
The Anglo-Norwegian Fisheries Case, 1951 (I. C. J. Reports 1951, p. 116)

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Source: *The Modern Law Review*, Jul., 1952, Vol. 15, No. 3 (Jul., 1952), pp. 373-377

Published by: Wiley on behalf of the Modern Law Review

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THE ANGLO-NORWEGIAN FISHERIES CASE, 1951
(I.C.J. Reports 1951, p. 116)

THE issue between the United Kingdom and Norway which was adjudicated upon by the International Court of Justice in December, 1951, may be stated simply. During the early years of the seventeenth century, when maritime princes favoured the *mare clausum* rather than the *mare liberum*, the King of Denmark and Norway protested against the presence of foreign fishermen in what were then regarded as the seas belonging to Norway. In the course of time such concepts of sovereignty over the seas outside the generally recognised limits of territorial waters became discounted. In 1906 British fishermen appeared in the vicinity of the fishing banks near the Norwegian coast, and in 1911 a British ship was seized for alleged violation of Norwegian waters. Diplomatic discussions ensued between Great Britain and Norway, but to no purpose. Finally in 1935 a Norwegian Decree was issued limiting Norwegian waters by reference to a four-mile belt seaward from straight base-lines drawn between 48 named points on Norwegian promontories, islands and drying rocks, closing a large area of water formerly regarded as high seas and important to the British fishing industry.

The United Kingdom applied to the World Court for a judgment declaring the principles of international law to be applied in defining the base-lines by reference to which Norway was entitled to delimit a closed fisheries zone, and to award damages for the wrongful seizure of British ships outside that area. Norway, on the other hand, asked the court for a declaration that the delimitation of the 1935 Decree was not contrary to international law. The court by ten votes to two, Judge Sir Arnold McNair and Judge Read of Canada dissenting, held that the system employed by the Norwegians was not contrary to international law, and by eight votes to four, Judge Hsu Mo of China and an unidentified judge having joined the dissidents, that the lines actually drawn were similarly compatible. Apparently, Judge Hackworth of the United States was not convinced of the Decree's compatibility with international law, for, while concurring in the operative part of the judgment, he "desires to emphasise that he does so for the reason that he considers that the Norwegian Government has proved the existence of an historic title to the disputed areas of water."

The problem of the limits of territorial waters is almost a perennial in international law, for although it was on the agenda of the 1930 Codification Conference it is one of the subjects considered suitable for codification by the International Law Commission. While, before 1951 at least, there was no doubt that States could not, at their own discretion, draw their maritime limits wheresoever they wished, the most that could be said from the point of view of international law was that States were entitled

to a maritime belt as least three miles wide which, so it was generally believed, should be measured seaward from low water mark more or less following the sinuosities of the coast. There were some States that refused to recognise the three-mile limit, and, for the purpose of this case at least, Great Britain recognised the Norwegian claim to a belt four miles wide.

The institution of territorial waters which is a manifestation of State jurisdiction is a derogation from one of the basic principles of customary international law, that of the freedom of the seas. It is essential, therefore, that some method of demarcation be applied which would assist in the adjustment of these conflicting claims. In practice most States, including the United Kingdom, have used the "arcs of circles" principle—which should be compared with what Professor H. A. Smith in his *Law and Custom of the Sea* calls the "double-radius rule." This is the counterpart of the method employed at sea in ascertaining a ship's distance from the coast to determine whether she is outside territorial waters or not. The court said that this principle only dated from 1930 when it was introduced by the United States. In fact, as a method of measurement, although perhaps not under that name, it has been used so long that Judge Read described it as the traditional method for at least a century-and-a-half, although he agreed that it was not a rule of customary law. Another method sometimes applied, particularly in connection with a highly indented coast, is that of the straight base-lines drawn between named points on the land territory. Apart from Norway, Iceland and Ecuador—both of whose assertions are contested—and Sweden use this method (see Johnson, "The Anglo-Norwegian Fisheries Case" (1952) *International and Comparative Law Quarterly*, p. 145, at p. 159, n. 25).

The United Kingdom did not oppose Norway's use of straight base-lines in all circumstances. She agreed that they were valid for denoting the closing lines of bays—"a bay in international law is a well-marked indentation, whose penetration inland is in such proportion to the width of its mouth as to constitute the indentation more than a mere curvature of the coast"—and of all fjords and sunds, to which it was recognised that Norway had an historical title. The contention was that at some points on the coast, which could not be regarded as bays, straight base-lines were completely improper.

As evidence of its claim Norway cited a number of Decrees going back to 1812. This was to the effect that "in all cases when there is a question of determining the limit of our territorial sovereignty at sea, that limit shall be reckoned at the distance of one ordinary sea league from the island or islet farthest from the mainland, not covered by the sea"—which came to mean in Norwegian practice not "continuously" covered by the sea. This was followed by similar Decrees in 1869—which France contested—

and 1889, but all these related to an area south of that in dispute and appear to have been intended as internal administrative measures—in fact that of 1812 was not published until 1830. From the time that the dispute with the United Kingdom started in 1911, the latter protested at the various seizures and sought to ascertain exactly where the Norwegian lines ran, but it was not until the 1935 Decree that any demarcation was made. Nevertheless, the court had no difficulty in holding that Norway had over a long period virtually enjoyed sovereignty over the disputed areas, and that the title had been acquiesced in by foreign States. This Norwegian claim is undoubtedly an exception derogating from the general rule: the court pointed out that it was justified by the unique character of the Norwegian coast, while Judge McNair drew attention to the Hebrides coast and Judge Read to that of Canada; and by the economic condition of the inhabitants—the court was unconcerned with the possible economic ill-effects that would befall British fishermen excluded from their habitual fishing grounds.

Professor Lauterpacht has pointed out, in a critical analysis of the case which appeared in *The Times* (January 8, 1952), that “inasmuch as it may create, with some, the impression of a daring piece of judicial legislation in the sphere of the law of the sea and in disregard of the historic attitude of the main maritime Powers, it raises issues which transcend the economic importance of the problem before the court.” It should not be forgotten that to establish a rule of law on geographical uniqueness and economic hardship appears to rely on special pleading and subjective legislation for hard cases. To substantiate it requires the clearest evidence of consistent practice and acquiescence. Nevertheless, as in the *Asylum Case*, while the dissenting judges examined in detail the historical background of the claim, the court satisfied itself with the barest evidence. The court merely referred to one early concession to fish in a named area, part of which was in fact outside the 1935 limits. In the view of the court “these ancient concessions tend to confirm the Norwegian Government’s contention that the fisheries zone reserved before 1812 was in fact much more extensive than the one delimited in 1935. It is suggested that it included all fishing banks from which land was visible, the range of vision being . . . the principle of delimitation in force at that time. The court considers that, although it is not always clear to what specific areas they apply, the historical data produced in support of this contention by the Norwegian Government lend some weight to the idea of the survival of traditional rights reserved to the inhabitants of the Kingdom over fishing grounds included in the 1935 delimitation, particularly in the case of LoppHAVET. Such rights, founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the court to have been

kept within the bounds of what is moderate and reasonable" (p. 142). Although the court may have been concerned with the moderation and reasonableness of the Norwegian claims, it had made clear in an earlier passage that it would not insist unduly on consistency or certainty: "Too much importance need not be attached to the few uncertainties, or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812 . . ." (p. 138).

It is not only the court's treatment of the historical background that is open to criticism. In every respect the paucity of evidence on which the majority decision is based is striking. As Dr. Schwarzenberger has pointed out in his recent paper on "Trends in the Practice of the World Court" (4 *Current Legal Problems*, 1951, p. 1, at p. 32), "the authority of the World Court (must) rest on the persuasiveness of its judgments and opinions. There is only one way to achieve the optimum that, in this respect, can be attained: the fullest and most cogent reasoning. It is probably not accidental that the least convincing statements made by the International Court of Justice excel by a remarkable economy of argument."

These criticisms of the judgment should not be taken to imply that the court conferred complete freedom upon Norway in establishing her base-lines. The court established three considerations which should be applied. "Base-lines must not depart to any appreciable extent from the general direction of the coast"—Judge Hsu Mo maintained that the permitted deviation must not be unduly liberal, while the court took the line that a liberal interpretation was to be applied, thus including Svaerholthavet and LoppHAVet, neither of which Judge Hsu Mo nor the dissidents regarded as bays nor consistent with the "general direction of the coast." Secondly, "the real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the régime of internal waters," another principle which the court felt should be liberally interpreted in the case of Norway. Finally, due consideration should be taken "of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage"—a subjective test which, if generally applied, could lead to the negation of most principles of law.

According to Art. 59 of the Statute of the World Court a decision is authoritative only on its own facts and for the parties to the particular issue. Strictly, it lacks all precedent value. It cannot be doubted, however, that, although it might be argued that the court was applying special rules to a special set of circumstances, other States will hasten—as Iceland has already done (*The Times*, May 5, 1952)—to apply similar base-lines to measure its own

territorial belt, for, as Sir Arnold McNair pointed out, it becomes somewhat hypothetical to conceive of any "principle or rule of law which allows a wider belt of territorial waters to a country possessing a mountainous coast, such as Norway, than it does to one possessing a flat coast, such as the Netherlands" (p. 171). Not only does the judgment not assist in finally delimiting territorial limits, but if generally applied it will make confusion more confounded and territorial waters will vary from coast to coast. The decision is in line with the modern tendency—somewhat strange in an age which expresses belief in international co-operation and inter-dependence—to whittle down the principle of the freedom of the seas in favour of coastal States, a principle which is already constantly asserted in connection with the continental shelf and rights to the resources of the sea, the seabed and its subsoil (see the writer's "The Continental Shelf" (1951) 4 *Current Legal Problems*, p. 54, at pp. 71 *et seq.*). If the matter is left to go uncontrolled the assertion in the Individual Opinion of Judge Alvarez, with all that it implies, may well become true: every State "is entitled, in accordance with the general principles of the law of nations now in existence, to determine not only the breadth of her territorial sea, but also the manner in which it is to be reckoned" (p. 153).

This trend towards subjectivity is not, unfortunately, confined to problems concerning territorial sovereignty. The decision lends further weight to Dr. Schwarzenberger's comment that "the synopsis of majority and dissenting opinions in any single case before the court provokes a . . . disturbing reflection. By the choice of the appropriate major premises and methods of treaty interpretation, every single case might have been decided in the opposite way" (*loc. cit.*, p. 31). Should this tendency become too marked, the court may well find itself the chief sufferer from its somewhat quixotic expositions of international law.

L. C. GREEN.

Erratum

In the note on "Common Mistake," pp. 229 *et seq.*, the reference at p. 229, line 12 from the bottom of the page should be to section 6, not to section 7, of the Sale of Goods Act. The words "to the knowledge of the seller" in lines 9 and 8 from the bottom should be replaced by "without the knowledge of the seller." We are obliged to Mr. A. M. Honoré, of Queen's College, Oxford, for drawing our attention to this regrettable error.

Editorial Committee.