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Summary record of the 66th meeting

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

Extract from the Yearbook of the International Law Commission:-
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When the Commission came to examine the question of the continental shelf it would have an opportunity, if it wished, to return to the question of the breadth of the contiguous zone.

135. Mr. BRIERLY desired the Rapporteur to be requested to collect the fullest possible documentation concerning the claims made by States and the measures taken by them in connexion with rights in the territorial sea and in the contiguous zone. The documentation should include detailed information on the various limits set by States.

136. Mr. FRANÇOIS accepted Mr. Brierly's proposal. He pointed out, however, that in 1930 governments had been asked to make their views known on the matter and a number of replies had been received. The situation had changed since that time and in connexion with the item under discussion it would therefore be advisable to ask governments once again to reply to very specific questions about the contiguous zone. Relevant data could not in his opinion be found in books or other publications. Governments should be asked what rights they claimed in the contiguous zone and how wide they thought it ought to be.

137. Mr. YEPES said that the Commission had already discussed the advisability of sending out a questionnaire to governments and it had decided against it. In the case in point, however, such a questionnaire was justified because governments would only be asked for information concerning law and practice, not on matters of doctrine. He thought that the Commission would consequently obtain a certain amount of information from them.

138. Mr. KERNO (Assistant Secretary-General) thought he was right in saying that the United Nations was already collecting documentation on the subject.

139. Mr. LIANG (Secretary of the Commission) confirmed that the Secretariat was at the moment engaged in collecting conventions, laws, decrees, etc. concerning certain matters relating to the law of the high seas, including the continental shelf and the contiguous zone. The documentation would be at the disposal of the Commission and in the first place of the Rapporteur, whom the Secretariat would also be very glad to supply with any other information which might come to hand later. Such being the case he was not sure whether it was necessary to send out a questionnaire. He did not feel that the Commission ought to limit itself to examining the replies given by governments in 1930.

140. Mr. HUDSON reverted to Mr. François' statement to the effect that some governments had adopted a position on the matter twenty years before. He was sure that many of them had changed their attitude since. They must therefore be asked for fresh information.

141. Mr. FRANÇOIS also felt that a request should be made for information concerning fact and practice. It would also have been desirable to receive governments' views on doctrine, but if Mr. Yepes' fears were grounded governments might perhaps hesitate to reply.

142. Mr. SPIROPOULOS stated that if the Commission desired to consider the question of the contiguous zone, it must have full information on the subject.

143. Mr. KERNO (Assistant Secretary-General) said that the Secretariat would attempt to keep all the information up-to-date.

144. Mr. HUDSON asked whether the enquiries would be confined to matters of law or of practice.

145. Mr. LIANG (Secretary of the Commission) thought that it would be difficult to obtain replies from governments concerning their attitude on matters of doctrine.

146. The CHAIRMAN was sure that many States had changed their attitude since 1930. The Commission had need of more exact information. The Secretariat would be able to provide it. Other methods of obtaining the information, however, ought to be used as well. What was required was knowledge of law and practice, not of views on doctrine.

The meeting rose at 1 p.m.

66th MEETING

Wednesday, 12 July 1950, at 10 a.m.

CONTENTS

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, 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).

Regime of the High Seas: Report by Mr. François (item 7 of the agenda) (A/CN.4/17) (continued)

SECTION 8: SAFETY OF LIFE AT SEA (*resumed from the 64th meeting*)

1. Mr. FRANÇOIS pointed out that the Commission had instructed him to ascertain the exact position with regard to the International Convention for the Safety of Life at Sea, 1948. He had found that the 1948 Conference had drawn up a Final Act which included the following:

" As a result of its deliberations, the Conference prepared and opened for signature and acceptance The International Convention for the Safety of Life at Sea, 1948, to replace the International Convention for the Safety of Life at Sea, 1929. . . .

" The Conference also had before it and used as a basis for discussion the present International Regulations for Preventing Collisions at Sea. The Conference considered it desirable to revise these Regulations and accordingly approved the International Regulations for Preventing Collisions at Sea, 1948, but decided not to annex the revised Regulations to the International Convention for the Safety of Life at Sea, 1948. The Conference invites the Government of the United Kingdom to forward the International Regulations for Preventing Collisions at Sea, 1948, to the other Governments which have accepted the present International Regulations for Preventing Collisions at Sea, and also invites the Government of the United Kingdom, when substantial unanimity has been reached as to the acceptance of the International Regulations for Preventing Collisions at Sea, 1948, to fix the date on and after which the International Regulations for Preventing Collisions at Sea, 1948, shall be applied by the Governments which have agreed to accept them."

(Great Britain Command papers 7487 - 7519, paper 7492, pp. 6 and 8)

2. Some slight change had been made as compared with the procedure laid down in the 1929 Convention in regard to the regulations for preventing collisions. The document consisted of the Convention itself with two separate annexes. Mr. Hudson had been right: both in 1948 and 1929 the States ratifying the Convention had not agreed to the regulations for preventing collisions at sea. However, the Final Act showed that those regulations had been examined during the Conference, and that a text had been drawn up asking governments to approve them. It was also provided that as soon as the necessary majority was obtained, the United Kingdom Government would determine the date on which the regulations were to come into force. In those circumstances, the Commission could do no more than express the hope that all the Member States would accept the regulations.

3. Mr. HUDSON said that there had been no change in the position since 1889. The regulation then adopted remained the basis of all municipal law. The provisions of the Final Act of 1948 were substantially the same as the corresponding provisions of the 1929 Convention, which in turn followed the procedure laid down in 1889. He hoped that Mr. François would be able to ascertain the general principle underlying those precedents. He believed the Commission would be going beyond its terms of reference in recommending that States should embody those regulations in their domestic legislation. Should it do so, it would be necessary to fix a date; but the United Kingdom Government had been made responsible for fixing such a date. The consultation on the date for the entry into force of the regulations provided for in the 1929 Convention had never taken place. He did not think it necessary to spend any more time on the matter, adding that any conclusion at which Mr. François might arrive would be acceptable to him.

The Commission decided to ask its special rapporteur to endeavour to establish a general principle.

4. Mr. FRANÇOIS stated that there was a Convention in existence for the unification of certain rules of law respecting collisions and another for the unification of certain rules of law respecting assistance and salvage at sea, both signed at Brussels on 23 September 1910. Mr. Hudson had expressed the opinion that the principle underlying those conventions could be adopted. He then read out the first paragraph of article VIII of the first of those Conventions:

" Subsequent to a collision, the master of each of the vessels in collision is bound, so far as he can do so without serious danger to his vessel, her crew and passengers, to render assistance to be the other vessel, her crew and passengers. "

and the first paragraph of article XI of the second:

" Every master is bound, so far as he can do so without serious danger to his vessel, her crew and passengers, to render assistance to everybody, even if an enemy, found at sea in danger of being lost."

Did the Commission desire to adopt regulations similar to those contained in the above conventions?

5. Mr. HUDSON was of the opinion that the Commission should adopt a principle based on the above articles.

It was so decided.

SECTION 21: EXCLUSIVE RIGHTS TO THE SEA BED AND THE SUBSOIL

(a) *Sedentary Fisheries*

6. Mr. HUDSON considered that the Commission must take into account the fact that a number of States had established control over sedentary fisheries situated outside their territorial waters. He hoped that the propriety of such action would be recognized. He was not quite clear what was meant in section 21 (a) of the report by " This question could be dealt with in relation to the problem of the continental shelf." He agreed with the passage from Sir Cecil Hurst's work quoted, but he was not in agreement with what Professor Gidel had said on the matter. He did not know how a right of control could arise from the occupation of the sea bed. From the historical standpoint, it could not be denied that States were able to exercise such control. Vattel had raised the question in connexion with pearl fisheries. He had himself studied the question and was in a position to say that, in the Persian Gulf, fishing was free to all. Control over sedentary fishing had been assumed by other States, as, for instance, many in South America. He believed that Mexico had done so, and suggested that the Rapporteur should study the way in which the regulations relating to sedentary fisheries had been drawn up; they were quite separate from the question of the continental shelf.

7. Mr. AMADO shared Mr. Hudson's views as regards

the words he had quoted. The question of sedentary fisheries was linked with that of freedom of the seas. The principle of the freedom of the seas was now accepted and implied the freedom of fishing. Governments were inclined to turn a sympathetic or indifferent eye on peaceful sedentary fisheries.

7 a. The question of the continental shelf involved that of territorial waters and of the contiguous zone. Some authorities were inclined to link the question of the continental shelf with that of the high seas, as they considered that the question of the continental shelf was bound up with that of the contiguous zone and that the contiguous zone formed part of the high seas. That was the reason why Mr. François had linked the two problems. He himself did not share that view, and he read out paragraph 6 of his proposal as follows:

> " Were fishing has been carried out over a prolonged period at the same points by ships flying a flag of a particular State, all other States shall be required to respect such peaceful fishing operations. "[1]

7 b. He quoted that principle so as to clarify the discussion. The regulation of sedentary fisheries formed part of the regulation of the regime of the high seas. Continued fishing operations and their continued tacit acceptance by other States had established a principle, but, in his opinion, that principle bore no relation to the continental shelf.

8. Mr. HUDSON was of the opinion that Mr. Amado did not go far enough. It could not be said that long use was necessary. A State might undertake the exploitation of oyster beds which had not hitherto been worked. It was not sufficient that ships flying the flag of that State should work such beds. In his opinion it was necessary that control should be exercised by the State itself. In Ceylon control had been exercised (since 1814) by virtue of a legislative act; a fishing permit was required. The Newfoundland banks had been visited by fishing vessels for a very long time, but such vessels had not acquired any exclusive rights. Access to the banks was free to all. The provision in question should not be applied to fishing in general, but confined to such things as oyster beds.

9. Mr. AMADO pointed out that the term " sedentary fishery " should have been used instead of " fishing ", in paragraph 6 of his proposal.

10. Mr. CÓRDOVA asked the Commission to avoid any hasty decision on that very important point. What was at issue was the right of a State to set up a sort of servitude on the high seas. According to the wording of paragraph 6 (quoted above) the States to which the sedentary fisheries belonged would be entitled to regulate the fishing. The fisheries of some States covered a wide area and they had already taken possession of the high sea. He was thinking of the gulf separating lower California from Mexico. If the principle were accepted that some countries with highly developed fishing industries were entitled to the exclusive control or regulation of the fisheries, other States would never be able to develop their fishing industry. He therefore asked the Commission to act with circumspection and to postpone any decision until the following year.

11. Mr. HUDSON pointed out that the northern part of the Gulf of California belonged to Mexico and further, that it was a fishing area and not one with sedentary fisheries.

12. Mr. BRIERLY remarked that any decision taken by the Commission at that stage would be provisional; he was of Mr. Hudson's opinion. It was a question of a right acquired by occupation. The criteria of occupation were well established and could be applied in that case. He did not believe there was any connexion between sedentary fisheries and the continental shelf, or that the question of sedentary fisheries should be related to that of contiguous zones. Those questions should be treated separately and, so far as sedentary fisheries were concerned, the principle of occupation should be borne in mind.

13. Mr. SPIROPOULOS was also of the opinion that caution was needed. The principle under discussion reminded him of the one recognizing that the sovereignty of States sometimes extended beyond territorial waters. He had in mind historic bays. The problem had been raised at the Codification Conference at The Hague in 1930. As in the case of historic bays, the right of sovereignty over sedentary fisheries had been exercised from time immemorial. The legal basis was the same.

14. Mr. AMADO said his colleagues would doubtless remember that by sedentary fisheries were meant permanent establishments constituting a derogation of the principle governing the high seas. Mr. Brierly had corroborated what he had said. The question had nothing whatever to do with the continental shelf or the contiguous zone.

14 a. Mr. Córdova's objection had been anticipated in the report which in section 21 (a) stated that: " The principle of freedom of the seas grants to all the right to fish freely in the open sea in the absence of an international convention limited in its application to the high contracting parties." They were not at the moment dealing with anything else but sedentary fisheries, the study of which was included in the general study of the regime of the sea bed.

14 b. He was ready to agree to any solution providing a clearer definition of the question, and felt that the Rapporteur should be instructed to prepare such a definition for the following year's session.

15. Mr. FRANÇOIS said that the question had given rise to a considerable divergency of views to which he had attempted to give expression at the end of section 21 (a) of his report:

> " A number of authorities consider that States must be given a general right to occupy the sea bed with a view to working the oyster beds, coral reefs and so forth which it contains. Others, however, refuse to recognize sovereign rights except in the case of ' effective and continued use '—without any formal and repeated protest against such use having been made by other States, and particulary by such States as by

[1] See 64th meeting, footnote 1.

reason of their geographical situation could put forward objections of particular weight."

15 a. If he rightly interpreted the views of the Commission, the majority was in favour of the second concept. It was effective and continued use that constituted a right which they could recognize. He asked the Commission to enlighten him on that point.

16. Mr. CÓRDOVA remarked that to say " others, however, refused to recognize sovereign rights . . ." was to go further than Mr. Hudson, who had spoken only of control.

17. The CHAIRMAN pointed out that they were dealing with a very characteristic case of usucapion, one of the rare instances in international law where acquisitive prescription was admitted. It was a question of confirming a right of usucapion arising from long, peaceful and recognized possession. French law contained an identical provision. In principle, no one had the right to take possession of state property. Nevertheless, the existence of legalized encroachments (établissements fondes en titre) was recognized. Those encroachments, existing before 1789, had been recognized and had never been contested. The case of sedentary fisheries was exactly similar and the underlying idea was the same as that of the second opinion quoted in the report.

18. Mr. HUDSON asked the Chairman whether the same regulations were applicable to any sort of fishery.

19. The CHAIRMAN answered in the affirmative.

20. Mr. HUDSON was not prepared to go as far as that.

21. Mr. FRANÇOIS read the following sentence from his report which had been taken from Professor Gidel's work: " 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." It was therefore not only a question of the fish caught, but also of the equipment used for the purpose.

22. The CHAIRMAN was of the opinion that both the above conditions had to be fulfilled—i.e., an exploitation of sedentary species by means of static equipment. The existence of a fishery could not be admitted where there was nothing to fish.

23. Mr. el-KHOURY said that at the preceding meeting the Commission had studied the question of the protection of certain species and had come to the conclusion that it could not force third party States to respect treaties signed for the protection of certain species, unless the treaties had been concluded under the auspices of the United Nations. The question under discussion was a similar case. It was customary for a State to require other States to respect its monopoly. He did not believe that the rules regarding acquisitive prescription were applicable to the case under consideration, as there was a difference between State property and the high seas. A certain type of right might arise out of use of State property, continued for a certain length of time, without protest on the part of the authority concerned. That could not apply to the high seas, as there were States which were not aware of what was taking place. The principle that continued use could create a monopoly could not therefore be applied to the high seas.

23 a. The question should be treated in the same way as that of the protection of certain species. States could not be required to accept a fait accompli. That would be contrary to the principle of freedom of the high seas. Again, in speaking of a continued use, what was to be understood by " continued " ? What period of time was required ? It would be preferable either to ask the Rapporteur to study the question with a view to arriving at a general principle, or to ask the Economic and Social Council to put it down on its agenda, so as to arrive at a text that could be submitted to all States for their acceptance. A definite result could ony be achieved by the adoption of a general convention.

23 b. He noticed that Mr. Amado's text stated that " all other States shall be required ". This should read: " are requested to respect such peaceable fishing operations, should they see fit to do so ".

24. Mr. BRIERLY was doubtful of the wisdom of excluding the possibility of a State exercising a right of control, if there were any real prospects of new sedentary fisheries being set up along its shores. That was not, however, in his opinion a problem of any practical import, as all existing banks had doubtless already been discovered.

25. Mr. HUDSON considered that further study should be devoted to the question. He did not attach any importance to the pronouncements of the authorities, as they were only repeating what had been written by other authorities and had paid no attention to the practice of States. He had not been able to find any work dealing with the practice of States and had been obliged to find that out for himself. States did not exclude foreign fishermen, they merely wished to control the fishing. In Ceylon, Arab fishermen from the Sea of Oman and the Persian Gulf were required to obtain a special permit. Although Ceylon appeared to claim the Gulf of Manar as part of its territorial waters, it did not attempt to exclude foreign fishermen. In his opinion, the Commission should examine the laws of the various States, and pay no attention to what had been said by the authorities who had not studied those laws. The laws of certain South American States were very interesting.

25 b. Along the coast of Florida and in the Gulf of Mexico there were very extensive sponge beds. So far as the United States of America was concerned, the inhabitants of a certain locality had the exclusive right to work those beds. But the State of Florida only attempted to regulate exploitation in so far as its own citizens were concerned. Mexicans were allowed to work the sponge beds without hindrance and nobody thought of regulating their operations. Anyone could come and work the sponge beds. The case was different as regards the Ceylon oyster beds, which were considered as forming part of that country's territorial waters. He had made a collection of laws on the subject which was entirely at Mr. François' disposal.

26. Mr. CÓRDOVA said that the situation regarding

the sponges of the Gulf of Mexico was satisfactory, and that it should be possible to request all States to conform to the regulations set up by certain countries for the conservation of sponges. In his opinion, however, it would be going too far to try to exclude a State on account of regulations established for purely commercial purposes. The high seas were common property and free to all. On the other hand, in regard to the protection of fish, everyone should observe the established regulations.

27. The CHAIRMAN remarked that they were not dealing with the acquisitive prescription of a fishing right, but with a right of sovereignty.

28. Mr. CÓRDOVA was not prepared to admit any prescription when it came to the exploitation of a high seas fishery. He pointed out that Mr. Brierly had said that the principle of occupation was the crux of the whole problem. In his opinion occupation and prescription were on and the same thing. He proposed to use the word "usucapion" as the Chairman had done.

29. Mr. BRIERLY pointed out he had said that they were dealing with a separate principle which had nothing in common with the contiguous zone or the continental shelf.

30. Mr. CÓRDOVA wished to refer to a specific case. The Californian fishing industry was very important, but it was dependent on the catch of small fish in the Gulf of California to serve as bait. Fishing boats first came to fish in the Gulf and then proceeded to the high sea. The success of their fishing obviously depended on the catch of those small fish. Mexico had always allowed vessels to come and fish in her waters, but if that were to lead to the acquisition of a prescriptive right to fish within her territorial waters, she would probably reconsider her attitude.

31. Mr. BRIERLY pointed out that only the high seas were in question.

32. Mr. AMADO remarked that the principles of Roman law had created a great deal of confusion in international law; he trusted that they would not once again complicate the question of sedentary fisheries. The principle of freedom of the seas propounded by Grotius was a clearly recognized principle of international law, and the Rapporteur had mentioned it in his report. That principle comprised the right of all to fish freely on the high seas. There was no need to confirm it by a convention, as it was already universally accepted.

The report said:

> "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."

32 a. There again they had a concept which did not require the support of conventions or the practice of States. It was a principle that was recognized in practice; if that point had been recognized earlier the discussion would not have been so lengthy. Sedentary fisheries should be accepted, provided they had been recognized by custom over a long period and without protest by the various States. He wished to repeat that the question had nothing to do with the contiguous zone or the continental shelf. The principle of freedom of the seas had been subjected to two restrictions of which the recognition of sedentary fisheries was one. It was, to all intents and purposes, a recognized principle in the practice of States that continued occupation implied recognition by other States of the right of control by one or more States.

33. Mr. SPIROPOULOS proposed that the Rapporteur be instructed to study the question in the light of the discussion and of Mr. Amado's and Mr. Hudson's proposals, and to submit his conclusions in the following year.

34. Mr. KERNO (Assistant Secretary-General) said that certain points had emerged from the discussion. The question at issue was that of sedentary fisheries on the high seas and there was possibly, but not necessarily, a factual connexion between that question and that of the continental shelf. In most cases, sedentary fisheries were found where there was a continental shelf. In regard to the definition of sedentary fisheries, Professor Gidel was of the opinion that sedentary fisheries were established, either because the species of fish caught were stationary, or because the equipment used to catch them was stationary. However, some members of the Commission took the view that those two criteria should be combined. Finally, it had to be established whether it was a case of occupation or of prescription. He would go into all those points.

35. Mr. CÓRDOVA wanted the Rapporteur to study the rights of States, and to see whether they were in a position to exclude all other States.

36. The CHAIRMAN said that if the Commission agreed, it might be left to the Rapporteur to ascertain the Commission's views.

It was so decided.

(b) *Installations on the high seas*

37. The CHAIRMAN remarked that the question was closely connected with that of fisheries.

38. Mr. HUDSON did not see any connexion between the two problems. Sedentary fisheries did not imply the existence of installations. In most cases there were no permanent installations for fisheries. The theoretical question of installations on the high seas had never raised any difficulties. He saw no reason why the Commission should devote any time to it. There had never been any objection to lightships.

38 a. As regards the drilling of oil wells, the report stated that "in 1894 petroleum was discovered for the first time in the continental shelf with the drilling of a well from a platform erected in shallow water off the coast of California". It should be noted that in California the drilling of wells took place in the soil

itself without the use of a platform. In the Gulf of Mexico, the question of the continental shelf arose. It was possible to contemplate the establishment of an airport on the high seas, but he felt that that question could be left on one side in view of the technical progress being made in aviation.

39. The CHAIRMAN then read the following extract from the report:

> " To a greater or lesser degree all these installations restrict the possibility of using the high seas and their erection must therefore be subject to the express or tacit agreement of the other States."

40. Mr. HUDSON did not dispute that statement.

41. Mr. FRANÇOIS considered that the drilling of wells did not necessarily have any connexion with the concept of a continental shelf, but if Mr. Hudson wished to link the two questions, he had no objection.

42. The CHAIRMAN had observed from the report that " Mr. Schüking had suggested the establishment of an ' International Waters Office ' ". That, he said, was very interesting, and related to the domestic practice of States. In the case of State property, no installations could be established without the authorization of a government, and for the same reasons.

43. Mr. SPIROPOULOS remarked that, so far as an international organization with judicial powers was concerned, it was mainly a question of historic bays, at the 1930 Conference had not considered the question of installations on the high seas. The problem had existed for a very long time and had nothing to do with the continental shelf, which was a concept of recent origin. For practical reasons, however, the two questions could be studied at the same time. For the sake of order, he himself would prefer to deal with the question of installations on the high seas straight away, though he felt that the Commission would do better to leave it aside.

44. The CHAIRMAN agreed Mr. Spiropoulos. The point at issue was whether any State could establish any installations it wished, and wherever it wished.

The Commission decided to leave the question aside for the time being.

45. Mr. KERNO (Assistant Secretary-General) pointed out that at the end of that section of his report the Rapporteur had said, " At the present time the International Maritime Committee is studying the possibility of setting up an International Maritime Court." He took it that the Commission's decision to leave aside for the moment the question of installations on the high seas did not mean that the Rapporteur should not deal with the problem in his report for the following year, or that he should not consult the International Maritime Committee.

46. The CHAIRMAN said it had been decided to instruct the Rapporteur to deal with all questions which the Commission had found it necessary to set aside for the time being, or to leave outstanding.

47. Mr. YEPES wished to point out that his proposal (A/CN.4/R.5) on the regime of the high seas was simply intended as a memorandum for the use of the Commission and its rapporteur. He did not ask for that proposal to be discussed that year, but he hoped the Rapporteur would take it into consideration, when preparing his next report. In drawing up the principles included in his proposal, he had been guided by the study made by Mr. Bluntschli, at the same time endeavouring to adapt them to modern conditiens.

48. Mr. FRANÇOIS expressed his agreement with what Mr. Yepes had said, and would duly take account of his proposal.

(c) *Subsoil of the High Seas*

49. Mr. HUDSON said that, in regard to that part of Mr. François' report there were some doubts in his mind as to the distinction which he made between the subsoil and the bed of the sea. The Rapporteur had said, " In no case, however, where the installations were not connected directly to the subsoil of the territorial waters would it be possible to use them without at the same time occupying a certain portion of the sea bed." In his opinion, the sea bed and the subsoil were one and the same thing. Incidentally, in a large number of treaties, those two terms were frequently used in juxtaposition and with the same meaning.

50. Mr. FRANÇOIS replied that the principle on which he had taken his stand was to be found in the second paragraph of the part of his report under discussion where it was stated that " the arguments on which recognition of the principle of the freedom of the high seas is based cannot be invoked in regard to the subsoil. There are no rules of positive law which prohibit States from establishing their jurisdiction over the subsoil of the sea. The right of States to occupy portions of the subsoil of the high seas must therefore be admitted ". Obviously that principle only applied to the subsoil of the high seas and on condition that the freedom of the high seas itself were not called in question. No provision of international law forbade the occupation of the subsoil, provided that it did not prejudice the freedom of the high seas. However, as soon as installations touched the surface of the soil of the sea—that is to say, the sea bed—the freedom of the high seas was involved. That was why he had stated in his report that " in no case, however, where installations were not connected directly to the subsoil of the territorial waters would it be possible to use them without at the same time occupying a certain portion of the sea bed. In this case the objections to such occupation are valid ". As soon as there was a direct connexion between the installations in the subsoil and the coast, exploitation of the subsoil was possible without touching the surface of the soil of the sea. Therefore, in principle, the occupation of the subsoil did not affect the freedom of the high seas.

51. The CHAIRMAN felt that Mr. François did not admit that utilization of the subsoil affected the sea bed.

52. Mr. FRANÇOIS gave as an example a tunnel or mine beneath the sea the entry to which was situated within territorial waters. In such cases there could be no doubt that States had the right to occupy the parts

of the subsoil of the high seas in which those works were situated.

53. Mr. CÓRDOVA asked the Rapporteur whether, in his opinion, a State had the right to work a mine in the subsoil of the high sea if the entry and exit were on dry land.

54. Mr. FRANÇOIS replied in the affirmative.

55. Mr. HUDSON thought that the definition of freedom of the seas as given in section 1 of the report was very vague. It stipulated that neither navigation nor fishing on the high seas could be forbidden to anyone. He would have preferred the interests of humanity to be mentioned as essential elements of such freedom. He recalled that during the First World War the freedom of the seas had been the slogan of both sides; nevertheless, it had not been respected.

55 a. He then asked what was the distinction made by the Rapporteur between the " subsoil of the high seas " and the " sea bed of the high seas ", and also whether a slight occupation of the bed of the high seas should be considered as a violation of the principle of freedom of the high seas. Such an occupation might, in his opinion, have only a slight effect on sea fishing. In any case, he was opposed to the tendency to exaggerate the difference between the two concepts of the bed and the subsoil. It was a mistake to go too far in that direction even in regard to the continental shelf. For instance, in the treaty of 26 February 1948, concluded between Venezuela and the United Kingdom on the submarine areas of the Gulf of Paria, under which the two countries reciprocally recognized certain rights of sovereignty over the high seas, the terms " subsoil of the high seas " and " bed of the high seas " were given the same meaning. Nevertheless, Mr. François made that distinction, which was not at all clear to him.

56. Mr. BRIERLY asked Mr. François whether, in his opinion, it was not true that it was impossible to distinguish between the sea bed and the subsoil of the sea, except in the case of operations starting out from the dry land.

57. Mr. FRANÇOIS agreed.

58. Mr. BRIERLY was not opposed to the principle whereby the exploitation of the subsoil did not represent a violation of the principle of freedom of the seas, provided that it started out from the land or from territorial waters. If, however, the exploitation took place through the waters of the high seas, it did involve a violation.

59. Mr. HUDSON reverted to that part of the report which dealt with the case of installations not directly connected to the subsoil of territorial waters, which it would be impossible to work without at the same time occupying a certain portion of the sea bed. He asked Mr. François what he had in mind in saying that the objections to such occupation " are valid ".

60. Mr. FRANÇOIS replied that his report had, in the first place, been drawn up in French and that in that respect the English translation was not correct. What he had said in his French text was that the objections to such occupation " valent en la circonstance " (hold good). That wording was not so strong as the English expression " are valid ".

61. Mr. HUDSON would have liked a distinction to be made between the sea bed and the subsoil on the one hand, and the waters which covered them on the other, so far as the continental shelf was concerned.

62. Mr. SPIROPOULOS was under the impression that the Commission was engaged in a discussion of the question of the subsoil of the high seas. He felt that it should recognize in principle the possibility of acquiring rights for the exploitation, as well as the occupation of the high seas. He was, moreover, of the opinion that the Commission was in agreement on that point.

63. Mr. el-KHOURY said that, according to Islamic law, the owner of a territory was also the owner of the air above it and of anything that might be found below the surface of the soil. What was to be found above and below the territory formed a continuous whole. He therefore failed to understand the distinction it was sought to make between the subsoil and the bed of the high seas, which, in his opinion, formed a whole. The State owning a portion of the sea bed had the right to take possession of anything that might be found under the bed and, therefore, of the so-called subsoil. Again, according to Islamic law, water could not be owned by anyone. As against that, however, the place where the water was found could be owned. It followed that the subsoil and the bed of the high seas could be owned by a State, and that they could not, therefore, constitute international territory. For those reasons he was unable to understand the distinction it was desired to make between the two terms.

64. The CHAIRMAN asked the Rapporteur to which standpoint he adhered. The Commission appeared to be agreed that, where the subsoil could be reached from territorial waters or from the land itself, the right of States to occupy that portion of the subsoil of the high seas was indisputable. The only divergence of opinion within the Committee was with respect to cases where it was necessary to pass through the high seas to reach the subsoil.

65. Mr. FRANÇOIS said that his reply was to be found in section 21 (b) of his report, where it was stated that " To a greater or lesser degree all these installations [the working of petroleum deposits by means of wells drilled out at sea] restrict the possibility of using the high seas and their erection must therefore be subject to the express or tacit agreement of the other States. " He felt that a violation of the principle of freedom of the high seas would occur, whenever such waters had to be passed through in order to reach the subsoil.

66. Mr. SPIROPOULOS believed the Commission to be of the opinion that an occupation of the subsoil of the high seas, throught its waters was admissible, provided that the installation of the equipment required for exploitation was agreed to by the other States.

67. The CHAIRMAN pointed out that the question at issue was dealt with in section 21 (b) of the report on which the Commission had no yet taken a decision.

68. Mr. CÓRDOVA asked the Rapporteur what he

thought about installations which did in fact constitute an obstacle to navigation and fishing.

69. In reply, Mr. FRANÇOIS referred to a passage in his report which stated that: " It cannot be denied that in fact this freedom of navigation will of necessity be curtailed through the existence of various fixed or mobile installations for the exploitation of the natural resources of the continental shelf."[2] In support of that statement he had quoted a report by Mr. Feith, Legal Adviser to the Royal Dutch, to the International Law Association, in which Mr. Feith stated: " One need not be a born cynic to have misgivings as to whether " proclamations of freedom of navigation over those parts of the high seas situated above the continental shelf " will mean much in practice. When the interests of international shipping come to be weighed against America's exploitation of submarine petroleum resources, will shipping come out on the winning side ? Is it not inconsistent to suppose that *if* important oilfields are discovered under the high seas, American rights will extend over those fields but not over the surface of the sea above those fields ? Will America find that she can allow Russian cruisers or Japanese fishing craft to make trips between American drilling derricks erected in the open sea over American oilfields ? " And yet, he added, Mr. Feith was a defender of the Royal Dutch interests.

70. The CHAIRMAN said that the Commission seemed prepared to admit the possibility of installations in the subsoil of the high seas. It might make a further examination of the question from the standpoint of obstacles to navigation on the high seas, when it had studied the question of the continental shelf.

SECTION 22: THE CONTINENTAL SHELF

71. Mr. HUDSON said that the matter was one of great importance. He felt that in taking it up the Commission should be guided by a social philosophy. The continental shelf was not only a legal or juridical concept, but was also of economic and social significance. There were means of exploiting submarine resources for the benefit of mankind. The exploitation of such resources was at the moment confined mainly to petroleum, but methods would be found of obtaining other minerals, foodstuffs, etc. Undertakings for the exploitation of submarine resources would therefore increase rapidly in the future. It was said that the mineral oil resources now under exploitation would give out sooner or later. It would therefore be necessary to exploit submarine resources; but even if existing resources did not become exhausted, he did not imagine that that would prevent the establishment of concerns for the exploitation of the resources of the high seas. For the time being, such undertakings were hampered by technical difficulties, but it should not be forgotten that some years ago wells had been drilled at Lake Maracaibo in water more than a hundred feet deep. On the Californian coast, drillings had been started on dry land in order to tap submarine resources.

71 a. Since there were resources underneath the high seas, the successful exploitation of which was already feasible, it should certainly not be prohibited by law. Developments over recent years did not cover the whole world but, for the time being, were confined to the waters around America and to the Persian Gulf. That did not mean that similar resources did not exist in other parts of the high seas. The fact that such developments would take place sooner or later throughout the world should not prevent the Commission from stating that all such undertakings should be carried out for the benefit of mankind. He agreed with Sir Cecil Hurst that means must be found of protecting the interests of the States concerned without hampering operations for the benefit of mankind.

72. The CHAIRMAN said that Mr. Hudson's statement reminded him of the discovery of America by Christopher Columbus. It had to be conceived in order to be transformed into reality.

73. Mr. HUDSON said that the best illustration of his argument was furnished by the Persian Gulf. In that gulf, there was no continental shelf; its waters were not very deep and nowhere exceeded 75 fathoms. The geologists had ascertained that the geological structure of the soil beneath the sea was the same as that of the adjacent territory which contained immense reserves of mineral oil. Consequently fantastic deposits of oil would certainly be discovered in the subsoil of the Persian Gulf. He felt that lawyers had no right to prevent the exploitation of those resources for the benefit of mankind. The Commission should bear social considerations in mind when examining the question of the continental shelf. It should consider in what way it could adapt the rules of international law to the requirements of humanity.

74. The CHAIRMAN pointed out that the scope of Mr. Hudson's statement went far beyond the continental shelf, in the strict sense of the word. It was concerned with the problem of sea resources.

75. Mr. AMADO had listened with great interest to Mr. Hudson's statement to the effect that submarine resources must be placed at the disposal of mankind, but he wondered what conclusions the Commission could draw, and from what angle it could most usefully consider the problem. Should it study the report, examine the International Law Association's conclusions, or merely adjourn the discussion ? It did not seem to him possible to draw any practical conclusions from Mr. Hudson's statement. The principle stated by him was universally recognized, but how could the Commission give practical effect to it ? In spite of those slight reservations, he fully agreed that the question should be examined from the social standpoint. Nevertheless, the Commission's main purpose was to settle the legal problem.

76. Mr. el-KHOURY was greatly impressed by Mr. Hudson's statement, and agreed with him that the resources of the high seas should be exploited for the benefit of mankind. He did not see, however, how that principle could be applied in practice. He thought that the Rapporteur should reflect on the matter. He went

[2] See A/CN.4/17, para. 114 (printed text), p. 37 (mimeographed English text).

on to say that the question of the continental shelf, with which the Commission was at present dealing, had nothing to do with territorial waters or their subsoil. The extent of territorial waters had been or could be determined. But he knew of no reliable method for determining the extent of the continental shelf, or where deep waters began. In some cases the continental shelf extended for five miles, in others for fifty miles, from the coast.

77. Mr. AMADO held that the Commission should examine the question from the standpoint of the possible formulation of principles based on existing regulations. That seemed to him to be the first question to be tackled. He was not sure, however, whether the time had yet come to formulate a principle in a field in which there were as yet hardly any regulations.

78. Mr. FRANÇOIS expressed his agreement with Mr. Hudson's ideas. As to the way in which the Commission could deal with the question, he thought the best thing would be to have a general discussion during which the different points of view could be expressed. The Commission might take the nine questions listed at the end of his report as a basis of discussion, examine them and make known its views. As to the point raised by Mr. Amado, he agreed that the question of the continental shelf was comparatively recent; but a large number of proclamations by States already existed, which constituted a starting point for the formulation of positive law. The Commission, whose duty it was not only to codify the existing rules of international law, but also to study the progressive development of that law, would do well to press on with its work, so as not to be overtaken by events. It should not wait until a multitude of regulations had given international law an orientation incompatible with the interests of mankind. It was more difficult to amend a law that had already been established by States, than to guide it into the desired channel by the enunciation of certain rules or principles. The Commission should not be too timid but should set forth the principles that, in its opinion, were in the interests of humanity.

79. Mr. SANDSTRÖM shared the Rapporteur's view. It seemed to him highly desirable that they should proceed forthwith to the establishment of principles of international law concerning the continental shelf.

80. Mr. YEPES considered that to discuss the size of the continental shelf was pointless. It had already been defined by scientists and all the necessary data were available. The Commission should approach the question from another angle. Was it prepared to admit that the continental shelf was a prolongation of the territory of riparian States, or, on the contrary, to rule that it was *res nullius* ? If the Commission should take its stand in favour of *res nullius,* its action in the matter would be revolutionary, for he was convinced that no State would admit the concept of *res nullius* in regard to the continental shelf. Although the question had only recently arisen and had only been the subject of contemporaneous study, certain rules had already been established, and the practice followed was becoming a custom. Since President Truman's statement in 1945, the South American republics and the Arab countries had already, by defining their attitude, established certain factors which might serve as a basis for discussion on the possibility of formulating rules for the continental shelf. The great importance of the economic resources of the continental shelf for the world as a whole could not be denied. But the problem should be studied with special reference to the claims of riparian States on that shelf.

81. Mr. SPIROPOULOS said that the continental shelf was undoubtedly the most important question with which they had to deal. The subject was entirely new. It was therefore all the more important that the Commission should approach it from the angle suggested by Mr. Hudson. The Commission could not sacrifice the interests of humanity to a purely legal concept. International law might impose limitations or restrictions on such and such a point, but what the Commission was concerned with was something different. It had to establish rules. Hence, it must take a decision which could be embodied in its code.

81 a. Mr. François had said that the Commission should not be timid. He was quite right. But timid or not, one thing was certain, namely that the States concerned might not be able to comply with the principles it enunciated. He recalled what had happened in regard to the air before the First World War. The first works published on that subject had laid down the principle that navigation in the air was as free as navigation on the high seas. But from the moment war broke out none of the belligerent States had observed that principle. As soon as the issues at stake became sufficiently important, States no longer observed rules which did not suit them. There could be no doubt that States possessing a continental shelf would impose their will on the others. He wondered whether the question was ripe enough for international regulation. The first Air Convention had only been concluded in 1919. It established the sovereignty of States over the air above their territories. He doubted, however, whether the Commission was as yet in a position to draw up rules for the continental shelf.

81 b. In none of the other matters so far discussed had the Commission come up against any new problems. But the field of the continental shelf was a new one, and if the Commission were asked to define the relevant law, it could only formulate some very vague principles. It seemed to him impossible to try to limit the extent of the continental shelf. Even if they wanted to, how were they to go about it ? By determining its length or alternatively its depth ? The report showed the divergence of opinion existing on that point. It had not so far been possible to determine the extent of territorial waters or of the contiguous zone and yet those were very old concepts. The most that the Commission could venture to do in regard to the continental shelf would be to enunciate a very general principle.

82. Mr. HSU wished to make a suggestion, although he felt sure it would not be accepted by the Commission. He took his stand on the universally recognized principle that the high seas were the property of the international community. Why then not entrust the development of the continental shelf resources to the international

community ? Why not a joint exploitation of continental shelf resources ?

83. Mr. HUDSON wished to draw attention to two points in the report. Mr. François had said: " The number of proclamations laying claim to special rights is, it is true, increasing but it is still small. Up to the present, most States have not laid claim to such rights nor have they specifically recognized the validity of such claims." [3] To his knowledge, a certain number of States had been consulted before President Truman made his proclamation in 1945. No protest had been raised against that declaration by the States in question. Due weight should be attached to the absence of such protest.

84. Mr. FRANÇOIS pointed out that there had been protests as soon as proclamations had been issued laying claim to sovereignty over the continental shelf, as for instance the proclamations of some South American countries.

85. Mr. HUDSON replied that the cases cited by Mr. François had nothing to do with the exploitation of continental shelf resources. The other point on which he wished to speak was to be found on page 40 of the report, where it was stated that: " With regard to the industrial utilization of the marine soil and sub-soil, the present stage of technical development is far from being such as to permit the working of the natural resources situated more than 200 metres from the surface. However this may be, it must be borne in mind that the adoption of a depth line of 100 fathoms as the outer limit of the continental shelf is likely to allot to the various States portions of the high seas varying greatly in extent. This would establish an unjustifiable inequality between States." [4] He could not agree with that statement. He did not believe that an unjustifiable inequality between States would be created by adopting a depth line of 100 fathoms. That depth was commonly used by geologists. Further, most countries suffered from inequality in regard to the continental shelf. The continental shelf of the United States on the Pacific coast was extremely narrow owing to the fact that the sea depth increased rapidly. On the other hand there was a large continental shelf on the Atlantic coast of the United States. He hoped the Rapporteur would not lay too much stress on the idea of inequality.

86. Mr. BRIERLY said that it was purely a question of geography.

87. Mr. HUDSON said that the problem of the continental shelf had been exhaustively discussed for what was really a very short period. As regards air navigation, the law had taken shape quite suddenly. In the case of the continental shelf, they were likewise faced with very rapid development. He hoped the Commission would find some means of establishing a principle. He had been greatly struck by a statement made by Mr. Altamira twenty years ago, to the effect that there was a time when a new thing blossomed forth and developed rapidly; one should not allow oneself to be overtaken by the event, but should try to direct it into the required channel. He hoped the Commission would bear in mind those very wise words.

88. The CHAIRMAN asked the Commission whether it was prepared to search for a general principle which would cover the matter.

89. Mr. el-KHOURY would prefer to discuss the question raised by Mr. Yepes in regard to the continuity of territory. It would be as well know what was the extent of that territory.

90. Mr. HUDSON said that there was yet another principle, that of contiguity. That principle had been adopted in a certain number of proclamations, and Prof. Max Huber had published a remarkable word on the principle of contiguity in international law. He would like the Commission to take not of that study.

The meeting rose at 1 p.m.

[3] See A/CN.4/17, para. 114 (printed text), p. 37 (mimeographed English text).

[4] Mimeographed English text; para. 122 of printed text.

67th MEETING

Thursday, 13 July 1950, at 10 a.m.

CONTENTS

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, 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).

Regime of the High Seas: Report by Mr. François (item 7 of the agenda) (A/CN.4/17) (continued)

SECTION 22: THE CONTINENTAL SHELF *(continued)*

1. Mr. YEPES stated that the problem was the most important one that the Commission had to discuss. It was confronted with what was perhaps an entirely new conception of international law and was dealing with a phenomenon which might be classed among the great events in the history of international law. It had