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International Law - Continental Shelf - Proprietary Interest of United States in Continental Shelf Precludes Claims of Acquisition by Private Entrepreneurs. *United States v. Ray* (S.D. Fla. 1969)

Sherry Eckhardt

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RECENT CASES

INTERNATIONAL LAW—CONTINENTAL SHELF—PROPRIETARY INTEREST OF UNITED STATES IN CONTINENTAL SHELF PRECLUDES CLAIMS OF ACQUISITION BY PRIVATE ENTREPRENEURS. *United States v. Ray* (S.D. Fla. 1969).

ATLANTIS, "ISLE OF GOLD"

A permanent injunction recently settled a dispute among two groups of imaginative entrepreneurs, and the United States government over construction operations atop coral reefs situated on the Continental Shelf,¹ ten miles from the Southeastern² Florida mainland and four and one-half miles from Elliot Key, the nearest landward isle.³ In *United States v. Ray*⁴ the district court found that the coral reefs,⁵ although

1. The Continental Shelf, in a geological-geographical context, is the extension of the continental land mass, sloping gradually from the low-water line until there is a marked increase in slope to the depths of the sea. Generally, this marked increase is found near the 200 meter isobath, but varies in breadth from less than one mile to more than 800. Grunawalt, *The Acquisition of the Resources of the Bottom of the Sea—A New Frontier of International Law*, 34 MILITARY L. REV. 101, 102 (1966) [hereinafter cited as Grunawalt]. For discussion of the Continental Shelf in its legal context see text accompanying notes 32-34 *infra*.

2. The territorial waters (*see infra* note 6) on the eastern coast of Florida extend for three miles as contrasted to the 9 mile width on Florida's western coast bordering the Gulf of Mexico. Submerged Lands Act, 43 U.S.C. § 1301(a)(2) (1964).

3. The reefs are shown on United States Coast and Geodetic Survey Chart No. 1249 (1967), and lie east of a series of island keys. Both the keys and the reefs parallel the southeastern tip of Florida.

Studies of these reefs indicate that they underlie the span between the outer reef formation and the coast and that they form the subsoil of the mainland. L. AGASSIZ, REPORT ON THE FLORIDA REEFS (1880); GEOLOGICAL SOCIETY OF AMERICA, LIVING & FOSSIL REEF TYPES OF SOUTHERN FLORIDA (1964).

The Continental Shelf in this area begins at a point three miles distant from the low-water line on the seaward side of the keys. The keys were included in the cession of Florida to the United States from Spain. Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, 8 STAT. 252, 254 (1846), T.S. No. 327 (effective Feb. 19, 1821). The keys are also the point from which the baseline is drawn. Convention on the Territorial Sea and the Contiguous Zone, Article 4, Sept. 15, 1958 [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639 [hereinafter cited as Convention on the Territorial Sea].

4. 294 F. Supp. 532 (S.D. Fla. 1969). Defendants in this action are Louis M. Ray,

outside the nation's territorial waters,⁶ were nevertheless within the territorial jurisdiction of the United States.

Prior to the commencement of the enjoined activities, Atlantis Corporation,⁷ intervenor in the *Ray* case, had sought permission for its operations⁸ from the State of Florida, the Department of the Interior and the Department of State.⁹ Upon being informed that the areas in question were outside the jurisdiction of the State of Florida and the United States,¹⁰ the area was surveyed and operations begun.¹¹

Atlantis brought buildings to the reef area and had commenced their installation on Triumph and Long reefs when a hurricane washed the buildings out to sea. Atlantis was notified by the Corps of Engineers that it had violated the law by

resident of Louisiana, and Acme General Contractors, Inc., a Florida Corporation. Intervenor, Atlantis Development Corporation, Ltd., is a Bahama corporation.

5. The reefs involved in this dispute are Triumph, Long, Ajax and an unnamed reef.

6. The territorial sea begins at the low-water mark, but is of unspecified breadth. "The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea." Convention on the Territorial Sea, Article 6.

7. Atlantis had acquired the rights of a Mr. Timothy Thomas Anderson who had explored the area in 1962. Mr. Anderson's idea of the reef development included constructing a fishing club, a marina, a skin diving club, a hotel and a gambling casino. Stang, *Wet Land: The Unavailable Resource of the Outer Continental Shelf*, 2 J. LAW & ECON. DEVELOPMENT 153, 168 (1968) [hereinafter cited as Stang, *Wet Land*].

8. Atlantis envisioned a sovereign nation at a cost of approximately \$250,000,000 housing a radio and television station, post office, building offices, stamp department and foreign offices, government palace, congress, international bank and mint. A gambling casino was also in the offing. *United States v. Ray*, *supra* note 4 at 535-36.

9. Both Atlantis and its predecessor, Anderson, had made every effort "to have legal rights ascertained in a peaceful fashion through established tribunals and not by self-help [They had] patiently sought permission from all governmental agencies, state and federal just short of the United Nations but to no avail." *Atlantis Development Corp. v. United States*, 379 F.2d 818, 820 (5th Cir. 1967).

10. *Id.* at 821. The State of Florida replied that the property was "outside the Constitutional Boundaries of the State of Florida and therefore not within the jurisdiction of the T.I.I.F. [Trustees of the Internal Improvement Fund]." *Id.* at 820. (This is true because of the three-mile territorial sea).

Stating in its reply, "[t]he Department of the Interior has no jurisdiction over land that is outside the territorial limits of the United States." Atlantis was referred to the Department of State. The Department of State replied: "The areas in question are outside the jurisdiction of the United States and constitute a part of the high seas. The high seas are open to all nations and no state may validly subject any part of them to its sovereignty. . . ." *Id.* at 821.

11. Relying on the replies received, *supra* note 10, Atlantis incurred approximately \$50,000 in costs for "investigations, tests, experiments, surveys, and construction of four prefabricated buildings." Stang, *Wet Land* 168.

obstructing navigation without a permit.¹² Defendant Acme¹³ subsequently applied to the Corps of Engineers for a permit to dredge and bulkhead the waters at or near Triumph Reef. Pending decision on Acme's application, Atlantis objected,¹⁴ claiming prior rights. Acme's permit was denied, but Acme and defendant Ray nonetheless dredged and filled two areas at Triumph and one at Long Reef.

A suit by the Government against the defendants resulted in the granting of a preliminary injunction to halt all dredging, filling or similar destructive activity on the reefs.¹⁵ Atlantis had moved to intervene in the Government's action and intervention was denied¹⁶ by the trial court, but allowed on appeal¹⁷ under the 1966 amendment to Rule 24(a) of the Federal Rules of Civil Procedure.¹⁸

12. The Rivers and Harbors Act of March 3, 1899, 33 U.S.C. §§ 401, 403 (1964), creates authority in the Secretary of the Army, through the Corps of Engineers, to prevent obstructions to navigation in the navigable waters of the United States. The Outer Continental Shelf Lands Act [hereinafter cited as OCSLA] 43 U.S.C. §§ 1331 *et seq.* (1964) read in conjunction with the Rivers and Harbors Act extends the authority of the Secretary of the Army to prevent obstruction to navigation to artificial islands and fixed structures on the Continental Shelf. Thus, any construction in navigable waters within the jurisdiction of the Secretary of the Army, absent approval by the Department of the Army, is unlawful and punishable as a misdemeanor. Removal may be enforced by injunction. 33 U.S.C. § 406 (1964).

The Corps of Engineers requested that Atlantis remove the structures and discontinue construction operations. Atlantis then asked the Corps to reconsider and withdraw its request. Attorney for Atlantis was notified "that after consultation with various federal agencies," the original notice that a permit was required for the proposed construction, was affirmed. *United States v. Ray*, *supra* note 4 at 537.

13. Defendant Ray was, at this time, President of Acme General Contractors, Inc.

14. In the Findings of Fact and Conclusions of Law, it is stated:

While this application was pending, the Corps of Engineers issued public notice thereof, sending a copy to the intervenor. The intervenor filed written objections . . . asserting its claim to ownership of the area . . . and stating that the intervenor was considering appropriate means of obtaining judicial determination of the questions under consideration with the Office of the Chief of Engineers.

United States v. Ray, *supra* note 4 at 537.

15. *United States v. Ray*, 281 F. Supp. 876 (S.D. Fla. 1965).

16. The district court denied intervention as a matter of right and declined to permit permissive intervention. Atlantis sought to intervene by way of proposed answer asserting lack of United States territorial jurisdiction, dominion or ownership in or over the reefs and to cross-claim, asserting that defendants were trespassers on property to which Atlantis had gained title. *Atlantis Development Corp. v. United States*, 379 F.2d 818 (5th Cir. 1967).

17. *Id.*

18. The court, in *Atlantis Development Corp. v. United States*, felt that the application of Atlantis claimed a sufficient interest relating to the property or

The action was tried again in February, 1969.¹⁹ In a memorandum opinion by Chief Justice Fulton, *held* injunction granted: (1) the reefs are a part of the seabed and subsoil of the United States under the Outer Continental Shelf Lands Act²⁰ and the Geneva Convention on the Continental Shelf;²¹ (2) the construction was destroying irreplaceable natural resources of the seabed of the Continental Shelf appertaining to the United States;²² (3) the district court had jurisdiction over the controversy in that defendants and intervenor were engaged in "developing" the seabed and resources of the Continental Shelf;²³ and, (4) construction, dredging and bulkheading atop the reefs created artificial islands and fixed structures on the Outer Continental Shelf, thus requiring a construction permit from the Secretary of the Army.²⁴ *United States v. Ray*, 294 F. Supp. 532 (S.D. Fla. 1969).

The only governmental allegation which the court would not sustain was that the activities of defendants and intervenor constituted a trespass. Basing its denial upon an interpretation of existing legislation, the *Ray* court, aided by a recent law review article,²⁵ concluded that the United States had never claimed title to the Continental Shelf or asserted sovereign ownership over it by way of congressional or presidential act. On the contrary, the court found that the United States merely claims the right to regulate the exploration and exploitation of the shelf and to

transaction which is the subject of the action to allow intervention. Atlantis' interest was not represented by any party and the allowance of intervention would work no injustice. *Id.* at 825.

19. The Outer Continental Shelf Lands Act gives trial court jurisdiction to the district court, 43 U.S.C. § 1333(b) (1964).

20. 43 U.S.C. §§ 1331 *et seq.* (1964). As defined by this act, [t]he term "outer Continental Shelf" means all submerged lands lying seaward and outside of the [territorial sea] . . . and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control. . . .

43 U.S.C. § 1331(a) (1964).

21. Convention on the Continental Shelf, Sept. 15, 1958 [1964] 1 U.S.T. 471, T.I.A.S. No. 5578 [hereinafter cited as Shelf Convention].

22. 59 STAT. 884 (1945); 43 U.S.C. §§ 1331 *et seq.* (1964). Though the reefs are stable enough to support the construction, the court received testimony to the effect that the reefs would die as a result of the dredging, bulkheading and construction. *United States v. Ray*, *supra* note 4 at 538.

23. OCSLA, 43 U.S.C. § 1333(b) (1964).

24. *Id.* at § 1333(f) (1964).

25. Stang, *Wet Land*. The court appears to have relied extensively upon the research and reasoning of Mr. Stang.

ensure the safety of navigation,²⁶ and that a trespass claim requires a showing of title, or alternatively, actual possession of the area affected, by the party asserting the cause of action.

However, the court did state that

[w]hatever proprietary interest exists with respect to these reefs belongs to the United States under both national (Shelf Act) and international (Shelf Convention) law. Although this interest may be limited, it is nevertheless the only interest recognized by law, and such interest in the United States precludes the claims of defendants and intervenor.²⁷

The action is being appealed by all parties.²⁸ In an analysis of the *Ray* decision, the following discussion will consider the claim of trespass and the court's findings in this regard.²⁹

THE CONTINENTAL SHELF

The Continental Shelf doctrine³⁰ proclaims that the resources of the seabed and subsoil of the area adjacent to the coastal state are subject, *ipso jure*³¹ to its exclusive jurisdiction and control for purposes of exploration and exploitation. In its legal context,³² the shelf begins at the outer limits of the territorial waters³³ of a coastal state.³⁴ Its outer limits³⁵ as well as

26. Stang, *Wet Land* at 180.

27. *United States v. Ray*, *supra* note 4 at 542.

28. Letter from J. Francis Hayden, attorney for intervenor, to writer, March 18, 1969.

29. For a consideration of the concepts involved in determining the character of the reef and an excellent discussion of the court's reasoning *see* Stang, *Wet Land*. For intervenor's arguments, *see* Trial Memorandum on Behalf of Intervenor, *United States v. Ray*, 294 F. Supp. 532 (S.D. Fla. 1969).

30. Shelf Convention, Article 2.

31. I A. SHALOWITZ, *SHORE AND SEA BOUNDARIES* 190 (Coast and Geodetic Survey Pub. 10-1 1964) [hereinafter cited as SHALOWITZ].

32. The legal and the geographical (*supra* note 1) definitions of the Continental Shelf differ greatly. The legal definition varies according to the claim of the coastal state.

33. Shelf Convention, Article 1. The territorial sea is a zone bordering the coast of a littoral state and is susceptible of ownership in the international sense of sovereignty. Customary international law decrees that the state's sovereignty extends equally to the seabed, waters and airspace of this zone. 4 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 7-13 (1935).

34. The terms state, or, coastal state, are used throughout this article to denote an international legal entity.

35. The outer limits of the Continental Shelf, much like the outer limits of the territorial sea remain definitionally imprecise due to conflicting claims of coastal states.

a universally accepted³⁶ definition of the shelf remain to be determined. In the words of the Geneva Convention,

the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.³⁷

This imprecise definition, resulting in a twofold test for determining shelf area (the 200 meter isobath plus the depth of exploitability), combines with differing theories as to the extent of a coastal state's jurisdiction and control over it to form the basis of legal controversies³⁸ over shelf areas.

A. *United States Claims to the Shelf*

To avoid any suggestion of an unreasonable encroachment upon the freedom of the seas, the United States has carefully limited the terminology of its claims to jurisdiction, control³⁹ and power of disposition⁴⁰ by excluding the word "sovereignty" or any assertion of ownership and by declaring that its proprietary interest in the Continental Shelf is *sui generis*.

Unlike sovereign ownership of the territorial waters, rights exercised by the United States over the Continental Shelf constituted something less than a fee simple.⁴¹ They were rights of a limited nature, on a horizontal plane. The theory of a

36. As stated by Grunawalt:

[The Geneva Convention] . . . definition of the continental shelf represents no clear victory for any school of thought on the subject. It is, in fact, a compromise which seeks to satisfy the proponents of the virtues of uniformity, fixity and certitude as well as the advocates of the need for flexibility.

Grunawalt at 118.

37. Shelf Convention, Article 1.

38. Disputes arise in reference to: the outer limits of the shelf so as to define the beginning of the deep sea floor; the extent of control which a coastal state may exert over the shelf; the rights of landlocked states; the rights of littoral states without a shelf in the geological-geographical sense; historical claims of states which assert rights to resources on the shelf of another state; the obligation of states not party to the Convention to comply with it.

39. 59 STAT. 884 (1945).

40. OCSLA, 43 U.S.C. § 1332 (1964).

41. *United States v. Ray*, *supra* note 4 at 540.

horizontal extension of jurisdiction and control was first enunciated in the Truman Proclamation of 1945:

[T]he Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.⁴²

Justifications for this proclamation were: (1) the shelf is an extension of the land mass of the contiguous state; (2) the oil and mineral resources of the shelf underlie, in part, the territorial waters; and, (3) self-protection in the international community compels coastal states to keep watch over activities along their shores.⁴³ The extension was characterized as horizontal so as to leave unaffected the high seas and airspace beyond the territorial waters of the nation.

The enactment of the Outer Continental Shelf Lands Act in 1953⁴⁴ added the term "power of disposition" to the United States claims that the subsoil and seabed, as well as the resources of the shelf appertain to and are subject to the jurisdiction and control of the United States.⁴⁵ Again, the character of the high seas, as well as navigation and fishing rights, were to remain unaffected.⁴⁶ The position of limited shelf jurisdiction appears to be founded upon a fear that assertion of actual ownership would result in claims by other coastal states to the high seas and airspace above the Continental Shelf, outside territorial waters.

42. 59 STAT. 884 (1945). For an analysis of the Truman Proclamation see 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 871-82 (1965). This Proclamation, based upon the theory of contiguity, is generally regarded as the first of any magnitude to deal with the Continental Shelf. It was preceded by the United Kingdom-Venezuela Treaty of 1942 which provided for the division of the seabed of the Gulf of Paria between Venezuela and Trinidad. Grunawalt at 111 n.34. This treaty was not expressed in terms of the Continental Shelf.

Though no definition of the term "continental shelf" was given in the Proclamation, a press release of the same date by the State Department, indicated that the shelf was delimited by the 200 meter isobath. 13 DEPT. OF STATE BULL. 484 (1945). The Truman Proclamation is seen as an expression, not of what the law was, but of what the law should be. Grunawalt at 112.

43. Grunawalt at 112.

44. 43 U.S.C. §§ 1331 *et seq.* (1964).

45. OCSLA, 43 U.S.C. § 1332(a)(1964).

46. OCSLA, 43 U.S.C. § 1332(b) (1964).

However, in 1958, the Geneva Conference adopted⁴⁷ the Convention on the Continental Shelf which reads in part:

The coastal State exercises over the continental shelf *sovereign rights* for the purpose of exploring it and exploiting its natural resources.

The rights . . . 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.

The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.⁴⁸

The term "sovereign rights" represented a compromise in terminology between states wishing to use the word "sovereignty"⁴⁹ and the United States' desire to assert "exclusive rights."⁵⁰ Apprehension over unreasonable encroachment upon the freedom of the seas should have been quieted when it was agreed at Geneva that the legal status of the superjacent waters and the airspace were unaffected by claims of sovereign rights.⁵¹

47. Shelf Convention, adopted April 26, 1958.

There were a total of 86 states in attendance at the United Nations Conference on the Law of the Sea, at Geneva, Switzerland, from February 24 to April 28, 1958, voting upon the proposed codification of international law as developed by the International Law Commission between 1949 and 1958. 46 states signed the Shelf Convention.

48. Shelf Convention, Article 2(1) - (3) (emphasis added).

49. In considering the text of Article 2(1) of the Shelf Convention, a Mexican proposal read: "The coastal State exercises sovereignty over the sea-bed and subsoil of the continental shelf . . ." The voting was 24 for, 37 against and 6 abstentions. Other states had made similar proposals employing the word sovereignty. Whiteman, *Conference on the Law of the Sea: Convention on the Continental Shelf*, 52 AM. J. INT'L LAW 629, 637 (1958) [hereinafter cited as Whiteman, *Convention on the Continental Shelf*].

50. The United States representative to the Geneva Conference later explained: It was well known, of course, that certain states desired that rights with respect to the continental shelf should affect the legal status of the waters above the shelf and the superjacent airspace, [sic] In that light, at least, it seemed desirable to some states, including the United States, to "play it safe" by avoiding the use of the term "sovereignty," or even "sovereign rights" in defining the relation of the coastal state to the continental shelf. . . .

The United States proposed . . . the deletion of the word "sovereign" and the substitution of the word "exclusive" . . . so that the article would read: "The coastal state exercises over the continental shelf exclusive rights for the purpose of exploring and exploiting its natural resources."

Whiteman, *Convention on the Continental Shelf* at 636.

51. Shelf Convention, Article 3. Seeing that the waters and airspace were to be

The *Ray* decision, however, would appear to perpetuate this apprehension by defining the words "sovereign rights" to mean exclusive jurisdiction and control, and not sovereignty. Historically, sovereignty, like title, has connoted a vertical as well as a horizontal claim of ownership. Because United States claims are limited to horizontal extensions, the court was, in its judgment, obligated to deny the trespass claim. It is submitted that the distinction between the rights asserted by the United States over the shelf, and an assertion of sovereign ownership is an illusory, definitional difference.

B. Extensions of United States Domestic Law

Through federal legislation dealing with public lands,⁵² the United States has applied its territorial legal system to the Continental Shelf:

The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf

[T]he civil and criminal laws of each adjacent state . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf . . . which would be within the area of the State if its boundaries were extended seaward to the outer margin on the outer Continental Shelf⁵³

This broad extension of domestic law is accented by specific grants of power through congressional acts and administrative authority, and underscores United States dominion of the shelf—in fact, if not in law.⁵⁴ The complete control exerted over

unaffected no matter which wording was employed in Article 2, "the United States, in order that the article should find wider support, found itself in a position to recede from its former position [*supra* note 50] and support the . . . wording of 'sovereign rights' in place of 'exclusive rights.'" Whiteman, *Convention on the Continental Shelf* at 637.

52. Title 43 U.S.C. (1964) deals exclusively with public lands. Included in the definition of public lands are:

the surface and subsurface resources of all such lands, including the disposition or restriction on disposition of the mineral resources in lands defined by appropriate statute, treaty, or judicial determination as being under the control of the United States in the Outer Continental Shelf.

43 U.S.C. § 1400(g) (1964).

53. 43 U.S.C. § 1333 (1964).

54. The Secretary of the Army is authorized to prevent obstruction to navigation, 43 U.S.C. § 1333(f) (1964); The Secretary of the Interior may lease portions of the Continental Shelf for oil and mineral exploitation, 43 U.S.C. § 1334 (1964), 43 C.F.R. § 3380.0-3; The United States Fish and Wildlife Service may veto shelf leases by

the shelf area should be contrasted with the very limited degree of jurisdiction and control which may be exercised over the waters above the shelf.⁵⁵ The extent of jurisdiction and control exercised by the United States over the shelf would appear to be more than sufficient to acquire title, or to demonstrate actual possession. Though the words "title," "ownership" or "sovereignty" have never been employed, the words "sovereign rights" and "appertain" have. The distinction is not readily apparent.

United States domestic legislation, in the international realm, is significant to the extent that it is evidence of this nation's position with regard to international law.⁵⁶ Bearing in mind that the purpose of the Continental Shelf doctrine is to enable the coastal state to protect and preserve its shelf, it would be reasonable, if activities similar to *Ray* are to be proscribed, to alter the United States position and admit title to the Shelf. The shelf is treated in all respects as if the United States claimed title to it. Denying title constitutes an open invitation to conduct commercial activities which may not be enjoined without first determining that title to the shelf and its resources is vested in the United States.

The United States, however, has never accepted the theory that the Continental Shelf is subject to acquisition in a territorial sense. It has rejected the *res omnium communis*⁵⁷ concept but has been unwilling to espouse its opposite, *res nullius*,⁵⁸ as

the Interior on grounds of protection and conservation, Fish and Wildlife Coordination Act, 16 U.S.C. § 661 (1964); the President may declare shelf areas to be National Monuments [Key Largo Coral Reef Preserve, 74 STAT. c48-50 (1960) and Biscayne National Monument, 82 STAT. 1188 (1968)]; and the Coast Guard is authorized to regulate maintenance of artificial islands and fixed structures on the Continental Shelf, 33 C.F.R. §§ 140-146 (1968).

55. The United States has jurisdiction over customs, fiscal, immigration and sanitation activities in a 9 mile contiguous zone, bordering on the territorial sea, over the Continental Shelf, Geneva Convention on the Territorial Sea, Article 24; and the United States has withdrawn international fishing rights from this 9 mile zone. 80 STAT. 908 (1966).

56. Grunawalt at 116 n.50.

57. Belonging to all states equally. Grunawalt at 105. This theory would accord with proposals that the shelf must be held in trust for the international community as a whole. For a discussion of the schools of thought which take the position that the Continental Shelf, like the superjacent high seas, is incapable of acquisition and that the two should stand together, see Oda, *A Reconsideration of the Continental Shelf Doctrine*, 32 TUL. L. REV. 21, 33 (1957).

58. Belonging to no one, but capable of being acquired. Grunawalt at 105. As stated

appropriate. Instead, it adheres to the proposition that a coastal state's proprietary interest in the shelf is unique and is not to be found within the traditional doctrines of ownership. However, the legal system, national and international, which is applied to the shelf has included the proposition that territory is either subject to acquisition or it is not. If it is not, it is held in community by everyone. It is inconceivable that the legal precedents evolved from traditional doctrines can be sufficiently manipulated so as to afford practical solutions to all future shelf controversies.⁵⁹

It may be fair to say that the holding of the *Ray* case is based more upon a concern for national security than national resources. The United States has never claimed that coral is among the resources which it wishes to exploit.⁶⁰ In fact, coral appears to have been excluded from any listings of claimed resources.⁶¹ Additionally, neither defendants nor intervenors intended to claim rights to the coral except as a platform upon

by one legal theorist, the *res nullius* theory of lands acquired by occupation would result in

[r]ights . . . vest[ing] in the occupant, no matter whence he came or how tenuous his prior connection with the region. A principle which permitted such a situation would rightly seem intolerable to most coastal states, and especially so to one unable to proceed immediately with the development on its own account. Considerations of security, of trade and navigation, of pollution, and of customs and revenue, would all militate against recognition of such a doctrine.

Young, *The Legal Status of Submarine Areas Beneath the High Seas*, 45 AM. J. INT'L LAW 225, 230 (1951).

59. Grunawalt suggests that it is difficult, if not impossible to apply concepts created to handle land area problems to the bed of the sea, and that perhaps an entirely new "pigeonhole" should be created. Grunawalt at 107-111. As noted by a leading theorist:

[i]t is a mistake to think that by some ingenious manipulation of existing legal doctrines we can always find a solution for the problems of a changing international world. That is not so; for many of these problems . . . the only remedy is that States should be willing to take measures to bring the legal situation into accord with new needs, and if States are not reasonable enough to do that, we must not expect the existing law to relieve them of the consequences.

J. BRIERLY, *THE LAW OF NATIONS* 264 (5th ed. 1955).

60. The Secretary of the Interior was authorized to publish a list, in the Federal Register, of the resources claimed by the United States as falling within the sedentary species. 16 U.S.C. § 1085(b) (1964). This list has yet to be published. It is noted in this context that the United States does not, apparently, hold coral to fall within the definition of minerals. 48 U.S.C. § 1701(f) (1964).

61. The Submerged Lands Act, 43 U.S.C. § 1301(e) (1964), provides: The term "natural resources" includes, without limiting the generality

which to construct their buildings.⁶² It would appear that the court was anxious to find some authority to rid the coasts of entrepreneurial adventurers without contravening the practice of protesting any assertions of sovereignty in the Continental Shelf by other states and avoiding such assertions by the United States.⁶³

ABALONIA

Another⁶⁴ recent attempt to make use of the shelf was defeated in much the same manner as in *Ray*. Abalonia was to

thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobster, sponges, kelp and other marine animal and plant life. . . .

The court, in *Ray*, states that "[t]he Outer Continental Shelf Lands Act incorporates the definition of natural resources which is contained in the Submerged Lands Act. . . ." *United States v. Ray* *supra* note 4 at 539. But this is contradicted by a statement of Miss Whiteman, United States representative at Geneva in 1958. Miss Whiteman stated that the definition of "natural resources" in Section 1301(e) related solely to the land and water of the country's territorial sea "and bore no relation to the outer continental Shelf." 10th Meeting of the Fourth Committee 19-20, U.N. Doc. A/Conf. 13/42.

Additionally, the inclusion of "fish," "shrimp," and "lobster" is inconsistent with the definition of natural resources in Article 2(4) Shelf Convention. As noted by the International Law Commission: "This definition [article 2, natural resources] excludes such crustaceans as shrimp, but it does give coastal states such as Australia the right to control oyster beds and pearl fisheries." Int'l Law Comm. Report, U.N. Gen'l Assembly, 11th Sess., Official Records, Supp. No. 9, U.N. Doc. A/Conf. 31/59.

62. Trial Memorandum on Behalf of Intervenor at 4, 33, *United States v. Ray*, *supra* note 29. This is also evident from the argument of intervenor that if the reef was *not* seabed, the United States had no territorial jurisdiction over it. This is arguable since the intervenor was not "exploiting" the reefs in the conventional sense of the term, but merely wanted to claim the upper surface as a platform upon which to put its building.

63. See text accompanying notes 49-51 *supra*. A 1945 statement by Eugene H. Doomen, Office of Assistant Secretary of State Dunn, to the Office of the Secretary of State concerning the Continental Shelf policy would appear to support this conclusion:

It was not our desire to reserve the resources of the continental shelf to nationals of this country any more than it was the policy of the United States to exclude foreigners from participating in the exploitation of the mineral resources of the United States itself. Our primary concern was to assert the necessary control over such operations off the coasts of the United States to guard against the depletion of our mineral resources and to regulate, from the point of view of security, the activities of foreigners in proximity to our coast.

4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 754 (1965).

Shortly after the issuance of the Truman Proclamation, 59 STAT. 884 (1945), Mexico, Argentina, Chile, Peru and Ecuador claimed sovereignty over Continental Shelf areas. The United States issued formal diplomatic protests against the sovereignty claims as being inconsistent with the principle of freedom of the seas. See, e.g., M. MOUTON, THE CONTINENTAL SHELF 89-96 (1952).

64. A third group of enterprising entrepreneurs, operating independently of the Atlantis and Abalonia promoters, attempted to gain permission to construct Taluga, a

be a nation on the Cortes Bank, a sea shallow rich in abalone and lobster, approximately 110 miles off the coast of San Diego, California. The nation's base, a reinforced concrete ship, was towed to the shallow and moored, but a mooring line broke before the ship could be sunk at the two fathom depth and it sank in deeper water. The Corps of Engineers quickly gave notice that the ship was a hazard to navigation and the government declared the area to be a part of the Outer Continental Shelf.⁶⁵

Because of the configuration of the shelf, the depth of the water between the coast and the Cortes Bank exceeds 1200 meters in some places.⁶⁶ The shallow is, therefore, beyond the 200 meter isobath delimitation of Shelf area and beyond the present depth of exploitability. Should suit be instituted, the government may have considerable difficulty litigating its "sovereign rights" over the Bank.⁶⁷ The shallow itself would fall within the "depth of exploitability" delimitation if it could first be established that the area was legally a part of the Continental Shelf in spite of intervening depths. A mere declaration that an area is a part of the Shelf is not conclusive and the initial hurdle will be establishing as a matter of law that the Bank is upon the Continental Shelf.⁶⁸ But, assuming *arguendo*, that the "depth of exploitability" test is applicable, the Government nevertheless

new nation to consist of four islands on the Cortes Bank. (See text accompanying note 65, *infra*). The group, operating out of Seattle, Washington, was informed by the Corps of Engineers that the area was part of the Continental Shelf and that permission from the Secretary of the Army would be required. Taluga is still in the planning stages, but it is suggested by Mr. Stang, in his article, that the promoters of both Taluga and Abalonia are awaiting the outcome of the *Ray* decision, and its final appeal, before making any further moves. Stang, *Wet Land* at 183-86.

65. 3 GEOMARINE TECHNOLOGY, No. 2, 9-12 (Feb. 1967). The declaration that the area was part of the Continental Shelf was in the form of published leasing maps in the Federal Register, 31 Fed. Reg. 16629 (1966). Further evidence of United States assertions of jurisdiction over the Cortes Bank are to be found in a letter from the Corps of Engineers to the Taluga (*supra* note 64) promoters, stating that the Cortes Bank is part of the United States outer Continental Shelf. Stang, *Wet Land* at 186.

66. 3 GEOMARINE TECHNOLOGY, No. 2, 9-12 (Feb. 1967). Contradicting facts are found in Kruger, *Mineral Development on the Continental Shelf and Beyond*, 42 J. ST. B. CALIF. 515, 521 (1967). In this article, Mr. Kruger states that the Cortes Bank lies approximately 120 miles offshore, and that the depths between the shore and the bank exceed 6800 feet with the shallow less than 50 feet deep in some places.

67. The promoters, at one time threatened with prosecution, will apparently not be sued if they do not resume their project. Stang, *Wet Land* at 184 n.163.

68. The depth of exploitability test appears to have been designed to protect coastal states, such as Japan, who do not have a Continental Shelf in the geological-geographical

will be confronted by assertions that lobster are not internationally recognized as one of the resources which are subject to the jurisdiction of the coastal state.⁶⁹ Thus, even if the Bank is a part of the shelf, activities may escape injunction by reason of the Government's failure to admit title to or ownership of the shelf.

CONCLUSION

The extension of national legal systems to enforce assertions of jurisdiction, control and power of disposition of the Continental Shelf and its resources is potentially more dangerous to the international community and its attempt to promote an orderly division of the ocean's wealth, than would be an extension of ownership or sovereignty. National legal systems differ whereas ownership is an international concept. That this ownership would

sense. The test was not designed to extend the shelf to the ocean depths because of technological advances or the existence of a sea shallow in an area distant from the shore.

However, a spokesman for the United States Department of the Interior has asserted that there is no objection to the federal leasing of areas beyond the 100 fathom contour line and that the Outer Continental Shelf Lands Act extends to all submerged lands seaward of a coastal State's offshore boundary and the waters superjacent thereto over which the U.S. asserts jurisdiction [Thus] the limits of the outer continental shelf leasing under the Outer Continental Shelf Lands Act should be considered as technological rather than geographical limits and . . . the leasing authority under the Act extends as far seaward as technological ability can cope with the water depth.

Schoenberger, *Outer Continental Shelf Leasing*, LAW OF FEDERAL OIL AND GAS LEASES 303, 305 (1964).

However, it is doubtful that a sea shallow a thousand or so miles from the shore would, even under this definition, fall within the outer Continental Shelf, since at some point the Shelf ends and the deep sea floor begins.

69. Even the United States would appear to exclude lobster (though it would include abalone) as natural resources of the shelf, under the Article 2, Shelf Convention definition of "living organisms belonging to the sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil."

However, lobster is specifically listed in the Submerged Lands Act, 43 U.S.C. § 1301(e) (1964) (*see note 61 supra*).

As pointed out in a recent article by Oda:

At the Geneva Conference of 1958, a number of European countries, including Sweden, Norway, Germany, Belgium, Denmark, Italy, Greece, Spain and Japan, insisted that continental shelf resources be limited to mineral resources. A Japanese delegate warned that the inclusion of sedentary fisheries in the concept of the continental shelf would lead to a restriction of the freedom of the seas

Oda, *The Geneva Conventions on the Law of the Sea: Some Suggestions for Their Revision*, NATURAL RESOURCES LAWYER, 103, 104 (1967).

be of a horizontal nature should be apparent from a reading of the Geneva Conventions.

The Geneva Conventions were reconsidered in June, 1969.⁷⁰ Should it be decided that the Continental Shelf is to be limited to a defined breadth, the differences among national legal systems would be of no consequence. If, on the other hand, the outer limits of the shelf remain undefined, a claim of title to and ownership of the Shelf would inject a reasonable degree of uniformity into an otherwise impossibly vague legal concept.

Until now, the United States has skirted the title issue. Attempts to populate the shelf have been successfully restricted because the planners were United States nationals or, if of foreign nationality, have in their operations had sufficient contacts with the United States to subject them to its jurisdiction. But, more problematical controversies are bound to arise, and the *Ray* decision, supplemented by the authority advanced to prevent Cortes Bank operations, fails to take into consideration potential future operations which may not obstruct navigation, or, which may not be thwarted without a showing of shelf ownership.

SHERRY ECKHARDT

70. The Convention was to be open for possible revision on June 10, 1969. Foell, *Nations, Large and Small Rush to Control Seabeds*, Los Angeles Times, Feb. 23, 1969, § 1, at 1, col. 3. The result of the revisions, if any, is not known at the time of this writing.