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Summary record of the 316th meeting

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

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63. While prepared to support Sir Gerald Fitzmaurice's amendment, he would not incorporate it in the text because he would prefer it to be put to the vote separately, lest it should endanger acceptance of his own text.

64. Mr. KRYLOV proposed that the two paragraphs of the Special Rapporteur's amendment be put to the vote separately.

65. The CHAIRMAN asked whether the Commission thought it necessary first to vote on a motion to reconsider Mr. Amado's text; such a motion would require a two-thirds majority.

66. Mr. HSU formally proposed a motion to that effect.

67. Mr. FRANÇOIS (Special Rapporteur) felt that such a motion was unnecessary in view of the fact that the Commission had originally taken only a provisional vote on Mr. Amado's text.

68. Mr. EDMONDS agreed with the Special Rapporteur that rule 124 of the rules of procedure was inapplicable, because the previous decision had been provisional.

69. The CHAIRMAN said that in order to extricate the Commission from the present difficulty he would put to the vote the question whether a vote on the Special Rapporteur's amendment should be regarded as constituting reconsideration of Mr. Amado's text.

The question was decided in the negative by 6 votes to 2, with 4 abstentions.

70. Mr. GARCÍA AMADOR asked whether Sir Gerald Fitzmaurice could withdraw his amendment to the Special Rapporteur's text since the Commission had decided to postpone consideration of objective criteria until its next session.

71. Sir Gerald FITZMAURICE withdrew his amendment for the insertion of the words "subject to historical rights", which had been designed to render the text more acceptable to certain members such as Mr. Sandström, in view of the fact that it would raise difficulties for others.

72. Mr. SANDSTRÖM, invoking rule 91 of the rules of procedure, opposed Mr. Krylov's request for separate votes on the two paragraphs of the Special Rapporteur's amendment because they formed an indivisible whole.

73. Mr. KRYLOV insisted on his proposal because the first paragraph was a perfectly complete and coherent statement and could stand by itself.

74. Mr. ZOUREK, supporting Mr. Krylov, pointed out to Mr. Sandström that if the second paragraph were rejected its substance could be re-introduced in the form of a new amendment.

75. Mr. SANDSTRÖM said that he would not press his objection if the Special Rapporteur considered a separate vote feasible.

76. Mr. FRANÇOIS (Special Rapporteur) said that the two paragraphs could be put to the vote separately.

77. The CHAIRMAN then put the Special Rapporteur's amendment to the vote paragraph by paragraph.

The first paragraph was adopted by 8 votes to none, with 5 abstentions.

The second paragraph was adopted by 7 votes to 6.

78. Mr. ZOUREK said that adoption of the Special Rapporteur's amendment entirely altered Mr. Amado's text, which he would now be forced to oppose.

79. The CHAIRMAN then put Mr. Amado's text to the vote as amended. It read:

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

"2. The Commission considers that international law does not justify the extension of the territorial sea beyond twelve miles.

"3. The Commission, without taking any decision as to the breadth of the territorial sea within that limit, considers that international law does not require States to recognize a breadth beyond three miles."

That text was adopted by 7 votes to 6.

Further consideration of item 3 of the agenda was adjourned.

The meeting rose at 6.25 p.m.

316th MEETING

Tuesday, 21 June 1955, at 10 a.m.

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* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

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

AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda)
(A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (continued)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV)
(continued)

Article 3 [3]: Breadth of the territorial sea (continued)

1. Mr. HSU proposed reconsideration of the Special Rapporteur's amendment, adopted at the previous meeting.¹ He recalled that the Commission, when it had tentatively adopted the resolution proposed by Mr. Amado,² had thereby recognized that international practice was not uniform regarding limitation of the territorial sea to three miles, and had stated that it considered international law did not justify an extension beyond twelve miles. To say that practice was not uniform was merely to admit a point of fact. But in stating the twelve-mile limitation, the Commission laid down a rule—a rule which, however much some members were unwilling to face the fact, clearly implied the coming into existence of another rule, namely, that a coastal State was entitled to extend its territorial sea within the twelve-mile limit. The Commission had done so only tentatively, subject to the determination of rules governing such extension, as could be seen from the qualifying phrase “without taking any decision as to the question of the proper extension of the territorial sea”.

2. With a view to determining such rules, the Commission had gone on to discuss the proposal of Mr. Sandström, which had been accepted by the Special Rapporteur; after lengthy consideration, it had rejected it. When discussion of the subject had been resumed at the previous meeting, the members had informally agreed that the whole question of rules governing extensions between three and twelve miles be left over to the following session. They had then reverted to the resolution which had been adopted on the proposal of Mr. Amado. Having failed to lay down any rules or conditions governing extensions within the twelve-mile limit, the Commission should have set that resolution aside. To allow it to stand on its own—implying that States were completely free to extend their territorial sea up to twelve miles—would have been unjustifiable, particularly as the resolution in question had been adopted only tentatively.

3. Instead of setting that resolution aside, the Commission had, on the Special Rapporteur's proposal, adopted at its previous meeting an additional rule on

the effect that other States were under no obligation to recognize such extension by the coastal State.

4. That course, although having justice on its side, unfortunately turned the original resolution into a legal monstrosity. It was axiomatic that if A had a right against B, B owed a duty to A; also, if B had a privilege against A, A had no right to deny it to B. It could not be stated that, while A had a right against B, B owed no duty to A or that, while B had a privilege against A, A had the right to deny it to B.

5. It could therefore not be stated that, while a coastal State had the privilege of extending its territorial sea to any distance within the twelve-mile limit, other States had the right to refuse to recognize such extension.

6. International law, as applied by the States upholding the three-mile rule, undoubtedly gave them the right to object to the extension. But by making it say that other States had the right to raise objection, side by side with the statement that a coastal State had the privilege of extending its territorial sea up to any distance within twelve miles, the Commission had transmogrified Mr. Amado's resolution and robbed it of all locality.

7. Thus transmogrified, the resolution could not be allowed to stand. The Commission was a technical body, and it was the privilege of political, not technical, bodies to create legal monstrosities.

8. There were two courses open to the Commission: either to eliminate the statement regarding extension beyond twelve miles; or to discard the resolution entirely. For his part, he (Mr. Hsu) preferred the second course, because it was more in harmony with the earlier decision to leave the whole question to the following session.

9. He therefore appealed for the necessary two-thirds majority to decide to reconsider the action taken at the previous meeting.³

The Commission decided not to reconsider the matter by 5 votes to 1, with 7 abstentions.

Article 4 [4]: Normal base line

10. Mr. FRANÇOIS (Special Rapporteur) pointed out that some of the comments by governments on article 4 were connected with their comments on article 5, dealing with straight base lines and he would therefore deal with them together.

11. Specific issues concerning article 4 had been raised by the Union of South Africa and Norway (A/2934, Annex, Nos. 15 and 11). The Union of South Africa had suggested that the article be re-drafted in such a way as to enable States whose coastlines contained long sandy stretches to measure their territorial waters from the “surf line” of the normal outer (seaward) edge of the surf. He (the Special Rapporteur) did not propose

¹ 315th meeting, paras. 36 and 77.

² 311th meeting, para. 63.

³ 315th meeting, para. 79.

that the Commission should adopt the Union Government's suggestion, which embodied quite a novel criterion. In any case, it would be most impracticable to try and measure the territorial sea from the "surf line" because the surf line was very much dependent on atmospheric conditions. In his own country, the Netherlands, the surf line was very near the coast with calm seas, but extended to several hundred metres when there was wind, and even further in case of storm.

12. The Norwegian Government suggested the deletion of the last sentence of article 4, and he (the Special Rapporteur) proposed in document A/CN.4/93 that that suggestion be followed. The sentence in question could be construed as meaning that a State might be obliged to use the high-water line in cases where no charts were available.

13. Mr. ZOUREK drew attention to the comment by the Government of Iceland (A/2934, Annex, No. 7), which suggested the deletion of the words "Subject to the provisions of article 5" so as to emphasize the fact that the two types of coast and the two different régimes applicable to them (normal base lines and straight base lines) were juridically on the same level and that one of them did not constitute an exception vis-à-vis the other.

14. Mr. FRANÇOIS (Special Rapporteur) felt that his own proposal to delete the words "As an exception" from article 5, paragraph 1, met the Icelandic Government's point. With regard, however, to the opening words of article 4, they seemed essential to a clear drafting of the text.

15. Mr. SANDSTRÖM said he was not in favour of article 5 as drafted. But it was clear that if an article on straight base lines were to figure in the provisional articles, it was necessary to include in article 4 a proviso along the lines proposed by the Special Rapporteur.

16. Mr. ZOUREK agreed to leave it to the Drafting Committee to decide about the opening words of article 4 in the light of the form in which article 5 was finally approved by the Commission.

The Special Rapporteur's proposal to delete the last sentence of article 4 was adopted by 9 votes to none, with 4 abstentions.

Article 4 as a whole, as amended, was adopted by 11 votes to none, with 2 abstentions.

Article 5[5]: Straight base lines

17. Mr. FRANÇOIS (Special Rapporteur) proposed that, in accordance with the valid comment made by the Belgian Government, (A/2934, Annex, No. 2) the words in the French text of article 5, paragraph 2, *fonds affleurant à basse mer* be replaced by *rochers ou fonds couvrants et découvrants*.

18. With regard to substance, he had a number of proposals, following the suggestions made by various governments.

19. In paragraph 1, he proposed the deletion of the first phrase "as an exception". The phrase had little meaning and seemed to suggest that the straight base lines were an exception to a general rule instead of a rule covering a particular type of coast.

20. A second proposal for paragraph 1 was to insert the word "numerous" before the words "islands in its immediate vicinity". That proposal followed the suggestion made by the United States Government (A/2934, Annex, No. 17). The presence of a few islands in front of the coast did justify *per se* the use of the straight line method.

21. In connexion with paragraph 2, there had been a number of criticisms, one State—Iceland (A/2934, Annex, No. 7)—going so far as to suggest that the provision was incompatible with the judgement of the International Court of Justice in the Fisheries Case.

22. In fact, the text he proposed for paragraph 2 was not incompatible with the Fisheries judgement.⁴ That judgement had laid down certain principles which had been incorporated in paragraph 1 of article 5. However, certain more precise formulations were necessary to put those principles into practice. For that reason, a committee of eminently qualified experts had been consulted and it was on the basis of their report⁵ that the rule had been adopted under which the maximum permissible length for a straight base line would be ten miles.

23. The Commission had not claimed that that rule, or the rule that longer straight base lines could be drawn provided no point on them was more than five miles from the coast, constituted part of positive international law. They were simply necessary practical criteria for the application of the general principles which the International Court of Justice had laid down in the Fisheries Case, and which the Commission had adopted for paragraph 1.

24. The United Kingdom Government, in its comments (A/2934, Annex, No. 16) on articles 4 and 5, had suggested that provision be made to safeguard the right of innocent passage where straight base lines were drawn, even though that might involve, in certain cases, that such right of passage would apply to internal as well as to territorial waters. And Sir Gerald Fitzmaurice had made a proposal along the same lines at a previous meeting.⁶

25. For his part, he (the Special Rapporteur) could not accept the United Kingdom's suggestion. That suggestion proceeded from the erroneous assumption that the essential purpose of the straight base lines system was to extend the outer limit of the territorial sea. In fact, the system was primarily aimed at increasing the

⁴ *I.C.J. Reports 1951*, p. 116.

⁵ *Yearbook of the International Law Commission, 1953*, vol. II, doc. A/CN.4/61/Add.1.

⁶ 299th meeting, para. 85.

zone of internal waters wherein navigation might be restricted by the coastal State. That such was the primary consideration in Scandinavia—an example particularly pertinent to the issue—was shown by the Swedish Government's comment (A/2934, Annex, No. 13) on article 5, in which the point was made that article 5 appeared to be based on the same idea as that expressed in Swedish law concerning internal waters.

26. The Commission could not, after giving the coastal State the right to draw straight base lines, take away the main corollary of that right by making provision for the right of passage. He quoted the French legal dictum: *donner et retenir ne vaut*.

27. Furthermore, the United Kingdom proposal would give rise to a complex situation in which there would be three types of waters:

- (1) Internal waters properly so-called;
- (2) Internal waters subject to right of passage;
- (3) Territorial waters.

28. It would be extremely difficult to draw a demarcation line between the first and second of those two categories of waters, particularly in the case of a deeply indented coast-line.

29. For all those reasons, he felt that the United Kingdom Government's suggestion could not be entertained.

30. Mr. SANDSTRÖM proposed that article 5, paragraph 2, be amended to read as follows:

“As a general rule the drawing of straight base lines shall be subject to the following additional conditions. The maximum length of such base lines shall be ten miles. They may be drawn between headlands of the coastline or between any such headland and an island less than five miles from the coast, or between such islands. Base lines shall not be drawn to drying rocks or drying shoals. The above distances may be modified in special cases particularly for historical or geographical reasons.”

31. There were two important differences between that text and the amended text proposed by the Special Rapporteur (A/CN.4/93). Firstly, the reference to “the international organ mentioned in article 3” made by the Special Rapporteur had been omitted in view of the fact that article 3 as voted did not provide for any international organ. In the second place, his (Mr. Sandström's) proposal omitted the sentence: “Longer straight base lines may, however, be drawn provided that no point on such lines is more than five miles from the coast.” That provision was far too general.

32. Mr. GARCÍA AMADOR said the straight-base-line system was an old-established one, although it had not received legal recognition until the Fisheries Case.⁷ In its judgement of 18 December 1951 on that case, the International Court of Justice, although dealing with a particular dispute, had laid down in very general terms

the criteria on which the straight base lines system should be founded. The Court had said in its judgement: “In this connection, certain basic considerations inherent in the nature of the territorial sea bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question.”⁸

33. The judgement then states those considerations, which were three in number:

(1) “...The drawing of base lines must not depart to any appreciable extent from the general direction of the coast...”;

(2) “...The close dependence of the territorial sea upon the land domain”; the real question raised in the choice of base lines was “whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the régime of internal waters”;

...

(3) “Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.”⁹

34. In the Special Rapporteur's draft for article 5, reference was made to the first two of those considerations, but nothing had been said about the third, which was extremely important.

35. That departure from the principles of the International Court of Justice's decision justified the criticism by the Government of Iceland that paragraph 2 of article 5 was incompatible with the Court's judgement.

36. Even more significant—in view of Norway's having been a party to the Fisheries dispute—was the comment by the Norwegian Government (A/2934, Annex, No. 11) that paragraph 2 embodied innovations “unwarranted by the practice of States”. The International Court of Justice, constituting the greatest authority on international law, had been satisfied with the three criteria above referred to. It was incumbent upon the Commission to adhere to those three criteria instead of reproducing them in part only. And it was equally incumbent upon the Commission not to endeavour to lay down a rule concerning the length of the straight base lines or their distance from the coast where international law acknowledged no such rules. He recalled the legal dictum: *Ubi lex non distinguit, nec nos ne distinguere debemos*.

37. The novel suggestion for a maximum limit for straight base lines of, as a general rule, ten miles in length and, exceptionally, five miles' distance from the coast had originated in the report of a committee of experts on geography, oceanography and navigation, who were not cognizant of the economic and social back-

⁷ *I.C.J. Reports 1951*, p. 116.

⁸ *Ibid.*, p. 133.

⁹ *Ibid.*

ground to the straight-base-line rule. The Commission should not therefore follow their conclusions.

38. He proposed that paragraph 2 be deleted and that paragraph 1 be amended so as to include a reference to "certain economic interests peculiar to a region, the reality and importance of which are evidenced by a long usage"—thus incorporating, in the terms by the International Court of Justice, the third of the three basic considerations which the Court had regarded as inherent in the nature of the territorial sea.

39. Mr. KRYLOV said he agreed with Mr. García Amador's remarks. The Icelandic criticism of paragraph 2 was rigorously correct; that paragraph was incompatible with the judgement of the International Court of Justice in the Fisheries Case.

40. He felt the Commission should not go any further than the International Court in the formulation of the basic considerations involved. As had been said, paragraph 2 was based on the report of a committee of distinguished experts on nautical problems. Those nautical experts, however, were not qualified to lay down a legal rule of that type.

41. Besides, the adoption of paragraph 2 would place the Commission in a very difficult position. There was no valid argument on which to base the arbitrary choice of the particular distances therein referred to.

42. He agreed with Mr. García Amador that paragraph 2 should be deleted from article 5, and that paragraph 1 should be re-drafted so as to incorporate all three considerations laid down by the International Court of Justice.

43. Mr. HSU recalled that the Icelandic Government (A/2934, Annex, No. 7) had described the provisions of paragraph 2—based on the suggestions of the Committee of Experts—as absolutely unacceptable because incompatible with the judgement in the Fisheries Case. For his part, faced with the choice between a decision of the International Court of Justice and the opinion of the group of nautical experts, he had no hesitation in siding with the former.

44. Sir Gerald FITZMAURICE pointed out that the report of the Committee of Experts (A/CN.4/61/Add. 1) had been made in May 1953—i.e., two years after the International Court of Justice's judgement in the Fisheries dispute.

45. The Committee of Experts had been invited by the Special Rapporteur to examine certain questions of a technical nature raised during the Commission's discussions regarding the régime of the territorial sea. Those technical questions had arisen precisely because the considerations laid down in the International Court of Justice's decision in the Fisheries Case had been of a rather too general—and in some respects altogether too vague—nature to be suitable for inclusion in the Commission's draft articles. In that respect and in several others, it was apparent to any well-informed observer that many of the International Court of

Justice's formulations might have been framed differently if it had taken independent expert advice on the technical issues involved.

46. It was essential to give a more precise character to some of the International Court of Justice's rather subjective considerations. That was particularly true of the following provision in article 5 which was taken from the judgement in the Fisheries Case: "The drawing of base lines must not depart to any appreciable extent from the general direction of the coast."¹⁰

47. The words "general direction of the coast" were an expression the implications of which depended upon how much coast was included in order to determine the general direction in question. It was obvious that the so-called general direction of the coast would be totally different according to the scale of the map or chart used: on a small-scale map of Europe, the whole Norwegian coastline from Narvik to Alesund could appear as a single straight line; on a large-scale chart such as used by seamen for navigation purposes, the general direction of the same coastline would appear as a complex broken line showing many deep indentations.

48. The expression "general direction of the coast" was already imprecise enough. But if, as was done in the article under discussion, it were coupled with the expression "must not depart to any appreciable extent", which introduced a subjective element, the whole sentence became altogether too vague a formulation and one which could not possibly be used as a valid legal criterion.

49. The Commission had to choose between two courses: (1) either to say "The drawing of such base lines must not depart to any appreciable extent from the *line* of the coast"—the term "line of the coast" being a generally recognized one having a clear meaning; or else (2) to say "The drawing of such base lines must not depart from the *general direction* of the coast"—the latter formulation being a less precise one than the former.

50. Reverting to his proposal to include a new article safeguarding the principle of the freedom of innocent passage through areas enclosed between the coastline and the straight base lines drawn in accordance with article 5, he recalled his earlier remarks concerning the somewhat accidental consequence of the judgement of the International Court of Justice in the Fisheries case—the fact that the waters between the straight base lines and the coast had acquired a new legal status as internal waters, instead of territorial waters, as they had previously been.¹¹

51. That was a case where waters which were geographically part of the sea and necessary to navigation, and in which the right of passage had existed from time immemorial, had been suddenly made subject to a régime which implied the coastal State's right to interfere with freedom of navigation.

¹⁰ *Ibid.*

¹¹ 299th meeting, paras. 85–89.

52. A provision safeguarding freedom of passage in the waters concerned would help to mitigate certain inconveniences caused by the International Court of Justice's decision in the Fisheries Case.

53. There was no difficulty in determining the waters which would be subject to the provision which he proposed. The area of water involved was simply that lying between the new straight base lines and the old limit of the internal waters. The latter limit, by and large, only enclosed waters which were actually behind the coastline, such as those of estuaries, lagoons and certain deep bays.

54. Finally, he opposed Mr. García Amador's proposal for the deletion of paragraph 2 of article 5. That paragraph introduced an element of precision which was absolutely indispensable. Following the International Court of Justice's decision in the Norwegian fisheries dispute, base lines of a very great length had been drawn with very little foundation. It was clear that the considerations laid down in the Fisheries Case decision left an enormous amount to the subjective appreciation of States.

55. A rule laying down a definite distance as the maximum permissible length for a straight base line would go a long way to avoid international disputes. So long as a State's straight base lines were kept within a reasonable distance from its coast and did not run to too great a length, it was unlikely in practice that other States would dispute them. In fact, with distance limitations clearly laid down, the relative importance of the other criteria was very considerably decreased. It was only if straight base lines of unlimited length were permitted that complaints on their validity were bound to arise and arguments entered into as to whether they departed from the general line of the coast, or again whether the sea areas they enclosed were sufficiently closely linked to the land domain to be subject to the régime of internal waters.

56. He supported the figures of ten and five miles respectively, as proposed, but the fixing of any other reasonable distances would have the same effect of reducing the chances of international disputes.

57. Mr. HSU pointed out in reply to Sir Gerald Fitzmaurice that expert opinion had been given during the hearing of the Fisheries Case as well as by the Committee of Experts which had sat at The Hague in 1953.¹²

58. Mr. ZOUREK said that in view of the critical reception given to paragraph 2 by governments it should be deleted if the draft were to command the widest possible measure of acceptance.

59. It was hardly appropriate to deal with the status of waters between base lines and the coast in a draft devoted to the régime of the territorial sea. It would be remembered that the Commission had deleted the reference to "inland waters" in article 24.

60. With regard to the substance of the question, he pointed out that it was difficult to accept a new category of waters with no very well-defined status. In the past, the area between base lines and the coast had been regarded as inland waters and that had not given rise to inconvenience since the only navigational interests involved were free entry to or exit from a port, which was a matter for regulation in a régime for international ports.

61. Mr. SANDSTRÖM was uncertain whether States using straight base lines in fact prohibited foreign merchant vessels from navigating in the zone between the base lines and the coast. It was certainly not the case in Sweden, though on certain routes vessels did have to take a pilot on board. On the other hand, some zones were declared closed to warships.

62. Mr. FRANÇOIS (Special Rapporteur) suggested that governments criticizing paragraph 2 had perhaps overlooked its opening proviso—"As a general rule"—which had been expressly inserted to give the text greater flexibility. The Commission had aimed to give general directives, recognizing that in special circumstances States need not be rigidly bound by the distances laid down. He could not remember offhand whether the text had been adopted by a considerable majority, but at all events considered that the objections to it were not weighty enough to warrant its deletion. Though he would prefer the Commission to maintain the original wording, he would be prepared to suppress the five-mile limitation if there were a considerable body of opinion in favour of doing so.

63. Turning to the problem raised by Sir Gerald Fitzmaurice, he said that in his third report (A/CN.4/77)¹³ he had strongly criticized the expression "general direction of the coast", having studied the report of the Committee of Experts, who had demonstrated irrefutably the errors of that concept and that it could not furnish a basis for a legal text. However, as the expression had been borrowed from the judgement of the Court, it should perhaps be retained and some modification introduced in paragraph 2 to elucidate its meaning a little more precisely. If, however, the latter paragraph were omitted altogether, then the Commission should attempt to find clearer and more accurate language for use in paragraph 1.

64. Sir Gerald Fitzmaurice's remarks had confirmed his own view that it would be difficult to recognize merchant vessels' right of innocent passage in the zone between straight base lines and the coast, which had now become inland waters. He wondered whether Sir Gerald wished to extend the proviso to warships as well.

65. Sir Gerald FITZMAURICE confirmed that he had had in mind the protection of the normal commercial activities of merchant vessels, and agreed that it would be difficult to envisage warships being granted the right of passage through inland waters. There was a strong case of continuing to grant the right of innocent passage through such zones to merchant vessels, whose

¹² See "Report of the International Law Commission covering the work of its sixth session" (A/2693), para. 63, in *Yearbook of the International Law Commission, 1953*, vol. II.

¹³ *Yearbook of the International Law Commission, 1954*, vol. II.

natural routes might for many years have crossed areas which had now suddenly become inland waters.

66. In answer to a question by Mr. SANDSTRÖM, Mr. FRANÇOIS (Special Rapporteur) explained that as the Commission had rejected the proposal for the establishment of an international organ, in connexion with both the draft articles on fisheries and article 3 of the present draft, he withdrew his first amendment to paragraph 2 (A/CN.4/93).

67. Mr. ZOUREK, referring to Mr. Sandström's remarks about the practice followed by his government, said that the regulations applied by a single State and a rule of international law were two quite separate things. The Commission must find some solution of the problem on the basis of general principles.

68. Mr. AMADO said that once again the Commission found itself in difficulties because it was trying to devise a general rule for exceptional cases. As a person without expert knowledge in the field under discussion, and as a national of a State for which the problem was not acute, he could approach it from a slightly different angle. He noted from its comment on the provisional text of article 5 that the Commission had interpreted the Court's judgement on the point as expressing the law in force and had based the article on that judgement. The Commission had also declared that the rules recommended by the Committee of Experts in 1953 (A/CN.4/61/Add.1)¹⁴ added certain desirable particulars to the general method advised by the Court and that it therefore endorsed the experts' recommendations in a slightly modified form. Finally, the Commission had expressed the view that those additions represented a progressive development of international law and could not be regarded as binding until approved by States. However, in view of the contradictory nature of the observations submitted by governments, he wondered whether that comment in fact reflected a discernible trend and because of his doubts had so far remained silent.

69. The CHAIRMAN suggested that as the Special Rapporteur's text was the basic one his amendments need not be put to the vote unless they gave rise to formal objections.

70. Mr. EDMONDS proposed that the words "As an exception" in paragraph 1 be retained.

The proposal was rejected by 6 votes to 3 with 3 abstentions.

The Commission accepted the Special Rapporteur's amendment for the insertion of the word "numerous" in paragraph 1 before the words "islands in its immediate vicinity".

71. Sir Gerald FITZMAURICE said that if paragraph 2 were deleted he intended to propose the deletion in paragraph 1 of the words "to any appreciable extent".

72. Mr. GARCÍA AMADOR said that apart from proposing the deletion of paragraph 2 he wished to amplify paragraph 1 by reference to the third criterion mentioned by the Court in its judgement, namely, special economic interests, since it would be impossible to give valid grounds for omitting it and mentioning the other two. He proposed that the Commission vote on the principle of such an addition at the end of paragraph 1 and leave the exact wording, which should be borrowed from the Court's judgement, to the Drafting Committee.

73. Mr. SANDSTRÖM pointed out that the criterion mentioned by Mr. García Amador had not been treated by the Court as one generally applicable, but only in special cases where there had been lengthy usage.

74. Mr. GARCÍA AMADOR replied that he had already indicated that his amendment should be couched in the terms used by the Court, and would therefore refer to special economic interests as evidenced by a long usage.

75. Sir Gerald FITZMAURICE suggested that Mr. García Amador's point was already covered by the reference to "historical reasons". The Court had not referred to any economic interests but to those whose reality and importance were "clearly evidenced by a long usage". Later, in connexion with the very long Lophavet base line it had concluded that traditional rights "founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable."¹⁵

76. Thus, the Court had clearly linked economic considerations with historic rights. The former were not a criterion for establishing base lines but a motive for selecting a particular method in doing so; they could not therefore be appropriately mentioned at the end of paragraph 1.

77. Mr. EDMONDS said that Mr. García Amador's amendment to paragraph 1 involved an important matter of principle which could not be put to the vote before the text had been circulated in writing. The Commission could not take a decision in the dark to transfer certain wording from the judgement of the Court into what was intended to become a legal instrument.

It was agreed to defer consideration of Mr. García Amador's amendment to paragraph 1 until it had been circulated.

78. The CHAIRMAN then put to the vote Mr. García Amador's proposal to delete paragraph 2.

The proposal was adopted by 6 votes to 5 with 2 abstentions.¹⁶

¹⁵ *I.C.J. Reports 1951*, p. 142.

¹⁶ See *infra*, 319th meeting, para. 70.

¹⁴ *Yearbook of the International Law Commission, 1953*, vol. II.

79. Sir Gerald FITZMAURICE said that as the Commission had now eliminated the sole provisions which might give at least some precision to the very vague idea of "the general direction of the coast", he would formally propose the deletion of the words "to any appreciable extent" in paragraph 1.

80. Mr. KRYLOV said that having just learnt from the Special Rapporteur that those words derived from the judgement of the Court, he considered that they should be retained. Though he understood the reasons for Sir Gerald Fitzmaurice's amendment, it was sometimes difficult to go beyond somewhat imprecise concepts, and it would be unwise to create difficulties: he was confident that the provision in question would be interpreted with common sense.

81. Sir Gerald FITZMAURICE said that it was natural that Mr. Krylov should be in favour of imprecision in the present instance since it would enable coastal States to draw base lines with the minimum of restriction. However, such latitude would surely simplify neither the law nor practice.

82. Mr. KRYLOV observed that the criticism should be directed against the Court's judgement.

83. Mr. GARCÍA AMADOR moved that voting on any amendment to paragraph 1 be deferred until his own had been circulated.

The motion was carried by 8 votes to 1 with 1 abstention.

84. Mr. FRANÇOIS (Special Rapporteur) observed that there had been no comments by governments on paragraph 3.

Paragraph 3 was unanimously adopted, further discussion of article 5 being deferred.¹⁷

Article 6 [6]: Outer limit of the territorial sea

85. Mr. FRANÇOIS (Special Rapporteur) said that apart from the United Kingdom, which had expressed its approval (A/2934, Annex, No. 16) of the article, no other government had commented on article 6.

Article 6 was unanimously adopted.

Further consideration of item 3 of the agenda was adjourned.

The meeting rose at 12.55 p.m.

¹⁷ See *infra*, 317th meeting, para. 1.

317th MEETING

Wednesday, 22 June 1955, at 10 a.m.

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* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (continued)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV)
(continued)

Article 5 [5]: Straight base lines
(resumed from the 316th meeting)

1. The CHAIRMAN invited the Commission to resume consideration of article 5. The voting on paragraph 1 had been deferred pending the circulation of Mr. García Amador's amendment.

2. Mr. GARCÍA AMADOR said that members now had before them the text he had submitted to replace paragraph 1. It read:

"1. Where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, or where this is justified by economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage, the base line may be independent of the low-water mark. In these special cases, the method of straight base lines joining appropriate points on the coast may be employed. The drawing of such base