ВИЗНАЧНІ РІШЕННЯ МІЖНАРОДНОГО СУДУ ООН У СФЕРІ МОРСЬКОГО ПРАВА

ОКРЕМІ ДУМКИ СУДДІВ ЩОДО РІШЕННЯ МІЖНАРОДНОГО СУДУ ООН У АНГЛІЙСЬКО-НОРВЕЗЬКОМУ СПОРІ ПРО ТЕРИТОРІАЛЬНІ ВОДИ *(Fisheries Case (United Kingdom v. Norway). Judgement of December 18, 1951)*[1]

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

[1] Продовження. Початок див.: LEX PORTUS. 2016. №1. С. 181- 248.

the international community 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 expanses 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 Svserholthavet, 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 fulfill 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 Sværholt 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. n 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 Fugloy, 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 Amoy 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 Soroysund. It does not at all cut through Lopphavet outside the islands of Amoy, Loppa and Soroy. 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 favor 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-a-vis* all foreign Stares. 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