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Summary record of the 120th meeting

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

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

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

118. Mr. CORDOVA found that suggestion excellent.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 1 p.m.

120th MEETING

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

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Chairman: Mr. James L. BRIERLY

Rapporteur: Mr. Roberto CORDOVA

Present:

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

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

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

CHAPTER 10: SEDENTARY FISHERIES (*continued*)

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

2. Mr. HUDSON pointed out that the draft article did not specify who made "effective and continued use", nor who established the "rules". He wondered whether, without expressly stating the fact, the purpose of the draft article was not the exercise of a certain measure of control by the State whose territory was contiguous to the area of the high seas in which such sedentary fisheries were located. In the case of Ceylon and the coastal principalities of the Persian Gulf, regulation was by the States whose territory was contiguous to the area of the high seas in which the sedentary fisheries were located.

3. Mr. FRANÇOIS did not think that the definition of sedentary fisheries was in dispute. In his first report on the high seas (A/CN.4/17) he had reproduced, at the beginning of the section dealing with sedentary fisheries (p. 31, mimeographed English text; para. 94, printed French text), the definition established by Professor Gidel, which was as follows:

"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."

In his second report he had assumed that definition to be known and had merely endeavoured, in his draft article, to qualify the sedentary fisheries with which the Commission specially desired to deal.

4. As a preliminary, however, the Commission could consider whether it was desirable to give a definition of sedentary fisheries or whether that definition could be taken as known.

5. Mr. HUDSON explained that he had only wished to point out that the draft article did not explain either who made "effective and continued use" or who established the "rules". It was a question of drafting.

6. He emphasized that sedentary species must be distinguished from sedentary fishing, which was an operation for the exploitation of sedentary species.

7. Mr. FRANÇOIS observed that Professor Gidel's definition was wider than what Mr. Hudson appeared to understand by sedentary fisheries. According to Professor Gidel there was sedentary fishing when the equipment used was fixed, even though the species fished were not sedentary.

8. The CHAIRMAN remarked that Mr. Hudson only wished it to be explained who made the "use" referred to in the draft article. In most cases it was the coastal State which made such use, but that was not necessarily so and it would be more correct to use the words "by the appropriating State" or, more simply "by a State".

9. Mr. SANDSTRÖM pointed out that at the previous meeting Mr. Scelle had said that the State whose nationals made use of sedentary fisheries might be other than the coastal State.¹ But Mr. Scelle had not explained whether that comment was hypothetical or not; he had given no example.

10. Mr. HUDSON, in support of that remark, cited the pearl fisheries in the Persian Gulf, where the inhabitants of Kuwait and Bahrein exploited sedentary fisheries in waters contiguous to the territorial waters of Iran. In that area a well established rule permitted all coastal dwellers of the Gulf to engage in pearl fishing. Europeans who had endeavoured to participate in the exploitation of those fisheries had, however, been compelled to abandon the attempt.

11. Mr. EL KHOURY said that the fishers of the Persian Gulf had to obtain a licence from the coastal authorities.

12. Mr. HUDSON observed that, in view of the difficulty of delimiting sovereignties on the shores of the Gulf, it might be difficult to ascertain which coastal State was competent. He did not consider that the idea of appropriation could be properly applied to sedentary fisheries and pointed out that the fishers of the Persian Gulf were not all licensed; some ports required licences but others did not.

13. The CHAIRMAN suggested the adoption of the following words: "by permission or acquiescence of the coastal State".

14. Mr. CORDOVA pointed out that, at the previous meeting, Mr. François had expressed the view that only a coastal State could exploit sedentary fisheries.

15. Mr. HUDSON observed that the exploitation of such fisheries was a form of occupation which was not accompanied by any kind of territorial claim.

16. The CHAIRMAN said that in that case the question of defining the occupier would arise.

17. Mr. ALFARO remarked that the draft article implied that "effective and continued use" might be made by a State, since the words "by other States" were included two lines lower. He would prefer the words "being made" to the words "having been made".

18. Mr. SANDSTRÖM said that he approved the addition of the words "by a State".

19. Mr. YEPES pointed out that the sedentary fisheries in question were only those established on the high seas. Moreover, he thought that the draft article could be shortened by using the words "effective and peaceful use", which would make it possible to delete the phrase referring to objections by other States.

20. The CHAIRMAN observed that, however justified that remark might be, it provided no answer to the question who made "effective and continued use".

21. Mr. YEPES said that he approved the addition of the words "by a State".

22. Mr. FRANÇOIS explained that, except in the Persian Gulf, sedentary fisheries were always regulated by a State. In the Persian Gulf, on the other hand, the régime was based on traditions respected by several States. He had given some details in his second report (A/CN.4/42, p. 59, mimeographed English text; para. 144, printed French text). It seemed impossible to bring the system in force in the Persian Gulf within the scope of general rules and to treat that entirely special case in the same way as other cases. The Commission should

¹ Summary record of the 119th meeting, para. 109.

provisionally disregard the régime of sedentary fisheries in the Persian Gulf and deal only with other fisheries, in order to avoid any confusion.

23. In reply to a question by Mr. Córdova, he confirmed that the draft article submitted in his report only applied to exploitation of sedentary fisheries on the high seas by a coastal State.

24. Mr. CORDOVA thought that it would consequently be advisable to add the words "by a coastal State".

25. Mr. SPIROPOULOS pointed out that sedentary fisheries might nevertheless be situated at any distance from the coast.

26. Mr. KERNO (Assistant Secretary-General) pointed out that sedentary fisheries were generally exploited by the nationals of the coastal State. Occupation of such fisheries by a State other than the coastal State remained exceptional. He did not see how the situation in the Persian Gulf differed from that of other sedentary fisheries.

27. Mr. FRANÇOIS considered that, in the case of the Persian Gulf, the term "occupation" could not be applied.

28. Mr. HUDSON regretted that he has used the word "occupation" which, on reflection, he found unsatisfactory.

29. The CHAIRMAN thought that, on the contrary, it was the correct term; he wished it to be retained.

30. Mr. HUDSON pointed out that pearl fishing had been practised in the Persian Gulf for thousands of years. It provided a livelihood for many people living on the coasts of the Gulf, who moved from one sheikdom to another. All natives of the coast could engage in fishing while some pearl fishers came from as far away as Muscat or Zanzibar. Fishers were not subject to any uniform regulations. Many coastal States did not regulate pearl fishing at all, but fishing vessels out of Bahrein were subject to certain regulations governing the sharing of their catch. Germans, Italians and French had tried to engage in fishing in the Persian Gulf by more mechanized methods, but had been obliged to abandon the attempt, which had been discouraged by the British who were anxious to respect the maritime truce.

31. If the Commission considered that case too special for inclusion in a general text, it should nevertheless refrain from making any statement which might appear to conflict with a very old-established practice, thus expressly excluding it from the contemplated codification.

32. In Ceylon, no one could engage in pearl fishing without a licence. The local courts had fixed the extent of the sovereignty of Ceylon over sedentary fisheries in the high seas contiguous to her territorial waters. There was a special administrative department in Ceylon dealing with Arab pearl fishers, who were issued with special licences.

33. He had had no occasion to make a special study of the efforts made by foreigners to engage in fishing in the waters adjacent to Australia and Tunisia; nor did he have any information on similar situations which might arise off the coasts of Venezuela and Panama.

34. Mr. ALFARO pointed out that the Government of Panama subjected foreign pearl-fishers to a licensing system if they used certain kinds of improved fishing equipment.

35. Mr. CORDOVA thought the discussion had shown that the Commission had insufficient information to solve the problem.

36. The CHAIRMAN considered that, if the Commission adopted the draft article submitted by the Rapporteur, it would exclude the system in force in the Persian Gulf.

37. Mr. SANDSTRÖM thought that the adoption of the words "use . . . by a State or group of States" would make it possible to include the Persian Gulf régime in the proposed text.

38. Mr. EL KHOURY said that, in view of the political situation on the coasts of the Persian Gulf, the Authorities there established could not be considered as States in the technical sense of the term. He thought that the draft article should be retained as it stood, except that he proposed the deletion of the words "and repeated".

39. The CHAIRMAN thought that the Commission could explain in its comment that it had no desire to interfere with the régime in force in the Persian Gulf.

40. Mr. KERNO (Assistant Secretary-General) agreed that the Commission had insufficient information. Mr. Hudson, the best informed of its members, had himself admitted that there were gaps in his documentation. That being so, he thought that the article should be retained as a provisional draft and submitted to governments, who could make comments and provide explanations.

41. Mr. FRANÇOIS drew the attention of the Commission to the note at the foot of page 52 of his report (mimeographed English text; footnote 38, printed French text), in which he had indicated that it was thanks to Mr. Hudson that he had been able to assemble most of the data used for his study on sedentary fisheries. The Secretariat had provided very little. Other information had been supplied direct from Tunisia and Ceylon (the latter too late for use in the report).

42. The subject was a very complex one. Since additional information might be available the following year, but it was unlikely that it would be possible to draw any clear-cut conclusions from it.

43. Mr. HUDSON said that Mr. Richard Young, who had made a special study of pearl fisheries in Ceylon and the Persian Gulf, would soon be in Geneva. He proposed putting him in touch with the Rapporteur.

44. Mr. LIANG (Secretary to the Commission) said that he had been surprised by Mr. François' last comment. At the previous session, it was Mr. Hudson who had volunteered to supply the Rapporteur with information on sedentary fisheries. The Secretariat had received no such instructions. If the question was not disposed of at the 1951 session, the Secretariat would carry out any research requested of it.

45. Mr. KERNO (Assistant Secretary-General) pointed out that questions put to governments frequently remained

unanswered. If the Commission adopted a provisional text and submitted it to governments, the latter would be encouraged to give their views if they had any criticisms to make. It would therefore be advisable to adopt a provisional text, the imperfections of which could be pointed out to governments in a comment.

46. Mr. FRANÇOIS thought the question of sedentary fisheries was not of sufficient importance to retain the Commission's attention for three consecutive sessions.

47. Mr. CORDOVA said that, if Mr. Kern's suggestion were adopted, the Commission would have to place the question on its agenda once again.

48. Mr. FRANÇOIS agreed, but pointed out that the question would only be examined after Governments had made their comments.

49. Mr. HUDSON read out the following draft:

"The regulation by a State of sedentary fisheries in areas of the high seas contiguous to the territorial waters of that State is lawful when nationals of that State have long carried on such fisheries without protest by other States, provided, however, that such State does not attempt to exclude altogether the nationals of other States and limits its regulations to the maintenance of order and measures of conservation."

50. It was necessary to sanction regulation by a State of sedentary fisheries contiguous to its territorial waters, without permitting the State to go so far as to exclude the nationals of other States.

51. He was not sure, however, whether such a text could be applied to the fisheries regulations in Ceylon; the Government of Ceylon derived a considerable revenue from fishing. As far as he knew, the régime of the Persian Gulf did not entail any claims to sovereignty over the fishing areas. Panama and Venezuela had only claimed the right to exercise control over fisheries and impose their own regulations. Australia appeared to follow the same lines.

52. In reply to a question by Mr. SANDSTRÖM, Mr. HUDSON explained that in the text he had just submitted he had discarded the idea of occupation.

53. Mr. AMADO said that his impression from the previous meeting was that the fundamental legal principle on which sedentary fisheries were based was occupation and he thought that that principle could be formulated as proposed by Mr. François in his draft article, the opening words of which could, however, be amended to read "Occupation of a part of the high seas by sedentary fisheries . . .".

54. He did not see why the Commission should hold such lengthy discussions on a question which gave no cause for anxiety. Those who were most deeply versed in the subject had doubts. That was the advantage of deep knowledge; the more one delved into a subject the more ignorant one felt. He himself, who was not so well informed, would be satisfied with a text which, apart from the opening words, followed almost exactly the draft proposed by Mr. François.

55. The CHAIRMAN observed that the words proposed

by Mr. Amado defined the "occupant" as the sedentary fisheries themselves. Occupation could only be by a State.

56. Mr. HUDSON said that in theory the high seas were open to everyone. He did not see how, on that principle, a State could protest against the installation of sedentary fisheries on the high seas, if no bounds were set to such fisheries and other States were not excluded. The Commission should state the principle justifying regulation by a State whose territorial waters were contiguous to the areas of the high seas in which sedentary fisheries were exploited; such regulation, however, could not exclude the nationals of other States from using the sedentary fisheries, unless such nationals failed to comply with the rules established by the regulating State.

57. Mr. AMADO considered that the right to exploit sedentary fisheries derived from permanent, peaceful and continued occupation. He regretted that the Commission had devoted so much time to the question. He would vote for Mr. François' text, to which he would propose certain amendments; that text should be submitted to Governments, who would not fail to protest if necessary. If the Commission consulted an expert, as had been suggested, its discussions might be still further prolonged.

58. Sedentary fisheries were a characteristic element of the régime of the high seas. If the Commission referred simultaneously to contiguous zones and the coastal State, it would be merging too many related questions.

59. Mr. YEPES read out the following text which he proposed as a substitute for the opening passage of the Rapporteur's draft article:

"Effective, continued and peaceful occupation by any State of a part of the high seas by means of sedentary fisheries characterized by the presence of species attached to the soil or by the equipment used shall be recognized to be lawful provided that . . ."

60. Mr. HUDSON read out the following draft article amending that which he had just proposed:²

"The regulation of sedentary fisheries in areas of the high seas contiguous to its territorial waters may be undertaken by a State, where such fisheries have long been maintained and conducted by nationals of that State, provided that nationals of other States are not excluded from participation in such fisheries."

61. The way must be left open to the nationals of other States, but when they proposed to participate, they must comply with the established régime.

62. He had been most surprised to learn that in Panamanian waters licences were required for fishers using certain equipment whereas others were exempt.

63. Mr. ALFARO explained that the regulation referred to by Mr. Hudson applied to pearl fishers and concerned those using diving equipment.

64. The CHAIRMAN, unlike Mr. Hudson, thought that where rights had been acquired by prescription the nationals of other States could be excluded.

65. Mr. FRANÇOIS was willing to accept the first part of Mr. Hudson's draft, but would prefer to retain the former text as from the words "provided that". In most

² See para. 49.

countries no distinction was in fact made between nationals and aliens.

66. Mr. HUDSON was prepared to agree, but wished to delete the final passage of Mr. François' text as from the word "nationality". It was, indeed, necessary to be able to exclude the use of equipment such as trawls. Trawlers had endeavoured on two occasions to engage in pearl fishing in the Persian Gulf, but there had always been opposition from the British authorities.

67. Mr. SANDSTRÖM observed that Mr. Hudson's last formula raised a question. Was it the use of fisheries which gave a State the right of regulation or was it the regulation which gave the right to engage in fishing? He thought that the new texts were based on the second view.

68. Mr. HUDSON agreed that his text required amendment in that respect.

69. Mr. EL KHOURY asked Mr. Hudson whether the "regulation" referred to in his draft included rules laid down for the conservation of resources of the sea.

70. Mr. HUDSON said that among other things the word included that special category of rules.

71. Mr. EL KHOURY proposed that in that case Mr. Hudson's text should be preceded by the words "without prejudice to rules protecting species against extermination".

72. Mr. HUDSON pointed out that the Commission had already considered measures relating to the conservation of species. It was now considering exclusive control of the exploitation of sedentary fisheries, but stopping short of the total exclusion of non-nationals; that was the basic idea of the Rapporteur's draft article and of the reservation included at the end of the article.

73. In view of Mr. Sandström's comment, it would be necessary to amend the formula he had proposed and he would like time to consider the matter. It might for instance be provided that: "The regulation of sedentary fisheries in areas of the high seas contiguous to its territorial waters may be undertaken by a State provided that . . ."

74. Mr. FRANÇOIS observed that that new drafting entirely changed the nature of the article. Mr. Hudson's text had first of all based the right of States on long use. The new version eliminated that basis.

75. The CHAIRMAN also considered that text too restrictive. It placed too great limitations on the powers of the occupying State which could, indeed, legitimately derive revenue from sedentary fisheries and limit their use to its own nationals.

76. Mr. FRANÇOIS did not think that any State had limited the use of sedentary fisheries to its own nationals.

77. Mr. HUDSON said that Ceylon did not impose restrictions in that respect. It even had special provisions relating to Arab fishers from Zanzibar.

78. Mr. KERNO (Assistant Secretary-General) observed that Ceylon was not yet a Member of the United Nations, but that it would nevertheless be desirable to communicate the results of the Commission's work to the Government of that country; that raised a difficulty.

79. Mr. HUDSON considered that public international law as codified under the auspices of the United Nations should be acceptable to all States, whether Members of the United Nations or not.

80. The CHAIRMAN put before the Commission the latest proposal submitted by Mr. Hudson, which read as follows:

"The regulation of sedentary fisheries in areas of the high seas contiguous to its territorial waters may be undertaken by a State where such fisheries have long been maintained and conducted by nationals of that State, provided that nationals of other States are not denied the right to participate in such fisheries."

He pointed out that he preferred Mr. François' text.

81. Mr. YEPES proposed that, after the words "of the high seas", the following words should be added: "characterized by species attached to the soil or by the equipment employed". He explained that that was the definition given the previous year in Mr. François' report (A/CN.4/17, p. 31, mimeographed English text; para. 94, printed French text).

82. Mr. CORDOVA observed that Mr. Yepes was trying to define sedentary fisheries on the basis of the species caught.

83. The CHAIRMAN said that that was not the place to define sedentary fisheries. Moreover, the term was well known.

84. Mr. YEPES said that he would not press the point.

85. Mr. HUDSON said that, after examining the matter with Mr. François, he had agreed with the latter that it would be preferable to say: "The regulation of sedentary fishers may be undertaken by a State in areas of the high seas contiguous to its territorial waters where . . ." and to add the following words at the end of the article: "on an equal footing with its own nationals".

86. Mr. KERNO (Assistant Secretary-General) suggested that the following wording would be preferable: "Provided that nationals of other States are permitted to participate in such fisheries on an equal footing with its own nationals".

87. Mr. HUDSON accepted that amendment. He proposed adding the following sentence to his text: "Such regulations may not affect, however, the general status of the areas as high seas". States must be prevented from claiming the right of sovereignty over such areas by reason of the regulations they enacted. The areas must not lose their status as high seas.

88. Mr. ALFARO suggested that it might be preferable to say "will not affect . . .".

89. Mr. HUDSON approved of that amendment.

90. Mr. YEPES observed that the article excluded sedentary fisheries — perhaps purely hypothetical — which were situated entirely in the high seas. He proposed the words "in areas of the high seas contiguous or not contiguous to its territorial waters".

91. Mr. HUDSON said that that amendment entirely defeated the purpose of Mr. François' text.

92. He had at first been influenced by Mr. Sandström's comments³ but he finally preferred Mr. François' drafting. The sedentary fisheries must have existed continuously for a certain length of time.

93. Mr. SANDSTRÖM explained that he had not expressed any opinion. He had observed that the Commission no longer took the view that the right in question was acquired by continued use. It was now considering the extension of the rights of the coastal State. He could also accept that idea.

94. Mr. AMADO said that, to his great regret, he could not accept Mr. Hudson's draft, since it excluded a characteristic feature of sedentary fisheries, namely, occupation without protest, or peaceful occupation over a certain length of time. Those were essential elements and in spite of his desire to reach a solution he could not change his views. He pointed out that Mr. Hudson's formula did not correspond to the "institutional" concept of sedentary fisheries.

95. Mr. CORDOVA, on the other hand, approved of Mr. Hudson's text.

96. Mr. YEPES asked whether Mr. Amado would accept the words "peacefully maintained and conducted.."

97. The CHAIRMAN proposed the words "without protest".

98. Mr. HUDSON did not see how there could be any ground for protest where the high seas were concerned. There could clearly be protests against regulation, but not against fishing.

99. Mr. FRANÇOIS did not approve of the proposed formula and preferred the words "without any formal and repeated protests against such use having been made by other states"; he agreed with Mr. Hudson, however, in thinking that there could be no protests, since the high seas were concerned.

100. Mr. AMADO said that sedentary fishing was a fact. The high seas belonged to everyone; they were either *res communis* or *res nullius*. There was appropriation of the area over a certain length of time. The case, in fact, was similar to that of first establishment by a settler, or "squatter". Without the element of acquisition by prescription, sedentary fishing was not explained. If it was a practical solution that was wanted, Mr. Hudson's text should be adopted. If it was desired to formulate a rule of international law, then Mr. François' proposal should be adopted. He would support the latter proposal.

101. The CHAIRMAN did not think it was merely a matter of protecting a right of regulation. Rights in sedentary fisheries were more comprehensive. The areas in question had been appropriated and had become national waters.

102. Mr. FRANÇOIS asked whether Mr. Amado would vote for Mr. Hudson's text if amended as follows: "... where such fisheries have long been maintained and conducted by nationals of that State without any formal and repeated protests against such use having been made by other States, provided that ..."

103. Mr. EL KHOURY asked why the word "repeated" should be included. From the legal point of view he did not consider that repetition added anything to a protest.

104. The CHAIRMAN put to the vote Mr. Hudson's proposal and the various amendments to it.

Mr. Yepes' amendment (paragraph 96 above) was rejected.

Mr. el Khoury's proposal to delete the word "repeated" in Mr. François' amendment was accepted by the latter.

Mr. François' amendment was rejected, there being 4 votes for and 4 against.

Mr. Hudson's proposal was adopted by 7 votes to 3.

105. Mr. AMADO explained that he had voted against Mr. Hudson's proposal because, among other reasons, he had wished to vote against the words "contiguous to its territorial waters", which were superfluous and might cause misunderstanding.

106. The CHAIRMAN also explained his negative vote; he considered that sedentary fisheries were based on appropriation of an area which the State should regulate without being obliged to treat the nationals of other States on the same footing as its own nationals.

107. Mr. YEPES said that he had voted against Mr. Hudson's proposed text because it did not include sedentary fisheries situated far from the coast and because the idea of peaceful use was not included.

CHAPTER 9: CONTIGUOUS ZONES

108. The CHAIRMAN read out the text proposed for adoption by the rapporteur (A/CN.4/42, page 51).

109. Mr. FRANÇOIS explained that the proposal was limited. It dealt only with the rights of coastal States in respect of customs and sanitary regulations. Similar rights had been claimed for other purposes, including fishing; in the latter case it was not a matter of conserving the resources of the sea but of claiming exclusive fishing rights for the nationals of the coastal State. That claim had always given rise to objections by other States, and the 1930 Codification Conference at the Hague had rejected it. The question was important in connexion with fishing, since it was linked with the question of the continental shelf and States might claim exclusive fishing rights in the area of that shelf. For that reason he thought that the Commission should decide against the recognition of special fishing rights, since aliens might be deprived of the right to fish in the zone in question.

110. After examining the regulations established by various States in that connexion, he had reached the conclusion that most of them did not claim exclusive rights, but merely asked for powers to exercise customs and sanitary control in the contiguous zone; that claim had been admitted by the Hague Conference of 1930 and accepted in principle by the Commission the previous year. It must nevertheless be pointed out that very few States had actually issued sanitary regulations.

111. As a basis for discussion, he had included in his proposal recognition of the contiguous zone, but only for customs and sanitary regulations, and he had stated

³ See para. 67 above.

that the zone should not extend beyond 12 miles from the coast. He did not consider that distance excessive.

112. The CHAIRMAN said that he was satisfied with that formula.

113. Mr. AMADO said that he also was satisfied. The previous year he had taken the initiative in submitting a formula on that point⁴ which provided that beyond its territorial waters a sovereign State might exercise administrative powers for the protection of its fiscal or customs interests. The zone could extend to twice the breadth of the territorial waters. Mr. Hudson had proposed the addition of sanitary interests, and he had accepted that proposal. At the time, he had said that 12 miles was the distance generally accepted and he was glad to note that in his report Mr. François had taken account of the observations he (Mr. Amado) had made the previous year.

114. Mr. LIANG (Secretary to the Commission) thought that while the original text was satisfactory, the English translation was ambiguous. All doubt would be removed if the words "within its territory or territorial waters" and the words "the infringement" were transposed.

It was so decided.

115. Mr. SPIROPOULOS wished to put a question to Mr. François. The previous year it had been considered necessary to give the coastal State the right to take protective fiscal measures. The text proposed by Mr. François referred only to customs and sanitary regulations. He asked why fiscal measures had been omitted.

116. Mr. FRANÇOIS replied that in omitting fiscal measures he had not changed the sense of the provision. He had omitted those measures because he had taken the text from the Preparatory Committee of the Codification Conference (Basis for Discussion No. 5). If the Commission thought it necessary to refer to protective fiscal measures he was quite willing to include them.

117. Mr. KERNO (Assistant Secretary-General) observed that in practice it was clear to everyone that customs and exchange control were not always carried out by the same official. It might be wise to include the word "fiscal".

118. Mr. HUDSON pointed out that the régime of free zones in the Haute Savoie and the Pays de Gex (France) provided a good example of the distinction between fiscal and customs control.

119. Mr. FRANÇOIS repeated that he was quite willing to add the word "fiscal".

It was so decided.

120. Mr. HUDSON said that the text referred to control of shipping. He asked whether Mr. François could give him any information regarding the control of aircraft. He believed that certain States exercised supervision of aircraft approaching their coast or flying in the immediate vicinity of their territorial waters. He assumed that Mr. François did not intend to refer to control exercised by coastal States over the air above the contiguous zones. He felt some anxiety with regard

to aircraft approaching the coast. In the United States, regulations had recently been enacted on the subject providing for supervision of all aircraft coming within a few miles of the coast. If it were intended to refer only to control of shipping, that should be explained.

121. Mr. SANDSTRÖM asked whether Mr. Hudson was considering the question from the point of view of security or from that of customs, sanitary and police regulations.

122. Mr. HUDSON considered that security considerations certainly increased the importance of the question.

123. Mr. SPIROPOULOS said that the problem raised by Mr. Hudson was most interesting and very important, but was in no way related to the matter which the Commission was considering. The Commission was dealing with the high seas and he did not see how it could examine the régime of the air at that stage.

124. Mr. FRANÇOIS agreed with Mr. Spiropoulos. The air above the continental shelf had certainly been mentioned, and rightly so, for the Commission had wished to explain that the existence of the continental shelf in no way affected the régime of the air. In the case under consideration it was only necessary to recognize the special right of the coastal State in respect of ships within the contiguous zone. Such a measure could only be taken in respect of aircraft, if the law of the air were considered.

125. Mr. HUDSON, supported by Mr. ALFARO, considered that that important problem of the future should be mentioned in the comment.

126. Mr. CORDOVA thought that the Commission should proceed as it had done with regard to the continental shelf. If it had referred to the air in one case, it should do so in the other.

127. The CHAIRMAN pointed out that the Commission had confined itself to the purely negative statement that the continental shelf in no way affected the régime of the air.

128. Mr. SPIROPOULOS thought that, if aircraft which alighted on the sea were to be considered, it should be borne in mind that flying-boats were not covered by the words "foreign ships".

129. Mr. AMADO asked the Commission not to depart from the familiar terminology. He had not so far heard of contiguous air zones. International law derived from facts. A certain significance had been given to the contiguous zone as a result of "prohibition" in the United States. The latter had concluded treaties with the United Kingdom, France and Canada, which had become international law. The Institute of International Law had referred to complementary zones and given them a breadth of 9 miles. It was the stringency of the protective measures brought into force by the United States against contraband traffic in spirits that had given that zone its importance in international law. It was now said that narcotics were brought into the United States by air. That was a fact which would no doubt lead to the enactment of regulations and the Commission could later draft a text with a view to codification.

⁴ See summary record of the 65th meeting, paras. 110 *et seq.*

130. Mr. HUDSON felt that the Commission had discussed the question sufficiently. He regretted that his fears were not shared by other members.
131. With regard to the comment by Mr. Spiropoulos, he doubted whether it was necessary to include the words "by foreign ships". If those words were deleted the difficulties would be reduced.
132. Mr. Amado had reminded him of a number of points that he had forgotten. In the days of prohibition a ship had been known to anchor $11\frac{1}{2}$ miles from the coast of the United States with a cargo of whisky and to announce that it was prepared to sell to all comers. People had thereupon gone out in boats. The ship was outside United States territorial waters so that the offence had not been committed by the foreign ship outside territorial waters, but in association with the small boats which came out from the coast.
133. Mr. FRANÇOIS did not think it necessary to include the words "by foreign ships". He agreed to their deletion.
134. The CHAIRMAN observed that Mr. Spiropoulos' anxiety over the problem of flying-boats would be allayed by that amendment.
- It was decided to delete the words "by foreign ships".*
135. Mr. HUDSON explained that the regulations varied considerably between country and country. The United States prescribed a limit of 3 miles for territorial waters and 9 miles for the contiguous zone. Mexico claimed a distance of 9 miles for territorial waters and if the 12 miles of the contiguous zone were measured from her coasts there would be a very small zone for protection against infringement of Customs regulations. The Soviet Union, having fixed the breadth of its territorial waters at 12 miles, would have no contiguous zone. It was perfectly satisfactory to fix the breadth of the contiguous zone at 12 miles, provided that the limit of territorial waters was known. The Hague Codification Conference of 1930 had shown that no agreement could be reached on the maximum breadth of territorial waters. Nearly all legislation enacted since 1930 in different countries had prescribed a limit exceeding 3 miles for territorial waters. He could cite Greece, Yugoslavia, Syria, Iran and Saudi Arabia, as countries which had adopted a breadth of 6 miles. He doubted whether it would be possible for the Commission to make such a specific provision.
136. Mr. CORDOVA thought that the 12-mile limit should be measured from the limit of territorial waters.
137. The CHAIRMAN observed that Mr. Córdova was introducing the difficulty of territorial waters into the question of the contiguous zone.
138. Mr. CORDOVA thought that the Soviet Union, which had fixed the breadth of its territorial waters at 12 miles, would not accept the limit fixed for the contiguous zone.
139. Mr. FRANÇOIS pointed out that the Soviet Union did not require a contiguous zone, since it had extended the limit of its territorial waters to 12 miles. It was countries with narrow territorial waters which required a contiguous zone, to exercise the control contemplated.
140. Mr. HUDSON pointed out that the treaties on contraband traffic in spirits concluded by the United States with the United Kingdom and other countries referred to the distance a ship could cover in one hour's sailing.
141. Mr. ALFARO explained that 12 miles was the distance normally covered by a ship in one hour.
142. The CHAIRMAN said that the treaties in question had not been based on recognition of the contiguous zone.
143. Mr. HUDSON explained that they recognized the contiguous zone for that particular purpose.
144. Mr. KERNO (Assistant Secretary-General) thought that the reason for that exception to the régime of the high seas should not be lost sight of. The main purpose to be achieved was to maintain the principle of the high seas as far as possible. Hence exceptions must only be codified where necessary. With perhaps a single exception, States did not extend their claims beyond the 12-mile limit.
145. After several speakers had cited cases of States claiming contiguous zones extending beyond 12 miles, Mr. HUDSON observed that the discussion had provided the Rapporteur with a basis on which to draft a comment. In his opinion, the relationship between territorial waters and the contiguous zone could not be left aside. It might also be necessary to take account of the increase in the speed of ships. He was sure that that question would be raised by governments.
146. Mr. FRANÇOIS said that he was willing for the 12-mile limit to be increased, but was opposed to the question of the contiguous zone being connected with that of territorial waters; that would be an inducement to States to extend their territorial waters further and further. If the Soviet Union had 12 miles of territorial waters, it would be contrary to the aims of the Commission to give that country 12 miles of contiguous zone.
147. The United States had adopted a zone of 12 miles for police and customs purposes and might eventually consider it necessary to extend the zone, but in his opinion the contiguous zone should not be made to begin from the limit of territorial waters.
148. The CHAIRMAN observed that if it did, that would certainly mean abandoning the principle of the high seas.
149. Mr. CORDOVA agreed that the breadth of the contiguous zone should be measured from the coast, but thought that it should be fairly large.
150. Mr. FRANÇOIS proposed laying down a figure of 12 miles and explaining in the comment that that distance might not be sufficient in future.
151. Mr. KERNO (Assistant Secretary-General) observed that the report (A/CN.4/12, p. 49, mimeographed English text; paras. 113-116, printed French text) referred to States which had established one contiguous zone for customs control and another for sanitary regulations. It could be seen that Chile claimed a zone of 100 kilometres and that other States claimed 12 miles

from the coast. Thus Chile was the sole exception. 152. The CHAIRMAN pointed out that the Codification Conference of 1930 had not laid down any uniform rule for territorial waters. If there were any such rule it would clearly be possible to begin the contiguous zone from the limit of territorial waters; but there was no rule. It was obvious that most States were satisfied with the breadth of 12 miles; he proposed fixing that distance and explaining in the comment that States could decide otherwise.

The 12-mile limit for the contiguous zone was adopted.
The meeting rose at 6.15 p.m.

121st MEETING

Tuesday, 10 July 1951, at 9.45 a.m.

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Chairman: Mr. James L. BRIERLY
Rapporteur: Mr. Roberto CORDOVA

Present:

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

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

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

CHAPTER 9: CONTIGUOUS ZONES (*continued*)

1. Mr. HUDSON, referring to the discussion at the previous meeting, proposed the insertion of the words "jurisdiction and" before the word "control" in the second line of the draft text (p. 51, mimeographed English text; para. 123, printed French text). He wished to use the same wording as in the case of the continental shelf. He also proposed that the words "over navigation" be inserted before the word "necessary".

2. The CHAIRMAN asked whether the position was really the same in the case of the high seas contiguous to territorial waters as in that of the continental shelf. In the former case he did not think that there was any question of jurisdiction.

3. Mr. SANDSTRÖM thought that that word would include the right to punish.

4. Mr. KERNO (Assistant Secretary-General) thought that the words "jurisdiction and control" might be wrongly interpreted as meaning that the coastal State was competent to try any offences committed within the contiguous zone, whereas the Commission only desired to give that State the right to take police measures.

5. Mr. FRANÇOIS preferred his own text.

6. Mr. HUDSON withdrew his proposal to add the word "jurisdiction". He asked whether the Commission accepted the addition of the words "over navigation".

7. Mr. SANDSTRÖM was not sure whether the control referred to must necessarily apply to navigation. He cited the example of certain forms of contraband traffic in spirits, occurring in Swedish waters. The smugglers came from the open sea and sank containers in the contiguous zone, while accomplices came from Swedish territory and collected them. The police of the coastal State must be able to seize such containers and the use of the words "over navigation" would appear to deny them that right.

8. Mr. HUDSON withdrew his proposal to add the words "over navigation". He then proposed the deletion of the second sentence of the text, which limited the breadth of the contiguous zone to twelve miles from the coast.

9. The CHAIRMAN pointed out that at the previous meeting the Commission had approved that limit.¹

CHAPTER 1: NATIONALITY OF SHIPS

10. The CHAIRMAN asked the Commission to take a decision on the principles formulated on that subject by the Rapporteur, which appeared in document A/CN.4/42, (pp. 7, 8, mimeographed English text; para. 18, printed French text). The English text of rule 1 was confusing and would require amendment.

11. Mr. FRANÇOIS said that the Secretariat had placed very voluminous documentation at his disposal, but it was difficult to know whether the regulations supplied were always the latest. With regard to Panama, for instance, Mr. Alfaro had been able to point out that the documentation used in the report was incomplete. He therefore apologized to the Commission in advance, in case the report had not always taken account of the most recent state of the law.

12. The rules he proposed regarding the nationality of ships were based almost entirely on existing regulations. They constituted a codification. The Commission might find objections to them and consider the result rather meagre. It might consider that such conclusions were of little practical importance and that they added nothing new, since most States already conformed to them.

13. In dealing with that subject, as with the continental shelf, the Commission should consider whether it wished to take a step forward in the progressive development of law and adopt certain rules which it would be desirable for States to apply. If the Commission took that course, it should accept the risk of meeting with some opposition

¹ Summary record of the 120th meeting, para. 152.