South Carolina Law Review

Volume 22 | Issue 1 Article 4

1970

The Continental Shelf and the United States

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NOTES

THE CONTINENTAL SHELF AND THE UNITED STATES

I. Introduction

In 1958, an international conference of plenipotentiaries was convened by the United Nations General Assembly. The Conference, meeting at Geneva, adopted four separate conventions, known collectively as the Geneva Conventions on the Law of the Sea.[1] One of these conventions, the Convention on the Continental Shelf,[2] was designed to answer questions raised by the newly emerging doctrine of the continental shelf. The continental shelf is a shallow platform or terrace that forms the transitional zone between dry land and the deep sea bed. The purpose of this note is to trace the events that led to the enactment of the Geneva Convention on the Continental Shelf and to see what effect this document has had on the national policy of the United States concerning the continental shelf.

II. Historical Development

A. Freedom of the Seas

During the middle ages, many states, including Venice, Denmark and England, claimed broad rights over portions of the high seas and by 1493, almost every major world power had claimed some portion of the high seas. The concept of "freedom of the high seas" grew up in opposition to this restrictive practice and by the end of the 17th century, "freedom of the high seas" was a recognized principle of international law. The scope of the principle was uncertain, however. No coastal state was willing to extend this freedom up to its own coast line, and accordingly the three concepts of internal waters, territorial seas, and contiguous zones were developed to permit the coastal

1. These conventions were: The Convention on the Territorial Sea and Contiguous Zone, U.N. Doc. No. A/CONF. 13/L.52 (1958); The Convention on the High Seas, U.N. Doc. No. A/CONF. 13/L.53 (1958); The Convention on Fishing and Conservation of the Living Resources of the High Seas, U.N. Doc. No. A/CONF. 13/L.54 (1958); and The Convention on the Continental Shelf, U.N. Doc. No. A/CONF. 13/L.55 (1958). Also adopted was an Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, U.N. Doc. No. A/CONF. 13/L.57 (1958).

2. The Convention on the Continental Shelf, U.N. Doc. No. A/CONF. 13/L.55 (1958).

state to exercise some degree of control over its coastal waters. The degree of control varied from complete control in internal waters to special jurisdiction for law enforcement and national security in the contiguous zones. Today these zones are recognized by all states; however, there is disagreement over the width of each.[3]

B. Early Development of the Continental Shelf Theory

The first significant development in continental shelf law was the treaty entered into between Great Britain and Venezuela on February 26, 1942.[4] This treaty settled a controversy between Venezuela and Trinidad over the ownership of the submarine areas of the Gulf of Paria, which lies between these two countries. Although the disputed area was located on the South American continental shelf, the treaty made no positive pronouncement concerning the ownership of the shelf. It was agreed, however, to divide the disputed area in half by a boundary line midway between the two countries. The treaty expressly provided that the superjacent waters would not be affected by its terms.

On September 28, 1945, President Truman issued a proclamation asserting the United States' claim to its continental shelf.[5] The Truman Proclamation painstakingly avoided any extension of the territorial sea claims of the United States.[6] The document carefully stated that the United States' claim referred only to jurisdiction and control over the natural resources of the continental shelf and was in no way a claim of sovereignty over the superjacent waters. It expressly stated that the status of the waters (*i.e.* high seas) was to remain unchanged.[7]

3. Originally the width of the territorial sea was set at three miles. This figure was reached on the theory that the range of a shore-based cannon only extended to this point and that to claim any further would be to claim what could not be controlled. The theory of cannon range was suggested by Cornelius Van Bynkerscholk, a Dutch jurist, and the distance was calculated by an Italian, Galaini, in 1782. P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 6 (1927).

4. [1942] Gr. Brit. T.S. No. 10.

5. Pres. Proc. No. 2667, 10 Fed. Reg. 12303 (1945).

6. The U.S. has historically favored narrow territorial waters.

7. Another distinction made in the U.S. pronouncement is that between control and jurisdiction, and sovereignty. Although this distinction was later adopted by the Geneva Convention and other nations, there is at least some authority in favor of the position that the distinction is one without substance, and that such claims are in reality claims to sovereignty over the submarine areas. Young, *The Legal Status of Submarine Areas Beneath the High Seas,* 45 AM. J. INT. L. 225 (1951).

The Truman Proclamation caused immediate reaction all over the world and it was followed by similar declarations from a number of different states. Unfortunately these declarations came at a time when long running feuds over coastal fisheries were coming to a head, and many countries used the Truman Proclamation as an excuse to grasp considerable areas of high seas for their own national purposes. These proclamations, in many instances, asserted jurisdiction over not only the sea bed but also over the superjacent waters and fisheries therein.[8] The Mexican Presidential Declaration of October 29, 1945,[9] laid claim to "the whole of the continental platform or shelf adjoining its coast line and to each and all of the natural resources existing there." Although this declaration expressly denied any intention to restrict the right of free navigation on the high seas, it did assert the right to control fisheries "irrespective of their distance from the coast." On October 11, 1946, Argentina, by presidential decree,[10] asserted full sovereignty over the waters and bed of its continental shelf. The decree, which subjected the Argentine epicontinental sea and continental shelf to the sovereign power of the nation, stated that free navigation in these areas would not be restricted; however, freedom of navigation is but one of several freedoms long recognized as protected under the international law principle of freedom of the high seas.[11] Moreover Argentina's declaration of sovereignty was in direct conflict with established international law, yet Argentina's claim purported to be based on a doctrine "implicitly accepted in modern international law". In 1947 Chile and Peru followed the Argentine example by publishing similar presidential decrees.[12] Despite vigorous worldwide protest this trend continued and reached its high point with a triparte declaration by Chile, Equador, and Peru — nations with virtually no continental shelf. This declaration asserted the "exclusive sovereignty and jurisdiction of each over the sea that bathes the coast of their respec-

8. W. BISHOP, INTERNATIONAL LAW 414-16 (1953).
9. Presidential Declaration with Respect to the Continental Shelf, 116 El Universal No. 10, at 54 (1945).
10. Decree No. 14,708, 54 Boletin Official de la Republica Argentina No. 15, at 641 (1946).
11. Other freedoms recognized under the theory of Freedom of the Seas are: freedom from claims of sovereignty, freedom of emersion and freedom of flight over the seas.
12. Presidential Declaration of June 23, 1947, 1947 El Mercurio 27; Presidential Decree No. 781, August 1, 1947, 103 El Peraano; Diano Official No. 1, 983, at 1 (1947).

tive countries to a minimum distance of 200 nautical miles from the aforesaid coast."[13]

As a result of the wide divergence of positions taken by the Western Nations on jurisdiction over the continental shelf, several attempts were made to formulate a uniform policy. Meetings were sponsored by the Organization of American States in Rio de Janerio in 1950, Caracas in 1954, and Mexico City in 1956. On March 15, 1956, the Inter-American Conference on "Conservation of Natural Resources: The Continental Shelf and Marine Waters" met in Cuidad Trujello. This special conference recognized that the sea bed and its subsoil appertained to the coastal state and were subject to its jurisdiction and control; however, it was unable to reach any further conclusions other than on the definition of the continental shelf.

Several other nations also made proclamations that varied in degree and scope. Among these nations were the Philippines, Iceland, Great Britain, The Republic of Korea, and Australia.

By this time it had become quite evident that some attempt at a uniform multilateral pronouncement must be made. The responsibility for this task fell to the International Law Commission which had been created by the United Nations General Assembly in 1947. The purpose of this commission at its inception was to assist in the codification and progressive development of international law.[14]

III. TRADITIONAL INTERNATIONAL LAW CONCERNS

One basic approach to the complex problem of the continental shelf is to characterize the problem as a question of acquiring territory. The problem can then be analyzed under traditional concepts of territorial acquisition. Under these traditional concepts there are two alternative theories that can be pursued. The first theory is as follows: Since the bed of the continental shelf lies under the high sea outside the littoral states' territorial waters, it is the property of all the people and it may not be acquired exclusively by any one state. This theory finds expression in the traditional principle of *res communis*. The second theory is to the effect that the sea bed is territory without a master and is thus capable of acquisition by effective occupation. This theory is termed *res nullius*.

13. 33 DEP'T STATE BULL. 1025 (1953).
14. G.A. Res. 174, U.N. Doc. A/104 (1947).

The debate engendered by these opposing theories has raged between the outstanding academicians in the field of international law for many years, and the modern trend is toward the *res nullius* theory; however, adoption of *res nullius* does not give a simple solution to the problem. A blanket acceptance of the *res nullius* theory would leave the international community in a position similar to that of California during the Gold Rush of 1849. Any state technically capable of effective occupation could claim an area of sea bed no matter how distant from its own shores and no matter how tenuous its prior connection with the area. Such a rule would be intolerable to most coastal states, particularly those unable to proceed immediately with the development of their own continental shelf.

The policy considerations underlying the arguments against *res nullius* were recognized in the case of the *Anna*.[15] That case involved the ownership of several mud islands that were formed off the coast of the United States by deposits from the Mississippi River. The court, holding that the islands were the territory of the United States, said:

> Consider what the consequences would be if islands of this description were not considered as appendant to the mainland, as comprised within the bounds of territory. If they do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America.[16]

In order to avoid the problems inherent in the *res nullius* rule, one writer has suggested "general recognition by international law of the principle that the continental shelf belongs to the coastal state."[17] Adoption of this position, however, would still leave unanswered the question of *ipso facto* jurisdiction. Does the coastal state's title rest on some claim by the state (notional occupation) or does it exist independent from any such actual claim? These and other questions faced the International Law Commission when it met for the first time in 1949.

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15. The Anna, 5 C. Rob. 373 (1805).
16. *Id.* at 385.
17. INTERNATIONAL LAW ASSOCIATION REPORT OF THE 43RD CONFERENCE, RIGHT TO THE SEA BED AND ITS SUBSOIL 168, 170 (1948).

IV. Development of the Geneva Conventions

A. The Geneva Convention

One of the first areas selected for codification by the International Law Commission was the law of the sea and after several intermediate drafts and reports, the commission adopted in 1956 a body of rules concerning the law of the sea. Since the commission's mandate covered both "codification" and "progressive development" and in view of the difficulty of distinguishing between these two mandates, the commission proposed that an international conference be called to pass on their final product. Approving this proposal, the eleventh General Assembly of the United Nations sponsored a conference at Geneva starting in February of 1958. Eighty-six nations attended this conference and although a wide variety of conflicting viewpoints was presented, four important conventions were passed. Even though some members of the international community may never ratify these conventions, past experience has shown that the important general principles of these conventions will be followed as a matter of reciprocity.

B. Article I.

Article 1 of the Convention on the Continental Shelf[18] contains a definition of the Continental Shelf reached after much discussion and compromise. The text reads as follows:

> For the purpose of these articles the term "continental shelf" is used as referring (a) to the sea bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond the limit, to where the depth of the superjacent waters admits of the exploration of natural resources of the said areas; (b) to the sea bed and subsoil of similar submarine areas adjacent to the coasts of islands.[19]

By comparing this final version with the several International Law Commission drafts that preceded it, one can clearly follow the debate and compromise that took place. In the 1951 draft no mention was made of a specific depth but rather the ability to explore the sea bed and subsoil marked the outer limit of the shelf.

18. U.N. Doc. No. A/CONF. 13/L.55 (1958).
19. *Id.* at 1.

A state could claim as far out as it was technically capable of exploring. The 1953 draft abandoned this test in favor of a static depth of 200 meters. The 1956 draft, on which the Geneva Convention was based, adopted both tests in the alternative. At the time of the final drafting, 200 meters was considered the outside limit for advancement in technical capability for undersea exploration and development during the next 20 years;[20] however, this estimate was grossly inaccurate. Offshore drilling is now technically possible at depths of up to 1,000 feet.

C. Article II

Article II of the convention reads as follows:

1. The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
2. The rights referred to in paragraph 1 of the article are exclusive in the sense that if the coastal state does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal state.
3. The rights of the coastal state over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
4. The natural resources referred to in these articles consist of the mineral and other nonliving resources of sea bed and subsoil together with living organisms belonging to sedentary species, that is on or under the sea bed or are unable to move except in constant physical contact with the sea bed or the subsoil.[21]

Probably the most controversial subject in international law today is the distinction between sovereignty, sovereign rights, and jurisdiction and control. In the 1951 International Law Commission draft, the power of the coastal state over its shelf was defined in terms of "control and jurisdiction for the purpose of exploring it and its natural resources."[22] The 1953 draft used the

20. M. Mounton, *Recent Developments in the Technology of Exploiting the Mineral Resources of the Continental Shelf*, U.N. Doc. No. A/CONF. 13/25 (1958).
21. U.N. Doc. A/CONF. 13/L.55, at 1 (1954).
22. Int'l L. Comm'n, Report, 6 U.N. GAOR, Supp. 9, U.N. Doc. A/1858 at 18 (1951).

language "sovereign right for the purpose of exploring and exploiting . . . ."[23] The 1956 draft was identical to the 1953 draft in this regard and the commentary prepared by the International Law Commission explained the reasons for the language change.

> The Commission desired to avoid language lending itself to interpretations alien to an object which the commission considers to be of decisive importance, namely, the safeguarding of the principle of the full freedom of the superjacent sea and the airspace above it. Hence it was unwilling to accept the sovereignty of the coastal state over the sea bed and subsoil of the continental shelf. On the other hand the text as now adopted leaves no doubt that the rights conferred upon the coastal state cover all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf. Such rights include jurisdiction in connection with the prevention and punishment of violations of the law. The rights of the coastal state are exclusive in the sense that, if it does not exploit the continental shelf, it is only with its consent that anyone else may do so.[24]

Some states had hoped that the rights granted in the continental shelf would extend the coastal state's jurisdiction over the superjacent waters and the airspace above. However, the United States and several other nations favored a wording that would leave no doubt that freedom of the superjacent waters and airspace was to be safeguarded. Accordingly, the United States proposed to modify the 1956 International Law Commission draft by deleting the word "sovereign" and in its place inserting the word "exclusive". The article in its pertinent part would then read:

> The coastal state exercises over the continental shelf *exclusive* rights for the purpose of exploring and exploiting its natural resources. (emphasis added)

In introducing this proposal, the United States' delegation made it clear that it was opposed to any wording that would cast the slightest doubt on the free status of the superjacent seas and airspace. After much debate and several counter proposals, the

23. *Id.* at 12.
24. Int'l L. Comm'n, Report, 6 U.N. GAOR, Supp. 9, U.N. Doc. A/1858 (1951).

United State's proposed draft was finally passed by the narrow margin of 21 to 20. At a later session, however, after it became evident that no move to subject the superjacent waters and airspace to state sovereignty would be successful, the United States receded from its former position in order to obtain wider support for this article in the international community. Thus the wording "sovereign rights" as found in the 1956 International Law Commission was accepted in the final Geneva draft.

The final draft of the Geneva Convention draws a distinction between jurisdiction and control over the resources of the continental shelf and sovereignty over the shelf itself, and in doing so creates a new legal concept — limited sovereignty. That is to say that a state may have sovereign rights for certain purposes in a certain area without having sovereignty over the area. By drawing this distinction the convention was able to maintain the freedom of the superjacent waters and airspace and at the same time permit the coastal state to exercise exclusive control over the resources of its continental shelf. As previously pointed out,[25] however, there is an argument that any distinction between sovereign (or exclusive) rights in the resources of the continental shelf and complete sovereignty over the shelf itself is a meaningless one. It is argued that the minimum intent is to control exclusively the resources of the shelf and that as a practical matter it is impossible to control the resources without also controlling the shelf itself. In other words, what is being attempted is the exercise of all those powers customarily thought of as accompanying sovereignty. The exercise of these powers, however, is not made under the name of sovereignty. But is it possible to exert such complete and exclusive control without in fact having sovereignty? Sovereignty being a matter of exclusive control and jurisdiction, the distinction, it is argued, is nonexistent. One reason for the attempted distinction that is perhaps unique to the United States is constitutionality. The United States has always been a leader in the fight for the limitation of off-shore claims. In all her declarations and proposals extreme caution has been taken to avoid any possible interpretation of these statements as an extension of national domain. This caution has been attributed to the constitutional requirement that congressional approval is necessary before new territories may be acquired by the United States.

25. See discussion at note 7 *supra*.

Although the distinction between "sovereign powers" and "sovereignty" has for the most part been accepted by the international community, the dictinction is extremely tenuous and it is difficult to view these claims as anything other than a pure and simple expansion of national dominion. Moreover, the convention at no point prohibits broader claims of sovereignty completely unrelated to natural resources. This inadequacy is important in view of the fact that both before and after the conference many states, including the United States, have made broad claims of plenary jurisdiction and control amounting to sovereignty over the shelf, although carefully avoiding usage of the word.

V. United States National Policy

A. Generally

Basically there are four areas of consideration regarding the United States' national policy concerning the continental shelf. These areas are: The Truman Proclamation,[26] The Submerged Lands Act,[27] The Outer Continental Shelf Land Act,[28] and the case law that has grown up around these pronouncements.

B. Truman Proclamation

In 1945, the Truman Proclamation asserted the jurisdiction and control of the United States over the resources of the subsoil and sea bed of its continental shelf but carefully avoided any extension of its territorial limits. Although the proclamation did not define the continental shelf, an accompanying press release described it as "submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms of water."[29]

C. The Submerged Lands Act

Roughly 15 years before the issuance of the Truman Proclamation, the question of ownership of the submerged lands within the territorial waters of the United States arose in a California case. California claimed the oil and gas rights in portions of this area and began leasing to private concerns. The Federal Government initiated a suit against California and subsequently against

26. Pres. Proc. No. 2667, 10 Fed. Reg. 12303 (1945).
27. Submerged Lands Act, 43 U.S.C. §§ 1301-15 (1964).
28. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-43 (1964).
29. 13 Dep't State Bull. 484 (1945).

Louisiana and Texas. The United States Supreme Court held that California, Louisiana and Texas had no title or property interest in the submerged lands and that the Federal Government had full dominion over the lands. In reaction to this decision, the United States Congress in 1953 passed the Submerged Lands Act, which vested in the coastal states ownership of "lands beneath navigable waters" within their respective historical boundaries. The term, "lands beneath navigable water" was defined as all submerged land lying between the three mile territorial limit and states' historical boundaries (the boundaries that existed when a state was admitted to the Union).

Prior to the passage of the Submerged Lands Act in 1953, no authority existed for the leasing of oil and gas rights in the submerged lands of the United States' continental shelf. President Truman's proclamation of 1945 had merely asserted jurisdiction and control over the natural resources and said nothing of their utilization. The power to authorize such utilization was vested in the Congress of the United States and not in the President. The Submerged Lands Act filled in this gap somewhat but the question of leasing procedure in the area outside the three mile limit still remained unanswered.

D. The Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act applies only to the subsoil and sea bed of that part of the continental shelf lying beyond the territorial limits of the United States. The Act claims exclusive jurisdiction and control for the United States' Federal Government over the outer continental shelf as far as international law will permit (*i.e.*, the Congress purposely did not specify how far the shelf should extend, but rather left the definition of the continental shelf open-ended and flexible). The act provides that the waters above the continental shelf are to retain their character as high seas and that the right to navigation and fishing will remain unaffected. The act defines "outer continental shelf" as the submerged lands lying seaward and outside of the lands granted to the states by and described in the Submerged Lands Act "and of which the subsoil and sea bed appertain to the United States and are subject to its jurisdiction and control."[80] Unlike the Truman Proclamation, the rights asserted in the Act extend to the whole of the subsoil and sea bed and are not re-

30. 43 U.S.C. § 1333 (1964).

stricted to the natural resources of the subsoil and sea bed. In this respect the Act appears to be at loggerheads with the traditional position taken by the United States in opposing any national claims that are broader than necessary to protect natural resources. Although the Geneva Convention on the Continental Shelf does not forbid these broader claims, it directly sanctions only those claims to jurisdiction and control for the purpose of exploring and exploiting natural resources.

The Act sets up the machinery for leasing oil and gas rights upon the payment of royalties. Other sections of the Act are concerned with administrative details. In addition to these provisions the Act extends the

> Constitution and laws and civil and political jurisdiction of the United States . . . to the subsoil and sea bed of the outer continental shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer continental shelf were an area of exclusive Federal jurisdiction located within a state. . . .[31]

Thus the Act applies the entire body of federal law to the sea bed and subsoil of the shelf and to any artificial structures built on the shelf for the purpose of exploring and exploiting its resources. This provision of the Act most assuredly would seem to be an extension of national sovereignty.

One deficiency in the Act is its failure to specifically provide that the jurisdiction of the United States shall extend to artificial structures on the shelf that are not built for the exploration and exploitation of natural resources. Arguably these structures are included under a subsection of the Act which deals with the power of the Secretary of the Army to prevent obstructions to navigation. That subsection provides that:

> The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is hereby extended to artificial islands and fixed structures located on the Continental Shelf.[32]

The implication is that the jurisdiction of the United States extends to non-resource exploitation structures only to the extent that they create an obstruction to navigation.

31. *Id.* § 1333(a)(1).
32. *Id.* § 1333(f).

One other problem stems from this same deficiency. The federal district courts are given original jurisdiction over cases concerning the exploring and exploiting of natural resouces.[33] But who has jurisdiction over cases involving the continental shelf but not concerning natural resources?

E. United States v. Ray

The case of *United States v. Ray*[34] may provide the answers to some of the above questions when it is ultimately decided. In that case the United States Government brought suit against Louis M. Ray and Acme General Contractors, Inc. asking for a permanent injunction to restrain them from proceeding further with the development of several coral reefs just outside the United States' three mile territorial limit. The defendants Ray and Acme were attempting to form an island on these reefs by dredging up sand from the ocean floor and filling in the reefs. Their intention was to establish what would amount to a sovereign nation just off the coast of Florida that would be subject to no national jurisdiction other than its own. The Atlantis Development Corporation, Ltd. intervened,[35] and the case was heard in the United States District Court for the Southern District of Florida. The threshold problem of subject matter jurisdiction was dealt with in a separate unreported opinion.[36] As was previously pointed out, the Outer Continental Shelf Lands Act gives the federal district courts original jurisdiction over cases arising from activities on the shelf involving "exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources. . . ."[37] The Act, however, makes no provision for cases that involve the continental shelf but do not involve natural resources. Here the district court held that it had jurisdiction, apparently on the theory that the dredging operation constituted the development, removal, and transportation of natural resources.

Because the dispute here was between the United States and its Nationals, the Outer Continental Shelf Lands Act was determinative of the rights of the parties. Thus although the Continental Shelf Convention was used as a guide, the case was essentially one involving the construction of a federal statute.

33. *Id.* § 1333(b).
34. 294 F. Supp. 532 (S.D. Fla. 1969).
35. 379 F.2d 818 (5th Cir. 1965).
36. United States v. Ray (S.D. Fla., April 21, 1965).
37. 43 U.S.C. § 1333(b) (1964).

The Government argued that under the Outer Continental Shelf Lands Act and an earlier statute[38] dealing with navigation, the United States, through the Secretary of the Army, had the right to regulate construction on the continental shelf. The navigation statute relied on by the government prohibited the obstruction of "the navigable capacity on any of the waters of the United States . . ."[39] and provided that the Secretary of the Army's authorization was necessary before any structure could be built in the waters of the United States. The Government argued that the operation of this navigation statute was extended to the superjacent waters of the entire continental shelf by subsection (f) of the Outer Continental Shelf Lands Act. As previously seen, subsection (f) provides that:

> The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to artificial islands and fixed structures located on the outer continental shelf.[40]

The intervenor argued, however, that subsection (f) extended the authority of the Secretary of the Army only to those artificial islands and structures located on that part of the continental shelf within the territorial waters of the United States. The intervenor's theory for limiting the operation of subsection (f) to the territorial waters of the United States, although not clearly set out in his trial memorandum, seemed to be that since the United States had specifically disavowed any claim to the superjacent waters of the outer continental shelf, the words, "waters of the United States", contained in subsection (f), should be read so as to exclude the superjacent waters of the Outer Continental Shelf.

The court rejected the intervenor's argument in favor of the literal language of subsection (f). The decision here is in accord with the legislative history of subsection (f)[41] and moreover, the intervenor's position goes against common sense. The term "outer continental shelf" by definition is outside the three mile territorial limits of the United States.

Since subsection (f) is not limited to structures built for the purpose of exploiting natural resources but rather is applicable

38. *Id.* § 403.
39. *Id.* § 403.
40. 43 U.S.C. § 1333(f) (1964).
41. The bill when introduced contained no provision similar to subsection (f) but the Senate Committee added the subsection after hearing testimony from the Army Engineers that they were in fact exercising such jurisdiction with good results in an area outside the three mile limit.

to all structures, the intervenor's only remaining argument was that this articifical island was not built on the sea bed itself and thus was not "located on the continental shelf". In other words, he argued that the term continental shelf is synonomous with sea bed and subsoil and that the reefs are neither, but are instead outcroppings of coral that grew up from the floor of the sea. The intervenor further argued that since the construction was taking place atop these reefs, it could not be said that this development was an "artificial island or fixed structure located *on* the outer continental shelf." (Emphasis added) This line of reasoning is intertwined with the concept of "horizontal jurisdiction"—the idea that the rights of the coastal state run horizontally across the continental shelf and not vertically. The district court rejected the argument of "horizontal jurisdiction" and found, as a matter of fact, that the reefs were a portion of the subsoil and sea bed of the continental shelf over which the United States had jurisdiction and control.

The intervenor argued finally that since its activities were not related to the exploration for or exploitation of the natural resources, the Federal Government had no authority over its activities. The court held, however, that:

> [T]he reefs and their coral and piscatorial inhabitants [are] natural resources not only as that term is understood by the general public, but as defined by law.
>
> . . . .
>
> The caissons positioned by Ray and the jack platform construction or "boathouse" built on pilings proposed by Atlantis constitute "artificial islands and fixed structures . . . erected . . . for the purpose of developing" the reefs, within the Outer Continental Shelf Lands Act.[42]

Because of the large sums of money involved,[43] The *Ray* case is almost certain to be appealed. Yet from the standpoint of national policy, one wonders whether the United States could tolerate an adverse decision on the questions presented in the *Ray* case. To permit independent sovereign nations to spring up just three miles off our coast would present problems. These independent island nations might be used to subvert the public policies of the state and federal governments (*e.g.*, gambling and drug laws) and they might pose threats to national security.

42. 294 F. Supp. 532, 539 (S.D. Fla. 1969).
43. There was testimony at the trial that the island if completed would be worth $1,000,000,000.00. 294 F. Supp. at 535.

Should the Government lose on appeal, the Congress could always amend the Outer Continental Shelf Lands Act to clear up the ambiguities that precipitated the *Ray* case; however, grave constitutional questions would be presented if the Congress attempted to apply the amendments retroactively to the *Ray* defendants. Moreover, perhaps the Outer Continental Shelf Lands Act was intentionally made ambiguous. The United States has traditionally opposed any attempts by other nations to extend their territorial waters. Thus the Congress was careful to avoid any language in the Act that might be used by another country as an excuse to extend its territorial limits. This same traditional policy places the Government in an awkward position in the *Ray* case; the Government must argue that its jurisdiction extends to artificial islands in the superjacent waters of the continental shelf and at the same time try to avoid setting a precedent that another nation might use to extend its territorial jurisdiction. For example, a Chilean court, by analogy to *Ray*, might conclude that fish constitute a natural resource of its continental shelf.

VI. Conclusion

The doctrine of the continental shelf is an area of the law in which more questions remain unanswered than are answered. The answers to certain general questions, however, are clear. The legal concept of the continental shelf is recognized although its definition and bounds are not certain. It is also universally recognized that the coastal state has certain rights in its continental shelf although there is no general agreement over the extent of these rights. Also these rights are generally recognized to be exclusive, but there is no precise agreement as to which rights are exclusive and which are not, and there is no general agreement over the degree of exclusiveness to which each right is entitled.

In the United States, coastal states are given rights in the continental shelf up to a distance of three miles by statute. As to the control of that area beyond this three mile limit, many questions remain unanswered. Again, the Federal Government exerts some degree of authority in this area, but the exact extent to which this authority runs and the precise degree of authority exerted still remain unsettled.

J. Munford Scott, Jr.