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Journal Staff

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ARTIFICIAL ISLANDS CONSTRUCTED ON UNITED
STATES CONTINENTAL SHELF DENIED STATUS
OF INDEPENDENT SOVEREIGNTY

The United States brought injunction and trespass claims in the federal district court against three private persons to prevent the unauthorized construction of artificial islands atop several submerged coral reefs located about four and one-half miles off the southeast coast of Florida. These reefs were composed of the skeletal remains of coral organisms and lay at a depth of 600 feet. The reefs continued to grow laterally, but had reached their maximum height and were completely submerged at all times except at low tide when their highest projections were momentarily visible. The reef area, which harbored countless varieties of marine life and was used extensively both for commercial and sport fishing and for navigation, was included within the Department of Interior's proposed Biscayne National Monument.¹ Both defendant Louis M. Ray, a Louisiana resident; and co-defendant-intervenor, Atlantis Development Corporation, Ltd., a Bahamian corporation, sought to establish independent sovereign states by constructing artificial islands on the reefs. Both parties proposed to commercialize the islands by selling ocean frontage; additionally, Atlantis intended to operate a gambling casino and charter a bank with accounts analogous to secret Swiss bank accounts. The government argued that the submerged reefs--a natural resource of the continental shelf--were subject to the exclusive jurisdiction and control of the United States under the Outer Continental Shelf Lands Act² and the 1958 Geneva Convention on the Continental Shelf.³ Therefore, contended the government, the defendants' drilling and dredging activities constituted a trespass on government property and should be enjoined. The government argued further that the erection of an artificial island without authorization by the Secretary of the Army violated the Outer Continental Shelf Land Act⁴ and, therefore, should be enjoined. The defendants contended that the reefs were res nullius islands amenable to occupation, control, and use, and that they were therefore subject to a lawful appropriation and

¹Subsequent to the hearing of the instant case, Congress created Biscayne National Monument which included the two reefs, known as Triumph and Long Reefs, which are geographically located at latitude 25 degrees 27' north and longitude 80 degrees 07' west. Charted evidence of the reefs first appeared on the U.S. Coast and Geodetic Survey Chart No. 166, issued in 1878.

²43 U.S.C. §1331 (1964).

³U.N. Doc. A/CONF. 13/L.55.

⁴43 U.S.C. § 1333(f) (1964).

a valid claim of sovereignty under international law. The United States District Court for the Southern District of Florida granted the injunction, but denied the trespass claim.⁵ The court held that submerged offshore reefs on the seabed of the continental shelf are not islands amenable to a claim of sovereignty but are natural resources of the United States; and in the absence of the required permit, construction activities on the reefs are unlawful. But where the United States has neither claimed title to nor taken actual possession of the reefs, common law trespass quare clausum fregit will not lie. United States v. Ray, 294 F. Supp. 532 (S.D. Fla. 1969).

The instant case involves the balancing of interests between the right of a state to exercise control over its continental shelf and the right of any state or person validly to proclaim sovereignty over an unowned island located on the high seas and amenable to control, possession, and use. The 1958 Geneva Convention on the Continental Shelf grants to coastal states exclusive sovereign rights over the natural resources of the seabed and subsoil of the continental shelf for the purposes of exploration and exploitation.⁶ The continental shelf is defined as "the seabed and subsoil of the submarine areas adjacent to the coast . . . to a depth of 200 meters [656 feet] or, beyond that limit, to where the depth . . . admits of the exploitation of the natural resources."⁷ There are other forms of control that the coastal state may exert over the adjacent waters. For example, the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone grants to the coastal state general sovereign rights within its territorial sea (subject to a foreign ship's right of innocent passage) and jurisdiction in a sea area beyond the territorial sea for certain types of acts detrimental to the good order of the coastal state, including the violation of fiscal regulations.⁸ The 1958 Geneva

⁵The court rejected the defendants' preliminary procedural objection that the court lacked federal subject matter jurisdiction since the reefs and the defendants' activities thereon were outside the United States' three-mile limit. Subject matter jurisdiction was present because the case arose out of the interpretation of the Outer Continental Shelf Lands Act, a law of the United States.

⁶U.N. Doc. A/CONF. 13/L.55, art. 2(1). Art. 2(4) defines natural resources as "the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species . . . 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."

⁷Id., art. 1.

⁸U.N. Doc. A/CONF. 13/L.52. Art. 1(1) provides: "The

Convention on the High Seas⁹ provides, however, that the high seas--that sea area beyond the territorial sea--are open to all states and are not subject to claims of sovereignty. Since the United States claims a three mile territorial sea, under convention law it cannot enjoin an appropriation of reefs beyond that three mile limit unless such reefs constitute part of the natural resources of the seabed or subsoil of the continental shelf or unless such activities on the reefs violate the United States' internal fiscal regulations.¹⁰ In addition to these international rights, the Outer Continental Shelf Lands Act provides that all submerged lands lying seaward of the area reserved to the state and appertaining to the United States are the continental shelf over which the United States exercises exclusive jurisdiction and control.¹¹ While the Act encompasses a greater submarine area than the Convention's continental shelf, the Convention recognizes sovereign rights in the seabed and subsoil whereas the Act grants only "jurisdiction and control."¹²

Whether a submerged reef constitutes an island in the high seas amenable to a sovereign claim or constitutes a natural resource of the seabed has not been determined. Had

sovereignty of a state extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea." Art. 14(1) provides: "[S]hips of all states . . . shall enjoy the right of innocent passage through the territorial sea." Art. 24 provides that in a zone contiguous to the coastal state's territorial sea, but not extending beyond twelve miles from the coast "the coastal state may exercise control necessary to: (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea; (b) Punish infringement of the above regulations committed within its territory or territorial sea."

⁹U.N. Doc. A/CONF. 13/L.53.

¹⁰The instant court declined to exercise jurisdiction on the high seas as a reasonable measure to prevent the violation of local law. Such jurisdiction was successfully exercised, however, in *The S.S. "Lotus"* (France v. Turkey), [1927] P.C.I.J., ser. A, No. 10, where a state made its law applicable to foreign nationals while they were outside its territorial sovereignty.

¹¹43 U.S.C. § 1331(a) (1964).

¹²The Outer Continental Shelf Lands Act gives no outer boundary to the continental shelf. But Congress has considered it to extend seaward at least to the depth of waters around the contested reefs, 600 feet (175 meters), which is about 25 meters short of the 200-meter minimum depth allowed by the Geneva Convention on the Continental Shelf. H.R. REP. NO. 413, 83d Cong., 1st Sess. 2 (1953). Thus Triumph and Long Reefs are clearly on the continental shelf under both the Act and the Convention.

that artificial structures on the high seas, such as light-houses, have been characterized as territory subject to the sovereignty of the state owning or controlling them.²² Hence, the erection of an artificial structure on a submerged reef on a state's continental shelf, and the subsequent control, occupation, and use of that structure, could be deemed the creation of an island and the perfection of a valid claim of sovereignty.

In the instant case, the court dismissed the defendants' proprietary claims to the reefs and their claims to sovereignty by denying the status of "island" to the reefs. It relied on United States v. California²³ which held that an island is a "naturally formed area of land surrounded by water, which is above the level of mean high water." "Mean high water" was defined in Borax Consolidated, Ltd. v. City of Los Angeles²⁴ to be the average height of all high waters over a given location during a span of 18.6 years. Since the reefs were completely submerged at mean high water, they could not be islands.

The instant court also held that the reefs were within both the domestic and international definitions of the continental shelf and subject to exclusive United States control and jurisdiction.²⁵ The reefs were part of the shelf's natural resources both practically and legally. Their aesthetic value to naturalists, commercial value to fishermen, and recreational value to sportsmen made the reefs a natural resource. Furthermore, the reefs specifically fit definitions of natural resources in both the Outer Continental Shelf Lands Act and the 1958 Geneva Convention on the Continental Shelf.²⁶ The defendants' construction of artificial islands without the statutory permit²⁷ was therefore unlawful and properly enjoined. The government's common law trespass action failed, however,

²²(Remarks of Sir Charles Russel) (1893), 1 J. MOORE, INTERNATIONAL ARBITRATIONS 755, 900-01 (1898).

²³382 U.S. 448 (1966).

²⁴296 U.S. 10 (1935).

²⁵See 1958 Geneva Convention on the Continental Shelf, U.N. Doc. A/CONF. 13/L.52; The Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (1964).

²⁶43 U.S.C. § 1301(e) (1964), defines natural resources as including "without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobster, sponges, kelp, and other marine animal and plant life...."

²⁷Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1964), which is incorporated in the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(f) (1964), requires approval from the Secretary of the Army to build any construction which affects the "navigable capacity of any of the waters of the United States."

the reefs in the instant case been islands, however, they would have been subject to a valid claim of sovereignty.¹³ Naturally-formed islands in the high seas are res nullius over which a state may establish sovereignty by taking possession and maintaining a continuous display of state functions.¹⁴ Usually the ceremonial raising of a flag and an express proclamation to establish sovereignty are sufficient.¹⁵ The fact that the island rests on another state's continental shelf, outside its territorial sea, is irrelevant since the Convention on the Continental Shelf confers sovereign rights to the coastal state only for the purpose of exploring and exploiting the natural resources of the shelf's seabed and subsoil.

The term "island" is defined in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, for the purpose of delimiting the territorial sea, as a "naturally-formed area of land, surrounded by water, which is above water at high tide."¹⁶ Generally, submerged land masses¹⁷ and artificial structures¹⁸ are not deemed islands because they are not natural formations of land above water. On the other hand, the Acts of the Hague Conference of 1930 included in the concept, island, "any area of land, surrounded by water, which is permanently above the high water mark."¹⁹ That conference expressed the view that artificial islands should enjoy the status of naturally-formed islands provided they rest upon the seabed and are capable of supporting human occupation.²⁰ It has been suggested recently that if artificially constructed islands are visible in normal weather, are relatively permanent, are in the nature of territory, and are capable of occupation, they enjoy the same status as naturally formed islands.²¹ In the Fur Seal Arbitration it was indicated

¹³C. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA § 129 (6th ed. 1967).

¹⁴Id.; Legal Status of Eastern Greenland Case, [1933] P.C.I.J., ser. A/B, No. 53, at 22, 46; Arbitration between France and Mexico (Clipperton Island), reported in 26 AM. J. INT'L L. 390 (1932); The Island of Palmas Case (the United States and the Netherlands), P.Ct. Arb. (1928), 2 U.N. REP. INT'L ARB. AWARDS 829 (1949).

¹⁵KELLER, LISSITZYN & MANN, CREATION OF RIGHTS OF SOVEREIGNTY THROUGH SYMBOLIC ACTS, 1400-1800, at 148-49 (1938).

¹⁶U.N. Doc. A/CONF. 13/L.52, art. 10.

¹⁷C. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA § 137 (6th ed. 1967).

¹⁸M. MCDUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 397 (1962); R. LUMB, THE LAW OF THE SEA AND AUSTRALIAN OFF-SHORE AREAS 22 (1966).

¹⁹League of Nations pub. C. 230 M. 117, 1930 V., at 131, cited in G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 652 (1942).

²⁰See Johnson, Artificial Islands, 4 INT'L L.Q. 203 (1951).

²¹Id.

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²³382 U.S. 448 (1966). By "water", the court meant "mean high water."

²⁴296 U.S. 10 (1935).

²⁵See 1958 Geneva Convention on the Continental Shelf, U.N. Doc. A/CONF. 13/L.52; The Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (1964).

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because the court found that the United States was not in actual or constructive possession of the reefs. The Outer Continental Shelf Lands Act speaks not of ownership, but only of "jurisdiction, control, and power of disposition."²⁸ Moreover, President Truman's Proclamation of 1945,²⁹ affording the United States the "jurisdiction and control" necessary to conserve and prudently utilize its natural resources, did not grant ownership rights. This distinction between jurisdiction and control and title was made clear in the Submerged Lands Act³⁰ by which the United States released to the states "all right, title, and interest" in certain coastal submarine areas while retaining only jurisdiction and control over the remaining continental shelf. Since the United States had neither claimed title to nor taken actual possession of the reefs, but had merely retained control and jurisdiction to ensure the orderly enjoyment of the shelf, the trespass claim would not lie.³¹

Undoubtedly the court's decision is consistent with national policy. The United States should be able to prohibit the utilization of her continental shelf as a means of evading her revenue laws. Furthermore, the construction of artificial islands, such as those in the instant case, could eventually harbor missile sites or other threats to the security of the United States. The court did not, however, resolve the broad issue of the status of the artificial structures. Whether a submerged natural formation is an island amenable to sovereignty should depend on its character in relation to the surrounding geographic area and on the right of the world community to rely upon the permanent geographical boundaries of sovereign states as a means of achieving international stability. For example, a mountain erupting from the middle of the Pacific Ocean should not be denied island status merely because it fails to pierce the surface by a few feet. If an artificial structure which is permanent and capable of supporting human habitation can be built upon such a seamount, it should be amenable to a valid claim of sovereignty. On the other hand, a submerged coral reef rising a few hundred feet from a state's continental shelf, composed of marine resources and enjoyed by the coastal state should not be treated as an island amenable to foreign claims of sovereignty. While a claim of sovereignty over a seamount in the center of the ocean would not seriously disturb the geographic relationship among nations, the

²⁸43 U.S.C. § 1332(a) (1964).

²⁹Proclamation of Sept. 28, 1945, 59 Stat. 884, 10 Fed. Reg. 12303.

³⁰43 U.S.C. § 1311(b)(1) (1964).

³¹Stand, Wed Land: The Unavailable Resource of the Outer Continental Shelf, 2 J. LAW & ECON. DEV. 153, 180 (1968).

sudden presence of a foreign territory on a state's continental shelf would upset the justified expectation that existing land masses establish and will forever maintain a stable geographic definition of national sovereignty.

PATRONS

Dr. Fred M. Medeweff

Mrs. Marjorie King Briggs

Mr. and Mrs. Norman D. Chadwick

Mr. and Mrs. Nelson V. Henry

Mr. and Mrs. Leslie D. Ball

Mr. and Mrs. G. Scott Briggs

Mr. and Mrs. William E. Weems

Vanderbilt Bar Association