THE ONASSIS DISPUTE

When the Onassis whaling fleet, discovered operating within waters claimed by the Government of Peru as territorial waters, was intercepted by units of the Peruvian navy during November 1954, the freedom of the high seas once more became the subject of international commentary. The area of sea which lies adjacent the territory of a coastal state is known as its territorial waters, or more exactly its maritime belt or marginal sea, and forms part of the national territory of the state. Can the area of territorial waters be contained within an internationally accepted limit? The Onassis dispute brings into focus a whole series of methods of extending jurisdiction and sovereignty over the high seas adopted by states over the last two decades. Keeping some sort of balance between the freedom of the high seas and the control of certain areas of the sea, whatever be the alleged justification for that control, has become an urgent and pressing problem.

On August 1, 1947, Peru claimed sovereignty over the high seas, the sea-bed and subsoil adjacent to her coast, to a distance of 200 miles out to sea.(1) In view of the declared intentions of Mr Onassis to send part of his whaling fleet to engage in sperm whaling off the Peruvian coasts, delegates from Peru, Chile and Ecuador (these two latter states also having made similar claims over the high seas and sea-bed) met in Santiago in October 1954 and agreed to stand firm together in maintaining their claims and to send out patrols 'to deal with foreign poachers'. One month after this meeting - on November 16, 1954 - the Peruvian Ministry of War announced the capture by Peruvian warships of four whale-catchers owned by Mr Onassis and that a fifth vessel, a whale-factory ship, had been ordered to enter Paita under threat of bombardment. A Peruvian naval court fined Onassis three million dollars on November 30, 1954, and on December 13, after considerable negotiation, the fine was paid.

Today most coastal states claim from 3-6 miles of adjacent waters as their territorial waters. Great Britain, the Commonwealth countries, the United States, Belgium, the Netherlands, Germany, Denmark, China and Japan adhere to the

three-mile limit; the Scandinavian countries claim the old maritime league, four miles. This group of countries includes the main fishing and maritime powers, which prefer narrow territorial waters, enabling them to fish over the widest possible sea and to patrol an extensive ocean in the interests of their own security. Portugal, Italy, Greece, Spain, Turkey, Syria, Lebanon, Persia, Colombia and Cuba all claim a six-mile limit. The U.S.S.R., Egypt, Bulgaria and Rumania until recently set the maximum, claiming 12 miles.(2) In 1946 Argentina claimed as territorial waters, the area of sea lying above the continental shelf, the so-called epicontinental sea;(3) while in 1947 Peru and Chile declared their respective claims to 200 miles, El Salvador following suit in 1950.(4)

The Peruvian and allied claims cannot be treated as isolated and purely capricious happenings. These are closely associated with other and more generally supported methods and arguments for extending jurisdiction over wider and wider areas of the high seas. Chief among these may be listed:

(1) The Contiguous Zone.
(2) The Base-line Approach. (The Anglo-Norwegian Fisheries Case, I.C.J. Reports 1951, p. 116).
(3) Arguments based on the "reasonable use" of the ocean and ocean resources.
(4) Action taken for the conservation of fisheries.
(5) Claims to the continental shelf.

The Contiguous Zone.

The development of the contiguous zone is the result of an attempt to allow a modern coastal state the measure of fiscal and jurisdictional control adequate and necessary for its security and efficient government and, at the same time, to preserve the present limit of the territorial sea. The concept of the contiguous zone, that is a zone which is not part of the territory of the coastal state but over which it has power to enforce some part of its laws, has been adopted by the International Law Commission. The Commission has defined it both as to extent and purpose. Its extent has been set at 10 miles; its purpose has been stated to be the enforcement of sanitary, fiscal and customs regulations. No country has made positive objections to the institution of such a zone

although conversely there has been no agreement as to its extent.(5) The idea of a contiguous zone may be allied to the doctrine of hot pursuit. When a foreign vessel is detected in the commission of an offence in the territorial sea, the institution of hot pursuit, established through custom and usage, permits the pursuit and capture of the vessel on the high seas. The contiguous zone is an incursion on the freedom of the high seas, but it is a limited incursion.

The Base-line Approach.

A decision of the International Court of Justice - the Anglo-Norwegian Fisheries case (supra) has had a two-fold impact on the freedom of the high seas. The dispute was the result of a Norwegian decree of 1935 in which Norway outlined an exclusive fishing zone off its island-fringed Northern coast. This zone extended from the mainland to the outer limits of the four mile belt which had always been regarded as Norway's territorial sea; the belt itself lay seawards of a series of straight base-lines, up to 40 miles in length, drawn between selected points at the low-water mark on outlying islands and rocks - the so-called Skjaergaard. The decree was strictly enforced against British fishing vessels in 1945. Proceedings were instituted before the International Court of Justice by the United Kingdom Government, which objected to the large areas shut off within the base-lines being classified as inland waters and, therefore, Norwegian national territory. The British contended that, subject to certain recognised exceptions, Norway must measure its four-mile territorial sea from the low water mark and should use straight base-lines only to close off inland waters or bays having that pronounced geographic characteristic. The Norwegian contentions prevailed.

The normal method of fixing the limit of the territorial sea has been to follow the sinuosities of the coast-line; but, where, as in Norway, the coast-line is deeply indented by wide fjords the advantage of joining the head-lands by base-lines is evident. This second approach has received support from the International Law Commission as it has recognised the justice of drawing base-lines in the case of deeply indented coast-lines and bays which are virtually land-locked waters, provided due publicity is given of the measures taken.(6)

Some weight was given by the Court to economic reasons based on the economic interests of Norway and her people, many of whom derive their livelihood from fishing. It was argued that "to take away the traditional fishing rights of these people [the Norwegian fishing folk] is quite simply to take away their fields".(7) Thus was exemplified the dangerous tendency of states to adopt a subjective appreciation of their rights instead of conforming to accepted international standards. It is not difficult to see how such a tendency could convert the doctrine of the high seas as free for all to use - and belonging to none - into a doctrine of beneficial use of the high seas under which the peculiar interests of the territorial state would be identical with the best and most appropriate use of ocean resources.

Reasonable Use.

In the Anglo-Norwegian Fisheries case the argument of reasonable use was applied to fishing rights. It would appear that the demands of national security as well as economic needs received the protective shadow of this broad canopy. Thus it has been used to justify the action of the United States in shutting off increasingly large areas of the Pacific Ocean to enable the testing of Hydrogen Bombs. In the Bikini tests in 1954 the area involved was 400,000 square miles. This year, the United States is proposing to take over a similar area for this purpose. A recent number of the Yale Law Journal contains both a criticism and a justification of this action.(8) The tests are justified on the basis that a common and reciprocal interest in the full use of seas demands a flexible approach to the problems raised and for all types of controversy the one test is applied - what is reasonable between the parties.

> In short, the commentators foresee that interference with other states' claims to rights of navigation, fishing and other uses will ordinarily be reasonable . . . . (9)

The writer urges that changing social and economic interest necessitates this modern and liberal view.

Criticism of the doctrine of reasonable use centres on its vagueness, the difficulty of defining its limits, and the

fear that the very elasticity of the doctrine makes it a very dangerous one. Its end result could well be anarchy. The proposition that the high seas are free to the commerce and seafaring of all is irreconcilable with the proposition that the high seas should be free to the reasonable use of some to the possible detriment of others.

Conservation of Fisheries.

The major policy behind the control of fisheries and navigation should be the peaceful use and development by all peoples of a great common resource, covering two-thirds of the world's surface, in accordance with present day needs and techniques.

The various attempts at conservation of fishing resources are only instances of this principle. A larger measure of agreement has been reached in fisheries control than in any other high seas problem. A number of treaties both multilateral and bilateral have been concluded. These include the North Sea Fisheries Convention (10), Convention for the Preservation of the Halibut Industry (11) and the Treaties of Washington in 1949 (12) and Tokyo in 1952 (13) concerning fisheries in the North West Atlantic and North Pacific respectively. These two latter treaties follow the pattern for future development seen in the United States Proclamation of September 28, 1945 (14) which established fish conservation zones off the North American Coast to be administered by the United States alone if fished only by its nationals, or under joint control if fishermen of other states were concerned. The Australian Pearl Fisheries Acts (15) adopt a slightly different approach with regard to waters which the Acts define as "Australian waters" although they include areas of the sea beyond territorial limits as measured by the "three-mile" rule. In order to fish in such "Australian waters" it is necessary to obtain a licence under the Acts. This action was necessary because Japanese exploitation of pearl fishing beds to the North of Australia had depleted the beds and depressed the world market. (Protection of the pearl oyster beds has also been an important factor behind Australia's proclamation of sovereignty over the continental shelf.)(16) It is unfortunate that the emphasis of Australian action has been on the protection of exclusive rights and not on conservation

for all users. The International Law Commission by defining the continental shelf to include sedentary fisheries has fostered this idea of absolute ownership.(17) Conservation restrictions should be agreed to by all states interested in the area concerned. This is the progressive view and is in line with the recent treaties of Tokyo and Washington mentioned above.

The Continental Shelf.

Before 1940 the continental shelf was not generally considered capable of occupation and ownership. Interest in the shelf stems from the fact that it is thought to be rich in minerals, particularly oil. In 1942 Great Britain and Venezuela concluded a treaty concerning the Gulf of Paria.(18) The Gulf is a rich oil-bearing area and by the treaty the two parties agreed to keep their operations to their own defined sectors. The United States Proclamation of September 28, 1945 (19) quickened interest in the shelf.

This proclamation, with respect to the natural resources of the sub-soil and sea-bed of the continental shelf, expressly recognised as high seas the waters above the shelf and declared that the right to free and unimpeded navigation was in no way affected. Claims to the continental shelf by Guatemala, the Philippines, the Arab States and Commonwealth countries have also contained this important proviso. The most recent proclamations concerning the shelf are those made by the Governor-General of Australia on September 11, 1953 (20). These proclamations follow the Draft Articles of the International Law Commission referred to above, and claim the continental shelf off Australia, and off her trusteeship territories, for the purpose of exploring and exploiting the natural resources of the sea-bed and sub-soil. Again, the proclamations state that the character of the waters above the shelf is unaffected.

Latin-American claims are different in this latter respect. Argentina, Cuba, Mexico and Panama claim the sea-bed and sub-soil of the shelf and also waters above the shelf, as national territory. And finally there are the excessive and arbitrary claims of Peru, Chile and El Salvador to sovereignty over a two hundred mile belt embracing waters, sea-bed and sub-soil.

Now that vast increases in the speed of travel make ocean distances smaller and hence new techniques of fishing and of tapping the riches of the sea-bed have been discovered, modifications in the law of the high seas are to be expected. State action in regard to fisheries, the continental shelf, and the contiguous zone, together with the recommendations of the International Law Commission, suggest that these modifications should be for a distinct purpose and should extend to cover that purpose only: namely, that the limits of territorial waters within which the littoral state has jurisdiction for all purposes should not be radically altered. Opposition to the Peruvian action in the Onassis case crystallises in the fact that action is based on a claim involving such a radical alteration, and the deadlock reached in the case has demonstrated that a solution will only come by way of restraint and negotiation among states. The International Law Commission impliedly recognises this as the only way to stop an incipient 'scramble for the high seas'. The Peruvian action points the way to eventual anarchy in the regime of the high seas.

The solution cannot be easy. The growth of responsible state practice, and arrangements affecting particular regions may lead to the adoption of wider multilateral agreements based on drafts like those of the International Law Commission, but there can be no quick way. International conferences called to seek a formula of general acceptance can have the effect of undermining and disrupting state practice - if the Hague Codification Conference of 1930 is any guide. This conference, called to establish the 3 mile limit for the territorial sea, did no more than emphasise the differing approaches being adopted by states.

Problems concerning the high seas are constantly occurring. No sooner is one dispute over and in the process of being forgotten than another arises. At the beginning of February 1956 Russian fishing vessels were alleged to have violated Norwegian territorial waters. One vessel was arrested. Russia did not dispute the fishing zones and territorial limits of Norway but denied that Russian vessels were within those areas. Nevertheless Norwegian municipal authorities imposed a fine which was paid on February 7, 1956. At present Great Britian and Iceland are

attempting to reach agreement regarding the extension of Iceland's territorial waters to include fishing grounds which British trawlers have traditionally worked.

These incidents are illustrative of the difficulties inherent in the recent developments in the regime of the high seas and are a pressing reminder that agreement in this sphere, if still elusive, is becoming a matter of increasing urgency.

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(1) Presidential Decree No. 781, Concerning Submerged Continental or Insular Shelf, Aug. 1, 1947. For text see Laws and Regulations on the Regime of the High Seas (U.N. Legislative Series), Vol. 1, 16-17.

(2) "Law of the Shallow Seas", The Round Table, June 1955, 255, 256 (Contributed).

(3) Declaration Proclaiming Sovereignty over the Epicontinental Sea and the Continental Shelf, Decree No. 14,708, 1946, Oct. 9, 1946. For text see op.cit. supra, n. 4.

(4) Peru: see note 2 supra. Chile: Presidential Declaration concerning Continental Shelf, June 23, 1947; for text see op.cit. supra n. 2, 6. El Salvador: Political Constitution, Sept. 7, 1950, Art. 7; for text see ibid., 300.

(5) See Gidel, Memorandum on the Regime of the High Seas U.N. Doc. A/CN.4/32, July 14, 1950.

(6) See Reports of International Law Commission - 6th Session (U.N. Doc. A/1858) 16, and 7th Session (U.N. Doc. A/2934) 17.

(7) Argument of M. Bourquin, I.C.J. Pleadings Oral Arguments, Documents, Fisheries Case (U.K. v. Norway), Vol. IV, 179. ". . . enlever à ces gens leurs fonds de pêche traditionnels c'est tout simplement leur enlever leurs champs." See whole of passage at 178-9, and also at 324-5.

(8) Margolis, "The Hydrogen Bomb Experiments and International Law" 64 Yale L.J. (1955), 629; McDougal and Schlei, "The Hydrogen Bomb Tests in Perspective; Lawful Measures for Security," ibid., 648.

(9) McDougal and Schlei, op.cit. , 673.

(10) For text see op.cit. supra no. 2, 179.

(11) For text see ibid., 205.

(12) International Convention for the North West Atlantic Fisheries (1949) Cmd. 8071, U.K. Treaty Series 62/1950.

(13) International Convention for High Seas Fisheries of North Pacific Ocean (1952). For text of draft convention see 26 Dept. of State Bulletin (1952) 346.

(14) Proclamation by the President with respect to Coastal Fisheries in Certain Areas of the High Seas; for text see 40 A.J.I.L. (Supplement) (1946) 46.

(15) The Pearl Fisheries Act, 1952 (No. 8 of 1952); the Pearl Fisheries Act, 1953 (No. 4 of 1953); the Pearl Fisheries Act (No. 2) 1953 (No. 38 of 1953).

(16) Mouton, "The Continental Shelf," 85 Recueil des Cours (1954), Vol. 1, 347, 447; O'Connell, "Sedentary Fisheries and the Australian Continental Shelf," 49 A.J.I.L. (1955) 185.

(17) Report of International Law Commission, 5th Session (U.N. Doc. A/2456), 14.

(18) For text see op.cit. supra no. 2, 44.

(19) Proclamation by the President with respect to the Natural Resources of the Subsoil and Sea Bed of the Continenal Shelf; for text see 40 A.J.I.L. (Supplement) (1946) 45.

(20) 1953 Commonwealth of Australia Gazette No. 56, September 11, 1953.