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Summary record of the 314th meeting

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

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64. For his part, he (Mr. Amado) felt that it would not be altogether realistic for the Commission to go any further than it had already gone.

65. Mr. GARCÍA AMADOR proposed that the Commission take a vote on the fundamental principles underlying Faris Bey el-Khouri's proposals. The two main principles were: firstly, the recognition of national interest as a justification equal in importance to historical rights; and, secondly, the provision for the jurisdiction of the International Court of Justice.

66. Sir Gerald FITZMAURICE gave notice of his intention to speak on Faris Bey el-Khouri's proposals (see para. 24 above) as soon as he had an opportunity to study them more closely.

Further discussion of article 3 was adjourned.

The meeting rose at 1 p.m.

314th MEETING

Friday, 17 June 1955, at 10 a.m.

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

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

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

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

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

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

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

1. Mr. SANDSTRÖM proposed the following text for article 3:

"Subject to any historic rights which a State may claim over a greater breadth, the breadth of the territorial sea which a State can lawfully claim against all other States is three nautical miles.

"Other States are under an obligation to recognize territorial waters fixed by the coastal State at a greater breadth than that laid down in the foregoing paragraph only if

"1. They have assumed treaty obligations in the matter, or claim an equal or greater breadth for their own territorial sea,

"2. As a result of a dispute referred to the International Court of Justice, the Court recognizes that the claim of the coastal State is based on a historic right or justified by the legitimate requirements of that State."

2. The only difference between that text and the one proposed by the Special Rapporteur[1] was an amendment to proviso 2 in the second paragraph. The change was intended to specify that it was for the International Court of Justice to adjudge on the question whether a coastal State's claim was based on a historic right or justified by its legitimate requirements.

3. Sir Gerald FITZMAURICE said he could not accept Faris Bey el-Khouri's amendments[2] to the text proposed by the Special Rapporteur because of the reference therein to "national necessities".

4. The Commission had already recognized the coastal State's claim to reasonable fishery conservation rights. It had also recognized its special rights, in the contiguous zone. Given those two sets of rights, there was no necessity whatsoever for a State to make a claim to sovereignty in the sea off its coasts beyond three miles.

5. With a very few possible exceptions, no national necessity could be quoted which was not already taken care of by fishery conservation rights and by the contiguous zone as defined by the Commission.

6. An excellent illustration was provided by the Norwegian fisheries dispute. If ever there had been a case where a country could claim national necessities it was Norway. That was apparent from the judgment of the International Court of Justice; it was even clearer if one referred to the pleadings presented on behalf of the Norwegian Government in that dispute. And yet Norway had made a claim only to four miles of territorial sea and, in doing so, had based that claim not on national necessities but on long-standing historical usage. Iceland provided another example of genuine national necessities in spite of which the claim was to four miles, based on long-standing historical usage.

[1] 310th meeting, para. 3.

[2] 313th meeting, para. 24.

7. There was no justification whatsoever for countries far more prosperous than Norway and Iceland claiming six or even twelve miles of territorial waters on the pretext of so-called national necessities. In the vast majority of cases where extensive claims were made, the countries making them were in no different position from other countries which refrained from doing so.

8. The analysis of the actual history of claims showed that most of them were merely imitative. It was some thirty years since one or two Mediterranean countries —certainly not more than two—had claimed a territorial sea of six miles. Other Mediterranean States had followed suit so as not to be left at a disadvantage. At a previous meeting[3] the Chairman had mentioned the case of his own country, Greece, which had originally been quite satisfied with the three-mile rule but, upon other Mediterranean States claiming six miles, had done the same in order to avoid being placed in an inferior position with regard to foreign fishermen in the waters lying between three and six miles from the coasts of Greece. In most cases the countries which claimed more than three miles did so simply because they imagined they would be placed at a disadvantage if they did not imitate claims made by other States. More often than not it was a matter of prestige.

9. It was a complete illusion to think that the question of the three-mile rule was somehow linked with a country's prosperity. All countries had coastal populations which depended exclusively on fishing for their livelihood. France was by many standards a wealthy country; but large sections of the population of Brittany and Normandy were completely dependent on fishing for their livelihood. The same was true of the United Kingdom—in many ways a prosperous country—where considerable numbers of people in south-west England, on the east coast and in Scotland and Northern Ireland were completely dependent on fisheries so that, if a diminution of stocks were to occur, their livelihood would be very seriously affected.

10. In reply to the suggestion that in certain wealthy countries the fishing industry was organized on a capitalist basis, he stressed that not only was line fishing in use in all countries—even the so-called wealthy countries—but that trawling too was not necessarily a capitalist enterprise. Some owners possessed only one or two trawlers; very often a single trawler was owned by several partners. The fishing industry in all countries was largely a small-man business.

11. There was no national necessity that could justify the extension of the coastal State's sovereignty over nine or twelve miles of sea instead of the normal three. The concept of the contiguous zone for customs control was based on a real necessity for the protection of the financial and economic interests of a State. That concept, together with the coastal State's power to enact measures for the conservation of fisheries, took care of all genuine needs.

12. It was true that Faris Bey coupled his suggestion with a reference to the International Court of Justice, but that reference did not really advance the matter very much. The Court, when it came to decide upon a dispute, would be in a quandary as to the criteria upon which to assess national necessities. National necessities did not constitute a legal conception.

13. In the articles which the Commission had adopted on the conservation of fisheries, certain objective criteria had been laid down, adherence to which was necessary in order to justify the coastal State's unilateral action. It connexion with the important matter of the breadth of the territorial sea, it was now suggested that the coastal State's freedom of action should be made subject to no criteria at all. For to make a reference to mere national necessities was to introduce a method which would allow countries to claim virtually what they liked.

14. Mr. HSU said that his plea on behalf of the small man who was being ousted by the larger fishery concerns was just as much a plea for the small fishermen in the wealthy countries as in any other.

15. It was necessary for the advocates of the three-mile rule to understand that some concessions were necessary to the countries which really needed some extension of the territorial sea. In the Far East, there was a real need which constituted a good and valid reason for the extension of the territorial sea beyond three miles; the need arose in respect of fishing, but was not covered by the right of the coastal State to adopt fishery conservation measures under certain conditions.

16. He admitted it was difficult to define national necessities. A much better expression was that of "legitimate requirements", which was used by Mr. Sandström in his proposal. Such a formula could quite well serve the purpose, as its interpretation could safely be left to judges or arbitrators.

17. Mr. SANDSTRÖM said that by "legitimate requirements" was meant primarily the coastal State's need for fish as food. For the satisfaction of those needs, a distance of three miles was often far too small, if beyond that distance fishermen of foreign States were carrying on their activities.

18. It was obvious that the Commission could not adhere uncompromisingly to the rigid three-mile rule, even if it were made subject to exceptions by virtue of historic rights. Some concessions were necessary in favour of the countries claiming more than three miles.

19. Mr. SCELLE said Sir Gerald Fitzmaurice's arguments were irrefutable. They constituted an able plea in favour of preserving the high seas for the use of all men—a principle which was one of the foundations of international society, and not only of international law.

20. But while national necessities could not justify any extension of the territorial sea beyond the three-mile limit, he understood Sir Gerald Fitzmaurice to be in agreement with him regarding the question of contiguous zones.

[3] 312th meeting, para. 23.

21. The problem of the conservation of fisheries was independent of that of the territorial sea, as conservation measures could be adopted at any distance from the coast.

22. One of the reasons leading to excessive claims regarding the extent of the territorial sea was the fact that the Commission had acknowledged the coastal State's right of sovereignty and property over the continental shelf. It was inevitable that claims to sovereignty and ownership of the continental shelf would lead to claims to sovereignty over the waters above the continental shelf.

23. A much better course would have been to follow the method employed in municipal law and consider the rights of the coastal State as no more than concessions on what was public domain. With such a system, the only problem which would arise would be that of ensuring that concessions were not detrimental to the freedom of the high seas—a problem which was not too difficult for the competent judge or arbitrator to solve in each specific case.

24. Two prejudices had been responsible for a great deal of confusion and it was desirable that the Commission should rid itself of them. The first was the assumption that the breadth of the territorial sea had to be the same for all States. That such an assumption was at the back of everyone's mind was shown by the fact that all members of the Commission spoke of the territorial sea (in the singular). In actual fact, there was not the same justification for the territorial seas of all the various States, and there was no reason why they should all be of exactly the same breadth. The second unfortunate prejudice concerned the concept of sovereignty. It should have been clear to all that sovereignty over the territorial sea could not possibly be of the same nature as sovereignty over land territory. Irrefutable evidence of that was provided by the fact that not only foreign merchantment but even foreign warships were entitled to right of passage through the territorial sea; in other words, the armed forces of foreign States had the right to go through the territory over which the so-called sovereignty of the coastal State was exercised. He would not, however, quarrel about words; it mattered little whether the term "sovereignty" were used. The reference was in any case to jurisdiction or competence over a series of matters. And that competence differed where sea and land were concerned.

25. The only answer to the problem with which the Commission was faced was to make provision for contiguous zones constituting encumbrances or encroachments on the high seas for specific purposes and for the benefit of the coastal State. What was required was not a single zone but several contiguous zones, each one for a particular purpose. If a single contiguous zone were laid down for all purposes, that would be tantamount in effect to an extension of the territorial sea.

26. The system of contiguous zones had to be coupled with provisions for an international authority or, failing such authority, for compulsory arbitration or, again, for the jurisdiction of the International Court of Justice on all disputes that might arise in connexion with those zones. Such a provision would constitute an indispensable safeguard.

27. Sir Gerald FITZMAURICE recalled that the Commission had already adopted a provision for a contiguous zone of not more than twelve miles for purposes of customs, sanitation and fiscal control. The Commission had also adopted articles on the conservation of fisheries, which contained provisions for the benefit of the coastal State. It was on that basis that the Commission had to discuss the breadth of the territorial sea.

28. The CHAIRMAN proposed to the Commission, in accordance with rule 75 of the rules of procedure of the General Assembly (A/3660), that the list of speakers be declared closed and that speeches be limited to five minutes.

It was so agreed.

29. Faris Bey el-KHOURI, referring to Sir Gerald Fitzmaurice's remarks on the term "national necessities", said that those words referred primarily to the provision by a State for its people of those "adequate means of subsistence and opportunities for economic development" referred to in a memorandum from the Legation of Ecuador transmitted to the Commission on 5 June 1955 by His Excellency Ramón Vintimilla Ramírez, the Minister of Ecuador in Switzerland. He (Faris Bey) had included the words in question in his proposal because he felt that a reference to historical rights was not sufficient to meet all legitimate needs.

30. It had to be remembered that many States had no geographical continental shelf. In order to provide food for their peoples they required to exercise a certain monopoly in respect of the resources in an area of sea somewhat greater than that enclosed by the traditional three-mile rule. The concept of the contiguous zone did not meet that particular requirement any more than the articles on the conservation of fisheries, for neither one nor the other gave the coastal State a monopoly of fishing in the areas concerned. No such monopoly could be legally established outside territorial waters, and it was clear that some concession with regard to the breath of the territorial sea would have to be made to satisfy the needs of the countries he was referring to. The best course for the Commission was the following:

(1) To grant recognition to claims based on national necessities up to a maximum of twelve miles from the coast. Such a system would enable the Commission's draft to obtain the support of many States which did not abide by the three-mile rule;

(2) To lay down a procedure whereby any State claiming more than three miles of territorial waters should be required to make a declaration to that effect and notify it to the Secretary-General of the United Nations for circulation among all States: those States which did not reply within a specified period would be considered as having accepted the declaration; States contesting the claim made by the coastal State would,

ipso facto, become parties to proceedings before the International Court of Justice to judge upon the dispute between them and the coastal State.

31. Finally, he would favour the formal adoption of four miles instead of three as the minimum territorial sea, which had to be recognized by all States.

32. Mr. AMADO said it was not the Commission's role to parcel out the sea among States. The Commission could only recognize facts. It was a fact that the three-mile rule—a rule which had stood for centuries—received the acceptance of many important maritime States bordering on the narrow seas. It was also a fact that a tendency had grown to extend the territorial sea beyond three miles. That international practice was in the process of transformation into a rule of international law—a rule which was as yet rather ill-defined. With the utmost goodwill in the world, the Commission could not give shape to a more definite rule because it could only codify reality, and reality was created by life.

33. He reiterated that the Commission could go no further than it had gone in adopting his own proposal.[4] He would oppose any other proposals on the breadth of the territorial sea.

34. Mr. HSU agreed that wiser statesmanship during the past thirty years would have no doubt avoided the problems with which the Commission was now faced. Unfortunately, it was too late to hold back the tide.

35. Like Mr. Scelle, he had opposed the idea of recognizing the coastal State's sovereignty over the continental shelf. The Commission, however, had accepted that idea. It had more recently granted the coastal State a greater say in the matter of high seas fisheries. It was surely in line with those developments to admit also the extension of the territorial sea, within reasonable limits, beyond the three miles.

36. Finally he stressed that, contrary to what Sir Gerald Fitzmaurice had suggested, the concept of the contiguous zone did not provide an answer to the problems involved. The contiguous zone did not give the coastal State any special rights in the matter of fishing. It was not a question of the conservation of fisheries that was involved, but of fishing activities. And for that purpose, only an extension of the territorial sea could possibly meet the legitimate requirements of the States to which he had been referring in his remarks.

37. Mr. EDMONDS said that any court of justice called upon to decide a dispute on the basis of the provisions the Commission was discussing would be faced by a very serious problem. Courts could only be guided in their decisions by principles of law. In the face of a provision referring to vague generalities like national necessities, a court had only two courses before it: either to say that no such national necessities existed or else to indulge in what was known as judicial legislation—a process generally recognized as a maladministration of the judicial function.

38. He wished to dispel the impression that the United States Government had somehow departed from the three-mile rule. It was President Jefferson who had established the three-mile rule for the United States, and since then his country had been the most consistent and persistent upholder of that rule. The Truman Declaration of 1945[5] only provided for jurisdiction over the sea-bed and the sub-soil of the continental shelf, while making explicit reservation in respect of the freedom of the superjacent waters, such waters being recognized as an integral part of the high seas.

39. Mr. ZOUREK said, with regard to the suggestion that a special authority be set up, that if international organizations were created for every specific purpose, there would arise a multifarious assemblage of such organizations which could only lead to increased confusion in the international scene.

40. As to the reference to judicial settlement, he pointed out that judges could only base their decisions on legal principles. Otherwise, they would be invading the legislative function—a function which was outside their competence.

41. All three proposals on article 3 which were before the Commission clearly repudiated all distances other than three miles as the breadth of the territorial sea. And yet claims to greater distances, in so far as they were made within reasonable limits, were just as much a part of existing international law as the so-called three-mile rule.

42. None of the three formulae proposed could be accepted by any of those States—the majority of the Members of the United Nations—which, at the present time, possessed a territorial sea of more than three miles; for such acceptance would necessarily imply only that they renounced the benefits of a legal situation which had been brought about by the exercise of sovereignty over their territorial waters, often combined with explicit or tacit recognition of their action by other States.

43. Mr. HSU stressed that neither the United Kingdom nor the United States was a genuinely strict adherer to the three-mile rule. Both those States claimed either sovereignty, or control and jurisdiction, over the continental shelf. The United States claimed a contiguous zone. It was clear to all that those claims in respect of the continental shelf and contiguous zones were intended to remedy the defects of the three-mile rule by extending beyond three miles the control of the coastal State for certain essential needs.

44. The CHAIRMAN suggested that the principles embodied in Faris Bey el-Khouri's amendment should be voted upon.

[4] 311th meeting, para. 63.

[5] See text in *Laws and Regulations on the Régime of the High Seas* (United Nations publication, Sales No.: 1951.V.2), p. 38.

45. Sir Gerald FITZMAURICE pointed out that a great deal depended on the wording in which the principles were actually going to be expressed. For those reasons, he preferred a vote on the texts proposed by Faris Bey el-Khouri rather than on principles.

46. He appealed to Faris Bey to accept the term "legitimate requirements" proposed by Mr. Sandström (para. 17 above) instead of the much vaguer term "national necessites". Such a change might enable him to vote differently on Faris Bey's proposal.

47. Faris Bey el-KHOURI said he preferred not to alter the terms of his proposal.

48. Mr. AMADO agreed on the necessity of voting on actual texts rather than on principles.

49. Following the adoption of his proposal at its 311th meeting, the problem before the Commission was whether it wished to go further and formulate in article 3 the conditions under which a State might legitimately extend its territorial sea beyond three miles but not more than twelve miles from its coast. Such a formulation was the aim both of the Special Rapporteur's proposed article 3 and of the amendments thereto proposed by Faris Bey el-Khouri and Mr. Sandström. For his part, he did not favour a formulation of that kind because he did not feel that international custom had reached the stage where such detailed provisions could be codified. It was, however, right and proper for the Commission to vote on the proposal made by the Special Rapporteur, and the amendments thereto by Faris Bey el-Khouri and Mr. Sandström.

50. The CHAIRMAN invited the Commission to vote on Faris Bey's amendments to the first paragraph of article 3 as proposed by the Special Rapporteur.

51. Mr. GARCÍA AMADOR requested separate votes on Faris Bey's two amendments to that paragraph, namely:

(1) To insert the words "or national necessities" after the opening words "Subject to any historical rights"; and

(2) To insert the words "up to a maximum of twelve miles" after the words "over a greater breadth".

52. Mr. AMADO questioned whether it was possible for the Commission to take a vote on the twelve-mile maximum in view of the fact that it had already done so in voting on the second paragraph of the resolution adopted at the 311th meeting.

53. The CHAIRMAN, speaking as a member of the Commission, and with a view to clarifying the position, formally proposed two amendments to the first paragraph of the Special Rapporteur's proposal[6] as amended by Faris Bey:

(1) To delete the words "or national necessities"; and

(2) To delete the words "up to a maximum of twelve miles".

He emphasized that he proposed the second amendment in order to facilitate the procedure, not because he personally was in favour of deleting the words "up to a maximum of twelve miles".

Mr. Spiropoulos' proposal to delete the words "or national necessities" was rejected by 7 votes to 5, with 1 abstention.

54. Mr. HSU, speaking to a point of order, said Mr. Spiropoulos' second proposal re-opened the question of a twelve-mile maximum beyond which extensions of the territorial sea were in no case justified by international law. It therefore involved the reconsideration of the second paragraph of the resolution adopted at the 311th meeting (para. 63).

55. The CHAIRMAN assured Mr. Hsu that, whatever vote the Commission might take on his second proposal, the resolution adopted at the 311th meeting would not be affected.

56. Mr. HSU accepted that assurance.

Mr. Spiropoulos' proposal to delete the words "up to a maximum of twelve miles" was rejected by 7 votes to 2, with 4 abstentions.

The Commission rejected by 6 votes to 5, with 2 abstentions, Faris Bey el-Khouri's proposed amendments to the first paragraph of the Special Rapporteur's proposed article 3.[7]

57. Faris Bey el-KHOURI then withdrew his amendment to the second paragraph of the Special Rapporteur's proposal in favour of Mr. Sandström's text (para. 1, above). He was prepared to do so particularly because the latter made no mention of a maximum limit of twelve miles and contained a provision whereby extensions beyond three miles had to be justified before the International Court of Justice.

58. Mr. FRANÇOIS (Special Rapporteur) withdrew his proposal in favour of Mr. Sandström's.

59. The CHAIRMAN pointed out that since the Special Rapporteur's text had been withdrawn his own amendment to it[8] was no longer before the Commission.

60. Mr. GARCÍA AMADOR, noting that Mr. Sandström had taken over proviso 1 of the Special Rapporteur's text, opposed its inclusion for reasons that he had already given. First, it was unnecessary to make explicit reference to treaty obligations since, if they existed, disputes would not arise; and secondly, it should surely be open to States to contest a claim for the same distance as they applied themselves if they considered the claim ill-founded.

61. Mr. FRANÇOIS (Special Rapporteur), explaining the reason for proviso 1, said that though self-evident,

[6] 310th meeting, para. 3.

[7] *Ibid.*

[8] 313th meeting, para. 20.

it was desirable to make express reference to the conclusion of treaties between two or more States for the reciprocal recognition of a certain delimitation of the territorial sea. He did not agree with Mr. Scelle concerning the latter part of the proviso because he thought it inadmissible for States to contest a delimitation equal to or smaller than their own. Moreover, the provision might have the useful effect of restraining States from claiming a certain extension because it would mean having to recognize the equivalent for another State. For those reasons he considered that the proviso should be retained.

62. Mr. SCELLE maintained his view and proposed the deletion of the words "or claim an equal or greater breadth for their own territorial sea" in proviso 1.

63. Mr. LIANG (Secretary to the Commission) observed that there was a substantial difference between proviso 2 in Mr. François' text and proviso 2 in Mr. Sandström's. The former had provided for the submission of disputes not only to the International Court but also to an arbitral tribunal. Mr. Sandström, on the other hand, while not providing for arbitration, had given far-reaching effect to the Court's decision. It would be interesting to learn the reason for Mr. Sandström's rejection of possible recourse to an arbitral tribunal.

64. Mr. SANDSTRÖM replied that his reason had been that States not parties to the dispute could not intervene in a hearing before an arbitral tribunal, whereas they could before the Court.

65. Mr. HSU asked whether Mr. Sandström would accept the Chairman's amendment originally moved to the Special Rapporteur's text.

66. Mr. FRANÇOIS (Special Rapporteur) pointed out that the Chairman's purpose had been to render his proposal more flexible, and Mr. Sandström had already achieved that by referring to "the legitimate requirements" of States. The Court would not be bound to apply the three-mile rule and would take into account all the legitimate interests of the coastal State.

67. Mr. ZOUREK asked whether the expression "legitimate requirements" was an exact translation of *besoins légitimes*.

68. Mr. FRANÇOIS (Special Rapporteur) replied in the negative and said that that point would have to be cleared up by the Drafting Committee.

69. Faris Bey el-KHOURI proposed the substitution of the words "national necessities" for the words "legitimate requirements", which, being vague and ambiguous, could not provide a criterion on which the Court could base its decision. It was impossible to determine what were legitimate requirements. On the other hand, there could be no doubt at all as to what was meant by "national necessities".

70. Mr. SCELLE proposed the insertion in proviso 2 of the words "an arbitral tribunal or" before the words "the International Court of Justice" and of the words "the tribunal or" before the words "the Court recognizes". He submitted that amendment because he had not been convinced by Mr. Sandström's reasoning. In practice there would be no great difference between submitting a case to the Court or to an arbitral tribunal, but the latter possibility should not be excluded, so as to allow States not bound by Article 36, paragraph 2, of the Court's Statute to intervene in a case.

71. Mr. FRANÇOIS (Special Rapporteur) pointed out that Mr. Scelle's amendment was quite unacceptable because according to Mr. Sandström's text the Court's decision would be binding on all States; that would be inadmissible in the case of arbitral awards.

72. Mr. SCELLE, drawing attention to Article 59 of the Statute of the Court, observed that the Court's decisions could only be binding on the parties to a particular case.

73. Mr. LIANG (Secretary to the Commission) said that Mr. Sandström had done little to dispel his doubts, which had now been further reinforced by Mr. Scelle's remarks. If the present provision were accepted by most States there would be little difference between the binding force of a decision by the Court and that of an arbitral award, but he could not understand why States which had not intervened in the case should be held to have forfeited the right to the delimitation in dispute. Such an argument could not be sustained in the face of the possibility of the Court's refusing to grant a hearing to a third party. Thus, as far as the creation of new obligations was concerned, the Court and an arbitral tribunal stood on the same footing.

74. Mr. SANDSTRÖM said that he would hesitate to accept Mr. Scelle's second amendment—for reference to an arbitral tribunal—first because third parties could not intervene in a case before an arbitral tribunal and secondly because the jurisprudence resulting from a whole series of arbitral awards would not be uniform and homogeneous, as in the case of the Court's decisions.

75. Mr. FRANÇOIS (Special Rapporteur) asked Mr. Scelle whether in reintroducing the arbitral tribunal he intended the award to be binding on the parties alone.

76. Mr. SCELLE replied in the negative since third parties could intervene in arbitral proceedings if the original parties to the dispute agreed. He added that no decision could be made universally valid for all States.

77. Mr. FRANÇOIS (Special Rapporteur) pointed out that a third party might be reluctant to intervene since it had had no influence in the choice of arbiters.

78. Sir Gerald FITZMAURICE considered that there was an important difference between the views held by the Special Rapporteur and Mr. Scelle. He personally agreed with Mr. François that the purpose of proviso 2 was to render the finding of the Court in any particular case binding not only on the parties, but on all other States as well. The question was whether it was desirable to give a similar status to an arbitral award, which in the nature of things would not have the same

authority as a finding of the International Court of Justice. Mr. François had rightly brought out that third parties would be reluctant to intervene in a case submitted to arbitration unless they had had some say in the choice of arbiters. Yet under Mr. Scelle's amendment they would still be bound by the award even if they did not intervene.

79. Mr. SCELLE asked whether, under proviso 2, a decision of the Court would be binding on all States.

80. Sir Gerald FITZMAURICE replied in the affirmative, on the ground that if States accepted that provision they undertook to recognize that any decision by the Court was valid for them, even though they had not been parties to the dispute.

81. Mr. SCELLE suggested that on that assumption, adoption of his amendment would simply mean that States also accepted in advance the validity of arbitral awards.

82. Sir Gerald FITZMAURICE pointed out that a further reason why a decision of the Court could be regarded as valid *erga omnes* was that if the claim in question were challenged again the same decision would be rendered.

83. Mr. SCELLE said that he was still unconvinced.

84. In reply to a question by the CHAIRMAN, Mr. FRANÇOIS (Special Rapporteur) said that there was no provision in the text for the obligatory submission of disputes to the International Court.

85. Mr. GARCÍA AMADOR said that after Mr. François' explanation concerning the first part of proviso 1 he would be prepared to accept it, but would support Mr. Scelle's proposal for the deletion of the latter part.

86. The CHAIRMAN put to the vote Mr. Scelle's proposal for the deletion from proviso 1 of the words "or claim an equal or greater breadth for their own territorial sea".

The proposal was rejected by 5 votes to 4, with 4 abstentions.

87. The CHAIRMAN put to the vote Mr. Scelle's proposal to re-introduce the reference to an arbitral tribunal in proviso 2.

The proposal was adopted by 5 votes to 4, with 4 abstentions.

88. Mr. GARCÍA AMADOR, referring to Faris Bey el-Khouri's amendment to proviso 2 (para. 69 above), said that it did not affect the Spanish text which would in any event remain unchanged.

89. The CHAIRMAN, before putting Faris Bey el-Khouri's proposal to the vote, pointed out that it was the word "legitimate" and not the word "requirements" which had given rise to difficulties.

The proposal to substitute the words "national necessities" for the words "legitimate requirements" was adopted by 6 votes to 4, with 3 abstentions.

90. Sir Gerald FITZMAURICE said that though he had intended to support Mr. Sandström's text, he would now be compelled to vote against it owing to the adoption of Mr. Scelle's second amendment. It was, in his opinion, impossible to stipulate that an award rendered by an arbitral tribunal appointed by two parties should be valid for the whole world. The reference to "national necessities" further reinforced his opposition to the amended text.

91. Mr. FRANÇOIS (Special Rapporteur) said that he would have to vote against the text for the same reasons. Mr. Scelle's second amendment had, in effect, destroyed the whole system proposed, since arbitral awards could not be binding on all other States.

92. Mr. SANDSTRÖM said that he would also have to vote against his own text as now amended.

93. Mr. SCELLE observed that neither a decision of the Court nor an arbitral award could be binding on States not parties to the dispute.

94. Mr. GARCÍA AMADOR expressed his intention of voting in favour of the amended text because he was unable to see how it could be inferred that decisions of the Court could be binding on States not parties to the dispute and an arbitral award obviously had no general validity. He therefore failed to understand why Mr. Scelle's second amendment should have aroused such keen opposition. Clearly there had been some misunderstanding with regard to Article 59 of the Court's Statute. He also favoured the amended text because it reinforced the Commission's decision to accept Mr. Amado's proposal recognizing the legitimacy of extensions up to twelve miles.

95. Mr. FRANÇOIS (Special Rapporteur) said that there appeared to be complete confusion about the meaning of proviso 2; it was essential to establish whether the decisions of the Court or the arbitral awards would be valid *erga omnes*. He therefore moved that the vote on the text as a whole be postponed until the following meeting.

96. Mr. AMADO considered that it would be inadmissible to lay down that decisions were valid *erga omnes*.

97. Mr. GARCÍA AMADOR supported Mr. François' motion.

Mr. François' motion was rejected by 7 votes to 6.

98. Mr. FRANÇOIS (Special Rapporteur) said that he could support proviso 2 on the understanding that a decision of the Court or an arbitral award were binding solely on the parties to a dispute.

99. Mr. SANDSTRÖM agreed.

100. The CHAIRMAN put to the vote Mr. Sandström's text as amended.

The text was rejected by 8 votes to 3 with 2 abstentions.

Further discussion of article 3 was deferred to the next meeting.

The meeting rose at 1.10 p.m.