

Document:-
A/CN.4/SR.317

Summary record of the 317th meeting

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

Extract from the Yearbook of the International Law Commission:-
1955 , vol. I

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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

lines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within these lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.”

3. He had proposed that amendment in order to reproduce as closely as possible the three criteria laid down by the International Court in the Fisheries Case.¹ The first two, which were both geographical in character, had been included in the original text, but the last, namely, “economic interests peculiar to a region the reality and importance of which are clearly evidenced by a long usage” had been omitted, and though Sir Gerald Fitzmaurice had argued that it was covered by the words “historical reasons” there was surely every reason for using the Court’s own wording. Apart from that change, he had followed the Commission’s original text.

4. Sir Gerald FITZMAURICE, referring to Mr. Hsu’s remarks at the previous meeting concerning experts, explained that he had had in mind independent experts of the kind used by the Court in the Corfu Channel Case² and not experts brought by the parties as in the Fisheries Case.³ On the latter occasion the opinions of the experts on the two sides had been contradictory.

5. Turning to article 5, he proposed, without any great hope of support, that it be omitted altogether. The reason why he made that proposal was that the Commission had at the previous meeting decided to delete paragraph 2. It would be remembered that the Court’s decision in the Fisheries Case had been received with a great deal of dismay, in the United Kingdom and elsewhere, not because the Court had reached a specific decision about the base lines drawn by Norway—a decision which had been fully accepted by the United Kingdom—but because it had laid down certain general principles without giving them any precision, thus leaving coastal States in the dark as to whether the base lines they had drawn or intended to draw were valid, and other States equally in the dark as to whether they were bound to accept them. It was most undesirable to have a general rule allowing straight base lines, provided they fulfilled certain conditions, without clearly defining those conditions, because the numerous controversies likely to arise could only be resolved by a tribunal, and it was perfectly conceivable that a coastal State might refuse to appear. Great relief had accordingly been felt when the Commission, while adopting the principles laid down by the Court for use in certain types of case, had sought to give them rather more concrete and precise form, as a result of which some of the difficulties of application might have been overcome. The concrete provisions introduced by the Commission in paragraph 2 had rendered article 5 more acceptable even to those States which were in principle opposed to the system of straight base lines. The Com-

mission’s decision to delete those provisions for no easily apparent reason meant a return to the uncertainty created by the Court’s decision and would revive much of the opposition to the principle of straight base lines which the Commission’s original draft had gone some way to diminish. In his opinion the only remedy was to omit article 5 altogether. If his proposal were rejected he would move that the Commission reconsider its decision to delete paragraph 2, in the hope that it would see its way to restoring that provision, though perhaps in a modified form.

6. Mr. EDMONDS entirely agreed with the views of Sir Gerald Fitzmaurice. No tribunal would be able to render judgement on the basis of such an imprecise text as that submitted by Mr. García Amador. It would only be applied, in fact, by recourse to judicial legislation, which was not an appropriate function for a judicial body. The expression “appreciable extent” and other indefinite elements in the text seemed to him open to the same kind of criticism as that levelled against a certain judgement in the United States according to which a statute had been held to be “slightly unconstitutional”.

7. Mr. SCELLE agreed with the preceding speakers that, after the suppression of paragraph 2, the remaining text was both vague and dangerous. Indeed, the Commission seemed to be following a retrograde course by giving States great latitude in delimiting their territorial sea by the use of straight base lines. Sir Gerald Fitzmaurice was right in thinking that, in the circumstances, it would be preferable to delete article 5 altogether.

8. Mr. FRANÇOIS (Special Rapporteur) could not agree with Sir Gerald Fitzmaurice, though he regretted the Commission’s decision to delete paragraph 2. Its importance, however, should not be exaggerated, because it only provided general directives. Paragraph 1 was not as useless as Sir Gerald Fitzmaurice supposed, and did give some guidance to States. It was true that the expression “to any appreciable extent” was not very precise, but elsewhere the Commission had accepted such words as “reasonable”, which were no less vague. The article, like others, might have to be submitted to an impartial judicial organ for interpretation, but its total suppression would not make the position any clearer, particularly as there were certain States which in fact applied the system of straight base lines.

9. Mr. KRYLOV said that he was astonished by the unexpected attack made on the decision of the International Court of Justice, which in the Fisheries Case had made a contribution to case-law. Like Mr. Edmonds he too had some experience of the bench and believed that in any specific instance a judge would be able to determine the meaning of the words “to any appreciable extent” by a simple exercise in logic and would not return a verdict of *non liquet*. It was the special business of judges to be able to apply such provisos.

10. He strongly deprecated any effort to undermine the case-law created by the Court. Norway was not the

¹ See *supra*, 316th meeting, para. 33.

² *I.C.J. Reports 1949*, p. 4.

³ *I.C.J. Reports 1951*, p. 116.

only State which possessed a deeply indented coastline as he had had the opportunity of seeing for himself when travelling near Murmansk and along the Finnish coast. There was, therefore, a need for article 5. He had, however, opposed paragraph 2 because it went far beyond what had been laid down by the Court.

11. Faris Bey el-KHOURI considered it essential to allow States to delimit their territorial sea from a straight base line whether their coast was deeply indented or not. He therefore proposed the insertion in article 5 of the following paragraph:

“When the coast is not appreciably indented, the base line shall be drawn by the coastal State in such a way as to keep its distance from the dry shore not less than one mile.”

12. Though he had abstained from voting on Mr. García Amador's proposal to delete paragraph 2, he believed that it might be useful to provide some indication of the method to be used in drawing straight base lines where the coast was heavily indented. He would therefore support a motion to reconsider the Commission's decision.

13. Mr. SANDSTRÖM said that he understood the reasons why Sir Gerald Fitzmaurice believed that the omission of paragraph 2 would create uncertainty and would encourage States to apply the system of straight base lines without real justification. He could not, however, support his proposal to eliminate the article altogether because, as the Special Rapporteur had argued, it filled a real need. The Commission had already adopted article 4 and unless article 5, paragraph 1, were retained, States would be prohibited from using straight base lines at all.

14. He did not believe that such vague wording as “to any appreciable extent” could be avoided in modern legislation, and judges often had, in the course of their duties, to apply such texts. In the Fisheries Case the Court had based its finding on the general direction of the coast, which it had evidently found to be discernible. The words “to any appreciable extent” should not therefore give rise to difficulties of application.

15. He would be unable to vote for Mr. García Amador's text because it was not consistent with the Court's finding. The Court, though it had taken into account “economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage”, had not made the use of straight base lines conditional on the existence of such interests.

16. Mr. GARCÍA AMADOR said that he had proposed the deletion of paragraph 2 laying down a maximum permissible length for base lines because though some of the language used in the judgement might have been vague, the Court had made a very definite and precise declaration to the effect that the Norwegian system of drawing straight base lines, being based on the three criteria it had accepted, was not contrary to international law.

17. Mr. Edmonds' critical remarks about his new text for paragraph 1 should be directed against the judgement of the Court since he had reproduced its language word for word. He vividly remembered one of his advantages of imprecision in connexion with the distinguished professors at Harvard demonstrating the sins of the Supreme Court of the United States.

18. In replying to Mr. Scelle he would point out that it was quite erroneous to suppose that coastal States would arrogate to themselves in an arbitrary manner the right to apply straight base lines when there was no geographical justification for doing so. They would only take advantage of the system, which the Court had declared not contrary to international law, if the requisite conditions were fulfilled. He therefore believed that the draft should contain a provision of the kind embodied in his text.

19. Mr. EDMONDS said that notwithstanding Mr. Krylov's generous appraisal of the ability of judges, he himself remained convinced that the expression “to any appreciable extent” would inevitably be interpreted in a most subjective way and could not provide a precise standard. The language of judgements, being frequently loose, was generally not appropriate for inclusion in an instrument of a legislative character and it would be well to bear in mind that there was a great difference between the legislative and the judicial function. In the present instance, the Commission should seek to establish a criterion which could be applied with reasonable certainty. The Special Rapporteur's argument that the Commission had used imprecise terminology elsewhere was no excuse for repeating the same fault. Moreover, the inclusion of ambiguous and doubtful criteria would provoke criticism and increase the possibility of the draft articles not being accepted. The analogy drawn from the imprecision of some of the judgements of the Supreme Court was hardly pertinent to an article which should fix precise standards, since it was essential for States to know exactly how their rights regarding the territorial sea were limited. In drafting the provision, the Commission must remember that it was exercising a legislative function which could not appropriately be carried out by the courts.

20. Mr. AMADO said that contrary to his usual practice, he had at the previous meeting abstained from voting on paragraph 2 of article 5 because he was doubtful about the manner in which the Special Rapporteur had sought to go beyond the judgement of the Court into the realm of the progressive development of international law. Such a move would give rise to even greater objections than those levelled against the use of the expression “to an appreciable extent”, which, in his opinion, was not particularly imprecise. Mr. Sandström had rightly argued that such provisos were necessary in the modern world because they gave the courts some latitude so that verdicts of *non liquet* could be avoided. He therefore intended to support Mr. García Amador's text.

21. Mr. SCELLE pointed out that the Commission had entirely overlooked the fact that the deletion of the

words "as an exception" in paragraph 1 had completely transformed article 5, which had originally been designed to cover exceptional cases. As it now stood, the text would encourage States to adopt a system of straight base lines on the most slender pretexts. Those which sought to extend their territorial sea would be particularly pleased to abandon the principle of the low-water line in favour of straight base lines. The Court in its judgement had made it very clear that it was dealing with a specific case and had purposely couched its conclusion in a particular way, declaring that the Norwegian base lines, fixed in application of a certain method, were not "contrary to international law". There could be no doubt whatsoever that the Court had not expounded any general principle or rule of international law. In any event, a single judicial decision was not enough to create case-law and until a further judgement had confirmed the Court's findings in an exceptional case, the whole of article 5 should be suppressed, because as it at present stood it was contrary to a general trend and was thus at variance with Article 38, paragraph 1(d), of the Court's Statute.

22. Sir Gerald FITZMAURICE considered that Mr. Krylov had perhaps underestimated the difficulties which a phrase such as "to any appreciable extent" might cause. Apart from the fact that it was bound to be interpreted subjectively, it had two possible connotations since the word "appreciable" either meant capable of being perceived, so that only the smallest deviation from the general direction of the coast would be allowed, or it could mean "considerable". A whole range of conflicting interpretations was possible between those two extremes. Though in practice a verdict of *non liquet* would not be returned and the judge would reach a decision, differing decisions were possible. Thus it was dangerous not to give more precise form to the provision regarding straight base lines in a text intended for general application in the future.

23. Referring to Faris Bey el-Khouri's amendment, he said that it was difficult to visualize the case he had in mind. In the Fisheries Case the Court had clearly laid down that straight base lines must have their terminal points on the coast or on an island—a principle which it was easy to apply where the coast was indented, whereas, where there were no indentations, the base line must be the line of the coast itself, that being the reason for the tide-mark rule. According to Faris Bey's text, the base lines would begin and end at some point in the sea, which was quite unacceptable.

24. Faris Bey el-KHOURI saw no objection to the terminal points of straight base lines being fixed in the water and was anxious that States with a more or less straight coast line should be compensated for the concession made by the Court to States with a highly indented coast. His text would enable certain countries applying a three-mile limit to extend their territorial sea up to four miles, which might make them more willing to accept the whole draft.

25. He did not agree with the criticisms of paragraph 1

on the score of imprecision; laws were frequently imprecisely drafted and had to be interpreted by the courts. In the present instance the competent court would be the International Court of Justice.

26. Sir Gerald FITZMAURICE observed that if in article 5 the Commission was trying to follow the Court's decision, it must bear in mind that there was no precedent for drawing base lines with terminal points which were not on land. The scheme proposed by Faris Bey el-Khouri was quite impracticable.

27. Mr. FRANÇOIS disagreed with the view propounded by Mr. Scelle in his last statement. The words "Where circumstances necessitate a special régime" amply sufficed to show that straight base lines could only be used in certain conditions and not at the mere whim of the coastal State. Of course no legal text in itself could prevent States from violating the law but that was a separate issue to be dealt with by an international judicial organ. The text proposed by Mr. García Amador made it clear that States were not at liberty to delimit their territorial sea arbitrarily by the use of straight base lines.

28. Perhaps too much importance had been attached to the words "to any appreciable extent". Though he held no strong views on the subject, on the whole he would prefer them to remain because they had been borrowed from the judgement of the Court.

29. He was unable to understand the purpose of Faris Bey el-Khouri's totally unacceptable amendment because when the coast was not highly indented there was no reason whatsoever for departing from the normal base lines. As at present drafted, the amendment would open the way to unlimited extensions of the territorial sea.

30. Faris Bey el-KHOURI observed that the high-water line to which reference was made in article 4 was not always straight. There was no reason why straight base lines should not be used even in cases where the coast was not heavily indented.

31. Mr. ZOUREK was surprised by the criticisms aroused by paragraph 1. The Commission should bear in mind that its task was to find a solution which might be acceptable to the maximum number of States. Surely, it was perfectly obvious that after the Court's judgement in the Fisheries Case, States would be unwilling to accept the provisions of paragraph 2.

32. Paragraph 1 as drafted by Mr. García Amador provided certain precise criteria establishing the cases where the use of straight base lines was permissible, and there was no reason to fear that States would abuse their right. Members who had objected to paragraph 1 perhaps exaggerated the exceptional character of the straight-base-line principle, and should note that the Court had stated that it "is unable to share the view of the United Kingdom Government that Norway, in the matter of base lines, now claims recognition of an exceptional system. As will be shown later, all that the

Court can see therein is an application of general international law to a specific case.”⁴

33. If article 5 were to be dropped altogether, all States, including those with a heavily indented coastline, would be forced to adopt the system of normal base lines; that would be inconsistent with both international law and the judgement of the Court. He could not, therefore be a party to such a decision.

34. The expression “to any appreciable extent” was perhaps not a happy one, but such wording was sometimes necessary when a precise spatial limitation applicable in all cases could not be laid down. The Commission would remember that in article 6 of its draft articles on the continental shelf⁵ it had referred to “a reasonable distance”. In the present instance any precise limitation would be purely arbitrary and no harm would be done by retaining the phrase “to any appreciable extent”. He added that he interpreted the word “appreciable” in the sense of “considerable”.

35. Mr. HSU said that despite the objections which it had provoked he would support Mr. García Amador’s amendment because it was based on the finding of the Court, which being liberal had been in harmony with the modern trend to depart from the three-mile rule.

36. Sir Gerald FITZMAURICE withdrew his proposal for the total deletion of article 5 (para. 5 above). He did not approve of the text of that article as it at present stood. The Special Rapporteur, however, was technically correct in saying that a provision for a deeply indented coast was necessary. Unfortunately, paragraph 1 by itself was not precise enough for practical purposes.

37. He urged the Commission to reconsider paragraph 2. Should the Commission refuse to do so, he would vote against article 5 as a whole. Prior to that, however, he would, in accordance with the proposal he had made at the previous meeting,⁶ ask for a separate vote on the words “to any appreciable extent”.

The Commission decided, by 6 votes to 5, with one abstention, not to reconsider its decision on paragraph 2 of article 5.

Article 5, paragraph 1, as proposed by Mr. García Amador (para. 2 above), was adopted by 9 votes to 3, with one abstention.

38. Mr. FRANÇOIS (Special Rapporteur) said he had understood that there was general agreement to qualify the term “islands” by the adjective “numerous”.

39. Mr. GARCÍA AMADOR pointed out that the term “numerous” had not been used by the International Court of Justice in its judgement in the Fisheries Case.

40. Mr. FRANÇOIS (Special Rapporteur) said that the matter could be dealt with by means of a reference in the comment to article 5. It would be stated therein that the Commission interpreted the International Court of Justice’s decision as meaning that a single island would not be enough to justify the application of the straight-base-line rule, but that a certain number of islands were necessary.

41. Mr. GARCÍA AMADOR agreed to such a reference in the comment.

Faris Bey el-Khourî’s proposal (para. 11 above) for article 5, paragraph 2, was rejected by 6 votes to one, with 6 abstentions.

Sir Gerald Fitzmaurice’s proposal (para. 36 above) for deletion of the words “to any appreciable extent” in paragraph 1 was rejected by 8 votes to 3, with 2 abstentions.

42. The CHAIRMAN invited the Commission to vote on article 5 as a whole as amended. The text read as follows:

“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 lines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within these lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

“2. The coastal State shall give due publicity to the straight base lines drawn by it.”

Article 5 as a whole as amended was adopted by 10 votes to 3.⁷

43. Mr. SCELLE explained that he had voted against article 5 for the reasons given in the course of the discussion.

Article 7 [7]: Bays

44. Mr. GARCÍA AMADOR proposed that speakers be limited to ten minutes in their first statement on any article and to five in subsequent statements.

It was so agreed.

45. Mr. FRANÇOIS (Special Rapporteur) said his proposal for article 7 (A/CN.4/93) provided that where the entrance of a bay exceeded ten miles, a closing line of such length should be drawn within the bay. That distance of ten miles, as the International Court of Justice had had occasion to state in the Fisheries Case,

⁴ *I.C.J. Reports 1951*, p. 131.

⁵ “Report of the International Law Commission covering the work of its fifth session” (A/2456), in *Yearbook of the International Law Commission 1952*, vol. II.

⁶ 316th meeting, para. 79.

⁷ See discussion of article 11, *infra*, 319th meeting, paras. 57–66.

did not constitute a part of positive international law. It was, however, based on a considerable measure of international practice and it appeared in several multi-lateral conventions; it represented twice the range of vision to the horizon in clear weather from the eye of a mariner at a height of 5 metres, which, as stated by the Committee of Experts he had consulted, was the internationally accepted height for hydrographical purposes (A/CN.4/61/Add.1, Annex, II).⁸

46. It was important to bear in mind that the said distance of ten miles was not in any way connected with the problem of the breadth of the territorial sea. Its purpose was to define the limits of a bay and thus indicate how far its waters constituted internal waters. The closing line of the bay simply constituted part of the base line from which the territorial sea was measured.

47. It was inadvisable to provide for a greater distance than ten miles as the closing line of a bay, because that would increase unduly the extent of internal waters. The ten-mile rule had much to recommend it to the Commission in its task of the progressive development of international law, although of course it did not constitute a rule of existing international law susceptible of codification as such.

48. He (the Special Rapporteur) proposed that when different lines of a length of ten miles could be drawn, that line should be chosen which enclosed the maximum water area within the bay. That proposal was based on the suggestion of the Committee of Experts (A/CN.4/61/Add.1, article 6, para. 7).

49. Perhaps the most difficult problem which arose in connexion with article 7 was the actual definition of a bay. Clearly it could not be held that incurvation of the coast constituted a bay. No coast was absolutely straight and some relationship between the depth of a bay and the breadth of its entrance was necessary. The International Court of Justice had acknowledged the necessity for some such relationship; unfortunately it had not been in a position to give a ruling with regard to actual figures.

50. The Committee of Experts had suggested a definition (A/CN.4/61/Add.1, II) on the basis of which he (the Special Rapporteur) proposed that a bay be defined as "an indentation of an area as large or larger than that of the semi-circle drawn on the entrance of that indentation". That definition could also be expressed as follows: the term "bay" meant an indentation the depth of which was at least half the length of its closing line.

51. Mr. KRYLOV said article 7 dealing with bays was very closely linked with the problem of the breadth of the territorial sea. He therefore felt that the Commission was not in a position to take a vote upon it. For his part, he could accept paragraph 2 of the Special Rapporteur's proposal (A/CN.4/93). He had, however,

serious misgivings about the rest of the article. It was not essential for the Commission to give definite rulings on all the points dealt with in paragraphs 1, 3, 4 and 5. The Commission was not a court of justice, and it was not improper for it to give a finding of *non liquet*.

52. Mr. GARCÍA AMADOR proposed the following text for article 7:

"1. For the purpose of these regulations, a bay is a well-marked indentation, whose penetration inland is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast.

"2. The closing line of a bay shall be drawn between the natural geographic entrance points where the indentation ceases to have the configuration of a bay.

"3. The waters within a bay shall be considered inland waters:

"(a) If the area of the indentation is as large or larger than that of the semicircle drawn on the entrance of that indentation.

"(b) If the bay is totally bordered by the territory of a single State.

"4. If a bay has more than one entrance, the semicircle shall be drawn on a line as long as the sum total of the length of the different entrances. Islands within a bay shall be included as if they were part of the water area of the bay.

"5. If the entrance of a bay is split up into a number of smaller openings by various islands, closing lines across the openings may be drawn.

"6. When the waters of a bay which lies within the closing line thereof are bordered by the territory of two or more States, the bordering States may agree upon a division of such waters as inland waters: in the absence of such agreement, the territorial sea of each State shall follow the sinuosities of the shore in the bay."

53. His proposal did not depart very much in substance from that of the Special Rapporteur. There was one important drafting change, in that the Special Rapporteur's text began by stating that "The waters within a bay shall be considered inland waters". It seemed to him (Mr. García Amador) more accurate first to define a bay in detail and only then state, by way of consequence, that the waters within the bay constituted inland (internal) waters. He preferred to mention the effect after the cause.

54. Paragraph 1 of his proposal was inspired by paragraph (6) of the conclusions which the United Kingdom Government had presented in the Fisheries Case, wherein it was stated:

"The definition of a bay in international law is a well-marked indentation whose penetration inland is in such proportion to the width of its mouth as to

⁸ Yearbook of the International Law Commission, 1953, vol. II.

constitute the indentation more than a mere curvature of the coast.”⁹

He had amended that text by the addition of the words “as to contain landlocked waters”—an idea taken from the dissenting opinion of Judge McNair in the same case.¹⁰

55. He had not adopted the so-called 10-mile rule because the International Court of Justice had explicitly that rule. Indeed the Court had noted that:

“The United Kingdom Government concedes that Norway is entitled to claim as inland waters all the waters of fjords and sunds which fall within the conception of a bay as defined in international law whether the closing line of the indentation is more or less than 10 sea miles long. But the United Kingdom Government concedes this only on the basis of historic title.”¹¹

56. In dealing with specific fjords, the International Court of Justice had not hesitated to acknowledge as bays such indentations as the Svaerholthavet and the Vestfjord, the mouths of which were as wide as 39 and 40 miles respectively, in the light of all the geographical factors involved. On the other hand, certain Norwegian claims in respect of the Lophavet had not been accepted by the Court, again without any reference to a 10-mile distance.¹²

57. Paragraph 2 of his proposal was based on the definition of a bay given in paragraph (7) of the United Kingdom Government’s conclusions in the Fisheries Case.¹³ That definition had been implicitly recognized by the International Court of Justice and tallied with historical tradition, which considered the waters of a bay as being those which were enclosed within the line *inter fauces terrarum*.

58. Proviso (b) in paragraph 3 had been taken from the proposals of the 1930 Codification Conference.

59. Paragraph 6 was based on the Harvard Draft dealing with the problem of a bay the waters of which were bordered by the territory of two or more States. The Harvard group had studied that problem following the dispute¹⁴ between El Salvador and Nicaragua (1917) brought before the Central American Court of Justice in connexion with the Gulf of Fonseca, the shores of which were shared by Honduras, Nicaragua and Salvador.

Further discussion of article 7 was adjourned.

The meeting rose at 1 p.m.

⁹ *I.C.J. Reports 1951*, p. 122.

¹⁰ *Ibid.*, p. 163.

¹¹ *Ibid.*, p. 131.

¹² *Ibid.*, pp. 141–143.

¹³ *Ibid.*, p. 122.

¹⁴ *American Journal of International Law* (1917), vol. 11, pp. 674 and 705.

318th MEETING

Thursday, 23 June 1955, at 9.30 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. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shushi 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 7 [7]: Bays (continued)

1. Mr. FRANÇOIS (Special Rapporteur) said that there was a considerable difference between the text which he proposed in document A/CN.4/93 and that submitted by Mr. García Amador.¹ The former defined a bay as an indentation the entrance of which was not more than twice its depth. The latter provided a definition which, when applied, might be found to be a *petitio principii*. Moreover, the expression “landlocked waters”, even in the sense ascribed to it by the International Court of Justice in the Fisheries Case,² was imprecise. He realized that in paragraph 3 Mr. García Amador had sought to avoid a fixed limit for the closing line of a bay, but that did not solve the problem since, according to his text, the waters of a bay which was a hundred miles wide at the opening and fifty miles in depth would become inland waters, and that would be absolutely unacceptable. The possibility of admitting a greater limit than ten miles could be contemplated, but not without any limitation as proposed by Mr. García Amador.

¹ 317th meeting, para. 52.

² *I.C.J. Reports 1951*, p. 116.