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Oliver L. Stone

LEGAL ASPECTS OF OFFSHORE OIL AND GAS OPERATIONS

OLIVER L. STONE*

The states[1] own title to the lands, minerals and other things underlying the navigable waters within their respective boundaries.[2] This ownership rests on the fact that the thirteen original colonies acquired from the Crown of England title to all lands and waterbottoms within their respective boundaries. When these colonies formed themselves into the United States, they ceded their vacant lands to the Union, but retained title to the beds and subsoil of their navigable waters.[3] Since states subsequently entering the Union did so on an "equal footing" with the original states, the waterbottom ownership doctrine applies to all states.[4] The ownership by the individual states extends also to "tidelands"—those lands lying between high and low water mark subject to the ebb and flow of tides.[5] Individual state ownership of the waterbottoms of navigable "inland" waters, including rights to the oil, gas and other mineral resources therein, is, therefore, a long-settled concept in the United States.[6]

In the 1930's, however, interest emerged in the oil and gas potential of the submarine areas off the coast of California. That state, asserting that under the "equal footing" doctrine it was the owner of the submerged lands underlying a belt extending seaward three English miles[7] from the low water mark, granted leases to private

* General Attorney, Shell Oil Company, New York, New York.

1. Unless otherwise indicated, the term "state" or "states" is used in a domestic sense and refers to the individual state or states of the United States.

2. Pollard's Lessee v. Hagan, 44 U.S. 212 (1845); Manchester v. Mass., 139 U.S. 240 (1891).

3. *Id.* Prior to its entry into the Union, Texas was an independent nation, not a Territory of the United States, hence, unlike other States, it retained title to its vacant lands as well as its waterbottoms. See note 4 *infra.*

4. *See, e.g.*, United States v. Texas, 339 U.S. 707, decree at 340 U.S. 900 (1950).

5. Borax Consolidated v. Los Angeles, 296 U.S. 10 (1935).

6. The federal government has power to regulate navigation and commerce on the overlying navigable waters. We are not here, nor elsewhere in this paper unless otherwise indicated, dealing with regulatory powers pertaining to navigation on or fishing rights in the waters of the continental shelf. We are concerned here only with the ownership of or the jurisdiction over the submarine minerals.

7. One English, statute, or land mile equals approximately .87 geographical, marine or nautical mile. The oft-referred to "3-mile limit" is equal to three geographical, marine or nautical miles (or one marine league), or approximately 3.45 land miles. *See* United States v. California, 381 U.S. 139, 148 n. 8, 180 n. 4 (1965).

concerns covering the oil and gas rights in portions of this three-mile marginal belt. Thus began a long, rigorous, judicial-legislative struggle between the federal government and several of the coastal states.[8] The economic stakes were high. At issue was the potential mineral wealth underlying the marginal belt of the United States.

To resolve the issue, the federal government instituted an original action in the United States Supreme Court against California, and later against Louisiana and Texas, as these were the states whose offshore areas seemed most promising for oil and gas.[9] The Supreme Court held that California, Louisiana and Texas had no title to or property interest in the submerged lands off their respective coasts, outside of inland waters. The federal government was decreed to be possessed of paramount rights in and full dominion and power over the lands, minerals and other things underlying the offshore waters, to the extent of three marine miles off California, twenty-seven marine miles off Louisiana, and to the outer edge of the continental shelf off Texas.[10]

I

THE SUBMERGED LANDS ACT OF 1953

This law[11] was enacted to upset the foregoing decisions of the Supreme Court.[12] It vests in the coastal states ownership of "lands beneath navigable waters" within their respective historical boundaries, and the natural resources within such lands and waters, together with the right to lease said lands and natural resources.

8. All aspects of this 30-some-odd-year controversy have not yet been settled, although many of the major issues are now at rest. *See* United States v. Louisiana, 382 U.S. 288 (1965).

9. This litigation is sometimes referred to as the "tidelands oil controversy," even though "tidelands," in a technical sense, were not involved. Neither "tidelands" nor ownership of the bottoms of "inland waters" was in issue. The federal government conceded ownership by the coastal states of their "tidelands" and the bottoms of "inland waters."

10. United States v. California, 332 U.S. 19, decree at 332 U.S. 804 (1947); United States v. Louisiana, 339 U.S. 699, decree at 340 U.S. 899 (1950); and United States v. Texas, 339 U.S. 707, decree at 340 U.S. 900 (1950). The different geographical limits for each of the three States were based upon the fact that these states were then respectively claiming those areas. The decrees, of course, dealt with the matter from a purely domestic standpoint.

11. 43 U.S.C.A. §§ 1301-15 (1964).

12. The Constitution of the United States (art. IV, § 3) vests in Congress the power to dispose of property belonging to the United States. The power of Congress to grant submerged lands to the states as it did in the Submerged Lands Act was challenged, but the Act was sustained. Alabama v. Texas, 347 U.S. 272 (1954).

"Lands beneath navigable waters" are defined as all submerged land lying within three geographical miles seaward of the "coast line," and to the boundary line of each such state where such boundary, as it existed at the time the state became a member of the United States, or as approved by Congress prior to the Act, extends seaward beyond three geographical miles. In no event, however, shall a state's boundary extend from the coast line more than three marine miles (one league, or about 3.45 land miles) into the Atlantic or Pacific Ocean, or more than three leagues into the Gulf of Mexico. "Coast line" is defined as the composite line of ordinary low water along that portion of the coast which is in direct contact with the open sea, and the line marking the seaward limit of inland waters.[13]

The Submerged Lands Act did not define the term "inland waters." This omission, together with the uncertainty as to the "historical" offshore boundaries of some of the coastal states, has given rise to federal-state offshore boundary disputes. The question concerning the historical boundaries of the states bordering the Gulf of Mexico was set at rest in 1960 in the companion cases of *United States v. Louisiana*[14] and *United States v. Florida*.[15]

The Court's decree reads in part:

> As against the respective defendant States, the United States is entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico more than *three geographic miles* seaward from the coast lines of Louisiana, Mississippi and Alabama, and more than *three leagues* seaward from the coast lines of Texas and Florida, and extending seaward to the edge of the Continental Shelf. . . . As used in this decree, the term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters.[16]

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13. 43 U.S.C.A. §§ 1301, 1311 (1964).

14. 363 U.S. 1 (1959).

15. 363 U.S. 121 (1959).

16. 364 U.S. 502-03 (1960) (emphasis added). It will be observed that three of the states bordering on the Gulf of Mexico (Louisiana, Mississippi and Alabama) get rights only 3 marine *miles* into the Gulf, whereas the other two states (Texas and Florida) are recognized as owning rights out 3 *leagues* (9 marine miles) into the Gulf. This result flows from the Court's resolution of the "historical" boundaries of these states, that is, the extent to which the boundary of each of these states purported to extend into the Gulf of Mexico at the time of its admission into the Union, or as the Congress of the United States might have recognized the state's gulfward boundary prior to enactment of the Submerged Lands Act.

The foregoing litigation involving the historical boundaries of the five states bordering on the Gulf of Mexico did not determine "the seaward limit of inland waters," hence this phase of the federal-state dispute in the Gulf of Mexico remains unsettled. However, in 1965 the Supreme Court resolved some of the major unsettled issues in the long-pending dispute concerning California's offshore boundary.[17] The focal point of the second California case was the meaning to be ascribed to the term "inland waters," as used in the Submerged Lands Act. Giving substantial weight to the 1958 Geneva Convention of the Territorial Sea and the Contiguous Zone,[18] the Court held that the waters lying between California's mainland and a series of offshore islands were not inland waters.[19] With further reference to that Convention the Court observed that "it may now be said that there is a settled international rule defining inland waters,"[20] and went on to state that the twenty-four-mile closing line, together with the semicircle test (recognized by the Convention), represents the position of the United States.[21] Accordingly, the Court held that, of the various bays which California claimed were inland waters, only Monterey Bay met the twenty-four-mile closing line-semicircle test that the United States had adopted.

Thus, subject to such disputes as may still exist concerning the precise location of the outer limits of certain inland waters, the federal-state offshore ownership dispute may now be regarded as settled, with the coastal states owning the waterbottoms and underlying resources of their respective offshore areas to the extent of their historical boundaries. The oil and gas leasing laws and regula-

17. United States v. California, 381 U.S. 139 (1965), sometimes referred to as the second California case.

18. U.N. Doc. A/Conf. 13/L.52 (1958).

19. Some of the islands are more than 50 miles from shore. The state of California claimed that these waters were historically regarded as "inland" hence were within the state's historic seaward boundaries. California also claimed that it was free to use the Straight Base Line method and to use boundary lines around the offshore islands. The Court rejected both of these contentions. As to the Straight Base Line method sanctioned by the Geneva Convention on the Territorial Sea and the Contiguous Zone, the Court concluded that it was for the federal government, not individual states, to elect whether to adopt the Straight Base Line method or the 24-mile closing line plus "semicircle" test as a criterion of inland waters.

20. *Supra* note 17, at 163.

21. "The semicircle test requires that a bay must comprise at least as much water area within its closing line as would be contained in a semicircle with a diameter equal to the length of the closing line. Unquestionably the 24-mile closing line together with the semicircle test now represents the position of the United States." 381 U.S. 139, 164 (1965).

tions of the respective states apply in these offshore, state-owned submerged lands. These state-owned submerged areas might be called the "inner continental shelf," to distinguish them from the "outer continental shelf" which, as we shall soon see, appertains to the federal government and is subject to its exclusive jurisdiction and control.

II
PROCLAMATION NO. 2667[22]

This Proclamation, issued by President Truman, was the key which unlocked the doctrine of the continental shelf. It proclaims that:

> [T]he Government of the United States regards the natural resources of the subsoil and sea bed 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.[23]

The Proclamation, which specifically recognizes the character as high seas of the waters above the continental shelf, recites the following as its underlying justifications:

> (a) Because of the long range worldwide need for new resources of petroleum and other minerals, efforts to discover new supplies of these resources should be encouraged;
>
> (b) Such resources are believed to underlie many parts of the U.S. continental shelf, and technology had progressed to the stage, or soon would, where their development is or shortly would be practicable;
>
> (c) Recognized jurisdiction over such resources is required in the interest of their conservation and prudent utilization; and
>
> (d) Exercise of jurisdiction over the natural resources of such continental shelf by the contiguous nation is "reasonable and just"; and

22. 10 Fed. Reg. 12303 (1945); 13 Dept. of State Bull. 485 (1945). The Proclamation is also reproduced at S. Rep. No. 411, 83rd Cong., 1st Sess. 54-55 (1953).

23. *Id.* On February 26, 1942, the United Kingdom and Venezuela entered a treaty (1942 U.K. Treaty Series, No. 10) providing for division of the seabed of the Gulf of Paria between Venezuela and Trinidad. But President Truman's 1945 Proclamation was the first formal assertion by a nation of the principle that the natural resources of its continental shelf appertained to such nation and were subject to its jurisdiction and control.

For an excellent collection of data dealing with the emerging legal status of the continental shelf, see 4 M. Whiteman, Digest of International Law 740 (1965).

> self-protection compels the coastal nation to keep close watch over activities off its shores.[24]

The Proclamation did not attempt to define the term "continental shelf," but a contemporaneous White House press release indicated that the term referred to submerged lands contiguous to the coast which are covered by no more than 100 fathoms (600 feet) of water.[25]

On the same date as the issuance of his continental shelf proclamation, President Truman issued Executive Order 9633,[26] in which he ordered that "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 . . . be placed under the jurisdiction and control of the Secretary of the Interior for administrative purposes, pending the enactment of legislation in regard thereto."

On January 16, 1953, the president issued Executive Order 10426,[27] which revoked the foregoing Executive Order 9633, and ordered that:

> [T]he lands of the continental shelf of the United States and Alaska . . . extending to the furthermost limits of the paramount rights, full dominion and power of the United States over lands of

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24. Preceding the Proclamation, memoranda dealing with U.S. policy relating to the continental shelf were prepared in the Department of State. One of these appears at 4 M. Whiteman, Digest of International Law 755 and states:

> In the exercise of its rights of self-protection and as a matter of national defense, the United States could not view without serious concern any attempt by a foreign power or the nationals thereof to exploit the resources of the continental shelf off the coast of the United States, at points sufficiently near the coast to impair or endanger its security, unless such activities were undertaken with its approval.

25. Press Release dated September 28, 1945, Dept. of State Bull. 484; also reproduced in S. Rep. No. 411, *supra* note 22, at 53. The press release stated: "[The policy proclaimed by the President] will . . . make possible the orderly development of an underwater area 750,000 square miles in extent. Generally, submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 feet) of water is considered as the continental shelf."

26. S. Rep. No. 411, *supra* note 22, at 56.

27. *Id.* at 63. On Feb. 13, 1953, the Attorney General advised the Secretary of Defense that Executive Order 10426 did not create a naval petroleum reserve to be administered pursuant to laws relating to such reserves, but merely transferred to the Secretary of Navy the administrative authority over these areas which had previously been conferred upon the Secretary of Interior by Executive Order No. 9633 issued September 28, 1945. 4 M. Whiteman, Digest of International Law 759 (1965). Executive Order 10426 was, however, revoked by § 13 of the Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1342 (1958). This Act will be discussed later.

> the continental shelf are hereby set aside as a naval petroleum reserve and shall be administered by the Secretary of the Navy.

President Truman's 1945 Proclamation on the Continental Shelf was promptly followed by similar proclamations issued by other nations. Some were not nearly as restrained as that of President Truman in that they asserted sovereignty in the overlying waters off their coasts, as well as in the subsoil and seabed thereof; some even extended this assertion to waters and submarine areas as far as 200 miles from their coasts.[28] These various assertions prompted the General Assembly of the United Nations to refer the continental shelf question to the International Law Commission, whose work largely produced the Geneva Convention on the Continental Shelf in 1958. This Convention will be discussed later, while we proceed to examine developments in the United States.

III
ASSERTIONS OF JURISDICTION

A. The Submerged Lands Act of 1953

Congress first gave legislative sanction to Proclamation No. 2667 in the Submerged Lands Act, discussed above. Section 9 of that Act provides that the natural resources of the continental shelf seaward of the areas granted by the law to the states "appertain to the United States, and the jurisdiction and control of which by the United States is confirmed."[29] The senate committee referred to this provision as giving "the weight of statutory law to the jurisdiction asserted by the proclamation of the President of the United States in 1945."[30]

Until adoption of the Submerged Lands Act in 1953, there was no authorization for oil and gas leasing in the submerged lands of the United States continental shelf, outside of inland waters. This is so because the United States Supreme Court had held, as heretofore discussed, that the coastal states did not have such authority; and, moreover, President Truman's proclamation of 1945 merely asserted jurisdiction and control in the United States of the natural resources of the subsoil and seabed of the continental shelf, but did

28. For discussions dealing with such assertions, see 4 M. Whiteman, Digest of International Law 763-64 (1965).
29. 43 U.S.C.A. § 1302 (1958).
30. S. Rep. No. 133, 83rd Cong., 1st Sess. 2 (1953).

not provide for their utilization or leasing—a power vested in Congress, not the president.[31] The Submerged Lands Act of 1953 partly filled the gap in this respect. In August of 1953, the United States Congress closed the gap by enacting the law which will now be discussed.

B. The Outer Continental Shelf Lands Act of 1953[32]

The enactment of this law was foreshadowed by President Truman's Continental Shelf Proclamation of 1945. It deals only with the subsoil and seabed. It picks up exclusive jurisdiction and control for the federal government at the offshore boundaries of the coastal states, and carries that jurisdiction and control out to the farthest extent that the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control. It makes clear that the character as high seas of the overlying waters of that area and the right to navigation and fishing therein are not affected.[33]

The Act defines the term "outer continental shelf" as all submerged lands lying seaward and outside the lands granted to the states by and described in the Submerged Lands Act, "and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control."[34] Thus the outer geographic limit of the Act's applicability is not definitely specified. It appears to reach out to whatever extent the United States is legally capable of reaching.

The rights asserted are that "the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this [Act]."[35] The rights asserted relate to the entirety of the "subsoil and seabed," and not merely to the "natural resources" thereof, as

31. The Mineral Leasing Act of 1920 (30 U.S.C.A. §§ 181, *et seq.*) authorizes the Secretary of Interior to lease lands owned by the United States for development and production of oil, gas and certain other minerals. Attempts were made to acquire leases of offshore minerals under that Act, but it was held that offshore submerged lands are not covered by this law. Justheim v. McKay, 229 F.2d 29 (D.C. Cir. 1956), *cert. denied* 351 U.S. 933 (1956).

32. 43 U.S.C.A. §§1331-43 (1958), hereafter sometimes referred to as the Outer Shelf Act or the Act.

33. The Convention on the Continental Shelf also vests in the United States exclusive "sovereign rights" to explore and exploit its continental shelf for, *inter alia*, living organisms belonging to the sedentary species, for example, clams, oysters, and abalone.

34. 43 U.S.C.A. § 1331 (1958).

35. *Id.* § 1332 (1958).

did the Truman Proclamation.[36] By adopting the Outer Shelf Act, Congress made a policy choice that the oil, gas and other minerals in the outer continental shelf were to be developed by private enterprise, in accordance with the leasing procedures contained in the Act.

The Act empowers the Secretary of Interior to administer the leasing provisions and to prescribe rules and regulations in that regard,[37] but, as noted, it does not specify the exact offshore limit of the geographical area which is subject to the Secretary's leasing power. The only enlightenment from the Act itself is that the Secretary's leasing power is coextensive with the "outer continental shelf." That, in turn, is defined as the submerged area beyond state ownership and of which the "subsoil and seabed appertain to the United States and are subject to its jurisdiction and control."[38]

The legislative history of the Act indicates that there was an awareness of the geological concept of the continental shelf held by some experts.[39] According to that notion, the continental *shelf* ends where the continental *slope* leading to the true ocean bottom begins. This is generally regarded as being that place where the overlying water reaches a depth of approximately 600 feet. Congress, however, although made aware of the geological concept of the shelf, did not specifically adopt that concept when it defined the term "continental shelf" in the Act. Rather, it saw fit merely to specify that the Act's coverage extended to all submerged lands outside state ownership that "appertain to the United States and are subject to its jurisdiction and control."[40]

36. The Senate Report and the Conference Report make clear that this extension of coverage was deliberate. The Senate Report, after observing that the Proclamation applied only to "the natural resources of the subsoil and seabed" states: "The provisions of S.1901 as reported carry this limited control a necessary step forward and extend the jurisdiction and control of the United States to the seabed and subsoil themselves." S. Rep. No. 411, *supra* note 22, at 7; see also House Conference Report No. 1031, 83rd Cong., 1st Sess. 12 (1953).

37. 43 U.S.C.A. § 1334 (1958).

38. *Supra* note 34.

39. Relevant portions of the legislative history in this regard are S. Rep. No. 411, *supra* note 22, at 2, 4-5, 7, 211-244; H. R. No. 215, 83rd Cong., 1st Sess. 6-7. *See also Outer Continental Shelf*, 6 Stan. L. Rev. 26 (1953).

40. The press release which accompanied the Truman Proclamation indicated that the continental shelf is considered to extend out to the point where the water depth is 600 feet. However, Executive Order No. 10426 which set aside the submerged lands of the continental shelf as a naval petroleum reserve provides in § 1(a) ". . . the lands of the continental shelf . . . extending to the furthermost limits of the paramount rights, full dominion, and power of the United States over lands of the continental shelf are hereby set aside as a naval petroleum reserve . . . ." Both the press release and the executive order were before the Senate Committee and are reproduced in its Report on the Outer Shelf Act. S. Rep. No. 411, *supra* note 22, at 53, 63.

In seeking to ascertain the Act's outer reach, an analogy might be drawn from the following: When the Submerged Lands Act was enacted, Congress rejected a proposal that the term "inland waters" be defined with specificity.[41] The meaning of that term, however, was crucial to a determination of the rights acquired thereunder by the states, and it was of cardinal significance in the second California case.[42] Being of the view that Congress intended to leave to the courts the responsibility for particularizing the meaning of the term "inland waters," the United States Supreme Court did so in light of what it considered to be the "settled international rule defining inland waters,"[43] as embodied in the Convention on the Territorial Sea and the Contiguous Zone, even though that Convention was not in being when the Act was passed in 1953. It was ratified by the United States on March 24, 1961, and became effective on September 10, 1964, when the requisite number of nations ratified it. The same rationale would appear to be applicable to the open-ended seaward limit of the Outer Shelf Act, in light of the Convention on the Continental Shelf[44] which the United States has like-

41. At the hearings on the bill which became the Submerged Lands Act, the Attorney General of the United States suggested that, to avoid uncertainty, a line delineating the outer limits of "inland waters" be drawn on a map to be made part of the bill. Hearings, Sen. Comm. on Interior and Insular Affairs on S.J. 13, 83rd Cong., 1st Sess., 926 (1953). Congress rejected this suggestion.

42. United States v. California, 381 U.S. 139 (1965). The Court observed: "The focal point of this case is the interpretation to be placed on 'inland waters' as used in the Act." *Id.* at 149.

43. 381 U.S. 139, 163 (1965). The Court felt that it could best fulfill its responsibility by "giving content to the words which Congress employed by adopting the best and most workable definitions available. The Convention on the Territorial Sea and the Contiguous Zone . . . provides such definitions. We adopt them for purposes of the Submerged Lands Act." 381 U.S. 139, 165 (1965). The Court held that while the Convention *permits* nations to adopt the straight base line method to define inland waters, the permissive alternative to do so rests with the federal government, not the individual states, and California could not use the base line method to extend its boundary against the opposition of the United States. The Court held that, absent the adoption of the base line method by the federal government, California's claim would be resolved by the Convention-approved method which permits a 24-mile maximum closing line for bays, and a "semicircle" test for measuring the sufficiency of the water area enclosed to determine whether it qualifies as a bay. The Court said [381 U.S. 139, 164 (1965)]:

> The semicircle test requires that a bay must comprise at least as much water area within its closing line as would be contained in a semicircle with a diameter equal to the length of the closing line. Unquestionably the 24-mile closing line together with the semicircle test now represents the position of the United States. (Footnote omitted.)

Employing the foregoing test, the Court held that of the various "bays" along California's coast, only Monterey Bay was an inland water.

44. U.N. Doc. No. A/Conf. 13/L. 55 (1958). This Convention will be discussed later.

wise ratified and which is now in effect. To center on the analogy: If the Convention on the Territorial Sea and the Contiguous Zone was judicially acceptable to make certain the legislative uncertainty in the coverage to seaward of the Submerged Lands Act—*i.e.*, the outer limits of "inland waters"—is not the Convention on the Continental Shelf equally acceptable to add certainty to the seaward extent of the Outer Shelf Act?

Although the question of the geographical limit to seaward on the Secretary's leasing power under the Outer Shelf Act has not been judicially determined,[45] it has been dealt with at the administrative level. On May 5, 1961, the Associate Solicitor of the United States Department of the Interior issued a memorandum dealing with the applicability of the Act to certain areas off the California coast.[46] The question was whether the geographical coverage of the Act extended to phosphate deposits lying about 40 miles off the mainland of Southern California. The depth of the water in the area ranged between 258 feet and 4,020 feet with the

45. While not dealing specifically with the question being discussed, a case of general interest is Employers Mutual Casualty Co. v. Samuels, 407 S.W. 2d 839 (Tex. Civ. App., 1966) (writ of error "Refused. No reversible error" by Supreme Court of Texas). The deceased was insured under a policy which applied to death "sustained in the United States of America, its territories or possessions." The deceased met death when an airplane in which he was a passenger crashed into the waters of the Gulf of Mexico more than 3 leagues from the Texas coast but overlying the outer continental shelf. After reviewing the Submerged Lands Act, the Outer Continental Shelf Lands Act, the Convention on the Continental Shelf and the Supreme Court's decree in United States v. Louisiana, 361 U.S. 1 (1960), the court concluded that the waters overlying the continental shelf outside of the state's boundary were "high seas," and "as a matter of law," not part of the United States, or a territory or possession thereof, hence the death was not covered by the policy.

On rehearing [407 S.W. 2d 839, 845-847 (Tex. Civ. App., 1966)] an interesting additional point was urged to but rejected by the court. In 1945, by statute, Texas extended her marine boundary "to the outer edge of the Continental Shelf." This statute was urged as bringing the site of the crash within Texas and hence within the United States. Reference was made to United States v. Louisiana, *supra*, which limited Texas' boundary to 3 leagues into the Gulf, and wherein the Court said [339 U.S. 699, 705 (1950)]:

> We intimate no opinion on the power of a State to extend, define, or establish its external territorial limits or on the consequences of any such extension vis-a-vis persons other than the United States or those acting on behalf of or pursuant to its authority.

The Court, treating rather summarily with this rather forceful contention, held that Texas' attempt to so extend its boundary was ineffective at least for purposes of this case, because (1) it purports to extend the territorial boundaries of the United States, a power vested solely in the federal government, and (2) it is inconsistent with the Submerged Lands Act.

46. M-36615. The Opinion is reproduced in Gower, Fed. Serv.—Cont. Shelf; OCS 1961-25.

greater part being in more than 600 feet of water. Between the area in question and the California mainland there is a deep channel of about 3,600 feet.

The Associate Solicitor concluded that the leasing provisions of the Act were applicable to the designated area. His conclusion is based principally on the definition of the continental shelf appearing in the Convention on the Continental Shelf. He finds that the ratification of this Convention by the United States constitutes the first definition of the continental shelf officially adopted by the United States that sets any seaward limit. Although he concludes that the Convention does not amend the Outer Shelf Act, it is, he reasons, "an indication of the extent of the area of seabed and subsoil over which the United States asserts jurisdiction, control, and power of disposition. . . ."[47] And, he concludes that:

> [S]ince the United States has now asserted rights to the seabed and subsoil as far seaward as exploitation is possible, it is clear that the Outer Continental Shelf Lands Act is now applicable to all those areas. There is no question that the area . . . falls within the scope of the definition in the Convention and is, therefore, subject to leasing under the Act.[48]

The memorandum approaches the problem from a purely domestic standpoint. There was no need to consider the extent to which the United States, as against other nations, can validly assert jurisdiction and control over the minerals underlying the seabed. As I read the memorandum, its main thrust is that, to whatever extent the United States *lawfully* asserts rights to submarine minerals, the Outer Shelf Act applies to the leasing of such minerals as are thus lawfully brought under jurisdiction and control of the federal government.[49] The Associate Solicitor's conclusion, that the Sec-

47. *Id.*

48. *Id.*

49. While apparently recognizing that the memorandum reaches the correct conclusion in light of the specific facts involved, there has been some disagreement with its language if interpreted to mean that exploitability alone, without reference to other factors, is the sole criterion of the Act's outer reach. See Tubman, *The Legal Status of Minerals Located On or Beneath the Ocean Floor Beyond the Continental Shelf*, Marine Technology Society Second Annual Conference 379, 387 *et seq.* (1966). The proceedings of the Second Annual Conference of the Marine Technology Society will be referred to hereafter as M.T.S. To the extent, if any, the Opinion indicates the United States can lawfully assert sovereign rights under the Convention on the Continental Shelf without limit into the oceans and without regard to the area being "adjacent" to the United States coast (even assuming exploitability), it would seem to go beyond the Convention's authorization to coastal nations, as will be hereafter discussed.

retary's leasing authority is coextensive with the United States' *valid* assertion of jurisdiction over natural resources in the continental shelf seems to be completely compatible with the philosophy and intent of the Act.[50] It appears also to find support in the rationale of the second California case, as heretofore indicated.

The Solicitor of the Department of the Interior recently remarked with reference to the foregoing opinion of the Associate Solicitor that: "The Opinion was submitted to the Departments of State and Justice to determine whether they had objections and they registered none."[51] On that same occasion the Solicitor remarked:

> That Opinion [M-36615 of the Associate Solicitor] has provided the basis for subsequent Department actions on lands beyond the 200 meter isobath. The most noteworthy was a letter Opinion of February 1, 1967, from Deputy Solicitor Edward Weinberg to Brigadier General John A. B. Dillard, Corps of Engineers, United States Army. The letter involved a proposal by a private group to build a private island on Cortez Bank, a rise in the ocean floor off the California coast. The Bank is located about 50 miles from San Clemente Island and 100 miles from the mainland. It is a rise of only 2½ feet deep at its shallowest point, but it is separated from San Clemente Island and the mainland by ocean floor trenches as much as 4,000 to 5,000 feet deep. The Deputy Solicitor's letter made clear that the Department of the Interior believed that Cortez Bank was an area of United States jurisdiction under the Outer Continental Shelf Lands Act and the Convention. The area was covered by leasing maps re-

50. When the United States Senate Committee was considering whether to give its consent to the Convention, it had been informed that no implementing federal legislation would be required. Hearings, Conventions on the Law of the Sea, Sen. Foreign Relations Comm., 86th Cong., 2d Sess. 92, hereafter cited as Sen. Comm. Hearings.

United States Congressman Edwin E. Willis of Louisiana was designated chairman of a special House subcomm. to study the operation of the Submerged Lands and Outer Continental Shelf Lands Acts. In that capacity he was designated as a Congressional observer at the 1958 Geneva Convention on the Law of the Sea. Mr. William R. Foley, General Counsel, Committee on the Judiciary, United States House of Representatives, attended the conference with Congressman Willis. R. Slovenko, Oil and Gas Operations: Legal Considerations in the Tidelands and on Land 32-34, 39 (1963). In late 1958, Congressman Willis stated with reference to the Continental Shelf Convention: "This particular convention . . . follows the basic pattern of our own Outer Continental Shelf Lands Act." *Id.* at 35-36. In 1961, Mr. Foley wrote: "The Convention on the Continental Shelf was, in my opinion, an international codification of the Outer Continental Shelf Lands Act with minor changes." *Id.* at 42.

51. "Administration of Laws for the Exploitation of Offshore Minerals in the United States and Abroad," remarks by Frank J. Barry, Solicitor, Department of the Interior, at American Bar Association National Institute on Marine Resources, Long Beach, California, June 9, 1967, p. 12.

garded as an affirmative assertion of jurisdiction by the United States and by the emplacement of a Coast Guard buoy. Additionally, a published scientific report showed the Bank to be an extension of the land mass of Southern California.

The letter indicated that the Department would regard the attempt to create an island as a trespass and would request the Attorney General to seek an injunction.

The private group nonetheless towed a cement ship to the Bank and attempted to sink it there as the first phase of the filling operation. They missed the mark, and also capsized their towing tug. The Coast Guard came to the rescue of the crew.

More recently the Department has indicated an assertion of jurisdiction beyond the 200 meter line by publishing leasing maps for areas off the Southern California coast as far as 100 miles from the mainland, at depths as great as 6,000 feet. Additionally, oil and gas leases have been issued in an area 30 miles off the Oregon coast in water as deep as 1,500 feet.

You may want to know whether the Department has decided on a line beyond which it will not lease, or has decided to lease as far out as anyone might suggest. The answer on both counts is no. Each case will be considered individually, with consultation with the State and Justice Departments where appropriate.[52]

As noted, the Secretary of Interior has granted oil and gas leases pursuant to the Act covering areas off the West Coast of the United States, in water depths substantially in excess of 600 feet. Hence, it is clear that he, too, is convinced that the 600-foot water depth line is not a limitation upon the leasing authority conferred upon him by the Act. That view appears to find support at the congressional level.[53]

Moreover, the Secretary of Interior announced in June 1965 that he had authorized approval of plans of a company to conduct

52. *Id.* at 12-13.

53. In 1964 Congress passed an act [16 U.S.C.A. §§ 1081-1085 (1967)] prohibiting foreign vessels or any master or other person in charge of such vessels from engaging, *inter alia*, "in the taking of any Continental Shelf fishery resource which appertains to the United States" [16 U.S.C.A. § 1081 (1967)]. The Act defines the term "Continental Shelf" as it is defined in the Convention on the Continental Shelf [16 U.S.C.A. § 1085 (1967)]. The Committee Report states that there are "now two bases upon which the United States could claim the resources of the Continental Shelf. First, pursuant to the provisions of the 1953 Submerged Lands Act and Outer Continental Shelf Lands Act, and, second, provisions found in the International Convention on the Continental Shelf [soon expected to take effect]." H.R. No. 1356, 88th Cong., 2d Sess., U.S. Code Cong. & Adm. News 2186 (1964). This is an indication that in 1964 the Committee felt, and so advised the House of Representatives, that the Outer Continental Shelf Lands Act and the Convention on the Continental Shelf covered the same "ground."

a core drilling project on the continental *slope* in the Gulf of Mexico off the coasts of Texas, Louisiana, and Florida, in waters ranging in depth from 600 to 3,500 feet.[54] This "permit" or authorization is not to be confused with the grant of an oil and gas or other mineral lease. The Secretary made clear that "No rights to any mineral leases will be obtained from these core drilling programs."[55] And, on May 26, 1967, the U.S. Geological Survey announced approval of plans for another company to conduct a core drilling program on the continental slope beyond the continental shelf "off Florida and northward to points seaward of Cape Cod and Georges Bank." The release states that "No rights to any mineral leases will be obtained from these core drilling programs."[56] It also indicates that about 21 core holes will be drilled beneath the floor of the Atlantic Ocean, in water ranging in depths from 650 to 5,000 feet. The depth of penetration in each core test is limited to a maximum of 1,000 feet.

In my view, the United States, for domestic as well as international purposes, is fully competent to assert jurisdiction and control of the minerals within the submarine areas *adjacent* to its coasts and seaward of individual state-owned water bottoms. The extent to which such assertion may validly be made will be discussed later. The mineral resources encompassed by any such assertion would appear clearly to be leasable under the Outer Shelf Act. The international law question that presents itself is, how far to seaward can the United States, or any coastal nation, validly assert rights in the submarine minerals as against the other nations of the world? In seeking an answer to this intriguing question, we must consider one of four conventions which emerged from the 1958 Geneva Conference on the Law of the Sea.

IV

THE CONVENTION ON THE CONTINENTAL SHELF[57]

This Convention was approved by the United States Senate on May 26, 1960,[58] and was ratified by the President on March 24,

54. U.S. Geological Survey News Release of June 1, 1965.

55. *Id.* Section 11 of the Outer Shelf Act authorizes the Secretary to issue authorizations to conduct "geological and geophysical explorations" in the outer shelf. 43 U.S.C.A. § 1340. These "permits" are, of course, not leases nor do they authorize the permittee to produce minerals.

56. U.S. Geological Survey News Release, May 26, 1967.

57. U.N. Doc. No. A/Conf. 13/L. 55 (1958).

58. 106 Cong. Rec. 11196 (1960).

1961.[59] On June 10, 1964, when the requisite number of twenty-two nations had ratified it, the Convention came into force.[60] Article 1 defines the term "continental shelf" as follows:

> For the purpose of these articles, 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.

Article 2 provides that: (1) The coastal nation exercises over the continental shelf "sovereign rights for the purpose of exploring it and exploiting its natural resources;" (2) The rights of the coastal nation are exclusive in the sense that if it does not explore the continental shelf or exploit its natural resources, no one may do so or make a claim to the shelf without its consent; (3) The rights of the coastal nation do not depend on occupation "effective or notional" or on any express proclamation; and (4) "Natural resources" consist of the minerals and other non-living resources of the seabed and subsoil, together with "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."[61]

Article 3 provides that the rights of the coastal nation over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

A number of the articles of the Convention deal with the nature and conditions of the exercise of the rights conferred upon coastal nations. Thus, Article 5(1) provides that in the course of exploration and exploitation, a coastal nation is not precluded from interfering with navigation, fishing or the conservation of the living resources of the sea if the work does not result in "unjustifiable interference." And, Articles 5 (3) and (6) provide that the coastal na-

59. 44 State Dept. Bull. 609 (1961).

60. As of June 28, 1966, thirty-five nations had become parties to this Convention. Dean, *Geneva Convention on the Continental Shelf*, 41 Tul. L. Rev. 419 (1967).

61. In acting on this Convention, the United States Senate understood that "under this definition, for example, clams, oysters, and abalone are included as 'natural resources,' whereas shrimp, lobsters, and finny fish are not." 106 Cong. Rec. 11191 (1960). Art. 5(1) U.N. Doc. No. A/Conf. 13/L. 55 (1958).

tion may maintain necessary installations and devices on the continental shelf and establish safety zones around them for a distance of 500 meters, which safety zones must be respected by ships. No such installations or devices may be established, however, where interference may be caused in the use of recognized sea lanes essential to international navigation. Article 7 provides that nothing in the Convention shall prejudice the right of the coastal nation "to exploit the subsoil by means of tunneling irrespective of the depth of water above the subsoil." Article 6 provides criteria for fixing boundaries where the same continental shelf is adjacent to nations which are opposite or adjacent to each other.[62]

At the 1958 Geneva Conference, and within the International Law Commission (whose draft article defining the "continental shelf" was adopted in substance by the Convention in Article 1), there was considerable debate whether to adopt a definition of the shelf based on water depth alone or one based on capability of exploitation alone. Both criteria were ultimately included, as depth alone seemed too rigid, and exploitability alone too vague.[63] The double criterion of water depth or exploitability incurred opposition from some of the delegates to the Convention because of its uncertainty. The exploitability criterion has given rise to considerable difference of opinion as to whether, assuming technical capability to exploit underwater areas, there is any limit (except perhaps some median line between nations) to a coastal nation's capability to assert sovereign rights under the definition.[64]

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62. For discussions of the applicability of these boundary criteria, see Shawcross, *The Law of the Continental Shelf*, Twentieth International Geographical Congress, London (1964), which includes a sketch indicating how the North Sea would be apportioned under Art. 6; Young, *Offshore Claims and Problems in the North Sea*, 59 A.J.I.L. 505 (1965); and Dean, *Geneva Convention on the Continental Shelf*, 41 Tul. L. Rev. 427-431 (1967); *Current Legal Developments—North Sea*, 15 Int'l and Comp. L.Q., 897 (1966) which also lists the treaties relating to delimitation of the North Sea; and Morris, *Oil and Gas Legal Problems on the North Sea Continental Shelf*, presented at American Bar Association meeting August 8, 1967.

63. Whiteman, *Conference on the Law of the Sea*, Convention on the Continental Shelf, 52 A.J.I.L. 629 (Oct. 1958).

64. See, e.g., *Law, Oil, and the Sea Today*, by Jean Devaux-Charbonnel, World Petroleum, May 1965, 44; *Id.* (Oct. 1965), 52; Grunawalt, *The Acquisition of the Resources of the Bottom of the Sea—a New Frontier of International Law*, 34 Military Law Review 101-133 (1966); International Law Association (Helsinki Conf. 1966), Netherlands Branch Comm., "Report of the Deep Sea Mining Committee on Exploration and Exploitation on the Ocean Bed and in its Subsoil"; McDougal & Burke, *Crisis in the Law of the Sea*, 67 Yale L. J. 539, 541 n. 11 (1958); also collection of papers in M.T.S. Second Annual Report; also Dean, *Geneva Convention on the Continental Shelf*, 41 Tul. L. Rev. (1967).

The Geneva Conference designated the Forth Committee to consider the International Law Commission's draft articles on the continental shelf. The record of the proceedings of the Fourth Committee leaves no doubt that many of the delegates had concern regarding the uncertainty of the definition of the shelf because of the double criterion of water depth or exploitability.[65] While the matter is not free from doubt, I am left with the impression that most delegates felt that under the definition of the shelf as ultimately adopted, "adjacency" to the shore of the coastal nation was an overriding limitation on the rights of coastal nations, despite the exploitability test.[66]

It is clear that the exploitability criterion makes ambulatory the limit to seaward of the sovereign rights recognized by the Convention.[67] But it also seems—although not quite as clearly—that there is a geographical limit, despite technical capability (and the median line of Article 6) that circumscribes the extent to which a coastal nation can validly assert "exclusive sovereign rights" to explore the seabed and to exploit its natural resources. This circumscribing factor lies in the definition's use of the words "submarine areas *adjacent* to the coast." I take these words as a qualification of what follows in the definition. Otherwise, they are meaningless. Of course, the ex-

65. Fourth Comm. (Continental Shelf), Official Records, Vol. VI, U.N. A/Conf. 13/42.

66. *Id.* at 2-6, 8-12, 21, 24, 27, 33-35, 40, 42, 53 and 55. See also, Report of the International Law Commission (8th Sess.), U.N. Gen. Assembly, 11th Sess., Official Records, Supp. No. 9 (A/3159) 43 (1956). This Report is hereafter cited as "ILC Rep."

67. This assumes, as I do, that the exploitability test contemplates future exploitability and is not limited to that capability as it existed at the date of the Convention. The debates in the Fourth Committee leave little doubt with me that the future was intended. However, inquiries concerning water depths in which exploitation was feasible at the time of the conference could possibly lead to a contention (which I believe unfounded) that that date, or the date the Convention went into force, controls. In this connection, when the Convention was before the United States Senate for its advice and consent, there was prepared by the Department of State, under date of March 2, 1960, "Answers to Questions of Senate Foreign Relations Committee Concerning the Law of the Sea Conventions (Executives J to N, Inclusive)." (Conventions on the Law of the Sea, Hearings before the Comm. on Foreign Relations, U.S. Sen., 86th Cong., 2d Sess., Jan. 20, 1960). Question 19 (*Id.* at 88) quoted the shelf definition from Article 1, and asked: "What are the practical or theoretical limitations on the exploitation of the natural resources of the 'Continental Shelf' at great depth?" The answer (*Id.*) is: "Answer. With respect to mineral resources, for practical purposes, the present limitation of operations normally is around 200 feet. Some holes have been drilled in exploring for petroleum in water about 1,500 feet deep. The depth at which operations can be carried on is continually increasing because of developing techniques. Serious discussion is now going on relative to the possibility of drilling, for research purposes, even from oceanic depths. It probably will be some time before oil and gas operations are practical on a substantial scale at depths even as great as 200 meters."

pression "submarine areas adjacent to the coast"[68] is, itself, imprecise. And to that extent the definition in its entirety is vague. That, however, does not mean that it confers limitless rights. What constitutes a "submarine area adjacent to the coast" must be resolved judicially or by agreement on an ad hoc basis with due regard to the circumstances. But, at any rate, the term surely imports "adjacency" though the exact extent thereof may be uncertain. If that is not so, what, if any, rights would be left to the landlocked countries to participate to the extent of their technological capability in the mineral wealth which might underlie the ocean depths far removed from all coasts?

Further indication exists that the Convention's definition of the shelf contemplated some limitation upon the coastal nations, in addition to the exploitability test. The International Law Commission, whose work was largely adopted at the 1958 Geneva Conference, submitted draft articles on the high seas as well as on the continental shelf. In its commentary dealing with freedom of the high seas, the ILC states: "Freedom of the high seas comprises, *inter alia*: (1) Freedom of navigation; (2) Freedom of fishing; (3) Freedom to lay submarine cables and pipelines; (4) Freedom to fly over the high seas."[69] The commentary then proceeds to say that its list of freedoms of the high seas "is not restrictive." It mentions the freedom to undertake scientific research as a freedom of the high seas, and then recites:

> The Commission has not made specific mention of the freedom to explore or exploit the subsoil of the high seas. It considered that apart from the case of the exploitation or exploration of the soil or subsoil of a continental shelf—a case dealt with separately in section III below—such exploitation had not yet assumed sufficient practical importance to justify special regulation.[70]

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68. The term "adjacent" is a relative one which does not have an arbitrary or definite meaning in law. But the authorities in the United States are uniform that, even in its broadest sense, the term connotes "nearness," even though in its strictest sense, it is not as confining as such words as "adjoining," "abutting," or "contiguous." It may also mean "appurtenant." Of course, the context in which used and the object sought to be accomplished are quite meaningful in determining the scope of the term. See Vol. 2, Words and Phrases.

Note that adjacency must be "to the *coast*." This seems to preclude step-by-step extension based upon the premise that the outer edge of the shelf, as it might from time to time be established by exploitability, thereupon becomes the base for measuring adjacency for the next round of out-steps.

69. ILC Rep. at 7, 24.

70. *Id.* at 24.

V

THE STATUS OF MINERALS ON AND UNDER THE BEDS OF THE OCEANS

If there be an outer limit to the continental shelf as the Convention defines it, and as I believe there is, what are the rights, if any, to drill for oil and gas in ocean depths outside all continental and island shelves and terraces? Can anyone do so, or can no one? Are these sub-oceanic lands and the minerals therein *res nullius*, belonging to no one and thus capable of being appropriated by the first occupier, or are they *res communis*, common property of all and incapable of exclusive acquisition?

To the extent the shelf convention is applicable, it rejects both these doctrines. To its applicable extent, it vests in the coastal nation the exclusive sovereign right to explore and exploit the natural resources. However, the concept inherent in that Convention is that exploitation for natural resources under *waters* deemed and recognized to be high seas, is not entirely inimical to the doctrine of freedom of the seas. The non-territorial waters above the continental shelves are high seas, yet the convention recognizes exploitation rights in the subsoil.

The International Law Commission, as heretofore noted, recognized exploitation of the sub-soil of the high seas (outside continental shelves) as one of the freedoms of the high seas,[71] but felt that such exploitation had not yet assumed sufficient practical importance to justify special regulation.[72] The only limitation the ILC would appear to attach to this freedom is that those exercising it "refrain from any acts which might adversely affect the use of the high seas by nationals of other nations."[73] Article 2 of the Convention on the High Seas specifies the four *main* freedoms of the high seas (navigation, fishing, laying submarine cables and pipelines, and overflight), followed by the recitation that these freedoms, "and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas."

It is permissible for nationals of any nation to undertake exploitation of the oil and gas under the bottom of the high seas, and outside continental and insular shelves. The question is, what results

71. *Supra* note 69.
72. ILC Rep. at 24.
73. *Id.*

flow when one succeeds in that effort? What right or interest does he acquire? Is it "exclusive" in the sense that he alone can develop and produce the reserve of oil, gas or other mineral which he discovers, or is his interest "inclusive," *i.e.*, a common interest to which all comers have equal access?

At some future date, the oilmen of the world will possess the technical capability to drill and produce wells, no matter the depth of the water overlying the drill site, unless the incentive to undertake the nigh prohibitive research and development cost is frustrated by fear that legal and political considerations will so entangle them that the devices cannot be put to use, or if they are successfully put to use, that their owners can have no reasonable assurance of protection to develop and produce what they find, together with reasonable tenure to do so. Assuming a private interest wishes to undertake, on its own, such drilling under the bottom of the ocean depths, we can, in the present state of the matter, but note the risks and surmise some of the possible consequences. At present, anyone undertaking on his own to drill in the distant offshore areas must first satisfy himself that he is not on some nation's continental shelf. If he drills and establishes the capability to exploit the underwater minerals at the drill-site, some nation might claim that he has established the extent of its continental shelf, and thus vested in it the exclusive right to do what he did, and proving that he was without right to do it. The consequences, although not presently formulated, could be devastating.

Assuming the explorer can be reasonably satisfied that his drill-site is not on any nation's continental shelf (and that his drilling will not establish it to be so) and assuming that he does discover an oil or gas reservoir, what rights does he thereby establish for himself? Here the situation becomes even more uncertain. We have seen that the International Law Commission deemed the freedom to explore and exploit the subsoil of the high seas to have not yet assumed sufficient practical importance to justify special regulations. Therefore, there are no regulations governing his rights or duties nor, of course, those governing the rights or assertions of others who might wish to try their hand, or drill-bit, snug up against his. In the present state of affairs, the very freedom invoked by the first explorer to try his hand might be urged against him by those who would like to become his immediate neighbor. The discoverer will urge that by his discovery he has acquired the exclusive right to exploit the

reserve he discovered. The latecomers will urge the non-exclusive nature of the discoverer's interest and assert equal rights to exploit the reserve.

It has been said that in dealing with the minerals underlying the deep sea floor and seeking reasonable principles for application, we are dealing with "fixed and firm real estate . . . [and to] make real estate valuable it must have ascertainable boundaries and be subject to clear and exclusive rights of occupancy."[74] That is a sound initial approach which must be recognized and accommodated in any endeavor concerning mineral exploitation of the ocean's depths. The Committee on Natural Resources and Development of the White House Conference on International Cooperation has recognized this concept. In its 1965 report the Committee points out that the bottom of the deep sea floor is covered by small nodules that contain various minerals which it may be possible to mine within the next few years. These resources, the Committee states, "are clearly outside national jurisdictions,"[75] and the possibility of their exploitation raises the two problems of the orderly exploitation of the nodules, and the distribution or sharing of the mineral rights. The report then continues: "Producers must have exclusive mining rights to areas that are sufficiently large to permit them to operate economically and without fear of congestion or interference."[76]

Controversy has developed as to whether jurisdiction and control of the ocean floor and its underlying minerals should be vested exclusively in the United Nations. A resolution supporting interna-

74. Ely, *The Laws Governing Exploitation of the Minerals Beneath the Sea*, presented to the N.Y. Section of American Institute of Mining, Metallurgical and Petroleum Engineers, Jan. 1966, at 13. Mr. Ely mentions four concepts which have been suggested, viz.: (1) the proposal by the Committee on Natural Resources and Development to the White House Conference on International Cooperation [an agency of the United Nations be established for international marine resources]; (2) assume for the time being that all practicable undersea development is sufficiently close to some coastal nation that the Shelf Convention applies; (3) treat the seabed beneath the high seas as open to appropriation and occupancy by all, free of licensing authority of any nation or international organization and let the matter develop on a piece by piece basis; and (4) let the structure conducting the operation fly the flag of some nation with which it has a "genuine link" (the test of recognition of the flag of a vessel under the High Seas Convention), and the explorer thereby appropriates a segment of the seabed and the jurisdiction, and perhaps sovereignty, of his flag attaches to the discovery. *Id.*, 10-12.

75. The White House Conference on International Cooperation, National Citizens Commission, Report of Committee on Natural Resources Conservation and Development 5 (1965).

76. *Id.*

tional control has been presented to the United Nations by Malta,[77] but it has been met by firm opposition. Resolutions have been introduced in Congress to the effect that, in view of studies pending pursuant to existing United States law relating to the resources of the bed of the ocean beyond the continental shelf and our national goals for the development of such resources, "any action to vest control of deep ocean resources in an international body would be premature and ill advised; and the President is requested to instruct the United States representatives at the United Nations to oppose any action at this time to vest control of the resources of the deep sea beyond the Continental Shelf of the United States."[78]

Until the time when a regime applicable to the natural resources on and under the ocean beds comes into existence, suppose a private interest wishes to drill into the subsoil of the deep sea floor, beyond all continental and island shelves. How might it minimize the risks heretofore indicated; how might the country of its nationality support it? The structures involved in such operations might fly the flag of some nation. The explorer would thereby appropriate a segment of the seabed, and the jurisdiction of the flag nation attach to the discovery.

Any private interest undertaking such operations on its own, by use of structures which float, whether at or en route to the drill-site, should certainly acquire a "nationality," by carrying the flag of its country and by complying with the country's requirements in that regard. If the structure is actually a "vessel," some countries might require it to do so before leaving port. This would afford the protection of the flag nation and might possibly give added weight to its claim to discovery rights. Moreover, the consequences of the structure being "stateless" might be severe.[79] But assuming compliance

77. The Malta Resolution and Memorandum appear in 113 Cong. Rec. H11945 (daily ed. Sept. 14, 1967).

78. H. J. Res. 830, 90th Cong., 1st Sess. For statements in support of this and similar resolutions see 113 Cong. Rec. A4315 (daily ed. Aug. 24, 1967); *Id.* H11823 Sept. 13, 1967. *Id.* H11945 Sept. 14, 1967.

79. When the Conventions on the Law of the Sea were before the Senate for its advice and consent in 1960, one of the questions asked by the Senate Foreign Relations Committee of the Department of State was, what is the significance of a nation withholding recognition of the national character (flag) of a ship? What are the practical consequences? The answer was: "The significance . . . is that the ship could as a general rule be regarded as stateless and thus the stipulation in Article 6 of the Convention on the High Seas that a ship is subject to the exclusive jurisdiction of the flag state would not need to be heeded. The practical significance would be that any state so desiring could assert the right to exercise jurisdiction over such a vessel as if it were its own even while the vessel was on the high seas." See Hearings, Conventions on the Law of the Sea, Senate Foreign Relations Comm., 86th Cong., 2d Sess. at 84.

with its nation's requirements, if any, so that its drilling structure can legally clear port for its destined use, there is no legal barrier to its doing so. The principal risks appear to be: (1) that the well might later be determined to have been drilled in some nation's continental or island shelf, in which event the operator proves itself out of the right to do what it did, and (2) if successful, the operator may have no assurance of the exclusive right to any area except that occupied by its well.

On one proposition there is probably substantial agreement: The pioneer who undertakes the tremendous risk of drilling under the great depths of the ocean should be entitled, within reasonable area and time limits, to the exclusive right to develop, produce, and own the mineral reserve which he has discovered. Otherwise, incentive is frustrated. Within the foregoing concept, reasonable but subordinate rights could exist in others. Until such time, if ever, that international accord is reached as to how such operations are to be dealt with, some nation—perhaps that of the discoverer's nationality—must assume the lead in implementing the rights of the discoverer. With that assurance, and with reasonable rules which we can hope will be developed over time, the energy reserves which may underlie the ocean depths can be made available to mankind.

VI

LAWS APPLICABLE TO OIL AND GAS OPERATIONS ON THE OUTER CONTINENTAL SHELF OF THE UNITED STATES[80]

The Outer Shelf Act extends the "Constitution and laws and civil and political jurisdiction of the United States" to "the subsoil and seabed 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. . . ."[81] The Act adopts as "the law of the United States," for application to the subsoil, artificial islands and fixed structures in the outer shelf, "the civil and criminal laws of each adjacent State as

80. This discussion will be limited to occurrences arising out of or in connection with oil and gas operations, or closely related thereto, and things which happen to, on or related to the fixed structures, artificial islands, pipelines, etc., used in connection with such operations. Admiralty matters, such as ship collisions occurring on the waters overlying the shelf, will not be dealt with.

81. 43 U.S.C.A. § 1333 (1958).

of August 7, 1953," but only to the extent such state laws "are applicable" and "not inconsistent with the Act or other Federal laws and regulations . . . now in force or hereafter adopted."[82]

Respecting the "body" of law to be applied in the outer Shelf, it has been specifically held that federal maritime law is applicable.[83] Another case arising from occurrences in the outer continental shelf is *Guess v. Read,*[84] a libel under the Death on the High Seas Act. The deceased was an employee of the Humble Oil and Refining Company, working on a drilling barge located in the outer shelf. He was aboard a helicopter that crashed into the Gulf (in the outer shelf) shortly after its takeoff from the landing platform on the drilling barge. His widow joined Humble's insurance carrier under the Louisiana Direct Action Statute[85] permitting direct suit against insurers, claiming that the law was available here because the Outer Shelf Act made Louisiana law applicable. The precise question did not have to be decided because the court held that the Act did not apply to occurrences in the waters overlying the shelf, but only to its subsoil and seabed and the artificial islands and fixed structures erected thereon. There is, however, some dicta in the case to the effect that the Louisiana Direct Action Statute is limited to accidents *occurring within the State of Louisiana,* and hence would not apply to occurrences on structures located in the outer shelf.[86] Notwithstanding such dicta, the court leaves the question open by saying:

> If the helicopter in which the appellant's husband was killed had cracked up on the drilling barge before completing its take-off, it could be urged that the accident occurred within the area over which the United States had declared its jurisdiction. Such a case is not before us and is not decided by us. In the case before us the plane had left the barge and was over the high seas, and hence there is no adoption by the federal act of the Louisiana law applicable to the situation here present.[87]

82. *Id.* State taxation laws are expressly made inapplicable.

83. Pure Oil Co. v. Snipes, see text. Petition for certiorari does not appear to have been filed.

84. 290 F.2d 622 (5th Cir. 1961).

85. 15A L.S.A.-R.S. 22:655 (1958).

86. The Court said: "The Louisiana statute contains venue requirements that an action be brought in the parish where the accident . . . occurred. . . . Thus is shown, we think, an intent on the part of the Louisiana Legislature that the accident or injury upon which a direct action may be maintained be one occurring within a parish of the State." 290 F.2d 622, 625 (5th Cir. 1961).

87. *Id.*

In *Touchet v. Travelers Indemnity Company*,[88] the court, by way of dictum, said:

> Having thus disposed of plaintiff's action, discussion of his suit against Travelers under the Louisiana Direct Action Statute . . . is unnecessary. We are constrained to say, however, that this statute cannot be given extra-territorial effect. See Guess v. Read, 290 F. 2d 622 (5 Cir. 1961).[89]

The foregoing dictum, as well as that in the *Guess* case, I believe, is an incorrect interpretation of Section 4(a)(2)[90] of the Outer Shelf Act. Otherwise, it renders meaningless the "adoption of State law" provision. In *Guess*, the court appears to look to the intent of the legislature of the adjacent state to determine if such state's laws were adopted by Congress. This is focusing on the wrong end.

State legislatures, with but rare exception, deal with and intend their laws to apply only to occurrences within the state. In some instances they so provide; in others, that result is clearly implicit. It would be a strange state law, of extremely doubtful validity, that provided that it was intended to reach out and apply to occurrences in other states, or to other areas over which the federal government had exclusive jurisdiction.[91] But it is an entirely different matter when one sovereign expressly adopts as its own, and to be administered by its courts, the body of law existing on a specific date in another sovereign. That is what Congress did in the Outer Shelf Act.

What an individual coastal state may have intended as to the territorial extent of its laws or the place of occurrence of the event giving rise to invocation of the law, is irrelevant as to the question of whether Congress adopted that law as federal law. The only relevant intent is that of Congress. And that intent, in the present context, is clearly evident from the words used.

Suppose that, instead of adopting adjacent state law as a body, Congress had listed all the laws which were in effect on August 7, 1953, in all the coastal states, and then provided that those laws

88. 221 F. Supp. 376 (1963).
89. *Id.* at 379.
90. 43 U.S.C.A. § 1333(a)(2) (1958).
91. We, of course, are not here concerned with the doctrine of extraterritoriality as between nations where, usually based upon treaty, a nation's laws are extended to its nationals while within the territory of another nation.

were adopted except as inconsistent with federal law. Suppose further (in reference to the *Guess* case) that the list had included the Louisiana Direct Action Statute. Certainly, in that event, it could not be plausibly urged that the statute could not be invoked in a case arising out of an occurrence on a fixed platform in the outer shelf. Yet, in reality, that is what Congress had done by electing to adopt the laws as a body and not individually. The only difference is in approach to the desired end, not in the end accomplished.[92]

92. There is an interesting line of cases dealing with whether a workman on offshore structures (both the fixed platform and the mobile, submersible types) is a "seaman" or "member of a crew" of a vessel. The leading case appears to be Gianfala v. Texas Company, 350 U.S. 879 (1955), in which the Court held the question is one of fact for the jury. Other cases of interest are Offshore Co. v. Robison, 266 F.2d 769 (5 Cir. 1959); Noble Drilling Corp. v. Saunier, 335 F.2d 62 (1964); Texas v. Savoie, 240 F.2d 674 (5 Cir. 1957); and Sirmons v. Baxter Drilling, Inc., 239 F. Supp. 348 (D.C.W.D. La. 1965). Excellent articles on this and related topics on the outer shelf appear in Slovenko, Oil and Gas Operations: Legal Considerations in the Tidelands and on Land.