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Situation, Documents, and Commentary on Recent Developments in the International Law of the Sea

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The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. Government, the U.S. Department of the Navy or the Naval War College.

SECTION I

JUDICIAL AND ARBITRAL DECISIONS

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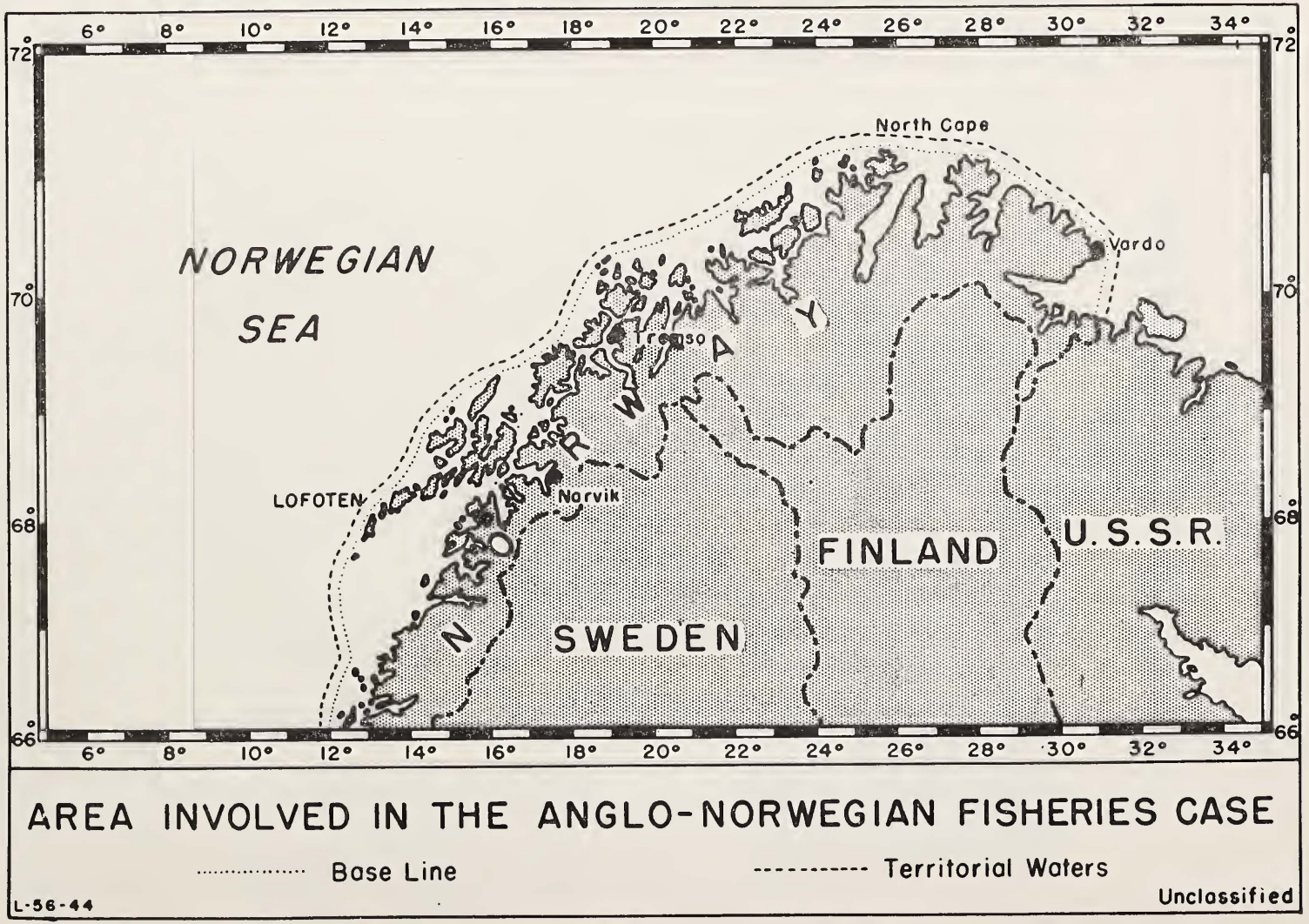
6° 8° 10° 12° 14° 16° 18° 20° 22° 24° 26° 28° 30° 32° 34°
72°
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68°
66°
NORWEGIAN
SEA
North Cape
Vardo
Tromso
NORWAY
LOFOTEN
Narvik
SWEDEN
FINLAND
U.S.S.R.
AREA INVOLVED IN THE ANGLO-NORWEGIAN FISHERIES CASE
Base Line
Territorial Waters
L-56-44
Unclassified

Figure 2.

A. Anglo-Norwegian Fisheries Case

1. Introductory Note to the Fisheries Case

The Norwegian government, by its Decree of July 12, 1935, established the limits of a Norwegian fisheries zone along the coast of Norway north of latitude 66° 28.8′ North. The limits of this zone were measured by perpendiculars drawn from the outer islands in the *skjaergaard,* or belt of islands and rocks along the Norwegian coast and from base lines drawn between these islands, or from base lines drawn between the headlands of certain bays. It was Norway's position that the fisheries zone delimited by this Decree was her territorial sea. On September 28, 1949, the government of the United Kingdom filed with the registry of the International Court of Justice an Application asking that the legality of this delimitation be tested under the principles of international law. That Norway claims a four-mile belt of territorial waters was not an issue in the case. Judgment, rendered by the Court on December 18, 1951, was in favor of the Norwegian position.

Twelve of the Court's fifteen judges participated in the decision. Judges Fabela (Mexico) and Krylov (U.S.S.R.) were absent and Judge Azevedo (Brazil) had recently died. In view of the importance of this case for the law of the sea, there are reproduced herein the Judgment of the Court, the individual concurring opinions of Judge Alvarez (Chile) and Judge Hsu Mo (China), and the dissenting opinion of Judge McNair (United Kingdom). It is regretted that space limitations prevent the reprinting of the dissenting opinion of Judge Read (Canada) as well. In brief summary, it was his opinion that certain of the base lines were contrary to international law, that the Norwegian base-line "system" was contrary to international law, and that the coastline rule was an established rule of international law. In general approach, his views resembled Judge McNair's, although he agreed with the majority of the Court on Indreleia and Vestfjord. He differed also with Judge McNair by expressing the opinion that the ten-mile rule for bays was established international law. Furthermore, he was of the opinion that the United Kingdom had not been shown to have acquiesced in the application of the Norwegian "system." Judge Read's dissenting opinion appears in I.C.J., Reports, 1951, pages 186–206.

Judge Hackworth (U.S.A.) concurred in the Judgment of the Court but recorded that he did so on the basis that Norway had proved a historic title to the disputed areas.

Immediately following this Introductory Note appears a Bibliographical Note summarizing the voluminous discussion this case has generated. Consequently, the following comments will be confined to a few salient points. There can be no question that the decision is one of the most important ever rendered by an international tribunal. Its significance for the law of the sea is evident. It will particularly affect the practice of States with respect to the methods for measuring base lines as well as having a significant impact on the extent of internal and territorial waters. It will also have some bearing on national claims to the continental shelf and fisheries. Even though the decision is not technically a precedent binding in future cases, it has already influenced and will continue to influence in practice the claims of States and the reactions of other States to such claims.

The Court's opinion is brief and not as explicit as would have been desirable in view of the importance of the questions raised. As a composite opinion of judges of varying nationalities and legal training, this is perhaps to be expected. It is clear, however, that the decision adopts a broad test of reasonableness in judging the claims of coastal States to the breadth of their territorial sea and the means adopted by them for measuring the base lines which serve as the boundary between territorial and internal waters. While the Court emphasized that the claims of coastal States are governed by international law, the standards laid down are somewhat indefinite, and are partially subjective in character. Account is taken, for example, of important economic interests of a region's inhabitants, of sufficiently long standing, as a factor along with geographic and historic considerations bearing on the reasonableness of the claim. The limitations on the use of this subjective factor are carefully stated by the International Law Commission in Article 5, Paragraph 1, fourth sentence, and Paragraph 4 of the Commentary thereto, both reprinted, *infra*. While frequent reference is made to the asserted unique character of the Norwegian coast, the decision will inevitably have broader implications.

Thus, the Court's opinion makes clear that the so-called coastline rule can no longer be regarded as having any universal validity. Neither the three-mile rule nor the breadth of the territorial sea in general were, however, directly at issue in the case. Only future adjudications can delineate the limits of the Court's principles with any certainty. The treatment of the histor-

ical evidence in the opinion of the Court was particularly terse. The ruling of the Court that the United Kingdom had acquiesced in the Norwegian "system" is subject to question. If followed, it will put a heavy burden in the future on States to discover the legislation of other States and to protest promptly if the legislation is objectionable. With the lack of compulsory jurisdiction in international tribunals, this will tend to encourage the growth of disputes without adequate means for resolution. This tendency is already evident in claims that have been made before and since the decision. For example, the claim of Chile-Ecuador-Peru to a maritime zone of 200 miles has been challenged by the United States and other States. The United States has formally proposed that these differences of view be submitted to the International Court of Justice for decision. Chile-Ecuador-Peru, which have not accepted the compulsory jurisdiction of that Court, have not been willing to agree to the United States proposal. Despite the sweep of the Court's decision, there can be little doubt that the decision does not justify such extravagant claims as Chile-Ecuador-Peru and some other States have made. The International Law Commission's 1956 Report, reprinted, *infra,* takes this position in Article 3, Paragraph 2, in stating that international law does not permit an extension of the territorial sea beyond twelve miles.

The concurring opinion of Judge Alvarez may make explicit the rationale of the opinion of the Court. It is probable that it goes beyond the Court in what it would accept in the way of claims by coastal States. It too, however, acknowledges the supremacy of international law and, in invoking the principle of *abus de droit* as a limitation, in essence adopts a very broad standard of reasonableness for judging the validity of coastal State claims.

Despite the criticisms that have been made of various aspects of the Court's opinion, the decision itself has considerable merit. On the particular facts involved, the result reached is understandable and not unreasonable. The United Kingdom case was based on a series of detailed and complex rules for which it was difficult to marshal convincing support in the practice of States. The standard of reasonableness, while vague, is sufficiently precise to serve as a basis for resolution of the conflicting claims of States to the use of the sea. If the international society had reached the stage of development in which legislative and judicial organs comparable to the modern state existed, the standards laid down by the Court would be adequate. Under existing conditions, it will be difficult to resolve the conflicts already present as well as the further disputes apt to be encouraged by the decision.

The possible effect of the decision on claims to internal and

territorial waters has been mentioned. It is generally asserted that national sovereignty is supreme in internal waters. A striking aspect of the *Fisheries* decision is its practical effect, through approval of the straight-line method, in turning large areas of water previously considered as high or territorial seas into internal waters. Does it necessarily follow that there should be no right of innocent passage for normal navigational routes through such internal waters? This question was not decided in the *Fisheries case.* But Article 5, Paragraph 3, of the final Report of the International Law Commission on the Law of the Sea, reprinted, *infra,* provides in such cases that a right of innocent passage shall be recognized if the waters involved have normally been used for international traffic.

The effect of the decision on the rights of belligerents and neutrals in the latter's territorial waters should be noted. Although the controversy concerned the validity of base lines for fishing grounds, the case was argued and decided on the basis of territorial waters. Consequently, if the usual assumption is made that the same limits and rules apply to the wartime situation, the decision could have serious consequences in this aspect of the subject. The possible implications are discussed, *supra,* in Situation I.

2. Bibliographical Note to Fisheries Case

In addition to the official report in *I.C.J. Reports,* 1951, pages 116–206, the Judgment of the Court, with minor omissions, is printed in 46 *A.J.I.L.* (1952), pages 348–370. The written and oral arguments and many documents appear in *I.C.J.–Pleadings, Oral Arguments, Documents, Fisheries Case* (*United Kingdom* v. *Norway*) in four volumes. A fifth volume contains maps of the disputed areas in detail, which are marked to show the respective contentions of the parties.

Comment on the case has been voluminous. Selected references to this commentary will be made. Counsel on both sides have been especially active in recording their reactions to the case and the decision. Professor Waldock, of counsel for the United Kingdom, discusses the case at length in 28 *B.Y.B.* (1951), pages 114–171. He concludes his criticism by stating that the Court's views were against the weight of state practice and juristic opinion without adequate explanation, and that disputed issues of fact were decided without referring to the facts adduced in opposition. He criticizes the vagueness of the Court's formula, and regrets its effect in encouraging expansion of inland waters by unilateral claims. Wilberforce, also of counsel for the United Kingdom, emphasizes the

evidentiary problems in the case from the standpoint of the practising lawyer, in 1952 *Transactions of the Grotius Society,* pages 151–168. Johnson, similarly of counsel for the United Kingdom, discusses the opposing contentions and the various opinions in 1 *I.C.L.Q.* (1952), pages 145–180. He regards the decision as not unreasonable if the premise that there was no existing rule of customary law was valid. He criticizes various aspects of the decision, and regrets that the only dissents were by British Commonwealth judges. A note by Johnson on the bearing of the decision on the Tidelands dispute in the United States appears in *Ibid.,* page 213.

Bourquin, counsel for Norway, discusses the case in detail, in 22 *Acta Scandinavica Juris Gentium* 101 *et seq.* (1952). Among other points, he believes the ten-mile rule for bays was the great victim of the decision, and that the implications of this point further enfeebled the three-mile rule for territorial waters, even though it was not at issue. He concedes the dangers of abuse in the economic-interests factor but argues that the Court's limitations on its use provide adequate protection. He stresses the connection of waters to the land as the key to use of the Court's formula for base lines. He defends the Court's decision as based on practice showing customary law under Article 38 of its Statute, and argues that the British position was based on proposed legislative solutions. Moreover, on the merits, the British position sought uniformity in an area where flexibility is essential. He concludes his defense of the Court's position by stressing the safeguards against abuse in the Court's formulation, and that the Court itself in future cases will furnish the requisite protection. Unfortunately, he does not discuss the lack of compulsory jurisdiction, which could easily make this safeguard illusory in practice.

Evenson, retained as an expert for the Norwegian Government in the case, summarizes the contentions of the parties and the opinions in 46 *A.J.I.L.* (1952), pages 609–629. He concludes that the decision throws doubt on the three-mile rule, implicitly accepts the four-mile claim, and was most significant in treating the Indreleia as internal waters. He believes that the decision will permit the extension of the Norwegian "system" to its entire coast, as has in fact been done. See Norway, Section VI, B, 26, *infra.* He does not believe the decision supports the more extreme claims that have been made.

Professor, now Judge, Lauterpacht, criticizes the decision and its effect on international judicial settlement in a letter to *The Times* of London, January 8, 1952, page 7, Cols. 6 and 7. There is

also a brief discussion of the case in *Oppenheim* (8th Ed., 1955, Vol. I, Peace, by Lauterpacht) at pages 488–490. Professor H.A. Smith has discussed the decision in the *Supplement* to the Second Edition (1954) of his *The Law and Custom of the Sea*, at pages 217–222, and in the 1953 *Year Book of World Affairs*, pages 283–307. In the former, he expresses the opinion that the United Kingdom position had little chance of acceptance and that the decision will have wide effect and in fact embodies state practice since 1930. He concludes that the three-mile rule is no longer law and every state is now free to draw its limits subject to the test of reasonableness. In the latter, a more extensive article, he approves the decision and discusses the limitations of international judicial settlement in commenting on the views of Johnson, *supra*, with which he disagrees. Fitzmaurice, Legal Adviser to the British Foreign Office, discusses the broader implications of the decision under various juridical rubrics in 30 *B.Y.B.* (1953), pages 1–70, at pages 8–54. The decision itself is analyzed exhaustively by him in 31 *Ibid.* (1954), pages 371–429. His conclusions on delimitation as determined by the Court appear at pages 426–428. It is too detailed to summarize briefly but in general may be said to draw narrower implications from the decision than Smith, *supra*, and some other commentators have drawn. There is a brief comment by L.C. Green in 15 *Modern Law Review* 373 (July 1952) and by Honig in 102 *Law Journal* 397 (July 1952). The Parliamentary Undersecretary of State for Foreign Affairs stated that the effect of the decision on British practice was being considered, taking account of fisheries conventions to which the United Kingdom is a party. *Parliamentary Debates, House of Lords*, 175 *Official Reports* (No. 25, 1952), Tuesday, February 19, 1952, Cols. 7 and 8. See Section VI, 35, b, 1, *infra*, for text of later official Statement.

Judge Hudson summarizes the opinions and expresses approval of the decision in 46 *A.J.I.L.* (1952), pages 23–30. He states, in part: "* * * The judgment of the Court, supported by a firm majority, takes high place in the annals of international jurisprudence. It paves the way for a much sounder approach to the subject of territorial waters * * * and it clears up many of the confusions * * *." *Ibid.*, page 30. Young comments briefly on the case in 38 *American Bar Association Journal* 243 (March 1952), and concludes that any reasonable moderate delimitation would be valid. The decision is approved in a note in 65 *Harvard Law Review* 1453 (June 1952). A comment stressing the implications of the decision for the United States appears in 4 *Stanford*

Law Review 546–558 (July 1952). McDougal and Schlei cite the decision in support of their standard of reasonableness for the law of the sea in general in 64 *Yale Law Journal* 648 (April 1955) at page 658, note 62, and page 665. Vaughan, 42 *Geographical Review* 302 (1952) summarizes the decision and points out the need that will arise for delineation on maps of exact limits which surface navigators and aviators can use.

Auby approves of the decision in general, although he criticizes the Court's opinion on the acquiescence and notice points. Some of his comments are too sweeping, especially his treatment of the Truman Proclamations, *infra,* Section VI, A, *Journal du Droit International* (Clunet—80th Year—No. 1), commencing on page 24 in French and page 25 in English). Brinton comments on the decision and applies it to the 1951 Egyptian Royal Decree of 15 January 1951 and to the Icelandic and Bulgarian laws in 8 *Revue Egyptienne de Droit International* 103 (1952) at pages 104–112. The Bulgarian, Egyptian, and Icelandic laws, which are discussed, *infra,* Section VI, B, 4, 13, and 18, resemble in various degrees the Norwegian "system". There is a brief comment on the case by the New Zealand Department of External Affairs in 28 *University of New Zealand Law Journal* (July 22, 1952), at page 201. The conclusion is that the rigidity of the freedom of the seas must yield to an orderly regime consistent with the needs of the international community.

3. Judgment (Opinion of the Court)

Present: *President* BASDEVANT; *Vice-President* GUERRERO; *Judges* ALVAREZ, HACKWORTH, WINIARSKI, ZORICIC, DE VISSCHER, Sir Arnold McNAIR, KLAESTAD, BADAWI PASHA, READ, HSU MO; *Registrar* HAMBRO.

In the Fisheries case,

between

the United Kingdom of Great Britain and Northern Ireland, represented by:

Sir Eric Beckett, K.C.M.G., K.C., Legal Adviser to the Foreign Office,

as Agent,

assisted by:

The Right Honourable Sir Frank Soskice, K.C., M.P., Attorney-General,

Professor C.H.M. Waldock, C.M.G., O.B.E., K.C., Chichele Pro-

fessor of Public International Law in the University of Oxford,
Mr. R.O. Wilberforce, Member of the English Bar,
Mr. D.H.N. Johnson, Assistant Legal Advisor, Foreign Office,
as Counsel,
and by:
Commander R.H. Kennedy, O.B.E., R.N. (retired), Hydrographic Department, Admiralty,
Mr. W.H. Evans, Hydrographic Department, Admiralty,
M. Annaeus Schjodt, Jr., of the Norwegian Bar, Legal Adviser to the British Embassy in Oslo.
Mr. W.N. Hanna, Military Branch, Admiralty,
Mr. A.S. Armstrong, Fisheries Department, Ministry of Agriculture and Fisheries,
as expert advisers;
and
the Kingdom of Norway,
represented by:
M. Sven Arntzen, Advocate at the Supreme Court of Norway,
as Agent and Counsel,
assisted by:
M. Maurice Bourquin, Professor at the University of Geneva and at the Graduate Institute of International Studies,
as Counsel,
and by:
M. Paal Berg, former President of the Supreme Court of Norway,
Mr. C. J. Hambro, President of the Odelsting,
M. Frede Castberg, Professor at the University of Oslo,
M. Lars J. Jorstad, Minister Plenipotentiary,
Captain Chr. Meyer, of the Norwegian Royal Navy,
M. Gunnar Rollefsen, Director of the Research Bureau of the Norwegian Department of Fisheries,
M. Reidar Skau, Judge of the Supreme Court of Norway,
M.E.A. Colban, Chief of Division in the Norwegian Royal Ministry for Foreign Affairs,
Captain W. Coucheron-Aamot, of the Norwegian Royal Navy,
M. Jens Evensen, of the Bar of the Norwegian Courts of Appeal,
M. Andre Salomon, Doctor of Law,
as experts,
and by:
M. Sigurd Ekeland, Secretary to the Norwegian Royal Ministry for Foreign Affairs,
as secretary,

THE COURT,

composed as above,

delivers the following Judgment:

On September 28th, 1949, the Government of the United Kingdom of Great Britain and Northern Ireland filed in the Registry an Application instituting proceedings before the Court against the Kingdom of Norway, the subject of the proceedings being the validity or otherwise, under international law, of the lines of delimitation of the Norwegian fisheries zone laid down by the Royal Decree of July 12th, 1935, as amended by a Decree of December 10th, 1937, for that part of Norway which is situated northward of 66° 28.8′ (or 66° 28′ 48″) N. latitude. The Application refers to the Declarations by which the United Kingdom and Norway have accepted the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute.

This Application asked the Court

> "(a) to declare the principles of international law to be applied in defining the base-lines, by reference to which the Norwegian Government is entitled to delimit a fisheries zone, extending to seaward 4 sea miles from those lines and exclusively reserved for its own nationals, and to define the said base-lines in so far as it appears necessary, in the light of the arguments of the Parties, in order to avoid further legal differences between them;
>
> (b) to award damages to the Government of the United Kingdom in respect of all interferences by the Norwegian authorities with British fishing vessels outside the zone which, in accordance with the Court's decision under (a), the Norwegian Government is entitled to reserve for its nationals."

Pursuant to Article 40, paragraph 3, of the Statute, the Application was notified to the States entitled to appear before the Court. It was also transmitted to the Secretary-General of the United Nations.

The Pleadings were filed within the time-limits prescribed by Order of November 9th, 1949, and later extended by Orders of March 29th and October 4th, 1950, and January 10th, 1951. By application of Article 44, paragraph 2, of the Rules of Court, they were communicated to the Governments of Belgium, Canada, Cuba, Iceland, Sweden, the United States of America and Venezuela, at their request and with the authorization of the Court. On September 24th, 1951, the Court, by application of Article 44, paragraph

3, of the Rules, at the instance of the Government of Norway, and with the agreement of the United Kingdom Government, authorized the Pleadings to be made accessible to the public.

The case was ready for hearing on April 30th, 1951, and the opening of the oral proceedings was fixed for September 25th, 1951. Public hearings were held on September 25th, 26th, 27th, 28th and 29th, October 1st, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 15th, 17th, 18th, 19th, 20th, 24th, 25th, 26th, 27th and 29th. In the course of the hearings, the Court heard Sir Eric Beckett, Agent, Sir Frank Soskice, Mr. Wilberforce and Professor Waldock, Counsel, on behalf of the United Kingdom Government; and M. Arntzen, Agent and Counsel, and Professor Bourquin, Counsel, on behalf of the Government of Norway. In addition, technical explanations were given on behalf of the United Kingdom Government by Commander Kennedy.

At the end of his argument, the Agent of the United Kingdom Government presented the following submissions:

> "The United Kingdom submits that the Court should decide that the maritime limits which Norway is entitled to enforce as against the United Kingdom should be drawn in accordance with the following principles:
>
> (1) That Norway is entitled to a belt of territorial waters of fixed breadth—the breadth cannot, as a maximum, exceed 4 sea miles.
>
> (2) That, in consequence, the outer limit of Norway's territorial waters must never be more than 4 sea miles from *some* point on the base-line.
>
> (3) That, subject to (4), (9) and (10) below, the base-line must be low-water mark on permanently dry land (which is part of Norwegian territory) or the proper closing line (see (7) below) of Norwegian internal waters.
>
> (4) That, where there is a low-tide elevation situated within 4 sea miles of permanently dry land, or of the proper closing line of Norwegian internal waters, the outer limit of territorial waters may be 4 sea miles from the outer edge (at low tide) of this low-tide elevation. In no other case may a low-tide elevation be taken into account.
>
> (5) That Norway is entitled to claim as Norwegian internal waters, on historic grounds, all fjords and sunds which fall within the conception of a bay as defined in

international law, whether the proper entrance to the indentation is more or less than 10 sea miles wide.

(6) That the definition of a bay in international law is a well-marked indentation, whose penetration inland is in such proportion to the width of its mouth as to constitute the indentation more than a mere curvature of the coast.

(7) That, where an area of water is a bay, the principle which determines where the closing line should be drawn, is that the closing line should be drawn between the natural geographical entrance points where the indentation ceases to have the configuration of a bay.

(8) That a legal strait is any geographical strait which connects two portions of the high seas.

(9) That Norway is entitled to claim as Norwegian territorial waters, on historic grounds, all the waters of the fjords and sunds which have the character of a legal strait. Where the maritime belts, drawn from each shore, overlap at each end of the strait, the limit of territorial waters is formed by the outer rims of these two maritime belts. Where, however, the maritime belts so drawn do not overlap, the limit follows the outer rims of each of these two maritime belts, until they intersect with the straight line, joining the natural entrance points of the strait, after which intersection the limit follows that straight line.

(10) That, in the case of the Vestfjord, the outer limit of Norwegian territorial waters, at the south-westerly end of the fjord, is the pecked green line shown on Charts Nos. 8 and 9 of Annex 35 of the Reply.

(11) That Norway, by reason of her historic title to fjords and sunds, is entitled to claim, either as territorial or as internal waters, the areas of water lying between the island fringe and the mainland of Norway. In order to determine what areas must be deemed to lie between the islands and the mainland, and whether these areas are territorial or internal waters, recourse must be had to Nos. (6) and (8) above, being the definitions of a bay and of a legal strait.

(12) That Norway is not entitled, as against the United Kingdom, to enforce any claim to waters not covered by the preceding principles. As between Norway and the United Kingdom, waters off the coast of Norway north of parallel 66° 28.8′ N., which are not Norwegian

by virtue of the above-mentioned principles, are high seas.

(13) That Norway is under an international obligation to pay to the United Kingdom compensation in respect of all the arrests since 16th September, 1948, of British fishing vessels in waters, which are high seas by virtue of the application of the preceding principles."

Later, the Agent of the United Kingdom Government presented the following Conclusions, at the end of his oral reply:

"The United Kingdom submits that the Court should decide that the maritime limits which Norway is entitled to enforce as against the United Kingdom should be drawn in accordance with the following principles:

(1) That Norway is entitled to a belt of territorial waters of fixed breadth—the breadth cannot, as a maximum, exceed 4 sea miles.

(2) That, in consequence, the outer limit of Norway's territorial waters must never be more than 4 sea miles from *some* point on the base-line.

(3) That, subject to Nos. (4), (9) and (10) below, the base-line must be low-water mark on permanently dry land (which is part of Norwegian territory) or the proper closing line (see No. (7) below) of Norwegian internal waters.

(4) That, where there is a low-tide elevation situated within 4 sea miles of permanently dry land, or of the proper closing line of Norwegian internal waters, the outer limit of Norwegian territorial waters may be 4 sea miles from the outer edge (at low tide) of this low-tide elevation. In no other case may a low-tide elevation be taken into account.

(5) That Norway is entitled to claim as Norwegian internal waters, on historic grounds, all fjords and sunds which fall within the conception of a bay as defined in international law (see No. (6) below), whether the proper closing line of the indentation is more or less than 10 sea miles long.

(6) That the definition of a bay in international law is a well-marked indentation, whose penetration inland is in such proportion to the width of its mouth as to constitute the indentation more than a mere curvature of the coast.

(7) That, where an area of water is a bay, the prin-

ciple which determines where the closing line should be drawn, is that the closing line should be drawn between the natural geographical entrance points where the indentation ceases to have the configuration of a bay.

(8) That a legal strait is any geographical strait which connects two portions of the high seas.

(9) (a) That Norway is entitled to claim as Norwegian territorial waters, on historic grounds, all the waters of the fjords and sunds which have the character of legal straits.

(b) Where the maritime belts drawn from each shore overlap at each end of the strait, the limit of territorial waters is formed by the outer rims of these two maritime belts. Where, however, the maritime belts so drawn do not overlap, the limit follows the outer rims of each of these two maritime belts, until they intersect with the straight line, joining the natural entrance points of the strait, after which intersection the limit follows that straight line.

(10) That, in the case of the Vestfjord, the outer limit of Norwegian territorial waters, at the southwesterly end of the fjord, is the pecked green line shown on Charts Nos. 8 and 9 of Annex 35 of the Reply.

(11) That Norway, by reason of her historic title to fjords and sunds (see Nos. (5) and (9) (a) above), is entitled to claim, either as internal or as territorial waters, the areas of water lying between the island fringe and the mainland of Norway. In order to determine what areas must be deemed to lie between the island fringe and the mainland, and whether these areas are internal or territorial waters, the principles of Nos. (6), (7), (8) and (9) (b) must be applied to indentations in the island fringe and to indentations between the island fringe and the mainland—those areas which lie in indentations having the character of bays, and within the proper closing lines thereof, being deemed to be internal waters; and those areas which lie in indentations having the character of legal straits, and within the proper limit thereof, being deemed to be territorial waters.

(12) That Norway is not entitled, as against the United Kingdom, to enforce any claims to waters not covered by the preceding principles. As between Norway and the United Kingdom, waters off the coast of Norway

north of parallel 66° 28.8′ N., which are not Norwegian by virtue of the above-mentioned principles, are high seas.

(13) That the Norwegian Royal Decree of 12th July, 1935, is not enforceable against the United Kingdom to the extent that it claims as Norwegian waters (internal or territorial waters) areas of water not covered by Nos. (1)–(11).

(14) That Norway is under an international obligation to pay to the United Kingdom compensation in respect of all the arrests since 16th September, 1948, of British fishing vessels in waters which are high seas by virtue of the application of the preceding principles.

Alternatively to Nos. (1) to (13) (if the Court should decide to determine by its judgment the exact limits of the territorial waters which Norway is entitled to enforce against the United Kingdom), that Norway is not entitled as against the United Kingdom to claim as Norwegian waters any areas of water off the Norwegian coasts north of parallel 66° 28.8′ N. which are outside the pecked green line drawn on the charts which form Annex 35 of the Reply.

Alternatively to Nos. (8) to (11) (if the Court should hold that the waters of the Indreleia are Norwegian internal waters), the following are substituted for Nos. (8) to (11):

I. That, in the case of the Vestfjord, the outer limit of Norwegian territorial waters at the southwesterly end of the fjord is a line drawn 4 sea miles seawards of a line joining the Skomvaer lighthouse at Rost to Kalsholmen lighthouse in Tennholmerne until the intersection of the former line with the arcs of circles in the pecked green line shown on Charts 8 and 9 of Annex 35 of the Reply.

II. That Norway, by reason of her historic title to fjords and sunds, is entitled to claim as internal waters the areas of water lying between the island fringe and the mainland of Norway. In order to determine what areas must be deemed to lie between the island fringe and the mainland, the principles of Nos. (6) and (7) above must be applied to the indentations in the island fringe and to the indentations between the island fringe and the mainland—those areas which lie in indentations having the character of bays, and within the proper

closing lines thereof, being deemed to lie between the island fringe and the mainland."

At the end of his argument, the Norwegian Agent presented, on behalf of his government, the following submissions, which he did not modify in his oral rejoinder:

"Having regard to the fact that the Norwegian Royal Decree of July 12th, 1935, is not inconsistent with the rules of international law binding upon Norway, and

having regard to the fact that Norway possesses, in any event, an historic title to all the waters included within the limits laid down by that decree,

May it please the Court,
in one single judgment,

rejecting all submissions to the contrary,

to adjudge and declare that the delimitation of the fisheries zone fixed by the Norwegian Royal Decree of July 12th, 1935, is not contrary to international law."

* * *

The facts which led the United Kingdom to bring the case before the Court are briefly as follows.

The historical facts laid before the Court establish that as the result of complaints from the King of Denmark and of Norway, at the beginning of the seventeenth century, British fishermen refrained from fishing in Norwegian coastal waters for a long period, from 1616–1618 until 1906.

In 1906 a few British vessels appeared off the coasts of Eastern Finnmark. From 1908 onwards they returned in greater numbers. These were trawlers equipped with improved and powerful gear. The local population became perturbed, and measures were taken by the Norwegian Government with a view to specifying the limits within which fishing was prohibited to foreigners.

The first incident occurred in 1911 when a British trawler was seized and condemned for having violated these measures. Negotiations ensued between the two Governments. These were interrupted by the war in 1914. From 1922 onwards incidents recurred. Further conversations were initiated in 1924. In 1932, British trawlers, extending the range of their activities, appeared in the sectors off the Norwegian coast west of the North Cape, and the number of warnings and arrests increased. On July 27th, 1933, the United Kingdom Government sent a memorandum to the Norwegian Government complaining that in delimiting the territorial sea the Norwegian authorities had made use of unjustifiable

base-lines. On July 12th, 1935, a Norwegian Royal Decree was enacted delimiting the Norwegian fisheries zone north of 66° 28.8′ North latitude.

The United Kingdom made urgent representations in Oslo in the course of which the question of referring the dispute to the Permanent Court of International Justice was raised. Pending the result of the negotiations, the Norwegian Government made it known that Norwegian fishery patrol vessels would deal leniently with foreign vessels fishing a certain distance within the fishing limits. In 1948, since no agreement had been reached, the Norwegian Government abandoned its lenient enforcement of the 1935 Decree; incidents then became more and more frequent. A considerable number of British trawlers were arrested and condemned. It was then that the United Kingdom Government instituted the present proceedings.

* * *

The Norwegian Royal Decree of July 12th, 1935, concerning the delimitation of the Norwegian fisheries zone sets out in the preamble the considerations on which its provisions are based. In this connection it refers to "well-established national titles of right", "the geographical conditions prevailing on the Norwegian coasts", "the safeguard of the vital interests of the inhabitants of the northernmost parts of the country"; it further relies on the Royal Decrees of February 22nd, 1812, October 16th, 1869, January 5th, 1881, and September 9th, 1889.

The Decree provides that "lines of delimitation towards the high sea of the Norwegian fisheries zone as regards that part of Norway which is situated northward 66° 28.8′ North latitude . . . shall run parallel with straight base-lines drawn between fixed points on the mainland, on islands or rocks, starting from the final point of the boundary line of the Realm in the easternmost part of the Varangerfjord and going as far as Traena in the County of Nordland". An appended schedule indicates the fixed points between which the base-lines are drawn.

The subject of the dispute is clearly indicated under point 8 of the Application instituting proceedings: "The subject of the dispute is the validity or otherwise under international law of the lines of delimitation of the Norwegian fisheries zone laid down by the Royal Decree of 1935 for that part of Norway which is situated northward of 66° 28.8′ North latitude." And further on: ". . . the question at issue between the two Governments is whether the lines prescribed by the Royal Decree of 1935 as the base-lines for the delimitation of the fisheries zone have or have not been drawn in accordance with the applicable rules of international law."

Although the Decree of July 12th, 1935, refers to the Norwegian fisheries zone and does not specifically mention the territorial sea, there can be no doubt that the zone delimited by this Decree is none other than the sea area which Norway considers to be her territorial sea. That is how the Parties argued the question and that is the way in which they submitted it to the Court for decision.

The Submissions presented by the Agent of the Norwegian Government correspond to the subject of the dispute as indicated in the Application.

The propositions formulated by the Agent of the United Kingdom Government at the end of his first speech and revised by him at the end of his oral reply under the heading of "Conclusions" are more complex in character and must be dealt with in detail.

Points 1 and 2 of these "Conclusions" refer to the extent of Norway's territorial sea. This question is not the subject of the present dispute. In fact, the 4-mile limit claimed by Norway was acknowledged by the United Kingdom in the course of the proceedings.

Points 12 and 13 appear to be real Submissions which accord with the United Kingdom's conception of international law as set out under points 3 to 11.

Points 3 to 11 appear to be a set of propositions which, in the form of definitions, principles or rules, purport to justify certain contentions and do not constitute a precise and direct statement of a claim. The subject of the dispute being quite concrete, the Court cannot entertain the suggestion made by the Agent of the United Kingdom Government at the sitting of October 1st, 1951, that the Court should deliver a Judgment which for the moment would confine itself to adjudicating on the definitions, principles or rules stated, a suggestion which, moreover, was objected to by the Agent of the Norwegian Government at the sitting of October 5th, 1951. These are elements which might furnish reasons in support of the Judgment, but cannot constitute the decision. It further follows that even understood in this way, these elements may be taken into account only in so far as they would appear to be relevant for deciding the sole question in dispute, namely, the validity or otherwise under international law of the lines of delimitation laid down by the 1935 Decree.

Point 14, which seeks to secure a decision of principle concerning Norway's obligation to pay to the United Kingdom compensation in respect of all arrests since September 16th, 1948, of British fishing vessels in waters found to be high seas, need not be con-

sidered, since the Parties had agreed to leave this question to subsequent settlement if it should arise.

The claim of the United Kingdom Government is founded on what it regards as the general international law applicable to the delimitation of the Norwegian fisheries zone.

The Norwegian Government does not deny that there exist rules of international law to which this delimitation must conform. It contends that the propositions formulated by the United Kingdom Government in its "Conclusions" do not possess the character attributed to them by that Government. It further relies on its own system of delimitation which it asserts to be in every respect in conformity with the requirements of international law.

The Court will examine in turn these various aspects of the claim of the United Kingdom and of the defence of the Norwegian Government.

* * *

The coastal zone concerned in the dispute is of considerable length. It lies north of latitude 66° 28.8′ N., that is to say, north of the Arctic Circle, and it includes the coast of the mainland of Norway and all the islands, islets, rocks and reefs, known by the name of the "skjaergaard" (literally, rock rampart), together with all Norwegian internal and territorial waters. The coast of the mainland, which, without taking any account of fjords, bays and minor indentations, is over 1,500 kilometres in length, is of a very distinctive configuration. Very broken along its whole length, it constantly opens out into indentations often penetrating for great distances inland: the Porsangerfjord, for instance, penetrates 75 sea miles inland. To the west, the land configuration stretches out into the sea: the large and small islands, mountainous in character, the islets, rocks and reefs, some always above water, others emerging only at low tide, are in truth but an extension of the Norwegian mainland. The number of insular formations, large and small, which make up the "skjaergaard", is estimated by the Norwegian Government to be one hundred and twenty thousand. From the southern extremity of the disputed area to the North Cape, the "skjaergaard" lies along the whole of the coast of the mainland; east of the North Cape, the "skjaergaard" ends, but the coast line continues to be broken by large and deeply indented fjords.

Within the "skjaergaard", almost every island has its large and its small bays; countless arms of the sea, straits, channels and mere waterways serve as a means of communication for the local population which inhabits the islands as it does the mainland. The coast of the mainland does not constitute, as it does in

practically all other countries, a clear dividing line between land and sea. What matters, what really constitutes the Norwegian coast line, is the outer line of the "skjaergaard".

The whole of this region is mountainous. The North Cape, a sheer rock little more than 300 metres high, can be seen from a considerable distance; there are other summits rising to over a thousand metres, so that the Norwegian coast, mainland and "skjaergaard", is visible from far off.

Along the coast are situated comparatively shallow banks, veritable under-water terraces which constitute fishing grounds where fish are particularly abundant; these grounds were known to Norwegian fishermen and exploited by them from time immemorial. Since these banks lay within the range of vision, the most desirable fishing grounds were always located and identified by means of the method of alignments (*"meds"*), at points where two lines drawn between points selected on the coast or on islands intersected.

In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing.

Such are the realities which must be borne in mind in appraising the validity of the United Kingdom contention that the limits of the Norwegian fisheries zone laid down in the 1935 Decree are contrary to international law.

The Parties being in agreement on the figure of 4 miles for the breadth of the territorial sea, the problem which arises is from what base-line this breadth is to be reckoned. The Conclusions of the United Kingdom are explicit on this point: the base-line must be low-water mark on permanently dry land which is a part of Norwegian territory, or the proper closing line of Norwegian internal waters.

The Court has no difficulty in finding that, for the purpose of measuring the breadth of the territorial sea, it is the low-water mark as opposed to the high-water mark, or the mean between the two tides, which has generally been adopted in the practice of States. This criterion is the most favourable to the coastal State and clearly shows the character of territorial waters as appurtenant to the land territory. The Court notes that the Parties agree as to this criterion, but that they differ as to its application.

The Parties also agree that in the case of a low-tide elevation (drying rock) the outer edge at low water of this low-tide elevation may be taken into account as a base-point for calculating the breadth of the territorial sea. The Conclusions of the United Kingdom Government add a condition which is not admitted by Norway, namely, that, in order to be taken into account, a drying

rock must be situated within 4 miles of permanently dry land. However, the Court does not consider it necessary to deal with this question, inasmuch as Norway has succeeded in proving, after both Parties had given their interpretation of the charts, that in fact none of the drying rocks used by her as base points is more than 4 miles from permanently dry land.

The Court finds itself obliged to decide whether the relevant low-water mark is that of the mainland or of the "skjaergaard". Since the mainland is bordered in its western sector by the "skjaergaard", which constitutes a whole with the mainland, it is the outer line of the "skjaergaard" which must be taken into account in delimiting the belt of Norwegian territorial waters. This solution is dictated by geographic realities.

Three methods have been contemplated to effect the application of the low-water mark rule. The simplest would appear to be the method of the *tracé parallèle,* which consists of drawing the outer limit of the belt of territorial waters by following the coast in all its sinuosities. This method may be applied without difficulty to an ordinary coast, which is not too broken. Where a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the "skjaergaard" along the western sector of the coast here in question, the base-line becomes independent of the low-water mark, and can only be determined by means of a geometric construction. In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coast line to be followed in all its sinuosities; nor can one speak of exceptions when contemplating so rugged a coast in detail. Such a coast, viewed as a whole, calls for the application of a different method. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast. The rule would disappear under the exceptions.[1]

It is true that the experts of the Second Sub-Committee of the Second Committee of the 1930 Conference for the codification of international law formulated the low-water mark rule somewhat strictly ("following all the sinuosities of the coast"). But they

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[1] The last three sentences of this paragraph were somewhat distorted by printing errors and the following translation was later provided by the Registry of the International Court of Justice for the authoritative French text of the judgment. This corrected translation and an explanatory note appear in the *Report of the International Law Commission,* covering its Eighth Session, Supplement No. 9 (A/3159), p. 14.

"[In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coastline to be fol-

were at the same time obliged to admit many exceptions relating to bays, islands near the coast, groups of islands. In the present case this method of the *tracé parallèle,* which was invoked against Norway in the Memorial, was abandoned in the written Reply, and later in the oral argument of the Agent of the United Kingdom Government. Consequently, it is no longer relevant to the case. "On the other hand", it is said in the Reply, "the *courbe tangente* —or, in English, 'envelopes of arcs of circles' method is the method which the United Kingdom considers to be the correct one".

The arcs of circles method, which is constantly used for determining the position of a point or object at sea, is a new technique in so far as it is a method for delimiting the territorial sea. This technique was proposed by the United States delegation at the 1930 Conference for the codification of international law. Its purpose is to secure the application of the principle that the belt of territorial waters must follow the line of the coast. It is not obligatory by law, as was admitted by Counsel for the United Kingdom Government in his oral reply. In these circumstances, and although certain of the Conclusions of the United Kingdom are founded on the application of the arcs of circles method, the Court considers that it need not deal with these Conclusions in so far as they are based upon this method.

The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea; these criteria will be elucidated later. The Court will confine itself at this stage to noting that, in order to apply this principle, several States have deemed it necessary to follow the straight base-lines method and that they have not encountered objections of principle by other States. This method consists of selecting appropriate points on the low-water mark and drawing straight lines between them. This has been done, not only in the case of well-defined bays, but also in cases of minor curvatures of the coast line where it was solely a question of giving a simpler form to the belt of territorial waters.

It has been contended, on behalf of the United Kingdom, that Norway may draw straight lines only across bays. The Court is

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lowed in all its sinuosities. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast; the rule would disappear under the exceptions. Such a coast, viewed as a whole, calls for the application of a different method; that is, the method of base-lines which, within reasonable limits, may depart from the physical line of the coast] . . ."

unable to share this view. If the belt of territorial waters must follow the outer line of the "skjaergaard", and if the method of straight base-lines must be admitted in certain cases, there is no valid reason to draw them only across bays, as in Eastern Finnmark, and not also to draw them between islands, islets and rocks, across the sea areas separating them, even when such areas do not fall within the conception of a bay. It is sufficient that they should be situated between the island formations of the "skjaergaard", *inter fauces terrarum.*

The United Kingdom Government concedes that straight lines, regardless of their length, may be used only subject to the conditions set out in point 5 of its Conclusions, as follows:

> "Norway is entitled to claim as Norwegian internal waters, on historic grounds, all fjords and sunds which fall within the conception of a bay as defined in international law (see No. (6) below), whether the proper closing line of the indentation is more or less than 10 sea miles long."

A preliminary remark must be made in respect of this point.

In the opinion of the United Kingdom Government, Norway is entitled, on historic grounds, to claim as internal waters all fjords and sunds which have the character of a bay. She is also entitled on historic grounds to claim as Norwegian territorial waters all the waters of the fjords and sunds which have the character of legal straits (Conclusions, point 9), and, either as internal or as territorial waters, the areas of water lying between the island fringe and the mainland (point II and second alternative Conclusion II).

By "historic waters" are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title. The United Kingdom Government refers to the notion of historic titles both in respect of territorial waters and internal waters, considering such titles, in both cases, as derogations from general international law. In its opinion Norway can justify the claim that these waters are territorial or internal on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other States, a kind of *possessio longi temporis,* with the result that her jurisdiction over these waters must now be recognized although it constitutes a derogation from the rules in force. Norwegian sovereignty over these waters would constitute an exception, historic titles justifying situations which would otherwise be in conflict with international law.

As has been said, the United Kingdom Government concedes that Norway is entitled to claim as internal waters all the waters of fjords and sunds which fall within the conception of a bay as defined in international law whether the closing line of the indentation is more or less than ten sea miles long. But the United Kingdom Government concedes this only on the basis of historic title; it must therefore be taken that that Government has not abandoned its contention that the ten-mile rule is to be regarded as a rule of international law.

In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.

In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.

The Court now comes to the question of the length of the base-lines drawn across the waters lying between the various formations of the "skjaergaard". Basing itself on the analogy with the alleged general rule of ten miles relating to bays, the United Kingdom Government still maintains on this point that the length of straight lines must not exceed ten miles.

In this connection, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not got beyond the stage of proposals.

Furthermore, apart from any question of limiting the lines to ten miles, it may be that several lines can be envisaged. In such cases the coastal State would seem to be in the best position to appraise the local conditions dictating the selection.

Consequently, the Court is unable to share the view of the United Kingdom Government, that "Norway, in the matter of base-lines, now claims recognition of an exceptional system". As will be shown later, all that the Court can see therein is the application of general international law to a specific case.

The Conclusions of the United Kingdom, points 5 and 9 to 11, refer to waters situated between the base-lines and the Norwegian mainland. The Court is asked to hold that on historic grounds

these waters belong to Norway, but that they are divided into two categories: territorial and internal waters, in accordance with two criteria which the Conclusions regard as well founded in international law, the waters falling within the conception of a bay being deemed to be internal waters, and those having the character of legal straits being deemed to be territorial waters.

As has been conceded by the United Kingdom, the "skjaergaard" constitutes a whole with the Norwegian mainland; the waters between the base-lines of the belt of territorial waters and the mainland are internal waters. However, according to the argument of the United Kingdom a portion of these waters constitutes territorial waters. These are *inter alia* the waters followed by the navigational route known as the Indreleia. It is contended that since these waters have this character, certain consequences arise with regard to the determination of the territorial waters at the end of this water-way considered as a maritime strait.

The Court is bound to observe that the Indreleia is not a strait at all, but rather a navigational route prepared as such by means of artificial aids to navigation provided by Norway. In these circumstances the Court is unable to accept the view that the Indreleia, for the purposes of the present case, has a status different from that of the other waters included in the "skjaergaard".

Thus the Court, confining itself for the moment to the Conclusions of the United Kingdom, finds that the Norwegian Government in fixing the base-lines for the delimitation of the Norwegian fisheries zone by the 1935 Decree has not violated international law.

* * *

It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law. The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.

In this connection, certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question.

Among these considerations, some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts. It follows that while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast.

Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. 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 regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.

Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.

Norway puts forward the 1935 Decree as the application of a traditional system of delimitation, a system which she claims to be in complete conformity with international law. The Norwegian Government has referred in this connection to an historic title, the meaning of which was made clear by Counsel for Norway at the sitting on October 12th, 1951: "The Norwegian Government does not rely upon history to justify exceptional rights, to claim areas of sea which the general law would deny; it invokes history, together with other factors, to justify the way in which it applies the general law." This conception of an historic title is in consonance with the Norwegian Government's understanding of the general rules of international law. In its view, these rules of international law take into account the diversity of facts and, therefore, concede that the drawing of base-lines must be adapted to the special conditions obtaining in different regions. In its view, the system of delimitation applied in 1935, a system characterized by the use of straight lines, does not therefore infringe the general law; it is an adaptation rendered necessary by local conditions.

The Court must ascertain precisely what this alleged system of delimitation consists of, what is its effect in law as against the United Kingdom, and whether it was applied by the 1935 Decree in a manner which conformed to international law.

It is common ground between the Parties that on the question of the existence of a Norwegian system, the Royal Decree of February 22nd, 1812, is of cardinal importance. This Decree is in the following terms: "We wish to lay down as a rule 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; of which all proper authorities shall be informed by rescript."

This text does not clearly indicate how the base-lines between the islands or islets farthest from the mainland were to be drawn. In particular, it does not say in express terms that the lines must take the form of straight lines drawn between these points. But it may be noted that it was in this way that the 1812 Decree was invariably construed in Norway in the course of the 19th and 20th centuries.

The Decree of October 16th, 1869, relating to the delimitation of Sunnmöre, and the Statement of Reasons for this Decree, are particularly revealing as to the traditional Norwegian conception and the Norwegian construction of the Decree of 1812. It was by reference to the 1812 Decree, and specifically relying upon "the conception" adopted by that Decree, that the Ministry of the Interior justified the drawing of a straight line 26 miles in length between the two outermost points of the "skjaergaard". The Decree of September 9th, 1889, relating to the delimitation of Romsdal and Nordmöre, applied the same method, drawing four straight lines, respectively 14.7 miles, 7 miles, 23.6 miles and 11.6 miles in length.

The 1812 Decree was similarly construed by the Territorial Waters Boundary Commission (Report of February 29th, 1912, pp. 48–49), as it was in the Memorandum of January 3rd, 1929, sent by the Norwegian Government to the Secretary-General of the League of Nations, in which it was said: "The direction laid down by this Decree should be interpreted in the sense that the starting-point for calculating the breadth of the territorial waters should be a line drawn along the 'skjaergaard' between the furthest rocks and, where there is no 'skjaergaard' between the extreme points." The judgment delivered by the Norwegian Supreme Court in 1934 in the *St. Just* case, provided final authority for this interpretation. This conception accords with the geographical characteristics of the Norwegian coast and is not contrary to the principles of international law.

It should, however, be pointed out that whereas the 1812 Decree designated as base-points "the island or islet farthest from the

mainland not covered by the sea", Norwegian governmental practice subsequently interpreted this provision as meaning that the limit was to be reckoned from the outermost islands and islets "not continuously covered by the sea".

The 1812 Decree, although quite general in its terms, had as its immediate object the fixing of the limit applicable for the purposes of maritime neutrality. However, as soon as the Norwegian Government found itself impelled by circumstances to delimit its fisheries zone, it regarded that Decree as laying down principles to be applied for purposes other than neutrality. The Statements of Reasons of October 1st, 1869, December 20th, 1880, and May 24th, 1889, are conclusive on this point. They also show that the delimitation effected in 1869 and in 1889 constituted a reasoned application of a definite system applicable to the whole of the Norwegian coast line, and was not merely legislation of local interest called for by any special requirements. The following passage from the Statement of Reasons of the 1869 Decree may in particular be referred to: "My Ministry assumes that the general rule mentioned above [namely, the four-mile rule], which is recognized by international law for the determination of the extent of a country's territorial waters, must be applied here in such a way that the sea area inside a line drawn parallel to a straight line between the two outermost islands or rocks not covered by the sea, Svinöy to the south and Storholmen to the north, and one geographical league north-west of that straight line, should be considered Norwegian maritime territory."

The 1869 Statement of Reasons brings out all the elements which go to make up what the Norwegian Government describes as its traditional system of delimitation: base-points provided by the islands or islets farthest from the mainland, the use of straight lines joining up these points, the lack of any maximum length for such lines. The judgment of the Norwegian Supreme Court in the *St. Just* case upheld this interpretation and added that the 1812 Decree had never been understood or applied "in such a way as to make the boundary follow the sinuosities of the coast or to cause its position to be determined by means of circles drawn round the points of the 'Skjaergaard' or of the mainland furthest out to sea —a method which it would be very difficult to adopt or to enforce in practice, having regard to the special configuration of this coast." Finally, it is established that, according to the Norwegian system, the base-lines must follow the general direction of the coast, which is in conformity with international law.

Equally significant in this connection is the correspondence which passed between Norway and France between 1869–1870.

On December 21st, 1869, only two months after the promulgation of the Decree of October 16th relating to the delimitation of Sunnmöre, the French Government asked the Norwegian Government for an explanation of this enactment. It did so basing itself upon "the principles of international law". In a second Note dated December 30th of the same year, it pointed out that the distance between the base-points was greater than 10 sea miles, and that the line joining up these points should have been a broken line following the configuration of the coast. In a Note of February 8th, 1870, the Ministry for Foreign Affairs, also dealing with the question from the point of view of international law, replied as follows:

> "By the same Note of December 30th, Your Excellency drew my attention to the fixing of the fishery limit in the Sunnmöre Archipelago by a straight line instead of a broken line. According to the view held by your Government, as the distance between the islets of Svinöy and Storholmen is more than 10 sea miles, the fishery limit between these two points should have been a broken line following the configuration of the coast line and nearer to it than the present limit. In spite of the adoption in some treaties of the quite arbitrary distance of 10 sea miles, this distance would not appear to me to have acquired the force of an international law. Still less would it appear to have any foundation in reality: one bay, by reason of the varying formations of the coast and seabed, may have an entirely different character from that of another bay of the same width. It seems to me rather that local conditions and considerations of what is practicable and equitable should be decisive in specific cases. The configuration of our coasts in no way resembles that of the coasts of other European countries, and that fact alone makes the adoption of any absolute rule of universal application impossible in this case.
>
> "I venture to claim that all these reasons militate in favour of the line laid down by the Decree of October 16th. A broken line, conforming closely to the indentations of the coast line between Svinöy and Storholmen, would have resulted in a boundary so involved and so indistinct that it would have been impossible to exercise any supervision over it. . . ."

Language of this kind can only be construed as the considered expression of a legal conception regarded by the Norwegian Government as compatible with international law. And indeed,

the French Government did not pursue the matter. In a Note of July 27th, 1870, it is said that, while maintaining its standpoint with regard to principle, it was prepared to accept the delimitation laid down by the Decree of October 16th, 1869, as resting upon "a practical study of the configuration of the coast line and of the conditions of the inhabitants."

The Court, having thus established the existence and the constituent elements of the Norwegian system of delimitation, further finds that this system was consistently applied by Norwegian authorities and that it encountered no opposition on the part of other States.

The United Kingdom Government has however sought to show that the Norwegian Government has not consistently followed the principles of delimitation which, it claims, form its system, and that it has admitted by implication that some other method would be necessary to comply with international law. The documents to which the Agent of the Government of the United Kingdom principally referred at the hearing on October 20th, 1951, relate to the period between 1906 and 1908, the period in which British trawlers made their first appearance off the Norwegian coast, and which, therefore, merits particular attention.

The United Kingdom Government pointed out that the law of June 2nd, 1906, which prohibited fishing by foreigners, merely forbade fishing in "Norwegian territorial waters", and it deduced from the very general character of this reference that no definite system existed. The Court is unable to accept this interpretation, as the object of the law was to renew the prohibition against fishing and not to undertake a precise delimitation of the territorial sea.

The second document relied upon by the United Kingdom Government is a letter dated March 24th, 1908, from the Minister for Foreign Affairs to the Minister of National Defence. The United Kingdom Government thought that this letter indicated an adherence by Norway to the low-water mark rule contrary to the present Norwegian position. This interpretation cannot be accepted; it rests upon a confusion between the low-water mark rule as understood by the United Kingdom, which requires that all the sinuosities of the coast line at low tide should be followed, and the general practice of selecting the low-tide mark rather than that of the high tide for measuring the extent of the territorial sea.

The third document referred to is a Note, dated November 11th, 1908, from the Norwegian Minister for Foreign Affairs to the French Chargé d'Affaires at Christiania, in reply to a request for

information as to whether Norway had modified the limits of her territorial waters. In it the Minister said: "Interpreting Norwegian regulations in this matter, whilst at the same time conforming to the general rule of the Law of Nations, this Ministry gave its opinion that the distance from the coast should be measured from the low-water mark and that every islet not continuously covered by the sea should be reckoned as a starting-point." The United Kingdom Government argued that by the reference to "the general rule of the Law of Nations", instead of to its own system of delimitation entailing the use of straight lines, and, furthermore, by its statement that "every islet not continuously covered by the sea should be reckoned as a starting-point", the Norwegian Government had completely departed from what it to-day describes as its system.

It must be remembered that the request for information to which the Norwegian Government was replying related not to the use of straight lines, but to the breadth of Norwegian territorial waters. The point of the Norwegian Government's reply was that there had been no modification in the Norwegian legislation. Moreover, it is impossible to rely upon a few words taken from a single note to draw the conclusion that the Norwegian Government had abandoned a position which its earlier official documents had clearly indicated.

The Court considers that 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, and are not such as to modify the conclusions reached by the Court.

In the light of these considerations, and in the absence of convincing evidence to the contrary, the Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose.

From the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States.

Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign States. Since, moreover, these Decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed this system itself which

would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States.

The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it. One cannot indeed consider as raising objections the discussions to which the *Lord Roberts* incident gave rise in 1911, for the controversy which arose in this connection related to two questions, that of the four-mile limit, and that of Norwegian sovereignty over the Varangerfjord, both of which were unconnected with the position of base-lines. It would appear that it was only in its Memorandum of July 27th, 1933, that the United Kingdom made a formal and definite protest on this point.

The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it and that the system therefore lacked the notoriety essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government. Nor, knowing of it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system. The same observation applies *a fortiori* to the Decree of 1889 relating to the delimitation of Romsdal and Nordmöre which must have appeared to the United Kingdom as a reiterated manifestation of the Norwegian practice.

Norway's attitude with regard to the North Sea Fisheries (Police) Convention of 1882 is a further fact which must at once have attracted the attention of Great Britain. There is scarcely any fisheries convention of greater importance to the coastal States of the North Sea or of greater interest to Great Britain. Norway's refusal to adhere to this Convention clearly raised the question of the delimitation of her maritime domain, especially with regard to bays, the question of their delimitation by means of straight lines of which Norway challenged the maximum length adopted in the Convention. Having regard to the fact that a few years before, the delimitation of Sunnmöre by the 1869 Decree had been presented as an application of the Norwegian system, one cannot avoid the conclusion that, from that time on, all the

elements of the problem of Norwegian coastal waters had been clearly stated. The steps subsequently taken by Great Britain to secure Norway's adherence to the Convention clearly show that she was aware of and interested in the question.

The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations.

The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.

The Court is thus led to conclude that the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law.

* * *

The question now arises whether the Decree of July 12th, 1935, which in its preamble is expressed to be an application of this method, conforms to it in its drawing of the baselines, or whether, at certain points, it departs from this method to any considerable extent.

The schedule appended to the Decree of July 12th, 1935, indicates the fixed points between which the straight base-lines are drawn. The Court notes that these lines were the result of a careful study initiated by the Norwegian authorities as far back as 1911. The base-lines recommended by the Foreign Affairs Committee of the Storting for the delimitation of the fisheries zone and adopted and made public for the first time by the Decree of July 12th, 1935, are the same as those which the so-called Territorial Waters Boundary Commissions, successively appointed on June 29th, 1911, and July 12th, 1912, had drawn in 1912 for Finnmark and in 1913 for Nordland and Troms. The Court further notes that the 1911 and 1912 Commissions advocated these lines and in so doing constantly referred, as the 1935 Decree itself did, to the traditional system of delimitation adopted by earlier acts and more particularly by the Decrees of 1812, 1869 and 1889.

In the absence of convincing evidence to the contrary, the Court cannot readily find that the lines adopted in these circumstances by the 1935 Decree are not in accordance with the traditional

Norwegian system. However, a purely factual difference arose between the Parties concerning the three following base-points: No. 21 (Vesterfallet i Gaasan), No. 27 (Tokkebaaen) and No. 39 (Nordböen). This difference is now devoid of object. A telegram dated October 19th, 1951, from the Hydrographic Service of Norway to the Agent of the Norwegian Government, which was communicated to the Agent of the United Kingdom Government, has confirmed that these three points are rocks which are not continuously submerged. Since this assertion has not been further disputed by the United Kingdom Government, it may be considered that the use of these rocks as base-points is in conformity with the traditional Norwegian system.

Finally, it has been contended by the United Kingdom Government that certain, at least, of the base-lines adopted by the Decree are, irrespective of whether or not they conform to the Norwegian system, contrary to the principles stated above by the Court as governing any delimitation of the territorial sea. The Court will consider whether, from the point of view of these principles, certain of the base-lines which have been criticized in some detail really are without justification.

The Norwegian Government admits that the base-lines must be drawn in such a way as to respect the general direction of the coast and that they must be drawn in a reasonable manner. The United Kingdom Government contends that certain lines do not follow the general direction of the coast, or do not follow it sufficiently closely, or that they do not respect the natural connection existing between certain sea areas and the land formations separating or surrounding them. For these reasons, it is alleged that the line drawn is contrary to the principles which govern the delimitation of the maritime domain.

The Court observes that these complaints, which assumed a very general scope in the written proceedings, have subsequently been reduced.

The United Kingdom Government has directed its criticism more particularly against two sectors, the delimitation of which they represented as extreme cases of deviation from the general direction of the coast: the sector of Svaerholthavet (between base-points 11 and 12) and that of Lopphavet (between base-points 20 and 21). The Court will deal with the delimitation of these two sectors from this point of view.

The base-line between points 11 and 12, which is 38.6 sea miles in length, delimits the waters of the Svaerholt lying between Cape Nordkyn and the North Cape. The United Kingdom Government denies that the basin so delimited has the character of a bay. Its

argument is founded on a geographical consideration. In its opinion, the calculation of the basin's penetration inland must stop at the tip of the Svaerholt peninsula (Svaerholtklubben). The penetration inland thus obtained being only 11.5 sea miles, as against 38.6 miles of breadth at the entrance, it is alleged that the basin in question does not have the character of a bay. The Court is unable to share this view. It considers that the basin in question must be contemplated in the light of all the geographical factors involved. The fact that a peninsula juts out and forms two wide fjords, the Laksefjord and the Porsangerfjord, cannot deprive the basin of the character of a bay. It is the distances between the disputed base-line and the most inland point of these fjords, 50 and 75 sea miles respectively, which must be taken into account in appreciating the proportion between the penetration inland and the width at the mouth. The Court concludes that Svaerholthavet has the character of a bay.

The delimitation of the Lopphavet basin has also been criticized by the United Kingdom. As has been pointed out above, its criticism of the selection of base point No. 21 may be regarded as abandoned. The Lopphavet basin constitutes an ill-defined geographic whole. It cannot be regarded as having the character of a bay. It is made up of an extensive area of water dotted with large islands which are separated by inlets that terminate in the various fjords. The base-line has been challenged on the ground that it does not respect the general direction of the coast. It should be observed that, however justified the rule in question may be, it is devoid of any mathematical precision. In order properly to apply the rule, regard must be had for the relation between the deviation complained of and what, according to the terms of the rule, must be regarded as the *general* direction of the coast. Therefore, one cannot confine oneself to examining one sector of the coast alone, except in a case of manifest abuse; nor can one rely on the impression that may be gathered from a large scale chart of this sector alone. In the case in point, the divergence between the base-line and the land formations is not such that it is a distortion of the general direction of the Norwegian coast.

Even if it were considered that in the sector under review the deviation was too pronounced, it must be pointed out that the Norwegian Government has relied upon an historic title clearly referable to the waters of Lopphavet, namely, the exclusive privilege to fish and hunt whales granted at the end of the 17th century to Lt.-Commander Erich Lorch under a number of licenses which show, *inter alia*, that the water situated in the vicinity of the sunken rock of Gjesbaaen or Gjesboene and the fishing grounds

pertaining thereto were regarded as falling exclusively within Norwegian sovereignty. But it may be observed that the fishing grounds here referred to are made up of two banks, one of which, the Indre Gjesboene, is situated between the base-line and the limit reserved for fishing, whereas the other, the Ytre Gjesboene, is situated further to seaward and beyond the fishing limit laid down in the 1935 Decree.

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, as is recognized by the United Kingdom Government, 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.

As to the Vestfjord, after the oral argument, its delimitation no longer presents the importance it had in the early stages of the proceedings. Since the Court has found that the waters of the Indreleia are internal waters, the waters of the Vestfjord, as indeed the waters of all other Norwegian fjords, can only be regarded as internal waters. In these circumstances, whatever difference may still exist between the views of the United Kingdom Government and those of the Norwegian Government on this point, is negligible. It is reduced to the question whether the base-line should be drawn between points 45 and 46 as fixed by the 1935 Decree, or whether the line should terminate at the Kalsholmen lighthouse on Tenholmerne. The Court considers that this question is purely local in character and of secondary importance, and that its settlement should be left to the coastal State.

For these reasons,
THE COURT,
rejecting all submissions to the contrary,
Finds
by ten votes to two,

that the method employed for the delimitation of the fisheries zone by the Royal Norwegian Decree of July 12th 1935, is not contrary to international law; and

by eight votes to four,

that the base-lines fixed by the said Decree in application of this method are not contrary to international law.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this eighteenth day of December, one thousand nine hundred and fifty-one, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the United Kingdom of Great Britain and Northern Ireland and to the Government of the Kingdom of Norway, respectively.

(Signed) BASDEVANT,
President.

(Signed) E. HAMBRO,
Registrar.

Judge HACKWORTH declares that he concurs in the operative part of the Judgment but desires to emphasize 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.

Judges ALVAREZ and HSU MO, availing themselves of the right conferred on them by Article 57 of the Statute, append to the Judgment of the Court statements of their separate opinions.

Judges Sir Arnold McNAIR and READ, availing themselves of the right conferred on them by Article 57 of the Statute, append to the Judgment statements of their dissenting opinions.

(Initialled) J.B.
(Initialled) E.H.

4. Individual Opinion of Judge Alvarez

[*Translation.*]

I

The United Kingdom has filed with the International Court of Justice an Application in which it challenges the validity of the Norwegian Decree of July 12th, 1935, which delimited the Norwegian fishery zones off a part of the Norwegian coast. It considers that the delimitation so effected is contrary to the precepts of international law and asks the Court to state the principles of inter-

national law applicable for defining the base-lines by reference to which the Norwegian Government is entitled to delimit its fisheries zones.

In the course of the oral proceedings, the United Kingdom Government submitted certain new conclusions, particularly on questions of law, and asked the Court to adjudicate upon these also.

In her Counter-Memorial and Rejoinder, and in her arguments in Court, Norway contended that the delimitation of these fisheries zones established in the 1935 Decree was not in conflict with the precepts of international law and that it corresponded, in any event, to historic rights long possessed by her and which she indicated.

The present litigation is of great importance, not only to the Parties to the case, but also to all other States.

At the beginning of his address to the Court, the Attorney-General said: "It is common ground that this case is not only a very important one to the United Kingdom and to Norway, but that the decision of the Court on it will be of the very greatest importance to the world generally as a precedent, since the Court's decision in this case must contain important pronouncements concerning the rules of international law relating to coastal waters. The fact that so many governments have asked for copies of our Pleadings in this case is evidence that this is the general view."

II

In considering the present case, I propose to follow a method different from that which is customarily adopted, particularly with regard to the law. It consists of bringing to light and retaining the principal facts, then of considering the points of law dominating the whole case and, finally, those which relate to each important question.

The application of this method may, at first sight, appear to be somewhat academic; but it is essentially practical, since it has as its object the furnishing of direct answers to be given on the questions submitted to the Court.

Moreover, this method is called for by reason of the double task which the Court now has: the resolution of cases submitted to it and the development of the law of nations.

It is commonly stated that the present Court is a continuation of the former Court and that consequently it must follow the methods and the jurisprudence of that Court. This is only partly true, for in the interval which elapsed between the operations of the Courts, a World War occurred which involved rapid and profound changes in international life and greatly affected the law of nations.

These changes have underlined the importance of the Court's second function. For it now happens with greater frequency than formerly that, on a given topic, no applicable precepts are to be found, or that those which do exist present lacunae or appear to be obsolete, that is to say, they no longer correspond to the new conditions of the life of peoples. In all such cases, the Court must *develop* the law of nations, that is to say, it must remedy its shortcomings, adapt existing principles to these new conditions and, even if no principles exist, create principles in conformity with such conditions. The Court has already very successfully undertaken the creation of law in a case which will remain famous in the annals of international law (Advisory Opinion of April 11th, 1949, on "Reparation for injuries suffered in the service of the United Nations"). The Court, in this case, can effectively discharge the same task.

The adaptation of the law of nations to the new conditions of international life, which is to-day necessary, is something quite different from the "Restatement" advocated by Anglo-Saxon jurists as a means of ending the crisis in international law, which consists merely of stating the law as it has been established and applied up to the present, without being too much concerned with any changes that it may recently have undergone or which it may undergo in the future.

III

I shall not dwell on a detailed examination of the facts alleged by the Parties nor upon the evidence submitted by the Parties in support of their contentions, because the Judgment of the Court deals with them at length. In the following pages I shall concentrate only on the questions of law raised by the present case.

For centuries, because of the vastness of the sea and the limited relations between States, the use of the sea was subject to no rules; every State could use it as it pleased.

From the end of the 18th century, publicists proclaimed, and the law of nations recognized as necessary for States, the exercise of sovereign powers by States over an area of the sea bordering their shores. The extent of this sea area, which was known as the territorial sea, was first fixed at the range of the contemporary cannon, and later at 3 sea miles. The question indeed was one for the domestic law of each country. Several of the countries of Latin America incorporated provisions relating to this question in their civil codes.

As the result of the growing importance of the question of the territorial sea, a World Conference was convened at The Hague

in 1930 for the purpose of providing rules governing certain of its aspects and to deal with two other matters. This Conference, in which such great hopes had been reposed, did not establish any precept relating to the territorial sea. It made it clear that no well-defined rules existed on this subject, that there were merely a number of conventions between certain States, certain trends and certain usages and practices.

It was contended at the hearings that a great number of States at this Conference had accepted the extent of the territorial sea as being fixed at three sea miles, and had also accepted as established the means of reckoning this breadth; and this assertion was challenged. It is unnecessary to dwell long on this point for, in fact, the Conference, as has been said, did not adopt any provision on the question. Moreover, the conditions of international life have considerably changed since that time; it is therefore probable that the States which in 1930 accepted a breadth of three sea miles would not accept it to-day.

IV

What should be the position adopted by the Court, in these circumstances, to resolve the present dispute?

The Parties, in their Pleadings and in their Oral Arguments, have advanced a number of theories, as well as systems, practices and, indeed, rules which they regarded as constituting international law. The Court thought that it was necessary to take them into consideration. These arguments, in my opinion, marked the beginning of a serious distortion of the case.

In accordance with uniformly accepted doctrine, international judicial tribunals must, in the absence of principles provided by conventions, or of customary principles on a given question, apply the *general principles of law*. This doctrine is expressly confirmed in Article 38 of the Statute of the Court.

It should be observed in this connection that international arbitration is now entering a new phase. It is not enough to stress the general principles of law recognized by civilized nations; regard must also be had, as I have said, to the modifications which these principles may have undergone as a result of the great changes which have occurred in international life, and the principles must be *adapted* to the new conditions of international life; indeed, if no principles exist covering a given question, principles must be *created* to conform to those conditions.

The taking into consideration of these general principles, and their adaptation, are all the more necessary in the present case, since the United Kingdom has asked the Court to declare that

the Norwegian Decree of 1935 is contrary to the principles of international law now in force.

V

What are the principles of international law which the Court must have recourse to and, if necessary, adapt? And what are the principles which it must in reality create?

It should, in the first place, be observed that frequent reference is made to the *principles* of the law of nations, in conventions and in certain of the Judgments of the Permanent Court of International Justice, but it is not said what those principles are nor where they may be found.

Some clarification is therefore necessary on this point.

In the first place, many of the principles, particularly the great principles, have their origin in the legal conscience of peoples (the psychological factor). This conscience results from social and international life; the requirements of this social and international life naturally give rise to certain norms considered necessary to govern the conduct of States *inter se*.

As a result of the present dynamic character of the life of peoples, the principles of the law of nations are continually being created, and they undergo more or less rapid modification as a result of the great changes occurring in that life.

For the principles of law resulting from the juridical conscience of peoples to have any value, they must have a tangible manifestation, that is to say, they must be expressed by authorized bodies.

Up to the present, this juridical conscience of peoples has been reflected in conventions, customs and the opinions of qualified jurists.

But profound changes have occurred in this connection. *Conventions* continue to be a very important form for the expression of the juridical conscience of peoples, but they generally lay down only new principles, as was the case with the Convention on genocide. On the other hand, *customs* tend to disappear as the result of the rapid changes of modern international life; and a new case strongly stated may be sufficient to render obsolete an ancient custom. Customary law, to which such frequent reference is made in the course of the arguments, should therefore be accepted only with prudence.

The further means by which the juridical conscience of peoples may be expressed at the present time are the resolutions of diplomatic assemblies, particularly those of the United Nations and especially the decisions of the International Court of Justice. Ref-

erence must also be made to the recent legislation of certain countries, the resolutions of the great associations devoted to the study of the law of nations, the works of the Codification Commission set up by the United Nations, and finally, the opinions of qualified jurists.

These are the new elements on which the new international law, still in the process of formation, will be founded. This law will, consequently, have a character entirely different from that of traditional or classical international law, which has prevailed to the present time.

VI

Let us now consider the elements by means of which the general principles brought to light are to be adapted to the existing conditions of international life and by means of which new principles are, if necessary, to be created.

The starting point is the fact that, for the traditional *individualistic* régime on which social life has hitherto been founded, there is being substituted more and more a new régime, a régime of *interdependence,* and that, consequently, the *law of social interdependence* is taking the place of the old individualistic law.

The characteristics of this law, so far as international law is concerned, may be stated as follows:

(a) This law governs not merely a *community* of States, but an organized international *society.*

(b) It is not exclusively juridical; it has also aspects which are political, economic, social, psychological, etc. It follows that the traditional distinction between *legal* and *political* questions, and between the domain of law and the domain of politics is considerably modified at the present time.

(c) It is concerned not only with the delimitation of the rights of States but also with harmonizing them.

(d) It particularly takes into account the general interest.

(e) It also takes into account all possible aspects of every case.

(f) It lays down, besides rights, obligations towards international society; and sometimes States are entitled to exercise certain rights only if they have complied with the correlative duties. (Title V of the "Declaration of the Great Principles of Modern International Law" approved by three great associations devoted to the study of the law of nations.)

(g) It condemns *abus de droit.*

(h) It adapts itself to the needs of international life and develops side by side with it.

What are the principles which, in accordance with the foregoing, the Court must bring to light, adapt if necessary, or even create, with regard to the maritime domain and, in particular, the territorial sea?

They may be stated as follows:

1. Having regard to the great variety of the geographical and economic conditions of States, it is not possible to lay down uniform rules, applicable to all, governing the extent of the territorial sea and the way in which it is to be reckoned.

2. Each State may therefore determine the extent of its territorial sea and the way in which it is to be reckoned, provided it does so in a reasonable manner, and that it is capable of exercising supervision over the zone in question and of carrying out the duties imposed by international law, that it does not infringe rights acquired by other States, that it does no harm to general interests and does not constitute an *abus de droit*.

In fixing the breadth of its territorial sea, the State must indicate the reasons, geographic, economic, etc., which provide the justification therefor.

In the light of this principle, it is no longer necessary to debate questions of base-lines, straight lines, closing lines of ten sea miles for bays, etc., as has been done in this case.

Similarly, if a State adopts too great a breadth for its territorial sea, having regard to its land territory and to the needs of its population, or if the base-lines which it indicates appear to be arbitrarily selected, that will constitute an *abus de droit*.

3. States have certain rights over their territorial sea, particularly rights to the fisheries; but they also have certain duties, particularly those of exercising supervision off their coasts, of facilitating navigation by the construction of lighthouses, by the dredging of certain areas of sea, etc.

4. States may alter the extent of the territorial sea which they have fixed, provided that they furnish adequate grounds to justify the change.

5. States may fix a greater or lesser area beyond their territorial sea over which they may reserve for themselves certain rights: customs, police rights, etc.

6. The rights indicated above are of great weight if established by a group of States, and especially by all the States of a continent.

The countries of Latin America have, individually or collectively, reserved wide areas of their coastal waters for specific purposes: the maintenance of neutrality, customs' services, etc., and lastly, for the exploitation of the wealth of the continental shelf.

7. Any State directly concerned may raise an objection to another State's decision as to the extent of its territorial sea or of the area beyond it, if it alleges that the conditions set out above for the determination of these areas have been violated. Disputes arising out of such objections must be resolved in accordance with the provisions of the Charter of the United Nations.

8. Similarly, for the great bays and straits, there can be no uniform rules. The international status of every great bay and strait must be determined by the coastal States directly concerned, having regard to the general interest. The position here must be the same as in the case of the great international rivers: each case must be subject to its own special rules.

At the Conference held in Barcelona in 1921 on navigable waterways, I maintained that it was impossible to lay down general and uniform rules for all international rivers, in view of the great variety of conditions of all sorts obtaining among them; and this point of view was accepted.

In short, in the case of maritime and river routes, it is not possible to contemplate the laying down of uniform rules; the rules must accord with the realities of international life. In place of uniformity of rules it is necessary to have variety; but the general interest must always be taken into account.

9. A principle which must receive special consideration is that relating to prescription. This principle, under the name of *historic rights,* was discussed at length in the course of the hearings.

The concept of prescription in international law is quite different from that which it has in domestic law. As a result of the important part played by force in the formation of States, there is no prescription with regard to their territorial status. The political map of Europe underwent numerous changes in the course of the 19th and 20th centuries; it is to-day very different from what it was before the Great War, without any application of the principle of prescription.

Nevertheless, in some instances, prescription plays a part in international law and it has certain important features. It is recognized, in particular, in the case of the acquisition and the exercise of certain rights.

In support of the effect of prescription in such cases, two very important learned works should be mentioned, which adopt the collective opinion of jurists.

The first of these is the "Declaration of the Great Principles of Modern International Law" which provides, in Article 20: "No

State is entitled to oppose, in its own interests, the making of rules on a question of general interest."

"When, however, it has exercised special rights for a considerable time, account must be taken of this in the making of rules."

The other learned work is the "Draft Rules for the Territorial Sea in Peacetime" adopted by the Institute of International Law at the 1928 Session in Stockholm. Article 2 of this draft provides:

> "The breadth of the territorial sea is 3 sea miles. (It was then thought that this was sufficient.)
>
> International usage may justify the recognition of a breadth greater or less than 3 miles."

For prescription to have effect, it is necessary that the rights claimed to be based thereon should be well established, that they should have been uninterruptedly enjoyed and that they should comply with the conditions set out in 2 above.

International law does not lay down any specific duration of time necessary for prescription to have effect. A comparatively recent usage relating to the territorial sea may be of greater effect than an ancient usage insufficiently proved.

10. It is also necessary to pay special attention to another principle which has been much spoken of: the right of States to do everything which is not expressly forbidden by international law. This principle, formerly correct, in the days of absolute sovereignty, is no longer so at the present day: the sovereignty of States is henceforth limited not only by the rights of other States but also by other factors previously indicated, which make up what is called the new international law: the Charter of the United Nations, resolutions passed by the Assembly of the United Nations, the duties of States, the general interests of international society and lastly the prohibition of *abus de droit*.

11. Any State alleging a principle of international law must prove its existence; and one claiming that a principle of international law has been abrogated or has become ineffective and requires to be renewed, must likewise provide proof of this claim.

12. Agreement between the Parties as to the existence of a principle of law, or as to its application, for instance, as to the way in which base-lines determining the extent of the territorial sea are to be selected, etc., cannot have any influence upon the decision of the Court on the question.

13. International law takes precedence over municipal law. Acts committed by a State which violate international law involve the responsibility of that State.

14. A State is not obliged to protest against a violation of

international law, unless it is aware or ought to be aware of this violation; but only the State directly concerned is entitled to refer the matter to the appropriate international body. (Article 39 of the "Declaration of the Great Principles of Modern International Law".)

VII

In accordance with the considerations set out above, I come to the following conclusions upon the questions submitted to the Court:

(1) Norway—like all other States—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.

(2) The Norwegian Decree of 1935, which delimited the Norwegian territorial sea, is not contrary to any express provisions of international law. Nor is it contrary to the general principles of international law, because the delimitation is reasonable, it does not infringe rights acquired by other States, it does no harm to general interests and does not constitute an *abus de droit*.

In enacting the Decree of 1935, Norway had in view simply the needs of the population of the areas in question.

(3) In view of the foregoing, it is unnecessary to consider whether or not Norway acquired by prescription a right to lay down a breadth of more than three sea miles for her territorial sea and the way in which its base-lines should be selected.

(4) If Norway is entitled to fix the extent of her territorial sea, as has been said, it is clear that she can prohibit other States from fishing within the limits of that sea without their being entitled to complain of a violation of their rights.

(5) The answer to the contentions of the Parties with regard to the existence of certain precepts of the law of nations which they consider to be in force at the present time has been given in the preceding pages.

(Signed) A. ALVAREZ.

5. Separate Opinion of Judge Hsu Mo

I agree with the finding of the Court that the method of straight lines used in the Norwegian Royal Decree of July 12th, 1935, for the delimitation of the fisheries zone, is not contrary to international law. But I regret that I am unable to share the view of the Court that all the straight base-lines fixed by that Decree are in conformity with the principles of international law.

It is necessary to emphasize the fact that Norway's method

of delimiting the belt of her northern territorial sea by drawing straight lines between point and point, island and island, constitutes a deviation from what I believe to be a general rule of international law, namely, that apart from cases of bays and islands, the belt of territorial sea should be measured, in principle, from the line of the coast at low tide. International law permits, in certain circumstances, deviations from this general rule. Where the deviations are justifiable, they must be recognized by other States. Norway is justified in using the method of straight lines because of her special geographical conditions and her consistent past practice which is acquiesced in by the international communty as a whole. But for such physical and historical facts, the method employed by Norway in her Decree of 1935 would have to be considered to be contrary to international law. In examining, therefore, the question of the validity or non-validity of the base-lines actually drawn by Norway, it must be borne in mind that it is not so much the direct application of the general rule as the degree of deviation from the general rule that is to be considered. The question in each case is: how far the line deviates from the configuration of the coast and whether such deviation, under the system which the Court has correctly found Norway to have established, should be recognized as being necessary and reasonable.

The examination of each base-line cannot thus be undertaken in total disregard of the coast line. In whatever way the belt of territorial sea may be determined, it always remains true that the territorial sea owes its existence to land and cannot be completely detached from it. Norway herself recognizes that the base-lines must be drawn in a reasonable manner and must conform to the general direction of the coast.

The expression "to conform to the general direction of the coast", being one of Norway's own adoption and constituting one of the elements of a system established by herself, should not be given a too liberal interpretation, so liberal that the coast line is almost completely ignored. It cannot be interpreted to mean that Norway is at liberty to draw straight lines in any way she pleases provided they do not amount to a deliberate distortion of the general outline of the coast when viewed as a whole. It must be interpreted in the light of the local conditions in each sector with the aid of a relatively large scale chart. If the words "to conform to the general direction of the coast" have any meaning in law at all, they must mean that the base-lines, straight as they are, should follow the configuration of the coast as far as possible and should not unnecessarily and unreasonably traverse great ex-

panses of water, taking no account of land or islands situated within them.

Having examined the different sectors of the territorial sea as delimited by the Decree of 1935, I find two obvious cases in which the base-line cannot be considered to have been justifiably drawn. I refer to the base-line between points 11 and 12, which traverses Svaerholthavet, and the base-line between points 20 and 21, which runs across Lopphavet.

In the former case, the base-line, being 39 miles long, encloses a large area of the sea as Norwegian internal waters. The question to be determined here is whether the line is to be considered as the closing line of a bay or whether it is simply a line joining one base-point to another. If it is the former, it will be necessary to determine whether the area in question constitutes a bay in international law. In my opinion, the area is a combination of bays, large and small, eight in all, but not a bay in itself. It is not a bay in itself simply because it does not have the shape of a bay. To treat a number of adjacent bays as an entity, thereby completely ignoring their respective closing lines, would result in the creation of an artificial and fictitious bay, which does not fulfil the requirements of a bay, either in the physical or in the legal sense. There is no rule of international law which permits the creation of such kind of bay.

It has been argued by the Agent of the Norwegian Government that the fact that the Svaerholt peninsula protrudes into the waters in question to form the two fjords of Laksefjord and Porsangerfjord cannot deprive these waters of the character of a bay. But geographically and legally, it is precisely the existence of this peninsula that makes the two fjords separate and distinct bays, and it is this fact, coupled with the protrusion of smaller peninsulas on either side of the two fjords, that gives to this part of the coast (the section between points 11 and 12), not the character of a bay, but merely the character of a curvature, a large concavity formed by the closing lines of several independent bays. Nature having created a number of bays, neighbouring but distinct from one another, the littoral State cannot, by the exercise of its sovereignty, turn them into one bay by drawing a long line between two most extreme points.

If the base-line over Svaerholthavet is not the closing line of a bay, it must be just one of the straight lines joining one base-point to another. In that case, I fail to see how that line can be considered to conform to the general direction of the coast. In order to follow the general configuration of the coast, it should take into account at least some of the points which serve as the starting or

terminal points of the closing lines of the bays now enclosed by the long line in question. To leave out all the points on land which interpose between the two extreme points Nos. 11 and 12 and to enclose the whole concavity by drawing one excessively long line is tantamount to using the straight line method to extend seaward the four-mile breadth of the territorial sea. The application of the method in this manner cannot, in my view, be considered as reasonable.

In the case of Lopphavet, the line connecting points 20 and 21, being 44 miles in length, affects an area of water of several hundred square miles. Norway does not claim this expanse of water to be a bay, and, indeed, by no stretch of the imagination could it be considered as a bay. Since Lopphavet is not a bay, there does not exist any legal reason for the base-line to skip over two important islands, Loppa and Fuglöy, each of which forms a unit of the "skjaergaard". In ignoring these islands, the base-line makes an obviously excessive deviation from the general direction of the coast. For this reason, it cannot be regarded as being justifiable.

The Agent of the Norwegian Government remarked during the oral proceedings that the basin of Lopphavet led to the Indreleia which should be considered as Norwegian internal waters. I do not think that the Indreleia has anything to do with the region in question. For the Indreleia, according to the charts furnished by the Norwegian Government, goes through the Kaagsund between the islands of Arnöy and Kaagen and proceeds northward and northeastward between the islands of Loppa and Loppakalven on the one hand and the mainland on the other, finally bending into the Söröysund. It does not at all cut through Lopphavet outside the islands of Arnöy, Loppa and Söröy. Consequently, it does not overlap any portion of the immense area in this sector enclosed by the long base-line as Norwegian internal waters.

I have so far examined the question of the validity or otherwise of the two base-lines, the one affecting Svaerholthavet, the other Lopphavet, exclusively from the aspect of their conformity or non-conformity with the general direction of the coast. It remains to consider whether Norway may base her claim in respect of the two regions on historical grounds. In my opinion, notwithstanding all the documents she has produced, she has not succeeded in establishing any historic title to the waters in question.

In support of her historic title, Norway has relied on habitual fishing by the local people and prohibition of fishing by foreigners. As far as the fishing activities of the coastal inhabitants are concerned, I need only point out that individuals, by undertaking

enterprises on their own initiative, for their own benefit and without any delegation of authority by their Government, cannot confer sovereignty on the State, and this despite the passage of time and the absence of molestation by the people of other countries. As for prohibition by the Norwegian Government of fishing by foreigners, it is undoubtedly a kind of State action which militates in favour of Norway's claim of prescription. But the Rescripts on which she has relied contain one fatal defect: the lack of precision. For they fail to show any precise and well-defined areas of water, in which prohibition was intended to apply and was actually enforced. And precision is vital to any prescriptive claim to areas of water which might otherwise be high seas.

With regard to the licenses for fishing granted on three occasions by the King of Denmark and Norway to Erich Lorch, Lieutenant-Commander in the Dano-Norwegian Navy towards the close of the 17th century, I do not think that this is sufficient to confer historic title on Norway to Lopphavet. In the first place, the granting by the Danish-Norwegian Sovereign to one of his own subjects of what was at the time believed to be a special privilege can hardly be considered as conclusive evidence of the acquisition of historic title to Lopphavet vis-à-vis all foreign States. In the second place, the concessions were limited to waters near certain rocks and did not cover the whole area of Lopphavet. Lastly, there is no evidence to show that the concessions were exploited to the exclusion of participation by all foreigners for a period sufficiently long to enable the Norwegian Government to derive prescriptive rights to Lopphavet.

My conclusion is therefore that neither by the test of conformity with the general direction of the coast, nor on historical grounds, can the two base-lines drawn across Svaerholthavet and Lopphavet, respectively, be considered as being justifiable under the principles of international law.

(Signed) Hsu Mo.

6. Dissenting Opinion of Sir Arnold McNair

In this case the Court has to decide whether certain areas of water off the coast of Norway are high seas or Norwegian waters, either territorial or internal. If they are high seas, then foreign fisherman are authorized to fish there. If they are Norwegian waters, then foreign fishermen have no right to fish there except with the permission of Norway. I have every sympathy with the small inshore fisherman who feels that his livelihood is being threatened by more powerfully equipped competitors, especially when those competitors are foreigners; but the issues raised in

this case concern the line dividing Norwegian waters from the high seas, and those are issues which can only be decided on a basis of law.

* * *

The preamble and the executive parts of the Decree of 1935 are as follows:

> "On the basis of well-established national titles of right;
>
> by reason of the geographical conditions prevailing on the Norwegian coasts;
>
> in safeguard of the vital interests of the inhabitants of the northernmost parts of the country;
>
> and in accordance with the Royal Decrees of the 22nd February, 1812, and 16th October, 1869, the 5th January, 1881, and the 9th September, 1889,
>
> are hereby established lines of delimitation towards the high sea of the Norwegian fisheries zone as regards that part of Norway which is situated northward of 66° 28.8′ North latitude.
>
> These lines of delimitation shall run parallel with straight base-lines drawn between fixed points on the mainland, on islands or rocks, starting from the final point of the boundary line of the Realm in the eastern-most part of Varangerfjorden and going as far as Traena in the County of Nordland.
>
> The fixed points between which the base-lines shall be drawn are indicated in detail in a schedule annexed to this Decree."

[Schedule]

Mr. Arntzen, the Norwegian Agent and Counsel, told the Court (October 5th) that:

> "The Decree of 1935 is founded on the following principles: the Norwegian territorial zone is four sea-miles in breadth. It is measured from straight lines which conform to the general direction of the coast and are drawn between the outermost islands, islets and reefs in such a way as never to lose sight of the land."

Although the Decree of 1935 does not use the expression "territorial sea" or "waters" or "zone", it cannot be denied that the present dispute relates to the Norwegian territorial sea. The Judgment of the Court is emphatic on this point. The same point emerges clearly from the United Kingdom's Application institut-

ing the proceedings and was insisted upon in the Norwegian written and oral argument on numerous occasions. Thus, on October 9th, the Norwegian Counsel, Professor Bourquin, said:

> "What is the subject of the dispute? It relates to the base-lines—that is to say, to the lines from which the four miles of the Norwegian territorial sea are to be reckoned. . . ."

And again, in his oral reply, he said on October 25th:

> "What [Norway] claims—apart from her historic title—is that the limits imposed by international law with regard to the delimitation of her maritime territory have not been infringed by the 1935 Decree and that this Decree can therefore be set up as against the United Kingdom without any necessity for any special acquiescence on the part of the United Kingdom."

One thing this dispute clearly is not. It is not a question of the right of a maritime State to declare the existence of a contiguous zone beyond its territorial waters, in which zone it proposes to take measures for the conservation of stocks of fish. An illustration of this is to be found in President Truman's "Proclamation with respect to Coastal Fisheries in certain areas of the High Seas, dated September 28th, 1945" (*American Journal of International Law,* Vol. 40, 1946, Official Documents, p. 46); it will suffice to quote the following statement:

> "The character as high seas of the areas in which such convervation zones are established and the right to their free and unimpeded navigation are in no way thus affected."

That is not this case, for here the question is whether certain disputed areas of sea water are parts of the high seas or parts of the territorial or internal waters of the coastal State.

In the course of the proceedings in the case, the United Kingdom has made certain admissions or concessions which can be summarized as follows:

(a) that for the purposes of this case Norway is entitled to a four-mile limit;

(b) that the waters of the fjords and sunds (including the Varangerfjord and Vestfjord) which fall within the conception of a bay, are, subject to a minor point affecting the status of the Vestfjord which I do not propose to discuss, Norwegian internal waters; and

(c) that (as defined in the Conclusions of the United Kingdom) the waters lying between the island fringe and the mainland are Norwegian waters, either territorial or internal.

The Parties are also in conflict upon another minor point, namely, the status of the waters in certain portions of Indreleia, about which I do not propose to say anything.

* * *

I shall now summarize the relevant part of the law of territorial waters as I understand it:

(a) To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory consisting of what the law calls territorial waters (and in some cases national waters in addition). International law does not say to a State: "You are entitled to claim territorial waters if you want them." No maritime State can refuse them. International law imposes upon a maritime State certain obligations and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory.

(b) While the actual delimitation of the frontiers of territorial waters lies within the competence of each State because each State knows its own coast best, yet the principles followed in carrying out this delimitation are within the domain of law and not within the discretion of each State. As the Supreme Court of the United States said in 1946 in the *United States* v. *State of California,* 332 U.S. 19, 35:

> "The three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its coasts. And in so far as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shore and within its protective belt, will most naturally be appropriated for its use. But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units." (Cited and re-affirmed in 1950 in *United States* v. *State of Texas,* 339 U.S. 707, 718.)

(c) The method of delimiting territorial waters is an objective one and, while the coastal State is free to make minor adjustments in its maritime frontier when required in the interests of clarity and its practical object, it is not authorized by the law to manipulate its maritime frontier in order to give effect to its economic and other social interests. There is an overwhelming consensus of opinion amongst maritime States to the effect that the base-line of territorial waters, whatever their extent may be, is a line which follows the coast-line along low-water mark and not a series of imaginary lines drawn by the coastal State for the purpose of giving effect, even within reasonable limits, to its economic and other social interests and to other subjective factors.

In 1894 Bonfils (*Droit international public,* Sec. 491) described *la mer juridictionnelle ou littorale,* as:

> "la bande de l'océan qui entoure et enceint les côtes du territoire continental ou insulaire et sur laquelle l'État peut, du rivage que baignent les eaux de cette mer, faire respecter sa puissance".

(d) The calculation of the extent of territorial waters from the land is the normal and natural thing to do; its calculation from a line drawn on the water is abnormal and requires justification, for instance, by showing that the line drawn on the water is drawn from the terminal line of internal waters in a closed bay or an historic bay or a river mouth, which will be dealt with later. One must not lose sight of the practical operation of the limit of territorial waters. It is true that they exist for the benefit of the coastal State and not for that of the foreign mariner approaching them. Nevertheless, if he is to respect them, it is important that their limit should be drawn in such a way that, once he knows how many miles the coastal State claims, he should—whether he is a fisherman or the commander of a belligerent vessel in time of war —be able to keep out of them by following ordinary maritime practice in taking cross-bearings from points on the coast, whenever it is visible, or in some other way. This practical aspect of the matter is confirmed by the practice of Prize Courts in seeking to ascertain whether a prize has been captured within neutral territorial waters or on the high seas; see, for instance, *The Anne* (1818) *Prize Cases in the United States Supreme Court,* page 1012; *The Heina* (1915), Fauchille, *Jurisprudence française en matière de prises,* I, page 119; II, page 409, a Norwegian ship captured by a French cruiser in 1914 at a point four miles and five-sixths from an island forming part of the Danish Antilles; and

by decisions upon illegal fishing within territorial waters, e.g. *Ship May* v. *The King,* Canada Law Reports, Supreme Court, 1931, page 374, or upon other illegal entry into territorial waters, *The Ship "Queen City"* v. *The King, ibid.,* page 387.

(e) Reference should also be made to the statement in the Report on Territorial Waters approved by the League Codification Committee in 1927 for transmission to governments for their comments, particularly page 37 of League document C.196.M.70. 1927.V., where, after referring to what it calls the seaward limit of the territorial sea, the Report continues:

> "Mention should also be made of the line which limits the rights of dominion of the riparian State on the landward side. This question is much simpler. The general practice of the States, all projects of codification and the prevailing doctrine agree in considering that this line should be low-water mark along the whole of the coast."

(f) In 1928 and 1929 replies were sent by a number of governments to the questions put to them by the Committee of Five which made the final preparations for the Hague Codification Conference of 1930 (League of Nations, C.74.M.39.1929.V., pp. 35 *et seq.*).

As I understand these replies—the language is not always absolutely plain—seventeen governments declared themselves in favour of the view that the base-line of territorial waters is a line which follows the coast-line along low-water mark and against the view that the base-line consists of a series of lines connecting the outermost points of the mainland and islands. The following Governments took the latter view: Norway, Sweden, Poland, Soviet Russia and, probably, Latvia. (In this respect my analysis corresponds closely to that of paragraph 298 of the Counter-Memorial.)

It may be added that Poland had recovered sovereignty over her maritime territory only eleven years before, after an interval of more than a century, and that Latvia became a State only in 1918. All the States parties to the North Sea Fisheries Convention of 1882, Belgium, Denmark, France, Germany, Great Britain and the Netherlands, as I understand their replies, accepted the rule of low-water mark following the line of the coast; so also did the United States of America. Governments are not prone to understate their claims.

(g) It is also instructive to notice the Danish reply because Denmark was, with Norway, the joint author of the Royal Decree of 1812, on which the Norwegian Decree of 1935 purports to be

based, and Denmark told the League of Nations Committee that the Decree of 1812 was still in force in Denmark. The Danish reply states that:

> "Paragraph 2 of Article 3 of the regulations introduced by Royal Decree of January 19th, 1927, concerning the admission of war-vessels belonging to foreign Powers to Danish ports and territorial waters in time of peace, contains the following clause:
>
> > 'Danish internal waters comprise, in addition to the ports, entrances of ports, roadsteads, bays and firths, the waters situated between, and on the shoreward side of, islands, islets and reefs, which are not permanently submerged.'
>
> (Quotation from Decree of 1927 ends.)
>
> "Along the coast the low-water mark is taken as a base in determining the breadth of the territorial waters. The distance between the coast and the islands is not taken into account, so long as it is less than double the width of the territorial zone."

(h) But although this rule of the limit following the coast line along low-water mark applies both to straight coasts and to curved and indented coasts, an exception exists in the case of those indentations which possess such a configuration, both as to their depth and as to the width between their headlands, as to constitute landlocked waters, by whatever name they may be called. It is usual and convenient to call them "bays", but what really matters is not their label but their shape.

A recent recognition of the legal conception of bays is to be found in the reply of the United States of America given in 1949 or 1950 to the International Law Commission, published by the United Nations in Document A/CN.4/19, page 104, of 23rd March, 1950:

> "The United States has from the outset taken the position that its territorial waters extend one marine league, or three geographical miles (nearly 3½ English miles) from the shore, with the exception of waters or bays that are so landlocked as to be unquestionably within the jurisdiction of the adjacent State."

(Then follow a large number of references illustrating this statement.)

There are two kinds of bay in which the maritime belt is measured from a closing line drawn across it between its head-

lands, that is to say, at the point where it ceases to have the configuration of a bay. The first category consists of bays whose headlands are so close that they can really be described as landlocked. According to the strict letter and logic of the law, a closing line should connect headlands whenever the distance between them is no more than double the agreed or admitted width of territorial waters, whatever that may be in the particular case. In practice, a somewhat longer distance between headlands has often been recognized as justifying the closing of a bay. There are a number of treaties that have adopted ten miles, in particular the Anglo-French Convention of 1839, and the North Sea Fisheries Convention of 1882, which was signed and ratified by Germany, Belgium, Denmark, France, Great Britain and the Netherlands. It cannot yet be said that a closing line of ten miles forms part of a rule of customary law, though probably no reasonable objection could be taken to that figure. At any rate Norway is not bound by such a rule. But the fact that there is no agreement upon the figure does not mean that no rule at all exists as to the closing line of curvatures possessing the character of a bay, and that a State can do what it likes with its bays; for the primary rule governing territorial waters is that they form a belt or *bande de mer* following the line of the coast throughout its extent, and if any State alleges that this belt ought not to come inside a particular bay and follow its configuration, then it is the duty of that State to show why that bay forms an exception to this general rule.

The other category of bay whose headlands may be joined for the purpose of fencing off the waters on the landward side as internal waters is the historic bay, and to constitute an historic bay it does not suffice merely to claim a bay as such, though such claims are not uncommon.. Evidence is required of a long and consistent assertion of dominion over the bay and of the right to exclude foreign vessels except on permission. The matter was considered by the British Privy Council in the case of Conception Bay in Newfoundland in *Direct United States Cable Company* v. *Anglo-American Telegraph Company* (1877) 2 Appeal Cases 394. The evidence relied upon in that case as justifying the claim of an historic bay is worth noting. There was a Convention of 1818 between the United States of America and Great Britain which excluded American fishermen from Conception Bay, followed by a British Act of Parliament of 1819, imposing penalties upon "any person" who refused to depart from the bay when required by the British Governor. The Privy Council said:

"It is true that the Convention would only bind the two

> nations who were parties to it, and consequently that, though a strong assertion of ownership on the part of Great Britain, acquiesced in by so powerful a State as the United States, the Convention, though weighty, is not decisive. But the Act already referred to . . . . goes further" . . . . "No stronger assertion of exclusive dominion over these bays could well be framed." [This Act] "is an unequivocal assertion of the British legislature of exclusive dominion over this bay as part of the British territory. And as this assertion of dominion has not been questioned by any nation from 1819 down to 1872, when a fresh Convention was made, this would be very strong in the tribunals of any nation to show that this bay is by prescription part of the exclusive territory of Great Britain. . . ."

Claims to fence off and appropriate areas of the high seas by joining up headlands have been made from time to time, but usually in the case of particular pieces of water and not on the thoroughgoing scale of the Decree of 1935. There is a considerable body of legal authority condemning this practice. This theory—to the effect that the coastal State is at liberty to draw a line connecting headlands on its coast and to claim the waters on the landward side of that line as its own waters—has sometimes been referred to as the "headland theory" or "la théorie" or "la doctrine des caps".

There are two decisions by an umpire called Bates in arbitrations between the United States of America and the United Kingdom in 1853 or 1854 (Moore's *International Arbitrations*, Vol. 4, pp. 4342–5) : the *Washington,* seized while fishing within a line connecting the headlands of the Bay of Fundy, which is 65 to 75 miles wide and 130 to 140 miles long and "has several bays on its coasts", and the *Argus*, seized while fishing 28 miles from the nearest land and within a line connecting two headlands on the north-east side of the island of Cape Breton; I do not know the distance between them. In both cases, the seizures were condemned and compensation was awarded to the owners of the vessels. In the *Washington* the umpire said:

> "It was urged on behalf of the British Government that by coasts, bays, etc., is understood an imaginary line, drawn along the coast from headland to headland, and that the jurisdiction of Her Majesty extends three marine miles outside of this line; thus closing all the bays on the coast or shore, and that great body of water called the

> Bay of Fundy against Americans and others, making the latter a British bay. This doctrine of headlands is new, and has received a proper limit in the Convention between France and Great Britain of August 2nd, 1839, in which 'it is agreed that the distance of three miles fixed as the limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.' "

Then, in 1881, Mr. Evarts, American Secretary of State, sent a despatch to the American representative in Spain which contained the following passage (Moore's *Digest of International Law,* i, p. 719) :

> "Whether the line which bounds seaward the three-mile zone follows the indentations of the coast or extends from headland to headland is the question next to be discussed.
>
> The headland theory, as it is called, has been uniformly rejected by our Government, as will be seen from the . . . . . opinions of the Secretaries above referred to. The following additional authorities may be cited on this point:
>
> In the opinion of the umpire of the London Commission of 1853 [I think he refers to the *Washington* or the *Argus*], it was held that: 'It can not be asserted as a general rule, that nations have an exclusive right of fishery over all adjacent waters to a distance of three marine miles beyond an imaginary line drawn from headland to headland.' "

He concluded:

> "We may therefore regard it as settled that, so far as concerns the eastern coast of North America, the position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a

distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign."

And "la théorie des caps" is condemned by Fauchille. *Droit international public,* para. 493 (6), in the words: "Elle ne saurait juridiquement prévaloir: elle est une atteinte manifeste à la libertè des mers."

* * *

I shall now examine the Decree of 1935 and direct attention to the results produced by the "straight base-lines" which it lays down. It is difficult without the visual aid of large-scale charts to convey a correct picture of the base-lines and the outer lines of delimitation established by the Decree of 1935. The area affected begins at Traena on the north-west coast not far from the entrance to Vestfjord and runs round North Cape down to the frontier with Russia near Grense-Jacobselv, the total length of the outer line being about 560 sea miles without counting fjords and other indentations. There are 48 fixed points—often arbitrarily selected—between which the base-lines are drawn. Twelve of these base-points are located on the mainland or islands, 36 of them on rocks or reefs. Some of the rocks are drying rocks and some permanently above water. The length of the base-lines and the corresponding outer lines varies greatly. At some places, where there are two or more rocks at a turning point, the length of the base-lines may be only a few cables. At other places the length is very great, for instance,

between	5	and	6	25 miles
	7	"	8	19 "
	8	"	9	25 "
	11	"	12	39 "
	12	"	13	19 "
	18	"	19	26½ "
	19	"	20	19.6 "
	20	"	21	44 "
	21	"	22	18 "
	25	"	26	19½ "
	27	"	28	18 "

I have omitted the base-lines connecting base-points 1 and 2 and base-points 45 and 46, which are respectively 30 and 40 miles, because they are the closing lines of Varangerfjord and Vestfjord, and these fjords, like the others, have been conceded by the United Kingdom to be Norwegian waters, subject to a minor controversy

as to the precise position of the closing line of the latter. I have also omitted mention of all base-lines less than 18 miles.

The base-line connecting base-points 20 and 21 (44 miles) rests for a brief moment upon Vesterfall in Gasan (21), a drying rock eight miles from the nearest island, and then continues, with an almost imperceptible bend, in the same direction for a further 18 miles to base point 22, a drying rock; thus between base-points 20 and 22 we get an almost completely straight line of 62 miles. Again, the base-line which connects base-points 18 and 20, both above-water rocks, runs absolutely straight for 46.1 miles.

In order to illustrate the distance between many parts on the outer lines and the land, I shall take two sectors which I find particularly difficult to reconcile with the ordinary conception of the maritime belt—namely, that comprised by base-points 11 and 12 (39 miles apart), an area sometimes called Svaerholthavet, and that comprised by base-points 20 and 21 (44 miles apart), an area sometimes called Lopphavet. In each case I propose to proceed along the outer line and take, at intervals of 4 miles, measurements in miles *from the outer line to the nearest mainland or on an island:*

Svaerholthavet: Measurements to mainland or islands from the *outer* line, at intervals of 4 miles proceeding from base-point 11 to base-point 12 are as follows: 4 miles at base-point 11, then 5⅓, 8⅓, 11, 13, 12 (or 11 from a lighthouse), 11 (or 9 from a lighthouse), 8, 6, and nearly 5;

Lopphavet: Measurements to mainland or islands from the *outer* line, at intervals of 4 miles proceeding from 20 to 21, are as follows: 4 miles at base-point 20, then 6, 8½, 12, 16, 16, 18, 17, 14½, 12½ (or 8 from base-point 21, a drying rock), 12 (or 5 from base-point 21).

Moreover, each of these two areas—Svaerholthavet and Lopphavet—in no sense presents the configuration of a bay and comprises a large number of named and unnamed fjords and sunds which have been admitted by the United Kingdom to be Norwegian internal waters within their proper closing lines. In one part of Lopphavet the outer line is distant more than 20 miles from the closing line of a fjord. In the opinion of the Court (see p. 141) Lopphavet "cannot be regarded as having the character of a bay"; and I may refer to an additional circumstance which militates against the opinion that the whole of this large area is Norwegian waters: that is, that according to the (British Admiralty) *Norway Pilot,* Part III, page 607, the approach to the port of Hammerfest through Söröysundet, which runs out of Lopphavet towards Hammerfest, "is the shortest and, on the

whole, the best entrance to Hammerfest from westward, especially in bad weather"; see *The Alleganean* (Moore, *International Arbitrations*, iv, pp. 4332–4341, "that it can not become the pathway from one nation to another"—as one of the conditions for holding Chesapeake Bay to be a closed historic bay). Another questionable area is that comprised by the lines connecting base-points 24 and 26, totalling 36 miles.

These three illustrations are among the extreme cases. A more normal base-line is that which connects base-points 5 (a point on the island of Reinoy) and 6 (Korsneset, a headland on the mainland); this base-line—25 miles in length—runs in front of Persfjord, Syltefjord and Makkaufjord, all of which have been admitted by the United Kingdom to be Norwegian internal waters, but the line pays no attention to their closing lines; at no place, however, is the distance between the outer line and the land or closing line of a fjord more than about six miles.

I draw particular attention to the fact that many, if not most, of the base-lines of the Decree of 1935 fence off many areas of water which contain fjords or bays, and pay little, if any, attention to their closing lines; in the case of the *Washington*, referred to above, the umpire, in rejecting the claim to treat the Bay of Fundy as a closed bay, twice drew attention to the fact that it comprised other bays within itself: "It has several bays on its coasts", and again he refers to "the imaginary line . . . . thus closing all the bays on the shore."

The result of the lines drawn by the Decree is to produce a collection of areas of water, of different shapes and sizes and different lengths and widths, which are far from forming a belt or *bande* of territorial waters as commonly understood. I find it difficult to reconcile such a pattern of territorial waters with the almost universal practice of defining territorial waters in terms of miles—be they three or four or some other number. Why speak of three miles or four miles if a State is at liberty to draw lines which produce a maritime belt that is three or four miles wide at the base-points and hardly anywhere else? Why speak of measuring territorial waters from low-water mark when that occurs at 48 base-*points* and hardly anywhere else? It is said that this pattern is the inevitable consequence of the configuration of the Norwegian coast, but I shall show later that this is not so.

* * *

Norway has sought to justify the Decree of 1935 on a variety of grounds, of which the principal are the following (A, B, C and D):

(A) That a State has a right to delimit its territorial waters in the manner required to protect its economic and other social

interests. This is a novelty to me. It reveals one of the fundamental issues which divide the Parties, namely, the difference between the subjective and the objective views of the delimitation of territorial waters.

In my opinion the manipulation of the limits of territorial waters for the purpose of protecting economic and other social interests has no justification in law; moreover, the approbation of such a practice would have a dangerous tendency in that it would encourage States to adopt a subjective appreciation of their rights instead of conforming to a common international standard.

* * *

(B) That the pattern of territorial waters resulting from the Decree of 1935 is required by the exceptional character of the Norwegian coast.

Much has been said and written in presenting the Norwegian case for the delimitation made by the Decree of 1935 of the special character of the Norwegian coast, the poverty and barrenness of the land in northern Norway, and the vital importance of fishing to the population, and so forth, and of the skerries and "Skjaergaard", which runs round the south, west and north coasts and ends at North Cape (Norwegian oral argument, 11th October). This plea must be considered in some detail from the point of view both of fact and of law. Norway has no monopoly of indentations or even of skerries. A glance at an atlas will shew that, although Norway has a very long and heavily indented coast-line, there are many countries in the world possessing areas of heavily indented coast-line. It is not necessary to go beyond the British Commonwealth. The coast of Canada is heavily indented in almost every part. Nearly the whole of the west coast of Scotland and much of the west coast of Northern Ireland is heavily indented and bears much resemblance to the Norwegian coast.

Skerry is a word of Norwegian origin which abounds in Scotland, both as "skerry" and as "sgeir" (the Gaelic form). The New Oxford Dictionary and any atlas of Scotland afford many illustrations. From this dictionary I extract two quotations: Scoresby, *Journal of Whale Fishery* (1823), page 373: "The islands, or skerries, which . . . . skirt the forbidding coast on the western side of the Hebrides"; W. McIlwraith, *Guide to Wigtownshire* (1875) (in the southwest of Scotland), page 62: "The rocks stretch seaward in rugged ledges and skerries." The following passage occurs in the *Encyclopaedia Britannica* (1947), Volume 20, sub-title "Scotland", page 141: "The Western Highland coast is intersected throughout by long narrow sea-lochs or fjords. The mainland slopes steeply into the sea and is fronted by chains

and groups of islands. . . . The Scottish sea-lochs must be considered in connection with those of western Ireland and Norway. The whole of this north-western coast line of Europe bears witness to recent submergence."

As was demonstrated to the Court by means of charts, in response to a suggestion contained in paragraph 527 of the Counter-Memorial, the north-west coast of Scotland is not only heavily indented but it possesses, in addition, a modest "island fringe", the Outer Hebrides, extending from the Butt of Lewis in a south-westerly direction to Barra Head for a distance of nearly one hundred miles, the southern tip being about thirty-five miles from the Skerryvore lighthouse. At present the British line of territorial waters round this island fringe, inside and outside of it, follows the line of the coast and the islands throughout without difficulty and does not, except for the closing lines of lochs not exceeding ten miles, involve straight base-lines joining the outermost points of the islands. This is also true of the heavily indented and mountainous mainland of the north-west coast of Scotland lying inside of and opposite to the Outer Hebrides.

A further factor that must be borne in mind, in assessing the relevance of the special character of the Norwegian coast, is that not very much of that special character remains after the admissions (referred to above) made by the United Kingdom during the course of the oral proceedings. The main peculiarity that remains is the jagged outer edge of the island fringe or "skjaergaard". In estimating the effect of the "skjaergaard" as a special factor, it must also be remembered that, running north-west, it ends at North Cape, which is near base-point 12.

Another special aspect of the Norwegian coast which has been stressed in the Norwegian argument, and is mentioned in the Judgment of the Court, is its mountainous character; for instance, Professor Bourquin said on October 5th:

> "The shore involved in the dispute is an abrupt coast towering high above the level of the sea; that fact is of great importance to our case. It is therefore a coast which can be seen from a long way off. A mariner approaching from the sea catches sight of a mountainous coast, like this of Norway, very soon. From this point of view a coast like this of Norway cannot be compared with a flat coast such as that, for example, of the Netherlands."

The Norwegian argument also repeatedly insists that the base-lines of the Decree of 1935 have been so drawn that the land is visible from every point on the outer line. I am unable to see the

relevance of this point because I am aware of no 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.

In brief, for the following reasons, I am unable to reconcile the Decree of 1935 with the conception of territorial waters as recognized by international law—

(a) because the delimitation of territorial waters by the Decree of 1935 is inspired, amongst other factors, by the policy of protecting the economic and other social interests of the coastal State;

(b) because, except at the precise 48 base-points, the limit of four miles is measured not from land but from imaginary lines drawn in the sea, which pay little, if any, attention to the closing lines of lawfully enclosed indentations such as fjords, except Varangerfjord and Vestfjord;

(c) because the Decree of 1935, so far from attempting to delimit the belt or *bande* of maritime territory attributed by international law to every coastal State, comprises within its limits areas of constantly varying distances from the outer line to the land and bearing little resemblance to a belt or *bande;*

(d) because the Decree of 1935 ignores the practical need experienced from time to time of ascertaining, in the manner customary amongst mariners, whether a foreign ship is or is not within the limit of territorial waters.

* * *

(C) That the United Kingdom is precluded from objecting to the Norwegian system embodied in the Decree of 1935 by previous acquiescence in the system.

Supposing that so peculiar a system could, in any part of the world and at any period of time, be recognized as a lawful system of the delimitation of territorial waters, the question would arise whether the United Kingdom had precluded herself from objecting to it by acquiescing in it. An answer to that question involves two questions:

When did the dispute arise?

When, if at all, did the United Kingdom Government become aware of this system, or when ought it to have become aware but for its own neglect; in English legal terminology, when did it receive actual or constructive notice of the system?

When did the dispute arise? Three dates require consideration: 1906, 1908 and 1911. I do not think it greatly matters which we take. As for 1906, Chapter IV of the Counter-Memorial is entitled "History of the Dispute since 1906". The Storting Document No.

17/1927 (to be described later) says (p. 122) that "in 1905 English trawlers began to fish in the waters along northern Norway and Russia", and the Counter-Memorial, paragraph 91, states that "British trawlers made their first appearance off the coast of Eastern Finnmark towards 1906". Some apprehension occurred among the local population. A Law of June 2, 1906, prohibiting foreigners from fishing in Norwegian territorial waters, was passed, and "since 1907, fishery protection vessels have been stationed every year in the waters of Northern Norway" (*ibidem*, paragraph 93).

As for 1908, Norwegian Counsel told the Court (October 25) that "as early as 1908 Norway organized its fishery patrol service on the basis of the very lines which were subsequently fixed in the 1935 Decree." It is strange that these lines were not communicated to the United Kingdom in 1908. According to Annex 56 of the Counter-Memorial, a Report made by the General Chief of Staff of the Norwegian Navy,

> "The instructions given to the naval fishery protection vessels as early as 1906 specified two forms of action to be taken in regard to trawlers: warning and arrest.
>
> The first warning, after the trawlers had begun to visit our Arctic waters, was given in the summer of 1908 to the British trawler *Golden Sceptre*."

As for 1911, on March 11th of that year, when the British trawler *Lord Roberts* was arrested in Varangerfjord and the master was fined for breach of the Law of 2nd June, 1906, Notes were exchanged between the British and Norwegian Governments and the Norwegian Foreign Minister had an interview with Sir Edward Grey, the British Foreign Minister, in London. At that interview, the Norwegian Minister, M. Irgens, "insisted on the desirability of England not at that moment lodging a written protest" (*ibidem*, paragraph 98 a), but on the 11th July, 1911, the British Government sent a protest to Norway (Counter-Memorial, Annex 35, No. 1), in which they maintained that they had "never recognized the Varanger and the Vest fjords to be territorial waters, nor have they participated in any international agreement for the purpose of conferring the right of jurisdiction beyond the three-mile limit off any part of the Norwegian coasts". On October 13th, 1951, Mr. Arntzen said in the course of his oral argument:

> "The Norwegian Government is happy to see the dispute which has lasted so long submitted for the decision

> of the International Court of Justice. I think it may be relevant to recall that M. Irgens, the Norwegian Foreign Minister, at the time of his discussions [that is, in 1911] with Sir Edward Grey concerning the *Lord Roberts* incident in 1911, was already speaking of the possibility of arbitration as a solution to the dispute."

In later years many other trawlers were arrested, and the dispute widened, but it was not until during the course of these proceedings that the United Kingdom admitted that the waters of Varangerfjord within the line claimed by Norway were Norwegian waters.

Between the arrest of the *Lord Roberts* in 1911 and May 5th, 1949, sixty-three British and other fishing vessels were arrested for fishing in alleged Norwegian waters, and many others were warned (see Counter-Memorial, Annex 56).

I must now examine the Decrees on which the Decree of 1935 purports to be based and some of which have been mentioned as evidence that the United Kingdom had acquired or ought to have acquired notice of the Norwegian system before the dispute began.

(i) *The Royal Decree of February 22nd, 1812.* The Storting Document No. 17/1927 tells us (pp. 506, 507) that after discussion between the Admiralty and Foreign Office of the Kingdom of Denmark-Norway, it was decided to request the King for a royal resolution and the Chancellery defined the matter to be

> "whether the territorial sovereignty, or the point from which the sovereign right of protection is fixed, shall be measured from the mainland or from the extremest skerries".

Thereupon the King of Denmark and of Norway made the Decree, of which a translation will be found on page 134 of the Judgment of the Court. The Decree makes no mention of straight lines between islands or islets, or of connecting headlands of the mainland by any lines at all.

This is the first of the Decrees mentioned in the preamble as the basis of the Decree of 1935, and it has been treated by the Norwegian Agent and Counsel as the basis and the starting-point of a series of Decrees made in the 19th century and of the Decree of 1935—a kind of *Magna Carta.* The Judgment of the Court attributes "cardinal importance" to it. It therefore deserves close examination. For this purpose, I must refer again to Storting Document No. 17/1927, which is a Report made by one section

of the "Enlarged Committee on Foreign Affairs and Constitution of the Norwegian Storting" in April 1927, later translated into English and then printed and published by Sijthoff in Leyden in 1937, under the title of *The Extent of Jurisdiction in Coastal Waters,* by Chrisopher B.V. Meyer, Captain, Royal Norwegian Navy.

On pages 492 ff., this document passes under review a large number of 17th and 18th-century Decrees and Proclamations, amongst others that of June 9, 1691 (Annex 6, I, to the Counter-Memorial), and another of June 13, 1691 (Annex 6, II) which, it will be noticed, refers to the area between the Naze in Norway and the Jutland Reef. It then refers to the Decree of 1812 and tells us that it was "not in reality intended to be more than a regulation for the actual purpose: prize cases on the southern coasts". Further, on page 507, we are told that the Royal Resolution "was communicated . . . . to all the Governors in Denmark and Norway whose jurisdictions border the sea, all the prize courts in Denmark and Norway and the Royal Supreme Admiralty Court". It was communicated "for information" with the additional order: "yet nothing of this must be published in printing".

Page 507 contains the following footnote:

> "( ) N.R.A. Chanc., drafts. As far as is known, the resolution was printed for the first time in 1830 in *Historisk underretning om landvaernet* by J. Chr. Berg. Dr. Raestad states that up to that time it was little known and apparently no appeal was made to it previously, either in Denmark or in Norway."

Then follow several quotations from Dr. Raestad's *Kongens Strömme,* commenting on the expression "in all cases", which should be noted because his interpretation of "in all cases" differs from that about to be quoted from this document, and because Dr. Raestad stated that, though the Decree of 1812 "was intended for neutrality questions", "the one-league limit at that time was the actual limit—at any rate the actual minimum limit—also for other purposes than for neutrality." We are then told (p. 509) that

> "in the light of the most recent investigations it seems quite clear that the term 'in all cases' only means 'in all prize cases'. The Resolution of 22nd February 1812, only completed the foregoing neutrality rescripts by deciding the question which was left open in 1759: whether the league should be measured from *terra firma* or from

> the appurtenant skerries, etc. The one-league limit of 1812 had, therefore, no greater scope than the one-league limit mentioned in the previous Royal Resolutions of the 18th century, that is to say, it applied only to neutrality questions, and was laid down only for the guidance of national authorities, not of foreign Powers."

The relevance of these passages is that they shew:

(*a*) that the Decree of 1812 was little known for some 18 years;

(*b*) that it was intended for administrative purposes and not for the guidance of foreign States;

(*c*) that, in the opinion of some people, it only applied to prize cases and even then, according to this document, only to prize cases on the southern coasts. On page 510 the Report speaks of "the prize case rule of 22nd February, 1812".

It is clear that between 1869 and 1935 "the prize case rule of 22nd February, 1812" was acquiring a wider connotation, as we shall now see.

It does not matter whether the views expressed in the Storting Document No. 17/1927 as to the meaning of the Royal Decree of 1812 are right or wrong. What is important from the point of view of the alleged notoriety of the Norwegian system is that such views as to the true import of the Decree of 1812 and its connection with the Norwegian system could be held by responsible persons in Norway as late as the year 1927.

(ii) The *Les Quatre Frères* incident in 1868. This French fishing boat was turned out of the Vestfjord by the Norwegian authorities. The French Government protested on the ground that the Vestfjord was not part of Norwegian territorial waters and "serves as a passage for navigation towards the North". Correspondence between the two Governments ensued, and the Minister of Foreign Affairs of Norway and Sweden on November 7th, 1868, claimed Vestfjord "as an interior sea", which appears to have closed the incident.

(iii) *A Royal Decree of October 16th, 1869,* provided

> "That a straight line drawn at a distance of 1 geographical league parallel to a straight line running from the islet of Storholmen to the island of Svinöy shall be considered to be the limit of the sea belt for the coast of the Bailiwick of Sunnmöre, within which the fishing shall be exclusively reserved to the inhabitants of the country."

This, according to Professor Bourquin (October 6), was the first application of the Decree of 1812 to fishing. The straight

base-line connecting the two islands above mentioned was 26 miles in length.

The Counter-Memorial contains in Annex 16 a Statement of Reasons submitted by the Minister of the Interior to the Crown dated October 1st, 1869, about which a few very much compressed comments must be made. Firstly, it represents the cry of the small man in the open boat against the big man in the decked boat. It says that the area in question "has of recent years been invaded by a growing number of decked vessels, both Swedish and Norwegian cutters, from which fishing was practised with heavy lines", etc. Apparently the Swedes began it in 1866 and the Norwegians followed suit. Another passage states that the local fishermen "bitterly complained of the fact that intruders on the fishing grounds previously visited exclusively by Norwegians were mainly foreigners—Swedes". The fear was also expressed that fishing boats from other countries, especially France, might soon appear on the fishing banks. Accordingly, the Minister had been asked "to form an opinion on the possibility of claiming them as Norwegian property". (The reference to France was probably prompted by the Vestfjord incident of the previous year which would be fresh in the departmental mind.)

The Statement of Reasons invokes the precedent of the Decree of 1812. In addition, there is a letter of November 1st, 1869 (Annex No. 28 to the Counter-Memorial) from the Norwegian Minister of the Interior to the Swedish Minister of Civil Affairs, informing him of the Decree made on the 16th instant (? ultimo), and it contains the passage: "it has been desired to bring this matter to the notice of the Royal Ministry in order that the latter may publish the information in those Swedish districts from which the fishing fleets set out for the Norwegian coast". (There is no evidence of any notification of the Decree to any other State.) The penultimate sentence in this letter is as follows:

> "Moreover, if the fishery in these areas were left open, there is reason to believe that the fishermen of many foreign countries would visit them, with the result of a diminution of the products of the fishery for everybody".

The Decree was a public document. A large part of the Statement of Reasons is quoted in the Norwegian Report of a Commission on the Delimitation of Territorial Waters of 1912, but, so far as I am aware, the Statement of Reasons was not published at the time of making the Decree.

The French Government—probably on the *qui-vive* by reason of the Vestfjord incident of the previous year—became aware of

the Decree of 1869 two months later and a diplomatic correspondence between the two Governments ensued, in which the French Government contended that "the limits for fishing between [Svinöy and Storholmen] should have been a broken line following the configuration of the coast which would have brought it nearer that coast than the present limit." The last item in this correspondence is a Note from the French Chargé d'Affaires at Stockholm to the Foreign Minister of Norway and Sweden, dated July 27, 1870, which referred to "the future consequences . . . . that might follow from our adhesion to the principles laid down in the Decree", and stated that "this danger . . . . could easily be avoided if it were understood that the limit fixed by the Decree of October 16th does not rest upon a principle of international law, but upon a practical study of the configuration of the coasts and of the conditions of the inhabitants", and offered to recognize the delimitation *de facto* and to join in "a common survey of the coasts to be entrusted to two competent naval officers". It would appear that the French Government wished to protect itself against a *de jure* recognition of principle. Meanwhile, on July 19, the Franco-Prussian war had broken out, and there the matter has rested ever since.

(iv) *A Royal Decree of September 9th, 1889,* extended the limit fixed by the Decree of 1869 northward in front of the districts of Romsdal and Nordmöre by means of a series of four straight lines, connecting islands, totalling about 57 miles, so that the two Decrees of 1869 and 1889 established straight base-lines of a total length of about 83 miles. The Decree of 1889 was also motivated by a Statement of Reasons submitted by the Minister of the Interior to the Crown, which was included in a publication called *Departements-Tidende* of March 9, 1890. This Statement of Reasons, which also refers to the Decree of 1812, indicates the necessity of empowering the Prefect responsible for Nordmöre and Romsdal to make regulations prohibiting fishing boats from lying at anchor at certain points on the fishing grounds during February and March. It makes no reference to foreign vessels.

The question thus arises whether the two Decrees of 1869 and 1889, affecting a total length of maritime frontier of about 83 miles, and connecting islands but not headlands of the mainland, ought to have been regarded by foreign States when they became aware of them, or ought but for default on their part to have become aware, as notice that Norway had adopted a peculiar *system* of delimiting her maritime territory, which in course of time would be described as having been from the outset of universal application throughout the whole coast line amounting (without

taking the sinuosities of the fjords into account) to about 3,400 kilometres (about 1,830 sea-miles), or whether these Decrees could properly be regarded as regulating a purely local, and primarily domestic, situation. I do not see how these two Decrees can be said to have notified to the United Kingdom the existence of a system of straight base-lines applicable to the whole coast. In the course of the oral argument, Counsel for the United Kingdom admitted that the United Kingdom acquiesced in the lines laid down by these Decrees as lines applicable to the areas which they cover.

(v) *A Decree of January 5th, 1881,* prohibited whaling during the first five months of each calendar year

> "along the coasts of Finnmark, at a maximum distance of one geographical league from the coast, calculating this distance from the outermost island or islet, which is not covered by the sea. As regards the Varangerfjord, the limit out to sea of the prohibited belt is a straight line, drawn from Cape Kibergnes to the River Grense-Jakobselv. It must thereby be understood, however, that the killing or hunting of whales during the above-mentioned period will also be prohibited beyond that line at distances of less than one geographical league from the coast near Kibergnes."

Thus, while expressly fixing a straight base-line across the mouth of the Varangerfjord (which is no longer in dispute in this case), the Decree makes no suggestion and gives no indication that it instituted a system of straight base-lines from the outermost points on the mainland and islands and rocks at any other part "along the coasts of Finnmark". I find it difficult to see how this Decree can be said to have given notice of a Norwegian system of straight base-lines from Traena in the west to the Russian frontier in the east.

(vi) *The 1881 Hague Conference regarding Fisheries in the North Sea resulting in the Convention of 1882.* The Judgment of the Court refers to this incident and draws certain conclusions from it. This Conference was summoned upon the initiative of Great Britain with a view to the signature of a Convention as to policing the fisheries in the North Sea. The following States were represented: Germany, Belgium, Denmark, France, Great Britain, Sweden, Norway, the delegate of the last-named being M.E. Bretteville, Naval Lieutenant and Chief Inspector of Herring Fishery. The intention was that the Convention should operate on the high seas and not in territorial waters, and consequently

it was necessary to define the extent of the territorial waters within the area affected. The procès-verbaux of the meetings are to be found in a British White Paper C. 3238, published in 1882.

The northern limit of the operation of the Convention was fixed by Article 4 at the parallel of the 61st degree of latitude, which is south of the area in dispute in this case.

At the second session of the Conference, the question of Territorial Waters was discussed, and the following statement appears in the procès-verbaux:

> "The Norwegian delegate, *M.E. Bretteville,* could not accept the proposal to fix territorial limits at 3 miles, particularly with respect to bays. He was also of opinion that the international police ought not to prejudice the rights which particular Powers might have acquired, and that bays should continue to belong to the State to which they at present belong."

Strictly speaking, there was no need for the Norwegian delegate to refer to the Decree of 1869 because the Convention deals with the area south of the parallel of the 61st degree of latitude, but if a system of straight base-lines had already been adopted by Norway in 1881 as being of general application all round the coast, it is surprising that he made no reference to it at a Conference at which all the States primarily interested in fishing in the North Sea were represented, and as a result of which all, except Norway and Sweden, accepted the provisions of Article II of the Convention, of which the following is an extract:

> "ARTICLE II
>
> "The fishermen of each country shall enjoy the exclusive right of fishery within the distance of 3 miles from low-water mark along the whole extent of the coasts of their respective countries, as well as of the dependent islands and banks.
>
> "As regards bays, the distance of 3 miles shall be measured from a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed 10 miles."

The Convention was eventually signed and ratified by all the States represented except Norway and Sweden.

This incident, to which I attach particular importance, induces me to put two questions:

(a) If a Norwegian system of delimiting territorial waters by means of straight base-lines had been in existence since 1869

(only 12 years earlier), could the Norwegian delegate, the Chief Inspector of Herring Fishery, have found a more suitable opportunity of disclosing its existence than a Conference of Governments interested in fishing in the North Sea? In fact, could he have failed to do so if the system existed, for it would have afforded a conclusive reason for inability to participate in the Convention of 1882?

(b) Could any of the Governments which ratified this Convention, knowing that Norway claimed four miles as the width of territorial waters and claimed her fjords as internal waters, be affected by the abstention of Norway with notice of the existence of a system which one day in the future would disclose long straight base-lines drawn along a stretch of coast line abcut 560 miles in length (without counting fjords and other indentations), and which is applicable to the whole coast?

* * *

Paragraph 96 of the Counter-Memorial, in discussing the events of the year 1908, states that

> "it may be asked why Norway did not from the beginning use force on all her territorial waters to apply the existing laws relating to foreign fishermen". . . . "In this respect it must be remembered that Norway had but recently acquired a separate diplomatic service, following the dissolution of the union with Sweden in 1905."

It is possible that this fact may explain the absence of any categorical assertion of the Norwegian system of straight baselines as a system of universal application along the Norwegian coasts and the notification of that system to foreign States. But even if this is the explanation, it is difficult to see why it should constitute a reason why foreign States should be affected by notice of this system and precluded from protesting against it when it is enforced against them.

* * *

In these circumstances, I do not consider that the United Kingdom was aware, or ought but for default on her part to have become aware, of the existence of a Norwegian system of long straight base-lines connecting outermost points, before this dispute began in 1906 or 1908 or 1911.

* * *

I must refer very briefly to certain incidents occurring after the dispute began, though they have no bearing on the question of acquiescence. Some of them are dealt with in the Judgment of the Court or in other Individual Opinions.

In 1911, the Norwegian Government appointed a "Commission for the Limits of Territorial Waters in Finnmark", which reported on February 29th, 1912. A copy of Part I, General, was translated into French and sent "unofficially" to the United Kingdom Government.

The following passage occurs on page 20 of this Part I:

> "En général, dans les cas particuliers, on prendra le plus sûrement une décision en conformité avec la vielle notion juridique norvégienne, si l'on considère la ligne fondamentale comme étant tirée entre les points les plus extrêmes dont il pourrait être question, nonobstant la longueur de la ligne."

This is clearly the language of a proposal. The tenses of the verbs should be noted.

On the same day, "the Commission presented Report No. 2 'Special and Confidential Part', containing proposals for the definite fixing of base-lines around Finnmark" (Counter-Memorial, paragraph 104). In 1913 a confidential Report was made upon the proposed base-lines on the coasts of the two other provinces concerned. Nordland and Troms (*ibidem,* paragraph 105). It appears (*ibidem*) that the base-points proposed in these confidential Reports are those ultimately adopted by the Decree of 1935; the confidential Reports were not disclosed until 1950 when they appeared as Annexes 36 and 37 of the Counter-Memorial.

* * *

The Judgment of the Court refers to the Judgment of the Supreme Court of Norway in the *St. Just* case in 1934, in which that British vessel was condemned for fishing in territorial waters under the Law of 1906. It is clearly a decision of high authority. From 1934 onwards, it is conclusive in Norway as to the meaning of the Decree of 1812 and as to its effect, whether or not it has been specifically applied to portions of the coast by later Decrees. But this Court, while bound by the interpretation given in the *St. Just* decision of Norwegian internal law, is in no way precluded from examining the international implications of that law. It is a well-established rule that a State can never plead a provision of, or lack of a provision in, its internal law or an act or omission of its executive power as a defence to a charge that it has violated international law. This was decided as long ago as in the Geneva Arbitration of 1870–1871 on the subject of the *Alabama Claims,* when the British Government pleaded that it had exercised all the powers possessed by it under its existing legislation for the purpose of preventing the *Alabama* from leaving a British port and

cruising against Federal American shipping, an omission which cost Great Britain a large sum of money.

The *St. Just* decision is important in the sense that after the decision, the existence of a Norwegian system of straight base-lines cannot be denied either within Norway or on the international plane. Only eight years earlier there had occurred the *Deutschland* case (a case of an attempt by a German vessel to sell contraband spirits) (Annex 9 to the Memorial and Annex 47 to the Counter-Memorial and Annex 31 to the Reply), in which the Norwegian Supreme Court, by a majority of 5 to 1, quashed a conviction by an inferior Court which had been upheld by the Court of Appeal. In the *Deutschland* case, which has now been overruled by the *St. Just,* it was possible for so distinguished a Norwegian jurist as the late Dr. Raestad (much quoted by both Parties in this case) to say in the Opinion supplied by him at the request of the Public Prosecutor that:

> "The question arises, however, whether in the present case the extent of the maritime territory must be determined from islands, islets and isolated reefs, or—as the Court of First Instance has done—from imaginary base-lines drawn between two islands, islets or reefs and, if necessary, how these base-lines are to be drawn. A distinction must be made here. On the one hand, the problem arises whether according to international law a State is entitled to declare that certain parts of the adjoining sea fall under its sovereignty in certain—or all—respects. On the other hand, the question may arise whether a State under international law, or by virtue of its own laws, is entitled to consider that its national legislation in the determined case extends to these same parts of the adjoining sea when it has not yet been established that its sovereignty extends that far. A State may have a certain competence without having made use of it."

and later

> "Neither the letters patent [that is, in effect, the Decree of 1812] nor, if they exist, the supplementary rules of customary law, prescribe how and between what islands, islets or rocks the base-lines should be drawn. . . ."

It does not greatly matter whether Dr. Raestad's views are right or wrong. What is important, from the point of view of the notoriety of the Norwegian system of straight base-lines, is

that, in the year 1926, a lawyer of his standing and possessing his knowledge of the law governing Norwegian territorial waters should envisage the possible alternative methods of drawing base-lines, for the Norwegian contention is that the United Kingdom must for a long time past have been aware of the Norwegian system of straight base-lines connecting the outermost points on mainland, islands and rocks, and had acquiesced in it.

The following passage occurs in the *Deutschland* case in the Judgment of Judge Bonnevie, who delivered the first judgment as a member of the majority:

> "It is also a matter of common knowledge that the public authorities have claimed, since time immemorial, certain areas, such as for example the Vestfjord and the Varangerfjord, as being Norwegian territorial waters in their entirety, and that the territorial limits should be drawn on the basis of straight lines at the mouth of the fjord (*sic*), regardless of the fact that very great areas outside the four-mile limit are thus included in Norwegian territory. But, for the greater part of the extensive coast of the country, no documents have been produced to prove that there exist more precise provisions, except for the coast off the country of Möre, for which reference is made to the two royal decrees of 1869 and 1889 referred to above."

* * *

Between 1908 and the publication of the Decree of 1935, the United Kingdom repeatedly asked the Norwegian Government to supply them with information as to their fishery limits in northern Norway; see the Report of the Foreign Affairs Committee of the Storting dated June 24th, 1935 (Memorial, Annex 15), which states that: "The British Government have repeatedly requested that the exact limit of this part of the coast should be fixed so that it might be communicated to the trawler organizations." The Norwegian reply to these requests has been that the matter was still under consideration by a Commission or in some other way, e.g., in the letter of August 11th, 1931, from the Norwegian Ministry of Foreign Affairs, "the position is that the Storting have not yet taken up a standpoint with regard to the final marking of these lines in all details."

The impression that I have formed is that what in the argument of this case has been called "the Norwegian system" was in gestation from 1911 onwards, that the *St. Just* decision of 1934 (overruling the *Deutschland* decision) marks its first public

enunciation as a system applicable to the whole coast, and that the Decree of 1935 is its first concrete application by the Government upon a large scale. I find it impossible to believe that it was in existence as a system at the time of the *Deutchland* decision of 1926.

* * *

(D) Another ground upon which Norwegian counsel have sought to justify the Decree of 1935 is that in any case the waters comprised within the outer lines fixed by that Decree lie well within the ancient fishing grounds of Norway to which she acquired a historic title a long time ago.

I think it is true that waters which would otherwise have the status of high seas can be acquired by a State by means of historic title, at any rate if contiguous to territorial or national waters; see Lord Stowell in *The Twee Gebroeders* (1801), 3 *Christopher Robinson's Admiralty Report* 336, 339. But, as he said in that case:

> "Strictly speaking, the nature of the claim brought forward on this occasion is against the general inclination of the law; for it is a claim of private and exclusive property, on a subject where a general, or at least a common use is to be presumed. It is a claim which can only arise on portions of the sea, or on rivers flowing through different States. . . . In the sea, out of the range of cannon-shot, universal use is presumed. . . . Portions of the sea are prescribed for. . . . But the general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established, on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated, by clear and competent evidence."

Another rule of law that appears to me to be relevant to the question of historic title is that some proof is usually required of the exercise of State jurisdiction, and that the independent activity of private individauls is of little value unless it can be shown that they have acted in pursuance of a license or some other authority received from their Governments or that in some other way their Governments have asserted jurisdiction through them.

When the documents that have been submitted in this case in support of historic title are examined, it appears to me that, with one exception which I shall mention, they are marked by a lack of precision as to the waters which were the subject of fishing.

We get expressions such as "near our fortress of Varshus", "off the coasts of Finnmark", "the waters off the coast of this country", "near the land", "fish quite close to the coast", "unlawful fishing which they have been practising in certain localities", "the waters of Finnmark", "fjords or their adjacent waters", "whaling in the waters which wash the coast of Norway and its provinces, in particular Iceland and the Faroe Islands", etc., etc.

The exception is the case of the licenses granted to Eric Lorch in the seventeenth century (see Annex 101 to Norwegian Rejoinder). In 1688 he received a license to fish in, amongst other places, "the waters . . . of the sunken rock of Gjesbaen"; in 1692 he received a license to hunt whales; in 1698 he received another license to hunt whales, which mentions, among other places, "the waters . . . of the sunken rock of Gjesbaen". The last two licenses state that it is forbidden to "all strangers and unlicensed persons to take whales in or without the fjords or their adjacent waters, within ten leagues from the land."

I do not know precisely where the *rock* called Gjesbaen or Gjesbaene is situated, beyond the statement in paragraph 36 of the Counter-Memorial that it is "near the word Alangstaran", which is marked on the Norwegian Chart 6 (Annex 75 to the Rejoinder as being *outside* the outer Norwegian line of the Decree of 1935. On the same chart of the region known as Lopphavet there appear to be two fishing-banks called "Ytre Gjesboene" and, south of it, "Indre Gjesboene", the former being outside the outer line of th Decree of 1935 and the latter between the outer line and the base-line of that Decree. What the dimensions of the fishing-banks are is not clear. The length of the base-line (from point 20 to 21) which runs in front of Lopphavet is 44 miles, so that even if the licences formed sufficient evidence to prove a historic title to a fishing-bank off "the sunken rock of Gjesbaen", they could not affect so extensive an area as Lopphavet. The three licenses cover a period of ten years and there is no evidence as to the duration of the fishery or its subsequent history.

* * *

In these circumstances I consider that the delimitation of territorial waters made by the Norwegian Decree of 1935 is in conflict with international law, and that its effect will be to injure the principle of the freedom of the seas and to encourage further encroachments upon the high seas by coastal States. I regret therefore that I am unable to concur in the Judgment of the Court.

(Signed) ARNOLD D. MCNAIR.

B. Abu Dhabi Arbitration Award

1. NOTE. This Award, reprinted below from 1 *I.C.L.Q.* 247 (1952), is included because of its interest as a pioneering discussion of the continental shelf doctrine. Although not authoritative except as between the parties, it will be influential because of the distinction of the participants. See Young, "Lord Asquith and the Continental Shelf," 46 *A.J.I.L.* (1952), page 512. See, also, a discussion of the Award by J. Y. Brinton in 8 *Revue Egyptienne de Droit International* 114 *et seq.* (1952). An earlier arbitration raising essentially the same question between the Ruler of Qatar and Petroleum Development (Qatar) Ltd. reached the same result in a decision by Lord Radcliffe as Third Arbitrator but without an accompanying opinion. See Annex II to a Note on "Problems of the Continental Shelf" (by J. Y. Brinton) in *Ibid.*, Vol. 6, p. 165 at p. 171 (1950).

2. Text of the Award

In the Matter of An Arbitration between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi.

AWARD OF LORD ASQUITH OF BISHOPSTONE

1. On January 11, 1939, Sheikh Shakhbut of Abu Dhabi, one of the Trucial States abutting on the Gulf of Persia from the south and west, entered into a written contract in the Arabic language with Petroleum Development (Trucial Coast) Ltd., whereby the Sheikh purported to transfer to that company the exclusive right to drill for and win mineral oil within a certain area in Abu Dhabi. That written agreement contained an arbitration clause, providing for the reference of disputes arising under it to arbitration, for the appointment of two arbitrators, and for the appointment of an umpire in the event of the two arbitrators being unable to agree. Certain disputes (the nature of which is indicated more precisely below, but which relate in substance entirely to the area of the concession) have arisen under this agreement and were in fact referred to arbitration; the said arbitrators did differ; and appointed me as umpire. According to the terms of the arbitration clause, this, my Award, in respect of the dispute is final.

1A. Abu Dhabi has a coast line of about 275 miles on the Gulf. It is bounded on the west by the State of Qatar, and on the east by the State of Dubai, both much smaller States. These frontiers, however, were and are to some extent vague. So is its mainland area, which has been estimated at anything from 10,000 to 26,000 square miles. The main reason for these wide divergences is that the depth of hinterland to be included is indeterminate. Abu Dhabi is a large, primitive, poor, thinly populated country, whose revenue, until oil was discovered, depended mainly on pearling. It is, like the other Trucial Principalities, a British-

protected State; that is, its external relations are controlled by His Majesty. Internally, the Sheikh is an absolute, feudal monarch.

2. The nature of the disputes referred to arbitration and the subject-matter of this Award are formulated in a letter from the claimants to the respondent dated July 18, 1949. The letter runs as follows:—

> "The arbitration is to determine what are the rights of the Company with respect to all underwater areas over which the Ruler has or may have sovereignty jurisdiction control or mineral oil rights.
>
> "The Company claims that the area covered by the Agreement of January 11, 1939 (notably Articles 2 and 3 thereof), includes in addition to the mainland and islands:
>
> "(1) All the sea-bed and subsoil under the Ruler's territorial waters (including the territorial waters of his islands), and
>
> "(2) All the sea-bed and subsoil contiguous thereto over which either the Ruler's sovereignty jurisdiction or control extends or may hereafter extend, or which now or hereafter may form part of the area over which he has or may have mineral oil rights."

The issues: The questions referred to arbitration can usefully be paraphrased by expanding them into four, of which the first two deal with territorial waters and the second two with the submarine area outside territorial waters—

(i) At the time of the agreement of January 11, 1939, did the respondent—the Sheikh—own the right to win mineral oil from the subsoil of the sea-bed adjacent to the territorial waters of Abu Dhabi? (There seems to be no doubt about this.)

(ii) If yes, did he by that agreement transfer such right to the claimant company?

(iii) At the time of the agreement did he own (or as the result of a proclamation of 1949 did he acquire) the right to win mineral oil from the subsoil of any, and, if so, what submarine area lying outside territorial waters?

(iv) If yes, was the effect of the agreement to transfer such original or acquired rights to the claimant company? (The Sheikh in 1949—10 years after this agreement—purported to transfer these last rights to an American company—the "Superior Corporation": which the Petroleum Development Company claim he

could not do, since he had already 10 years earlier parted with these same rights to themselves.)

I would add that the parties requested me to express a view both on question (iii) and on question (iv), even if owing to the answer given to one of these questions, the other should become academic; and the view expressed upon it at best an *obiter dictum.*

3. *The terms of the agreement:* The terms of the agreement which are mainly relevant to the determination of these questions are articles 2, 3, 12a, 1 and 17; from which I proceed to quote certain passages.

4. The agreement having originally been in the Arabic tongue, considerable differences have arisen as to what is and what is not an accurate translation. This applies particularly to what is the most crucial article of all, namely article 2. Although, as will later appear, the divergences between those translations are not important, I think I ought for completeness to set out the rival translations. In the translation originally relied upon by the claimant company, the wording of article 2 is as follows:—

> "ARTICLE 2. (a) The area included in this Agreement is the whole territory subject to the rule of the Ruler of Abu Dhabi and its dependencies, and all its islands and territorial waters. And if in the future there should be carried out a delimitation of the territory belonging to Abu Dhabi, by arrangement with other governments, then the area (of this Agreement) shall coincide with the boundaries provided in such delimitation.
>
> "(b) If in the future a Neutral Zone should be formed adjacent to the territories of Abu Dhabi and the rights of rule over such Neutral Zone be shared between the Ruler of Abu Dhabi and another Ruler, then the Ruler of Abu Dhabi undertakes that this Agreement shall include all the mineral oil rights which belong to him in such Zone.
>
> "(c) The Company shall not undertake any works in areas used and set apart for places of worship or sacred buildings or burial grounds."

In the translation of this article relied upon by the respondent, the Sheikh, the wording is as follows:—

> "ARTICLE 2. (a) The area included in this Agreement is the whole of the lands which belong to the rule of the

Ruler of Abu Dhabi and its dependencies and all the islands and the sea waters which belong to that area. And if in the future the lands which belong to Abu Dhabi are defined by agreement with other States, then the limits of the area shall coincide with the limits specified in this definition.

"(b) If in the future a Neutral Area should be established adjacent to the lands of Abu Dhabi and the rights of rule over such Neutral Area be shared between the Ruler of Abu Dhabi and another Ruler, then the Ruler of Abu Dhabi undertakes that this Agreement shall include what mineral oil rights he has in that area.

"(c) The Company shall not undertake any works in areas used and set apart for places of worship or sacred buildings or burial grounds."

Article 3 of the Agreement runs as follows in the translation relied upon by the claimants:

"ARTICLE 3. The Ruler by this Agreement grants to the Company the sole right, for a period of 75 solar years from the date of signature, to search for, discover, drill for and produce mineral oils and their derivatives and allied substances within the area, and the sole right to the ownership of all substances produced, and free disposal thereof both inside and outside the territory: provided that the export of oil shall be from the territory of the Concession direct without passing across any adjacent territory.

"And it is understood that this Agreement is a grant of rights over Oil and cannot be considered an Occupation in any manner whatsoever."

In the translation relied up by the respondent the only difference is the wholly immaterial one that "dig for" appears in lieu of "drill for."

Article 12 (a) runs as follows:
In the translation relied upon by both parties:—

"ARTICLE 12. (a) The Ruler shall have right at any time to grant to a third party a Concession for any substances other than those specified in Article 3, on condition that this shall have no adverse effect on the operations and rights of the Company."

Article 1 defines the expression "The Ruler" in the translation relied upon by both parties as follows:—

> "ARTICLE 1. The expression "The Ruler" includes the present Ruler of Abu Dhabi and its dependencies and his heirs and successors to whom may in future be entrusted the rule of Abu Dhabi."

Article 17 is in these terms:

In the translation relied upon by the claimants:—

> "ARTICLE 17. The Ruler and the Company both declare that they intend to execute this Agreement in a spirit of good intentions and integrity, and to interpret it in a reasonable manner. The Company undertakes to acknowledge the authority of the Ruler and his full rights as Ruler of Abu Dhabi and to respect it in all ways, and to fly the Ruler's flag over the Company's buildings."

In the translation relied upon by the respondents:—

> "ARTICLE 17. The Ruler and the Company both declare that they *base their work* in this Agreement on goodwill and sincerity of belief and on the interpretation of this Agreement in a fashion consistent with reason. The Company undertakes to acknowledge the authority of the Ruler and his full rights as Ruler of Abu Dhabi and to respect it in all ways, and to fly the Ruler's flag over the Company's buildings."

The variation between the two translations of Article 17 would seem immaterial.

5...*Order in which questions considered:*

The order in which I propose to consider the questions raised by the arbitration is the following:—

(a) What is the true translation of the Agreement?

(b) What is the "Proper Law" of the Agreement, that is, the law applicable in interpreting it?

(c) If that law were applied to the bare language of the Agreement, and no regard were paid either (1) to the so-called doctrine of the "Continental Shelf" or, (2) to the negotiations leading up to its signature, what construction ought to be placed on those of its provisions which are the subject-matter of the present dispute?

(d) What is the substance and history of the doctrine of the Continental Shelf?

(e) Is it an established rule of International Law?

(f) If it were, would it operate in any, and if so, what way to modify the construction of the contract which would prevail in its absence?

(g) If not, did the negotiations leading up to the execution of the contract have any such modifying operation?

I will then record my conclusions in paragraph 6.

I now revert to paragraph 5, taking its subparagraphs in turn.

(a) *Translations:* I have indicated the two rival translations of the contract of 1939. There is in this matter little conflict; and there would probably have been even less but for the circumstance that the Arabic of the Gulf, in which the contract is framed, is an archaic variety of the language, bearing, I was told, some such relation to modern current Arabic as Chaucer's English does to modern English. Such discrepancies, however, as exist between the two translations are fortunately trivial, and the claimants were willing for purposes of argument to accept the translation put forward on behalf of the respondent. I therefore adopt that translation in what follows.

(b) What is the "Proper Law" applicable in construing this contract? This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments. Nor can I see any basis on which the municipal law of England could apply. On the contrary, Clause 17 of the agreement, cited above, repels the notion that the municipal law of any country, as such, could be appropriate. The terms of that clause invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilised nations—a sort of "modern law of nature." I do not think that on this point there is any conflict between the parties.

But, albeit English municipal law is inapplicable *as such,* some of its rules are in my view so firmly grounded in reason, as to form part of this broad body of jurisprudence—this "modern law of nature." For instance, while in this case evidence has been admitted as to the nature of the negotiations leading up to, and of the correspondence both preceding and following the conclusion

of the agreement, which evidence as material for construing the contract might, according to domestic English law be largely inadmissible, and to this extent the rigid English rules have been disregarded; yet on the other hand the English rule which attributes paramount importance to the actual language of the written instrument in which the negotiations result seems to me no mere idiosyncrasy of our system, but a principle of ecumenical validity. Chaos may obviously result if that rule is widely departed from; and if, instead of asking what the words used mean, the inquiry extends at large to what each of the parties meant them to mean, and how and why each phrase came to be inserted.

The same considerations seem to me to apply to the principle *expressio unius est exclusio alterius.* I defer entirely to the warnings given by Wills J. and Lopes L.J. in the case of *Colquhoun* v. *Brooks* (19 Q.B.D. 400, at p. 406; 21 Q.B.D. 52, at p. 65), as to the possibilities (and indeed the frequency) of its misapplication. But confined within its proper borders it seems to me mere common sense. (If I have a house and a garden and 200 acres of agricultural land and if I recite this and let to X "my house and garden," it seems obvious that the 200 acres are excluded from the lease.)

Much more dubious to my mind is the application to this case of certain other English maxims relied on by one or the other party in this case. For instance, *verba chartarum fortius accipiuntur contra proferentem:* or the rule that grants by a sovereign are to be construed against the grantee. The latter is an English rule which owes its origin to incidents of our own feudal polity and royal prerogative which are now ancient history; and its survival, to considerations which, though quite different, seem to have equally little relevance to conditions in a protected State of a primitive order on the Persian Gulf.

(c) The next point for consideration is what construction the words of the contract (in particular those of articles 2 and 3, which are crucial) would bear, if (1) no regard were had to the doctrine of the so-called "Continental Shelf" or "submarine area," and (2) no regard were had to the negotiations preceding the Agreement or to the correspondence accompanying it. It may help in the first place to brush aside these complicating factors and consider the bare language of the Agreement itself; reintroducing the complications at a later stage.

Articles 2 and 3 define the area within which the concession is to operate and therefore touch the heart of the dispute; which turns entirely on the extent of that area.

Article 2 opens with the words "The area included in this Agreement." "Included" for what purpose? This question remits

us to article 3, which provides that the Ruler of Abu Dhabi grants to the claimant company the "sole right" for a period of 75 years to "discover, dig for and produce" mineral oils and their derivatives and allied substances "within the area." The "sole right" shortly, is a right to win petroleum from the "area" in question. What area? Turning back to Article 2 we find the area includes "the whole of the lands which belong to the rule of the Ruler of Abu Dhabi and their dependencies." The sentence does not end there. It goes on with the words "*and* all the islands and sea waters which belong to that area."

What does the word "and" mean in this connection? In its most natural sense it surely means "plus." It introduces an addendum to something which has gone before. (I discuss an alternative meaning suggested for it below). But if it simply means "plus," then the expression "the whole of the lands which belong to the rule of the Ruler" cannot be read literally; for read literally that phrase would include in any case the islands, and probably the territorial waters, and it would not be necessary or sensible to make these items addenda. On this meaning of "and," the "land" must be limited to the mainland (no doubt excluding inland or landlocked waters in an indented coast). What, on this basis, does the second addendum mean? *viz.*, "the sea waters which belong to that area?" Placing oneself in th year 1939 and banishing from one's mind the subsequent emergence of the doctrine of the "Shelf" and everything to do with the negotiations, I should have thought this expression could only have been intended to mean the territorial maritime belt in the Persian Gulf, which is a three-mile belt; together with its bed and subsoil, since oil is not won from salt water. In what other sense at that time could sea waters be said to "belong" to a littoral power or to the "rule of the Ruler?" In point of fact, that is the meaning the claimant company were asserting for the expression as late as March, 1949, ten whole years after the contract (see letter page 86A of the Correspondence).

Even if "and" had a different signification, not cumulative but epexegetic, such as "and mark you, in case you are in doubt, I include in the 'lands' the islands and sea waters which belong to the area," I should still hold, in the absence of what I have termed the two complicating factors, that the Concession covered the sea-bed and subsoil of the territorial belt. Nothing less. The only question would be whether it covered more.

Conclusion as to territorial waters' subsoil: I therefore hold or find that the subsoil of the territorial belt is included in the Concession. Neither the ambiguity, if any, of the word "and"

nor any of the considerations dealth with hereafter affect this conclusion. In particular I cannot accept the argument put forward for the respondent that sea waters are merely "included" as a means of access to dry land, whether mainland or insular. To read the word "included," in the Concession, as meaning in the case of the mainland and islands "included as petroliferous areas": and to read it in relation to the "sea waters" as something totally different, namely, "included as means of access to the petroliferous areas," seems to me unjustifiable, if not perverse.

I am not impressed by the argument that there was in 1939 no word for "territorial waters" in the language of Abu Dhabi, or that the Sheikh was quite unfamiliar with that conception. Mr. Jourdain had none the less been talking "prose" all his life because the fact was only brought to his notice somewhat late. Every State is owner and sovereign in respect of its territorial waters, their bed and subsoil, whether the Ruler has read the works of Bynkershoek or not. The extent of the Ruler's Dominion cannot depend on his accomplishments as an international jurist.

So far affirmatively. Negatively (still leaving aside what I have called the complicating factors) I should certainly in 1939 have read the expression "the sea waters which belong to that area" not only as including, but as *limited* to, the territorial belt and its subsoil. At that time neither contracting party had ever heard of the doctrine of the Continental Shelf, which as a legal doctrine did not then exist. No thought of it entered their heads. None such entered that of the most sophisticated jurisconsult, let alone the "understanding" perhaps strong but "simple and unschooled" of Trucial Sheikhs.

Directed, as I apprehend I am, to apply a simple and broad jurisprudence to the construction of this contract, it seems to me that it would be a most artificial refinement to read back into the contract the implications of a doctrine not mooted till seven years later, and, if the view which I am about to express is sound, not even today admitted to the canon of international law. However, the time has now come to consider this doctrine more narrowly.

(d) *The doctrine of the Continental Shelf, its substance and history:* The expression "Continental Shelf" was first used by a geographer in 1898.[1] The legal doctrine which later gathered round this geographical term was possibly foreshadowed when in 1942 England and Venezuela concluded a treaty about the Gulf

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[1] It made a fleeting appearance on the legal stage in 1916: but passed over it with "printless feet."

of Paria providing for spheres of influence in respect of areas covered by the high seas and followed by certain annexations coincident with these spheres. The doctrine was perhaps first explicitly asserted as a legal doctrine (in a very exaggerated form) in a proclamation by the Argentine Republic in 1944, but its classical enunciation in the form in which it has mainly to be considered in this case was the well-known proclamation by President Truman of September 28, 1945.

The substance of the doctrine then proclaimed, as I understand it, was this: A coastal power is not surrounded, even at low water, by a precipice leading vertically to the bottom of the ocean, perhaps two miles below. As a rule the sea-bed shelves very gently outwards and downwards for a considerable distance, a distance generally (but not invariably) exceeding the three-mile territorial limit.[2] Again, not always but very often, where the sea reaches a depth of about 100 fathoms or (what is much the same thing) 200 metres, the edge of this shelf is reached and there is a more or less abrupt plunge of the land-mass down to the ocean floor. The doctrine of the "Shelf" as proclaimed in the Truman Declaration of 1945 arrogated to the United States "jurisdiction and control" over "the resources" of the American Continental Shelf which was described as "appertaining" to the United States.

The resources referred to were those of the subsoil of that zone of the sea-bed which lies between the limit of the territorial waters and the point at which its gently shelving character gives place to an abrupt descent.[3]

Several other States followed roughly the same course as the United States. For instance, Great Britain (not quite on the same lines) in respect of Jamaica and of the Bahamas, and Saudi Arabia in respect of parts of the Persian Gulf. Other States weighed in with similar claims. These other States fall into two groups; I. Mexico and the Latin and Central American Republics, and II. The States which are most directly relevant in this Arbitration—States bordering on the Persian Gulf other than Saudi Arabia.

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[2] If I speak of the three-mile limit and of the Territorial Maritime Belt interchangeably, this is only for brevity. I am aware that some States claim more than a three-mile belt, but about 80 per cent of the merchant shipping in the world is registered in "three-mile" countries; and this is the width of territorial waters on the Persian Gulf.

[3] It does not seem to make any difference for the present purpose whether as a matter of geological fact the Shelf was built up by erosion of material from the unsubmerged portion and by its sedimentation, or whether the Shelf was originally there in a denuded state and was subsequently submerged by what is poetically called the "transgression of the seas."

In almost every case the claim was embodied in a decree or proclamation. Most often, though not invariably, the proclamation was in a "declaratory" form, that is in a form asserting or implying that the proclamation was not constitutive of a new right but merely recorded the existence of a pre-existing one.[4]

I. The claims of the Latin and Central American Republics were often far more ambitious than those of this country, the United States and Saudi Arabia; inasmuch as on the one hand the former claims were often claims to actual sovereignty over the Shelf and its subsoil [5] and on the other hand, and this is more important, the claims were often not limited to the Shelf as a geological entity or even to the area ending where the depth of the sea began to exceed 100 fathoms, but sometimes extended to a zone 200 nautical miles from the mainland; an area quite unrelated to the width of the physical Shelf.[6] In these exorbitant forms the claims met with protest and resistance; but in the more modest form in which they were advanced by the United States, the United Kingdom and Saudi Arabia, they were acquiesced in by the generality of Powers, or at least not actively gainsaid by them.

II. *The British Persian Gulf Proclamations:* The proclamation of Saudi Arabia was followed in 1949 by proclamations issued by the Sheikhs of the Trucial States (or on their behalf by the Government of the United Kingdom *qua* protecting Power) including the Sheikh of Abu Dhabi. All of these last proclamations conform broadly in their terms to the Truman proclamation. They mostly contain recitals on the following lines: "Whereas it is just that the sea-bed and subsoil extending to a reasonable distance from the coast should appertain to and be controlled by the littoral State to which it is adjacent." The Abu Dhabi proclamation of June 10, 1949, provides in its operative part "We, Shakhbut Bin Sultan Bin Za'id, Ruler of Abu Dhabi, hereby declare that the sea-bed and subsoil lying beneath the high seas in the Persian Gulf contiguous to the territorial waters of Abu Dhabi and extending seaward to boundaries to be determined more precisely as occa-

[4] Declaratory: see, for instance, the proclamations of Saudi Arabia, May 28, 1949, of the Trucial States including Abu Dhabi of June 10, 1949; the Truman proclamation of 1945, though its language is not on this point wholly free from ambiguity: and contrast with these proclamations the language of the United Kingdom proclamations in the case of the Bahamas, November 27, 1949; Jamaica, November 26, 1948; and of the Falkland Islands, December 21, 1950, all of which employ somewhat annexatory language such as "the boundaries" of the Colony "are hereby extended": language "constitutive" of rather than merely declaratory of the rights involved.

[5] As in the case of Argentina 1944, Mexico 1945 and Chile 1947.

[6] As in the case of Chile, El Salvador, Honduras and Costa Rica.

sion arises on equitable principles by us after consultation with the neighboring states appertain to the land of Abu Dhabi and are subject to its exclusive jurisdiction and control."

(e) *Is the doctrine in any of its forms part and parcel of international law?:* The preceding section calls attention not only to the recent origin of the doctrine but to the great variety of forms which in its short life it has assumed. Some States claim sovereignty over the Shelf. Others pointedly avoid doing so, claiming only "jurisdiction" or "control," "appurtenance" and the like. Whatever the scope of the rights claimed, some States assert those rights by declaratory proclamations implying their preexistence; others issue proclamations which are on the face of them a new departure and designed to be constitutive of title. What is the seaward limit of the Shelf? Here again the answers given differ. Some States say, "its geological or geographical limit, its 'edge' or its 'drop'." Others (whether because their particular Shelf has got no edge and has got no drop, or for other reasons), say, "the point at which the sea becomes 100 fathoms or 200 metres deep"; while yet others say, "a line drawn parallel to the coast of the contiguous power and 200 nautical miles from it." The 200-mile claim seems to be more or less universally discredited. The other two criteria seem on their face much more reasonable. But what is the position where as in the Persian Gulf itself, both of these more reasonable criteria fail us, because the Shelf not only has no edge, but extends continuously across a sea whose waters never attain a depth of as much as 100 fathoms? Is it to extend outwards to a "reasonable distance" from the coast—the expression used in the recital of the Abu Dhabi proclamation? If so, what is a "reasonable distance"? Where States are grouped, as in this case, round a more or less cylindrical gulf, is the principle "*usque ad medium filum*" applicable? How could it possibly be applied in the case of comparably shallow seas of completely irregular configuration, such as the North Sea? Again how are rights of whatever character to the subsoil of the Shelf acquired? Can they indeed be acquired at all? Or would their existence inevitably conflict with the "freedom" of the high seas? Before the doctrine of the Shelf was promulgated I think the general answer might well have been that they cannot be acquired at all—that the Shelf is as inappropriable as the high seas that roll or repose above it: subject to this reservation, that the sea-bed (not the subsoil) of the submarine area, is in certain rare cases, subject to a customary right vested in certain States to conduct "sedentary" fisheries in such sea-bed. For instance, the right to

fish for sponges, coral, oysters, pearls and chank.[7] Indeed, the shallow seas of the Persian Gulf are subject to mutual pearling rights by subjects of the various littoral States. If, however, the submarine area is capable not merely of being the subject-matter of these limited occupational rights over the sea-bed, and *pro tanto* a *"res nullius,"* is its subsoil as a whole *res nullius?* that is to say, something in which rights can be acquired, but only by effective occupation? Or is the position, as the claimants' main argument maintains, that the rights in the subsoil of the Shelf adhere (and must be taken always to have adhered) *ipso jure*—occupation or no occupation—to the contiguous coastal Power? Or failing that, if occupation be indeed necessary; in cases where it is almost impracticable, may proclamations, or similar acts be treated as a constructive or symbolic or inchoate occupation (the claimants' alternative contention under this head)?

Conclusion as to doctrine of the Continental Shelf: Neither the practice of nations nor the pronouncements of learned jurists give any certain or consistent answer to many—perhaps most—of these questions. I am of opinion that there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine claim as yet to have assumed hitherto the hard lineaments or the definitive status of an established rule of international law.

Whether there *ought* to exist a rule giving effect to the doctrine in one or other and, if so, which of its forms is another question and one which, if I had to answer it, I should answer in the affirmative. There seems to me much cogency on the arguments of those who advocate the *ipso jure* variant of the doctrine. In particular: (1) it is extremely desirable that someone, in what threatens to become an oil-starved world, should have the right to exploit the subsoil of the submarine area outside the territorial limit; (2) the contiguous coastal Power seems the most appropriate and convenient agency for this purpose. It is in the best position to exercise effective control, and the alternatives teem with disadvantages; (3) there is no reason in principle why the subsoil of the high seas should, like the high seas themselves, be incapable of being the subject of exclusive rights in any one. The main reasons why this status is attributed to the high seas is (i) that they are the great highways between nations and navigation of these highways should be unobstructed. (ii) That fishing in the high seas

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[7] An incompletely, sedentary crustacean. I gathered from Professor Waldock that a chank moves very slowly: *epur si muove:* on this whole subject Sir Cecil Hurst's Paper read to the Grotius Society in 1948 is the *locus classicus.*

should be unrestricted (a policy approved by this country ever since Magna Carta abolished "several" fisheries). The subsoil, however, of the submarine area is not a highway between nations and the installations necessary to exploit it (even though sunk from the surface into the subsoil rather than tunnelled laterally) need hardly constitute an appreciable obstacle to free navigation; nor does the subsoil contain fish. (4) To treat this subsoil as *res nullius*—"fair game" for the first occupier—entails obvious and grave dangers so far as occupation is possible at all. It invites a perilous scramble. The doctrine that occupation is vital in the case of a *res nullius* has in any case worn thin since the East Greenland Arbitration and more especially since that relating to Clipperton Island. But leaving that aside, it is difficult to imagine any arrangement more calculated to produce international friction than one which entitles nation A, it may be thousands of miles from nation B, to stake out claims in the Continental Shelf contiguous to nation B by "squatting" on B's doorstep—at some point just outside nation B's territorial water limit.

The question just considered, namely not what is but what ought to be the rule, is not so irrelevant as it might at first sight appear, for the following reason: the International Law Commission appointed by the United Nations with M. Francois as Rapporteur, has been investigating the doctrine and problems of the Continental Shelf. This body has made a number of reports of great interest and importance including a draft code contained in the Report of the Third Session of the International Law Commission (A–CN 4–48) consisting of some six or seven short articles of which I will quote the first three.

> ARTICLE 1. "As here used the term 'Continental Shelf' refers to the sea-bed and subsoil of the submarine areas contiguous to the coast but outside the areas of territorial waters where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil."
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> ARTICLE 2. "The Continental Shelf is subject to the exercise by the coastal state of control and jurisdiction for the purpose of exploring it and exploiting its natural resources."
>
> ARTICLE 3. "The exercise by a coastal state of control and jurisdiction over the Continental Shelf does not affect the legal status of the superjacent waters as high seas."

These draft Articles have been prayed in aid by the claimants with the implication that they are, or are intended to be the

expression of principles which are already part of international law, not merely of principles which ought to, or might with advantage, form part of that law in future. If this is indeed the contention of the claimants, I am of opinion that it is ill-founded. It is clear that the Codifying Commission of the International Law Commission is charged with two distinct functions, (1) that of recording existing rules of international law, and (2) that of indicating what the law should be; promoting as the phrase runs, "the progressive development of international law" by preparing draft conventions on "subjects which have not yet been regulated by international law, or in regard to which the law has not yet been sufficiently developed in the practice of States." It seems to me clear that these Articles were framed in the discharge, not of the first but of the second, of these functions. As the Commission in paragraph 6 of its commentary on Article 2 says: "The Commission has not attempted to base on customary law the right of a State to exercise control and jurisdiction for the limited purposes stated in Article 2, and though numerous proclamations have been issued over the past decade it can hardly be said that such unilateral action has already established a new customary law." [8]

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[8] In respect of this interpretation of the suggested Articles—*viz.*, as recommendations rather than records—the following United Nations documents are relevant; besides A–CN. 4–48 of 1951 itself (the suggested Articles and commentary thereon), A–CN. 4–Sr. 66, 67, 68 and 69 (these last constituting the Summary Record of the meetings of the Second Session of the International Law Commission, 1950). Perhaps I may make this footnote the vehicle for an expression of gratitute to those who addressed me, for bringing to my notice some of the voluminous literature, articles, addresses and other publications—by experts on the Continental Shelf. Those from which I have derived the most instruction include:

(1) Prof. H. Lauterpacht's article entitled "Sovereignty over Submarine Areas," which is likely to be published in the *British Year Book of International Law*, Vol. 27, 1950, pp. 376-433, almost simultaneously with this Award.

(2) Professor Waldock's article "The Legal Basis of Claims to the Continental Shelf" (to appear in *Transactions of the Grotius Society*, Vol. 36, 1950), previously printed as a paper submitted to the Copenhagen Conference of the International Law Association, 1950.

(3) Mr. Richard Young's article, "The Legal Status of Submarine Areas beneath the High Seas," published in the *American Journal of International Law*, Vol. 45, 1951, April, pp. 225–249.

(4) The Memorandum of the Secretary-General of the United Nations on the *Regime of the High Seas*—2nd Session (1950) of the International Law Commission (A–CN. 4–32).

(5) The works of Sir Arnold McNair *passim;* my debt to which is too diffused to be particularised by chapter and verse.

I therefore cannot accept these Articles as recording, or even purporting to record, established rules: and if they do not, if they are mere recommendations as to what such rules might with advantage be, if adopted by International Convention, they clearly cannot affect the construction of the contract of 1939. (f) Pausing here before dealing with the last question, *viz.*, the effect, if any of the *negotiations* on the meaning of the contract; and considering only the possible effect on the construction of the contract of the doctrine of the Shelf; I would summarise as follows the claimant's argument and my conclusions about it: The claimant's primary contention is (1) that the doctrine of the Shelf is settled law, (2) that it always was so, and therefore that it was so in 1939; *ergo,* the meaning which some of the expressions in the contract would or might otherwise have borne is enlarged by the inclusion therein of the Shelf. For instance, in Article 2 either the expression "the whole of the lands which belong to the rule of the Ruler of Abu Dhabi" or the expression "and the sea waters which belong to that area," are so enlarged by the inclusion of an area in this case measuring over 10,000 square miles of extraterritorial marine subsoil. The argument falls to the ground if I am right in rejecting the premiss on which it rests, namely, that the doctrine of the Shelf has become and, indeed, was already in 1939, part of the *corpus* of international law.

Again, if I am right in rejecting that premiss, the second way in which they put their case also fails; here they rely on the proviso to Article 2 which says that "If in future the lands which belong to Abu Dhabi are defined by agreement with other States, then the limits of the area" (of the Concession) "shall coincide with the limits specified in this definition." The argument is that the Concession is by these words expressly to extend to any after-acquired area of Abu Dhabi, and that the effect of the proclamations of 1949, if not retrospective, cannot be less than to add the Shelf to the area originally covered as from the date when the proclamations were promulgated. This argument also fails if I am right in thinking that the premiss on which it rests is invalid; but I think it would fail independently of that since there has been no definition of anything "by agreement with other States," and I should have thought in any case that the definition referred to was limited to one affecting dry land, whether epirot or insular.

LASTLY:—

(g) *The Negotiations:* Did the negotiations attending the conclusion of the contract operate to modify what I have held to be the construction which the contract would bear if there

had been no such negotiations? I do not find it possible to base any firm conclusion under this head on the use of Arabic words such as "ard" or "aradi" or "mantiqua" in the negotiations leading up to the Agreement, nor on the fact that the price offered for options for oil concessions to the various Trucial Sheikhs from 1935 onwards till 1939 were proportioned not to any square mileage which included marine areas, but only to the length of the respective coast lines; although it is clear that marine areas were at this stage quite outside the contemplation of the parties.

Some evidence was given as to oral interchanges between the Sheikh on the one hand and Mr. Lermitte and Brigadier Longrigg on the other in the last fortnight or so before the contract was signed. The Sheikh in his evidence said, I doubt not in perfect good faith, that the meaning of the expression "the sea waters belonging to that area" was never discussed with him at all. The two witnesses for the company say that it was; they said that they explained that the territorial water belt of three miles would be included prima facie in the Concession, but added that the Sheikh then claimed that he ruled the waters leading out from the coast to islands, 50, or one of them even 100, miles out from the shore: and that it was in deference to this claim of the Sheikh's that the formula "and the sea waters belonging to that area" was inserted.

I am clearly of opinion and find as a fact that the Sheikh's recollection was at fault in so far as he said that the phrase in question was never mentioned in the negotiations. Mr. Lermitte and Brigadier Longrigg cannot have imagined the discussion to which they testified. They were excellent witnesses in point both of integrity and accuracy; although under the latter head one cannot forget that they, like the Sheikh, were testifying to events 12 years old. I think it more probable than not that the Sheikh did claim to rule coastal seas outside the three-mile limit. It is not the custom of Oriental potentates to minimise the extent of their dominions; but having regard particularly to subsequent correspondence it seems to me far more probable that this was, and was taken by the claimants to be, a rhetorical flourish than that it was either intended or treated at the time as a sober contractual stipulation. In a similar vein we say, "Britannia rules the waves." We do not expect to be taken literally. If we were, we should be challenging the doctrine of the freedom of the seas.

Certainly there is nothing in the correspondence for a whole 10 years or more after the contract to suggest that the company attached any binding contractual quality to this statement, assum-

ing it was made. As late as March 9, 1949 (p. 84a of the correspondence) the company were claiming no more (apart from the mainland and islands) than the territorial three-mile belt. On March 24, 1949, however, a controversial discussion (recorded at p. 87 and the following pages of the correspondence) occurs between Mr. Lermitte and the Sheikh on which some such claim is raised for the first time. The Sheikh is contending that the company have no right under the Agreement to drill in any part of the sea bed even in the territorial zone. Mr. Lermitte replies, "It is recognised universally that the boundaries of any country situated on the sea extend automatically three miles into the sea. This is what is called 'territorial waters'." In the latter part of this interview as recorded, Mr. Lermitte for the first time claims more submerged land than that covered by territorial waters, and this does not appear to be expressly challenged by the Sheikh (p. 88, sub-p. 3) : but Brigadier Longrigg even as late as March 25, 1949, in a letter from London is only mooting in a very tentative fashion the view that where "exclusive rights are granted to a company in respect of the whole of a State including its territorial waters then the company is entitled to the same rights in respect of the subsoil of the Continental Shelf appertaining to that State" (p. 89). If Brigadier Longrigg had had a clear express promise of a contractual order from the Sheikh of rights in respect of the subsoil in the sea for 50 or a 100 miles out from the coast, no halting tentative and *ex post facto* recourse to the Shelf doctrine would have been needed. He would have had an express undertaking valid without reference to that doctrine, and would have said so.

For these reasons I am of opinion that the prima facie construction of the Agreement, which in my view excludes from the Concession the Shelf, is not modified so as to include it by the negotiations incident to the Agreement any more than by the (in my view incompletely established) doctrine of the Shelf itself.

6. *Conclusions and award:* It follows, if I am right, that the claimants succeed as to the subsoil of the territorial waters (including the territorial waters of islands) and that the Sheikh succeeds as to the subsoil of the Shelf; by which I mean in this connection the submarine area contiguous with Abu Dhabi outside the territorial zone; *viz.*, the former is included in the Concession and the latter is not; and I award and declare to that effect.

I would only add in conclusion a word about the Qatar Arbitration over which Lord Radcliffe presided. I have reached a

result in this case which happens closely to correspond with that reached by Lord Radcliffe in that case, on other facts and a different Agreement. There is, in fact, little connection between the two Arbitrations if only because in the Qatar Agreement there was no allusion in the contract to "sea waters" at all. If Lord Radcliffe instead of merely recording his conclusions had expounded the principles on which he had reached them, I should have derived invaluable and authoritative guidance from such an exposition; but as he took the course he did, I am to that extent *inops consilii,* and have only departed from his (perhaps more prudent) method and gone into general principles at the express invitation of the parties; to whose legal representatives I would wish to express my deep indebtedness.

(Signed) ASQUITH OF BISHOPSTONE.

The proceedings were held at 5 Rue le Tasse, Paris, France, from Tuesday, August 21, 1951, to Tuesday, August 28, 1951.

Sir Walter Monckton, K.C.M.G., K.C.V.O., M.C., K.C.; with him Professor H. Lauterpacht, K.C., Mr. G.R.F. Morris, and Mr. R. Dunn (instructed by Messrs. Bischoff & Co., Solicitors, London), appeared on behalf of Petroleum Development (Trucial Coast) Ltd.

Mr. N.R. Fox-Andrews, K.C., with him Professor C.H.M. Waldock, K.C., Mr. Stephen Chapman, and Mr. J.F.E. Stephenson (instructed by Messrs. Holmes, Son & Pott, Solicitors, London), appeared on behalf of His Excellency, the Ruler of Abu Dhabi.