to the Regulation of Aerial Navigation, signed at Paris on 13 October 1919. That came back to Mr. François' proposal to reconcile the interested parties when they could not reach agreement, by obliging them to resort to arbitration. By that solution, the international body, which was the third stage, could provide judges, who represented the fourth stage, with the necessary technical information, as in the case of parties appearing before national courts.

15. The Commission must decide how far it wished to go. He found it agreeable and reassuring that the Commission was moving towards those successive stages. He was sure that it was on the way to making progress.

16. He supported Mr. Sandström's proposal, or better still, that of Mr. Spiropoulos; he could give partial support to the proposal submitted by Mr. Hudson if the latter was prepared to go much further in his third paragraph. His proposal in fact stated that agreement must be reached, without providing any means of compelling the interested parties to agree or to accept a judicial or arbitral decision.

17. Mr. ALFARO, speaking on a point of order, said that there were three main questions which the Commission must decide before embarking on further discussion. Firstly, the Commission must decide whether a coastal State took precedence in the regulation of fisheries on the high seas up to a certain distance from its coasts, or whether that power rested with States whose nationals engaged in fishing. That was the essential difference between the proposals submitted by Mr. François and Mr. Hudson. Secondly, in the absence of agreement, should the dispute be submitted to some compulsory procedure for pacific settlement? Thirdly, the Commission must decide whether it was necessary for a specialized agency of the United Nations to take charge of the whole question. The Commission could not settle the third question until it had taken a decision on the first two.

18. The CHAIRMAN pointed out that, at the previous meeting, there had been an equal vote of 6 to 6 on the first question and that, after Mr. Hudson had added a second paragraph to his text, a decision had been reached by the very narrow majority of 6 to 5.²

19. Mr. SCALLE did not consider those questions mutually exclusive. The fact of giving certain powers to a coastal State did not mean that it could not be subsequently decided that governments must reach agreement, or even that a specialized agency must be set up. Those were stages of progress. He was prepared to abandon the first stage, as he did not wish to see a government given powers in an international matter. The other stages constituted progress.

20. Mr. CORDOVA did not see how a vote could be taken on the first paragraph of Mr. Hudson's text until the decision on paragraph 2 was known, since that paragraph met the objections to paragraph 1.

21. The CHAIRMAN thought that Mr. Córdova's anxiety was unfounded. If the first paragraph were

¹ Summary record of the 118th meeting, paras. 14-16 and para. 28.

² Summary record of the 118th meeting, paras. 89 and 94

adopted and the second rejected, a vote would be taken on the proposal as a whole and those who could not accept the first paragraph without the second would vote against the proposal.

22. Mr. HUDSON asked the Commission to decide whether it preferred the first two paragraphs of Mr. François' text or the first two paragraphs of his own.

23. Mr. HSU observed that there had been an equal vote on the substance. Thus neither text should be taken as a basis for the new rules, or else both should be adopted. Moreover, the principles were not mutually exclusive; hence it could be decided to take both into account.

24. Mr. FRANÇOIS thought that Mr. Hsu could be given satisfaction. The report would state that there had been an equal vote, that the Commission had endeavoured to find common ground and had found it in Mr. Hudson's modified text. If the General Assembly considered that the first proposal should have been submitted and rejected the compromise, everyone would know the Commission's opinion.

25. Mr. YEPES proposed that the first paragraph of Mr. Hudson's proposal be amended to read as follows:

"The States whose nationals are engaged in fishing in any area of the high seas situated within X miles of the coast . . .".

He made that suggestion because from the very general statement of principles submitted by Mr. Hudson, a State might claim the right to regulate fishing right up to the coastal waters of another State. He was disturbed by the words "any area of the high seas". It must be explained that the whole of the high seas was not included.

26. Mr. HUDSON pointed out that that amendment entirely upset the system on which his text was based.

27. Mr. SPIROPOULOS considered that the purpose of Mr. Hudson's proposal was to regulate fishing on the whole of the high seas, although in order to satisfy Mr. François it referred, in paragraph 2, to fishing on that part of the high seas in the neighbourhood of a coastal State. Regulation could not be confined to coastal fisheries, but must cover the whole of the high seas. The Commission should vote for the text which expressed that idea and which, in any case, was not the final text.

28. The CHAIRMAN asked whether the Commission was ready to decide how the principle was to be dealt with. If it was not satisfied with the text as a whole, it would still be able to reconsider its decisions.

29. Mr. YEPES wished to explain his position. He favoured the intervention of an international authority as proposed by Mr. Spiropoulos and had included it in his proposal; but he did not wish the coastal States to be lightly treated and to be practically excluded, as in Mr. Hudson's first paragraph. He could not accept that paragraph as a general basis for discussion. It must be explained that coastal States were best qualified to institute regulation. He proposed that paragraphs 1 and 2 be combined.

30. Mr. AMADO asked Mr. François whether he did

not wish to urge the adoption of the limit he had proposed, namely a distance of 200 miles.

31. Mr. FRANÇOIS believed that, as a result of the equal vote, the Commission had reached a dead-end. It had been necessary to find common ground for agreement and he certainly could not urge his proposal, since it had resulted in an equal vote. Another solution must be sought, and he would therefore vote for Mr. Hudson's text. Nevertheless, he still preferred the solution he had outlined.

The principles contained in paragraphs 1 and 2 of Mr. Hudson's text were adopted by 8 votes to 4.

32. Mr. AMADO said that he was not entirely satisfied, but his vote had been based on the considerations advanced by Mr. François.

33. Mr. YEPES said that one of the reasons for his vote was his interpretation of President Truman's proclamation, namely, that it was based on the particular interest of a coastal State in direct participation in the conservation of the resources of the sea. But the formula adopted in principle by the Commission excluded the coastal State and was confined to a very vague statement, in paragraph 2, that the coastal State could take part in any concert adopted. He had voted against the proposed text because he believed that the coastal State had an interest which should prevail.

34. Mr. ALFARO said that he was prepared to vote in favour of the text to be proposed if it were so drafted as not to exclude coastal States. He did not wish paragraph 2 to appear as an addendum to paragraph 1. The text should be so drafted that it did not appear to reject the coastal State.

35. The CHAIRMAN pointed out that Mr. Hudson's principle had been adopted by the Commission and that it only remained to perfect the drafting. Paragraph 3 and the alternative text proposed were based on the same principle. In the absence of agreement between the States concerned, the matter was referred to the Food and Agriculture Organization.

36. Mr. CORDOVA thought that if a vote were taken on the principle, it should be stated that the international body should have power to establish regulations which States must apply.

The principle that, failing agreement, an international organization should intervene, was unanimously adopted.

37. Mr. EL KHOURY said that he still approved of the first two paragraphs of Mr. Hudson's text. He proposed the following amendment to the text of paragraph 3: for the word "recommendations" substitute the word "regulations" and for the word "adopted" substitute the word "applied".

That amendment was in conformity with the views of Mr. Scelle, Mr. Spiropoulos and Mr. Sandström.

The amendment proposed by Mr. el Khoury was adopted by 9 votes to 2, with 1 abstention.

38. Mr. HUDSON observed that the majority preferred regulation by a specialized agency, and proposed adopting the alternative text for paragraph 3, in place of the original text. That alternative did not in fact go as

far as paragraph 3 as amended by Mr. el Khoury and would be more acceptable to him.

39. The CHAIRMAN, in reply to a question by Mr. ALFARO, explained that the protective measures to be adopted would be notified by the Food and Agriculture Organization and that the text proposed by Mr. Hudson offered two solutions. The alternative text which Mr. Hudson now preferred provided that the conservatory measures notified should come into force if no State made objection.

40. Mr. SCELLE said that if the Commission voted for that text it would be voting for the opposite of what it had just adopted. The Commission had, in fact, decided in favour of regulation.

41. The CHAIRMAN agreed that the essential difference between paragraph 3 as amended and the alternative text was the addition in the latter of the words "provided no such State makes objection within that period"; the alternative text had already been rejected, as a result of the vote just taken.

42. The Commission had adopted the principle; it must now consider how that principle should be drafted.

43. Mr. FRANÇOIS asked for an explanation. Paragraph 1 stated that: "In any case, however, no area may be closed to the entry of nationals of other States to engage in fishing activities". Assuming that the nationals of three States were engaged in fishing in a certain area of the high seas and reached agreement, if the nationals of a fourth State came into the area with a view to engaging in fishing, would the paragraph be applicable or would the new arrivals not be required to conform to the agreement?

44. Mr. HUDSON replied that the new situation would necessitate the conclusion of a new agreement with the fourth State.

45. Mr. FRANÇOIS observed that the system would be very unstable.

46. Mr. HUDSON said that it was bound to be unstable since no State could be excluded.

47. Mr. SCELLE did not believe that the difficulty mentioned by Mr. François could be overcome in the manner Mr. Hudson had described. The fourth State would be joining an international organization having a rule of law which those acceding to it must observe. On the other hand, as soon as it joined the organization, the new State could propose changes and the Food and Agriculture Organization would decide whether, in that particular instance, it should recognize the objections.

48. Mr. HUDSON pointed out that he had drafted the last sentence of paragraph 1 before the idea of introducing the Food and Agriculture Organization had been submitted. If that organization were to intervene, the sentence would not be applicable.

49. Mr. SCELLE did not think that the two questions could be settled at the same time. He believed that the Commission wished to give powers to the Food and Agriculture Organization.

50. Mr. EL KHOURY and Mr. KERNO (Assistant-Secretary-General) agreed with Mr. Scelle. If three or

four States instituted regulations and were joined by a fifth, the latter must observe the rules; if it was not satisfied, it could approach the Food and Agriculture Organization.

51. Mr. CORDOVA said that if a régime were established by an international organization, the newly entering State would have to observe the rules. Moreover, if there were regulation by agreement between the States engaged in fishing, it should be possible for the new State, if it did not approve of such regulation, to submit its objections to an international organization. He wished the report to take account of that point, and to give the international organization powers to intervene when a State joined those already engaged in fishing.

52. Mr. HUDSON suggested setting up a drafting sub-committee.

53. The CHAIRMAN proposed that the Rapporteur be instructed to draft the principle adopted.

54. Mr. FRANÇOIS said that he would endeavour to do so, but wished to discuss the matter with the Sub-Committee previously appointed.³

55. Mr. KERNO (Assistant Secretary-General) thought that as a matter of courtesy the Secretariat should inform the Food and Agriculture Organization that the International Law Commission intended to recommend the General Assembly to entrust it with duties in connexion with the conservation of the resources of the sea.

It was so decided.

56. Mr. FRANÇOIS observed that there were other questions to be settled. In an article entitled "The Legal Status of Submarine Areas Beneath the High Seas", by Richard Young,⁴ it was pointed out that in certain cases the continental shelf had more than one edge. He did not think it necessary to go into all the details, for it was impossible to draft complete rules for the continental shelf forthwith. The Commission should merely consider the main points to be submitted to Governments. He proposed that the question be left aside.

57. Mr. SANDSTRÖM said that he also had read the article and had arrived at the same conclusion as Mr. François.

58. It was stated by Young that: "Actually the edge of the shelf does not appear to be as simple a phenomenon as the maps might lead one to suppose. In some regions it may lie at depths either more or less than 100 fathoms; in others, the edge may be almost imperceptible; in still others, there may be several shelves and edges, or the submarine terrain may be so confused as to make difficult the location of any continuous line."⁵

59. In his opinion it was the latter situation which raised difficulties, but they could not be overcome.

60. Moreover, Young also wrote that:

"A definition of the continental shelf takes care of most but not all submarine areas which may be regarded as appurtenant to land territory. There remain insular

³ Summary record of the 117th meeting, para. 88.

⁴ *American Journal of International Law*, vol. 45 (1951), pp. 225-239.

⁵ *Ibid.*, p. 234.

shelves and submarine areas in shallow seas where no shelf edge exists. With respect to the former, it would appear not difficult to apply, *mutatis mutandis*, the principles suggested for the continental shelf... Submarine areas in shallow seas or gulfs — such as the Baltic, the Persian Gulf, and the Gulf of Paria — present perhaps the most difficult situation of all. In addition to due regard for the interests of adjoining States lying along the same coast, the interests of all States facing on such a body of water must be taken into account. In the absence of any large area lying beyond the 100-fathom line — such as is found in the narrow but deep Red Sea — the entire bed and subsoil must be divided equitably among the littoral States.”⁶

61. He thought that in those circumstances it was impossible to fix rules on the subject. If such problems arose, they must be left to the judge to decide.

Mr. Sandström's view was accepted.

62. Mr. FRANÇOIS pointed out that the second question remaining to be settled was that of the possibility of establishing a contiguous zone for fisheries. The question of fisheries remained unchanged. For the time being, the Commission did not wish to make any change in the limits within which fishing could be carried on under existing international law, when not only the nationals of a single State were so enjoyed.

CHAPTER 10: SEDENTARY FISHERIES

63. The question of the resources of the sea having been provisionally disposed of, Mr. FRANÇOIS observed that the problem of sedentary fisheries also required solution. Mr. Yepes had proposed amending the text of the second article on the continental shelf adopted by the Commission, so as to refer to mineral resources instead of natural resources.⁷ That would exclude sedentary fisheries from the régime of the continental shelf, but it would then be necessary to adopt certain rules for such fisheries. The principle he had proposed in his report maintained the *status quo*.⁸ The question of principle to be decided was whether it was intended that the State entitled to exploit the sea-bed should have special rights in sedentary fisheries, not by virtue of existing custom, but by virtue of its rights in the continental shelf.

64. Mr. YEPES explained that he had not proposed the exclusion of sedentary fisheries and submarine vegetation from the régime of the continental shelf; he had mostly suggested that the question be examined. He believed that such fisheries should come under the régime of the continental shelf.

65. Mr. FRANÇOIS read out the article on sedentary fisheries which he had proposed.

66. It was a question of principle. The Commission must decide whether it should extend to sedentary

fisheries the régime adopted for the sea-bed. He thought it preferable not to do so and to treat sedentary fisheries as an entirely special subject for which there should be special rules. Nevertheless, the contrary solution might be adopted, regardless of whether ancient custom existed. President Truman's proclamation referred to natural resources in general, but the preamble showed that the President had only had mineral resources in mind.

67. Mr. KERNO (Assistant Secretary-General) pointed out that the Commission was dealing with two exceptions to the principle of freedom of the high seas: sedentary fisheries and the continental shelf. It must be decided whether priority should be given to one or the other. As the regulation of the continental shelf only gave the right to exploit the sea-bed and the subsoil, he considered it logical for sedentary fisheries, although they entailed fixed installations, to be set apart and subjected to special rules.

68. Mr. YEPES observed that any derogations authorized by the Commission would affect the freedom of the seas. Where there was a conflict between the freedom of the seas and a higher interest, namely that of mankind, which required that freedom to be restricted, preference should be given to the higher interest.

69. The CHAIRMAN hoped that the Commission would decide that the question of sedentary fisheries was independent of the continental shelf and that there was no reason to modify existing practice with regard to such fisheries.

70. Mr. YEPES took a contrary view. He did not consider that the two questions could be separated; in approving the principle of the continental shelf, the Commission had at the same time implicitly approved the principle of sedentary fisheries. If it were desired to apply the general rule of law whereby the accessory followed the principal, it must be admitted that sedentary fisheries and submarine vegetation formed an integral part of the continental shelf. That being so, if a coastal State were empowered to regulate the continental shelf, it should also be made responsible for the regulation of sedentary fisheries.

71. Mr. FRANÇOIS pointed out that the Commission had only adopted a legal concept of the continental shelf. It was not necessary to draw the conclusion advocated by Mr. Yepes. The words “natural resources”, in article 2, could possibly be replaced by the words “mineral resources”.

72. Mr. SANDSTRÖM wondered whether the adoption of the formula proposed by Mr. Yepes would not result in acquired rights being impaired.

73. Mr. SCALLE thought that it was the adoption of the concept of the continental shelf that would entail the continual impairment of acquired rights.

74. Mr. KERNO (Assistant Secretary-General) observed that in practice a distinction was continually made between proprietary rights in the surface of the land and those in the subsoil.

75. Mr. YEPES said that that was only done by special contract; when proprietary rights in land were granted, they applied equally to the surface and the subsoil.

⁶ *Ibid.*, p. 236.

⁷ Summary record of the 114th meeting, paras. 30 *et seq.*, in particular paras. 31, 33, 48 and 53–57.

⁸ A/CN.4/42, p. 62 (mimeographed English text); para. 150 (printed French text).

76. Mr. SCELLE explained that in France the question was governed by the mining laws.

77. Mr. AMADO asked why the Commission should try to introduce new provisions into the régime of sedentary fisheries, which was based on a peaceful, stable and lasting tradition. From time immemorial such fisheries had operated under the benevolent supervision of States, without ever having caused any conflict. He pointed out that in his first report Mr. François had stated that: "It should, however, be noted that many sedentary fisheries have never given rise to objection by other States. Hence, it may be concluded that, in so far as sedentary fisheries are concerned, the international community accepts within certain limits this derogation from the principle of freedom of the seas in specific portions of the sea situated outside territorial waters but close to the coast; 'through long usage these banks are regarded as being occupied and constituting property'." ^{9, 10}

78. The original of the institution of sedentary fisheries might be unjust, but they had now acquired true rights. That being so, he thought it better to apply the old Latin principle *quieta non movere*.

79. Mr. SPIROPOULOS agreed with Mr. Amado, but he pointed out that the Commission had been instructed to codify international law. If it set aside all peaceful matters, what would it codify? In his opinion it would be preferable to ascertain the existing law and codify it.

80. Mr. FRANÇOIS was quite willing for the law of sedentary fisheries to be codified, but he was opposed to Mr. Yepes' suggestion that it be included in the concept of the continental shelf.

81. Mr. AMADO pointed out that States followed a general practice with regard to sedentary fisheries, so that the task of codification would be simple. The question of the continental shelf was entirely new and arose from the development of international law. In his opinion the best course with regard to sedentary fisheries would be to consolidate existing practice where it was considered useful.

82. Mr. YEPES hoped that the Commission would not forget that it must forge ahead and that it was effecting a veritable revolution in international law. In adopting the principle of the continental shelf it had, indeed, denied the doctrine of the freedom of the seas.

83. The CHAIRMAN asked the Commission to decide whether the question of sedentary fisheries should be connected with that of the continental shelf.

It was decided by 11 votes to 1 that those questions should not be connected.

84. The CHAIRMAN proposed that the Commission examine, sentence by sentence, the article on sedentary fisheries proposed by the special rapporteur.¹¹

⁹ Reply by Great Britain to the question asked by the Proprietary Committee of the Conference on Codification, Basis for Discussion No. 2, p. 28.

¹⁰ A/CN.4/17, p. 31 (mimeographed English text); para. 96 (printed French text).

¹¹ A/CN.4/42, p. 62 (mimeographed English text); para. 150 (printed French text).

85. In reply to a question by Mr. YEPES, Mr. FRANÇOIS stated that the article meant that, with regard to sedentary fisheries, the *status quo* would be maintained.

86. Mr. CORDOVA observed that the article proposed by the Special Rapporteur made no provision for the conservation of the resources of the sea. He emphasized that, since such resources were the inheritance of mankind, States were only entitled to exploit them in so far as they refrained from destruction. He regretted that the article proposed by Mr. François did not prohibit the extermination of marine fauna.

87. Mr. FRANÇOIS said that in the case of sedentary fisheries the question did not arise in quite the same form. In his opinion it was the States using such fisheries that should decide on the measures to be adopted for the protection of marine fauna. The régime for the conservation of resources of the sea might well be extended to sedentary fisheries; but it would then be possible to go even further and to provide that the régime for the conservation of certain resources should be so extended that States were forbidden to waste the resources of their own soil.

88. Mr. CORDOVA thought that, although a coastal State certainly had the greatest interest in conserving the resources of the sea, it must not be forgotten that the nationals of other States frequently came to fish in places where sedentary fisheries were situated. Hence it was important to ensure the protection of marine fauna in such cases.

89. Mr. FRANÇOIS pointed out that, if the system he proposed were adopted, nothing would prevent the Mexican Government, for instance, from adopting the necessary measures to conserve the resources of the sea in the Gulf of Mexico.

90. Mr. AMADO stressed that the régime of sedentary fisheries was based on the fundamental principle of occupation. He pointed out that, at the 66th meeting of the Commission, Mr. Córdova had already expressed the same idea, and Mr. Brierly had considered that the principle of occupation must be adopted for sedentary fisheries. Mr. Scelle had also supported that view.¹² He thought it necessary to distinguish between fishing in general and sedentary fisheries.

91. Mr. CORDOVA feared that those exploiting sedentary fisheries might be granted the privilege of exterminating the marine fauna in such areas. He would prefer the régime adopted for the conservation of resources of the sea in general to be extended to sedentary fisheries.

92. The CHAIRMAN pointed out that in that case the *status quo* would not be maintained. At present, there was no such obligation for States which had acquired rights in sedentary fisheries by prescription. Nevertheless, it was in their own interests not to exhaust such fisheries.

93. Mr. CORDOVA considered that, without wishing to deny States a right acquired by prescription, it was

¹² See summary record of the 66th meeting, paras. 10, 12, 17 *et seq.*

necessary to impose on them the obligation to conserve the resources they exploited.

94. Mr. FRANÇOIS said that he was prepared to satisfy Mr. Córdova by explaining in the article he proposed that the coastal State was entitled to regulate the conservation of resources of the sea.

95. Mr. CORDOVA said that that was not sufficient; it would still be necessary to stipulate the distance up to which protection must be ensured. Moreover, it must not be forgotten that in certain cases it was not the coastal State which exploited sedentary fisheries, but other States; who would then be responsible for regulation? The coastal State certainly had a general interest in ensuring the conservation of resources of the sea, but it had no immediate interest.

96. Mr. FRANÇOIS pointed out that in his text he had only been concerned with the coastal State.

97. The CHAIRMAN emphasized that it was only necessary to recognize existing sedentary fisheries as lawful.

98. Mr. EL KHOURY considered that the first paragraph of the text proposed by Mr. Hudson and adopted by the Commission, regarding resources of the sea, could also be applied to sedentary fisheries. That text provided that a State whose nationals were engaged in fishing in an area could take the necessary measures for regulation and control in that area; if the nationals of several States were engaged in fishing in an area, such measures must be taken by those States in concert.

99. Mr. FRANÇOIS said that that principle could of course be adopted, but the *status quo* would then be changed; he doubted whether that was really necessary.

100. The CHAIRMAN proposed that, in the first sentence of the article submitted by the Rapporteur, the words "by the coastal State" be added after the words "a part of the high seas".

101. Mr. FRANÇOIS accepted that proposal.

102. Mr. CORDOVA wished to know what would happen where a coastal State did not exploit sedentary fisheries.

103. The CHAIRMAN said that sedentary fisheries in which no rights had been acquired by prescription would be subject to the general régime of fisheries.

104. Mr. SANDSTRÖM was not sure that it was advisable to add the words "by the coastal State", as the Chairman had suggested. It must be borne in mind that sedentary fisheries were generally exploited by the coastal State, but other States might have acquired the rights.

105. The CHAIRMAN suggested the words "by a particular State".

106. Mr. CORDOVA could not agree that prescription gave any State the right to exhaust the resources of the sea.

107. Mr. EL KHOURY considered that the question of sedentary fisheries should be examined in conjunction with that of the conservation zones established round ordinary fisheries. He did not think it necessary to make a distinction between sedentary and other fisheries,

provided that the rules for conservation of the resources of the sea in general were observed in sedentary fisheries.

108. Mr. SCELLE thought that the members of the Commission were somewhat confused. Sedentary fisheries must not be understood to mean only sedentary fish, but also areas in which rights had been acquired by prescription. Sir Cecil Hurst went so far as to speak of property in that connexion.

109. For a sedentary fishery to be recognized, there must be establishment and occupation and effective and continued use of a part of the high seas by a State which, moreover, was not necessarily the coastal State.

110. Mr. AMADO pointed out that in his first report Mr. François had stated that: "Fisheries may be described as sedentary either by reason of the species with which they are concerned, that is to say species attached to the soil or irregular surfaces of the sea-bed, or by reason of the equipment employed, for example stakes driven into the sea-bed".¹³ He also recalled that at the second session Mr. Scelle had maintained that both conditions must be satisfied, there being both exploitation by means of static equipment and sedentary species.¹⁴

111. He observed that Mr. Córdova was deeply concerned over the question of conservation of sedentary fisheries. But he wondered whether there was any need to consider it. It was clear that States using such fisheries had every interest in refraining from extermination of the species. In his opinion the Commission was not entitled to introduce rules for the conservation of species. It should merely decide to maintain the *status quo*.

112. Mr. FRANÇOIS said that sedentary fisheries generally began in territorial waters but sometimes extended beyond the limits of those waters. He wondered whether, in practice, there were many sedentary fisheries situated in the high seas.

113. Mr. CORDOVA was prepared to accept the principle of prescription where the coastal State exploited sedentary fisheries and to recognize that that State had powers of regulation. But with regard to the other points, the question remained unsolved. In any case, the general interest of mankind must not be lost sight of. He thought that the Commission considered that only fishing rights were accorded to States using sedentary fisheries, but not proprietary rights or the right to destroy.

114. Mr. SCELLE described how the practice relating to waterways and rivers had been codified in France. The Civil Code had regulated institutions which had been established on waterways and rivers in the same way as sedentary fisheries had been established at sea. Those which had acquired a legitimate title by grant or charter had been authorized to continue, but had been obliged to conform to rules laid down for all such institutions. The legality of organizations had not been considered, but they had been subjected to a general régime.

115. Mr. CORDOVA said that that was exactly what he desired for sedentary fisheries.

¹³ A/CN.4/17, p. 31 (mimeographed English text); para. 94 (printed French text).

¹⁴ See summary record of the 66th meeting, para. 22.

116. Mr. SCELLE, supported by Mr. AMADO, added that in view of the generally small scale of sedentary fisheries it might be questioned whether there was any danger of their exhausting the species. He himself was not in favour of connecting them with the concept of the continental shelf, with which he considered them in conflict.

117. Mr. EL KHOURY proposed that, at the beginning of the article submitted by Mr. François, the following words be inserted: "Subject to rules relating to the conservation of resources of the sea".

118. Mr. CORDOVA found that suggestion excellent.

119. Mr. SPIROPOULOS said that in his opinion the problem with which Mr. Córdova was concerned did not arise. He thought it useless to endeavour to establish rules where they were not required. The exhaustion of sedentary species could have no serious consequences either for the interests of the coastal State or those of the international community.

120. The CHAIRMAN thought that the majority of members considered that the Commission should confine itself to codifying existing practice in respect of sedentary fisheries, which Mr. François had endeavoured to formulate.

121. Mr. SCELLE said that he well understood Mr. Córdova's anxiety and admitted that the latter must find his attitude rather illogical. But in international law there was no rule by which a State could be forbidden to destroy its plantations and wheatfields, if it so desired.

122. Moreover the article which Mr. François had proposed to the Commission provided that regulation of sedentary fisheries should ensure maintenance of order and conservation of the beds.

123. Mr. CORDOVA pointed out that other members of the Commission were not prepared to accept that view.

124. The CHAIRMAN asked whether the Commission could accept, in principle, the formula proposed by Mr. François.

125. Mr. EL KHOURY said that he could not accept that formula, since it left the way open for abuses.

126. Mr. YEPES wished the article to be more concisely drafted and proposed the deletion of the words: "Without any formal and repeated protests against such use having been made by other States, and particularly by such States as, by reason of their geographical situation, could have put forward objections of particular weight." He would also prefer the article to refer to "continued and peaceful use" rather than "effective and continued use".

127. Mr. AMADO protested against the deletion proposed by Mr. Yepes. The legal basis of sedentary fisheries was, in fact, occupation recognized by other States.

128. Mr. SCELLE thought that the word "existing" could be added before the words "sedentary fisheries"; that would show that the article only applied to sedentary fisheries with a recognized title, and that prescription would not apply to new fisheries.

129. The CHAIRMAN announced that slight drafting amendments would be made to the text proposed by Mr. François. He put that text to the vote.

Mr. François' text was adopted by 8 votes to 3.

130. Mr. HSU said that he had voted against the text. In his opinion the question raised by Mr. Córdova required thorough examination; the discussions had not sufficiently brought out whether users of sedentary fisheries had the right, under positive law, to destroy marine fauna. If they did not possess that right, the codification undertaken by the Commission should state the fact. If they had such a right at present, the Commission should establish new rules to ensure the conservation of sedentary fisheries.

131. Mr. EL KHOURY said that he also had voted against the article proposed by Mr. François, because he could not agree to the maintenance of the *status quo* if that were harmful.

The meeting rose at 1 p.m.

120th MEETING

Monday, 9 July 1951, at 3 p.m.

CONTENTS

	<i>Page</i>
Régime of the high seas: report by Mr. François (item 6 of the agenda) (A/CN.4/42) (<i>continued</i>)	
Chapter 10: Sedentary fisheries (<i>continued</i>)	319
Chapter 9: Contiguous zones	324

Chairman: Mr. James L. BRIERLY

Rapporteur: Mr. Roberto CORDOVA

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

Régime of the high seas, report by Mr. François (item 6 of the agenda) (A/CN.4/42) (*continued*)

CHAPTER 10: SEDENTARY FISHERIES (*continued*)

1. The CHAIRMAN reminded members of the Commission that at the previous meeting they had finished the general discussion on the question of sedentary fisheries. They must now take a decision on the draft article submitted by the Rapporteur at the end of the section of his report dealing with sedentary fisheries (A/CN.4/42, p. 62, mimeographed English text; para. 150, printed French text).