Number 9 Original

In the Supreme Court of the United States

OCTOBER TERM 1968

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF LOUISIANA, ET AL.

Brief of the State of Louisiana in Support of its Motion for Entry of Supplemental Decree No. 2; and in Support of its Response and Opposition to the Counter-Motion by the United States; and in Support of Louisiana's Alternative Motion for Entry of Supplemental Decree Number 2

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Part II
Alternative Line

CONTENTS

CITATIONS

CASES:

Page

Page

Page

Page

Page

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PART II

Turning from our arguments principally relating to the Inland Water Line, we next discuss contentions which principally relate to our alternative positions. In setting forth the following arguments, we wish to emphasize their alternative character, and the fact that they should in no way be construed as departing from our principal position, but rather discuss the law applicable only in the event of an adverse decision on the Inland Water Line.

PRELIMINARY REMARKS

I. The Basic Framework of Decision.

In *United States v. California*, 381 U.S. 139, this Court held that the coast line of California for

purposes of the Submerged Lands Act should be determined primarily by the rules of the Convention on the Territorial Sea and the Contiguous Zone, a holding derived from the Court's basic view that the coast line should be controlled by the principles then being followed in international law and by the United States in the conduct of its foreign relations. *See* 381 U.S. at 161-66, and note 25 on p. 162.

Although the Court relied primarily on the Convention, it did not hold that its provisions were exclusive. So, when the United States urged otherwise in its motion for a supplemental decree in the *California* case, the Court refused to adopt language proposed by the United States establishing the exclusiveness of the Convention and accepted instead language proposed by California, thereby indicating that the rules of the Convention were not the only rules that could be followed in determining the coast line under the Submerged Lands Act. *See* Decree Proposed by the United States and Memorandum in Support of Proposed Decree, p. 3 (para. 4), pp. 8-10, pp. 16-17; Decree Proposed by the State of California and Memorandum in Support of Proposed Decree, p. 3 (para. 4), pp. 9-12, p. 16, p. 22; Supplemental Decree, *United States v. California*, 382 U.S. 448, (para. 4).

We make this point because of our view that the doctrine of historic waters and other valid concepts are applicable to portions of the Louisiana coast, as more fully explained hereafter, although waters we deem inland could be so considered on the basis of

an "elaboration and modification" of the Convention.[1] Aside from this essential point, the differences between the parties as to the determination of the coast line (apart from the Inland Water Line) rest in the main on the interpretation to be placed on the rules of the Convention on the Territorial Sea and the Contiguous Zone and the application of these rules to the particular geographic situations on the Louisiana coast.[2]

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[1]*See e.g., United States v. California*, 382 U.S. 448, Decree Proposed by the United States and Memorandum in Support of Proposed Decree, p. 9:

> We may assume that the word "bay" in the expression "historic bays" has a somewhat broader meaning than its usual one. Particularly, it is not limited to the restrictive definitions of paragraphs 2 & 3 of Article 7 of the Convention; paragraph 6 of that Article specifically so provides. Thus the Convention may sanction recognition as "historic bays" of areas that might not be considered bays in a usual sense.

[2]We invite the Court's attention to the fact that it has virtually determined the status of a portion of the Louisiana coastal area. In *United States v. California*, 381 U.S. 139, 171, the Court, speaking through Justice Harlan, stated that the Chandeleur and Breton Sounds are inland waters of the United States:

> By way of analogy California directs our attention to the Breton and Chandeleur Sounds off Louisiana which the United States claims as inland waters, *United States v. Louisiana*, 363 U.S. 1, 66-67, n. 108. Each of these analogies only serves to point up the validity of the United States' argument that the Santa Barbara Channel should not be treated as a bay. . . . Neither is used as a route of passage between two areas of open sea. In fact both are so shallow as to not be readily navigable.

In the footnote to these remarks, Justice Harlan noted,

> The depth in general ranges between 6 and 12 feet

In its discussion of the use of the 54 maps in applying the relevant rules, the United States asserts (Motion, 40) that only the facts portrayed on the maps "are relevant to the delimitation of the coast line, unless Louisiana claims that there are 'historic bays' within the meaning of the Convention," and that "the Convention does not permit departure from the principles therein stated on the basis of other data." Louisiana submits that this position reflects a misunderstanding of the function of this Court in determining the coast line and is inconsistent with some of the lines drawn by the United States.[3]

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according to Coast and Geodetic Survey Chart No. 1270, but there is no passage as much as 12 feet deep connecting the ends of the sounds. The sounds are "navigable waters" in the legal sense even in the parts too shallow for navigation. . . .

The relevant officially recognized coastal charts (U.S.C. & G.S. nautical charts, 1200 series) will show that nearly the entire Louisiana coastal area is characterized by waters as shallow or even shallower than the waters of Chandeleur and Breton Sounds. It should also be noted that the danger curve on the 1200 series nautical charts is located at the five fathom contour line. 2 *Shalowitz, Shore and Sea Boundaries* 329 (1964).

[3]We deal here with the misconception of the Court's function by the United States in its statements concerning the use of the 54 maps. We deal later, pp. 86-89, *infra,* with the specific problem of the use of the maps to delineate Louisiana's coast line, but it should be pointed out here for the information of the Court that neither the United States nor the State of Louisiana authorized the committees which engaged in the making of the 54 maps to bind either government. The survey and the resulting maps were not an official undertaking of either government; and they cannot now be said to be binding upon them. Furthermore, Louisiana Act 9 of 1962

In the present case, this Court is called upon by the United States to lay down a particular line that not only will be the coast line of Louisiana for purposes of the Submerged Lands Act but also will be the baseline claimed by the United States vis à vis foreign nations. In light of this latter function, we believe it vital that the Court, in applying the relevant rules, consider those facts of history, geography, and economy that are inherently involved in the establishment of any jurisdictional baselines. *See Fisheries Case (United Kingdom v. Norway)*, [1951] I.C.J. 116, 132-33, and *see United States v. California*, 381 U.S. at 171. Naturally, we do not seek a departure from the clear rules of the Convention, as does the United States, for example, when it contends (Motion, 69) that the size of an island has relevance in determining its use as a baseline point under Article 10 of the Convention; but we do urge that the facts of history, geography, and economy provide additional support for the alternative coast line Louisiana has drawn as well as for the Inland Water Line.

With this exposition of the basic framework in which a decision on the coast line must be reached, we turn to the general rules applicable to the Louisi-

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prohibits any agreement or compromise which may affect the state's claim to its historic boundaries as redefined in Act 33 of 1954 (which accepted and approved the coast line of the state as designated and defined by the United States under applicable Acts of Congress) and requires ratification by a vote of a majority of the members elected to each house of the legislature to any agreement affecting its coast line or historic boundary.

ana coast and next to the application of these rules to particular segments.[4]

II. Technical Matters.

The determination with exactness of an alternative coast line of Louisiana requires at the outset agreement on such technical questions as the water datum to be used, the unit of measurement to be followed, and so forth. Fortunately, the past practices of the parties with respect to the administration of the submerged lands pending the outcome of this controversy provides an adequate basis for resolving some of these questions without disagreement, and the United States has for the most part followed the former practices in its present Motion. Consequently, while Louisiana does object to many of the definitions presented by the United States, it has no objections to the following definitions proposed by the United States in its Motion, at p. 55, Nos. 1 (mean low-water) and 2 (mean high-water); p. 56, No. 4 (geographical mile); p. 58, No. 5 (grid scale); and p. 62, No. 8 (derivation of boundary from coast line).

III. The Set of 54 Maps.

In its Motion and Memorandum the United States says of the series of 54 maps accompanying the "Report of the Determination of the Contact Line of

[4]Throughout this analysis the Court is asked to remember that Louisiana does not agree that its shore line is synonymous with its coast line, and Louisiana again submits that Acts of Congress from 1806 on support Louisiana's contention that its coast line is the outer limit of inland waters.

Mean Low Water on the Gulf of Mexico with the Mainland and Adjacent Islands of the State of Louisiana by a Committee Representing the U.S. Dept. of Interior and a Committee Representing the State of Louisiana," that they "depict the mean low-water line of the Louisiana coast in minute detail, . . ." (Motion, 39-40), that "there can be no dispute about the geographical facts portrayed by the maps, . . ." (Motion, 40), and that "these facts alone are relevant to the delimitation of the coast line. . . ." (Motion, 40). Louisiana cannot and does not agree with these inflexible and dogmatic statements. The maps are based on surveys as much as 15 years old and cannot be depended on to reflect present conditions. Further, there are, as we next list, so many defects, omissions, and difficulties encountered in the use of these maps that were it not for the fact that they are the only ones now available that may be used as a basis from which to delimit an alternate coast line, Louisiana would find them completely unacceptable.

(a) The maps do not depict the whole of the coast. The area from Ship Island, Mississippi, to the northernmost extremity of the Chandeleur Island chain is not shown, and in several places the depth of penetration and interior extent of bays and other bodies of water are not indicated.

(b) The maps mistakenly label as "Gulf of Mexico" waters admittedly inland.

(c) They fail to show water depths in the bays and inland waters of Louisiana and in the near-shore waters, although this Court has recognized the rele-

vance of water depths in determining inland waters. *See United States v. California*, 381 U.S. 139, 171.

(d) They do not portray the outermost permanent harbor works, which, according to the United States, are to extend the coast line of the state (Proposed Decree, 7). The parties will have to go beyond the series of 54 maps in order to present these vital facts to the Court.

(e) They do not in all cases accurately portray the engineering and geographical data developed by the surveys on which they are based. As we later show, some islands of consequence actually surveyed are not depicted on the maps. Louisiana retains the right to contest, with appropriate evidence, the accuracy of the maps when relevant to the determination of the coast line.

(f) Finally, the maps are not the large-scale charts recognized by the Convention in Article 3 as the reference from which to determine baselines. In *United States v. California*, 381 U.S. at 176, the Court found that with respect to the United States the charts referred to by Article 3 were the official coastal charts prepared by the United States Coast and Geodetic Survey. Along Louisiana's coast, these large-scale charts are the 1:80,000 scale Coast and Geodetic Survey nautical charts, 1200 series.

Notwithstanding the above problems concerning the series of 54 maps[5] and without at all minimizing

[5]It should also be noted that at the time these surveys were conducted and the maps produced, it was agreed that

the inadequacies pointed out, Louisiana accepts their use in the present proceedings, to the extent they can be so used, as convenient tools. However, Louisiana fully reserves its rights to question the information shown on the series of 54 maps, to introduce other maps, and to produce relevant data in addition to and in conflict with that found on the 54 maps.

IV. Lateral Boundaries of Louisiana.

The precise locations of the water boundaries between Louisiana and Mississippi on the east side of Louisiana, and Louisiana and Texas on the west side, have never been completely fixed. We agree with the United States (Motion, 66, No. 9) that the introduction of these collateral issues into the present proceedings should be avoided; accordingly, our alternative decree expressly limits the location of the Louisiana coast line to the area within her lateral boundaries.

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neither government would be bound by the work. In the subsequent "Report of the Joint Federal and State Committee Regarding the Effect that the Geneva Convention on the Territorial Sea and the Contiguous Zone Would Have if Applied to the Coastline of the State of Louisiana" it is stated at page 1 that "the appointing officials of the two governments have not authorized the Committee to bind either government," and at page 3 it is said that "for convenience, this Report uses the terms 'Federal views' and 'State views,' but these are to be understood as representing only the views of the two Sections of the Joint Committee, and are not to be construed as being necessarily the views of either the United States or the State of Louisiana." The survey and the resulting maps were not an official undertaking of either government; they cannot now be said to be binding on them.

PRINCIPLES AND RULES

I. Development of the International Law of Bays.

International law from the beginning of its modern development in the time of Grotius to the present day has always recognized the special importance of bays to the states whose coasts they penetrate. As the Court of Arbitration in the *North Atlantic Coast Fisheries* case said:

> . . . [T]he geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defence, of commerce and industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally in proportion to the penetration inland of the bay. . . .[6]

A. The Early Rules for Bays.

At the time of Louisiana's admission to the Union the rules of international law in regard to bays were not stated in the precise terminology of the international law of today. The concept of a "bay" at that time was best stated in the *Fisheries Arbitration's* interpretation of a treaty entered into by the United States and Great Britain in 1818:

> . . .[T]he tribunal is unable to understand the term "bays" in the renunciatory clause in other than its geographical sense, by which a bay

[6] *Scott, The Hague Court Reports,* (North Atlantic Coast Fisheries Case) 141, at 183 (1916).

is to be considered as an indentation of the coast, bearing a configuration of a particular character easy to determine specifically, but difficult to describe generally.

The negotiators of the treaty of 1818 did probably not trouble themselves with subtle theories concerning the notion of "bays"; they most probably thought that everybody would know what was a bay. In this popular sense the term must be interpreted in the treaty. The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of its width to the length of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general.[7]

On the basis of its judgment of the state of the international law of bays at the time of the 1818 treaty, the Court made this award:

In case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast.[8]

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[7] *Id.*, 187.
[8] *Id.*, 188.

The Court's decision as to the international law of bays in 1818 is completely in accord with the history of the development of the rules concerning bays up to that date. The first explicit recognition of the internal character of bays or gulfs appeared simultaneously with the first assertion of the principle that no nation could claim as its own waters those that lay beyond cannon range. In 1610 the special Dutch Ambassador to the English Court asserted that no prince could "challenge further into the sea than he can command with a cannon, *except gulfs within their land from one point to another.*" [9]

Grotius[10] and Pufendorf[11] both recognized that

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[9]*Fulton, The Sovereignty of the Sea* (1911) p. 156 (Emphasis added). Tacit recognition of the special status of bays can be traced back even further. In the Treaty of 1521 between the Emperor Charles V and King Francis I of France, which was negotiated through the mediation of Cardinal Wolsey of England, the parties agreed not to attack each other's ships "in the harbours, bays, rivers, mouths of rivers, roads or stations for shipping, and especially in the Downs or other maritime place under the jurisdiction of the King of England." (*See Fulton,* p. 119).

[10]Grotius made it clear that his main argument concerning the freedom of seas relates only to "the immense, the infinite" ocean and "does not concern a gulf or a strait in this ocean, or even all the expanse of the sea which is visible from the shore." (*Grotius, The Freedom of the Seas* (1609; translated by R. D. Magoffin, 1916), p. 37.)

Later Grotius was even more explicit on the subject and stated that "the sea also can be acquired by him who holds the lands on both sides, even though it may extend above as a bay, or above and below as a strait, provided that the part of the sea in question is not so large that when compared with the lands on both sides, it does not seem a part of them."

bays could belong to the littoral state, whereas ordinary parts of the sea could not. But neither attempted to set forth geometric tests of any sort as to what would be considered a bay. They merely used the term "bay" in the same manner that it was used by geographers, cartographers, and others in their day.

The practice of using the term "bays" in the popular sense of the word in treatises on international law continued through the eighteenth century. Typical in this respect was Emmerich de Vattel, whose writings were quite popular amongst American jurists. Vattel asserted that "in general, the dominion of the state over the neighboring sea extends as far as her safety renders it necessary and her power is able to assert it," and that this rule applied with even greater force to:

> . . . roads, bays, and straits, as still more capable of being possessed, and of greater importance to the safety of the country. . . . A bay, whose entrance can be defended, may be possessed and rendered subject to the laws of the sovereign; and it is important that it should be so, since the country might be much more easily insulted in

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(*Grotius, De jure belli ac pacis libri tres* (1625; English translation by F. W. Kelsey, 1925), (Book II, Ch. III, §VIII). p. 209.)

[11]Samuel Pufendorf had no doubt that bays "regularly belong to that nation whose territory encloses any particular one, the same being true also of straits." [*Pufendorf, De jure naturae et gentium libri octo* (1688), Book IV, Ch. IV, §VIII; English Translation by C. H. and W. A. Oldfather (1934), p. 565.]

> such a place than on the coast that lies exposed to the winds and the impetuosity of the waves.[12]

Of particular importance was the opinion of the Italian jurist Ferdinando Galiani, who pointed out that:

> . . . [I]n those places where the land curves and opens into bays and gulfs, the rule is accepted by the most civilized nations that a line should be drawn from one point to another on the mainland, or from islands which are located beyond the promontories of the land, and all that branch of the sea should be considered as part of the territory, even where the distance between its center and the neighboring land should in every direction be larger than three miles.[13]

In justifying this proposition, he discusses the need to respect "the whole gulf belonging to a neutral State," [14] and to avoid hostilities there. He suggests that:

> . . . [W]hen a vessel enter such gulf, it shows clearly that it does not intend to follow the straight route but tries to find shelter from a tempestuous sea, or from enemies, or that it is sailing toward the places on the gulf for purposes of commerce. To attack her in such a spot would violate the asylum which it tries to invoke, and would spread alarm and terror over all the coast, disturbing thus its calm. Nor can a neutral power be forced to bear

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[12] *E. deVattel, Le droit des gens,* (1758), §§289, 291; 4th American Edition by J. Chitty (1835), pp. 128 to 130.

[13] *F. Galiani, Dei doveri dei principi neutrali* (1782) p. 422. (Translation ours.)

[14] *Ibid*

> patiently such disturbance, nor to watch in cold blood the attack before its very eyes on those who have asked for its protection.[15]

Galiani's opinion in this respect had great effect, not only in Europe, but in this country. His opinion was adopted by D. A. Azuni, whose work, *The Maritime Law of Europe,* was translated into English, published in this country, and exerted a great influence on our jurists and courts at the beginning of the nineteenth century.[16]

That Galiani was entirely correct in stressing the importance of a neutral littoral state's owning its bays

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[15]*Ibid.*

[16]The English translation by William Johnson was published in New York in 1806. Vol. 1, p. 206 translates Azuni's adoption of Galiani's opinion slightly inaccurately as follows:

> It is already established among polished nations, that in places where the land, by its curve, forms a bay or a gulf, we must suppose the line to be drawn from one point of the enclosing land to the other, or along the small islands, which extend beyond the headlands of the bay, and that the whole of this bay, or gulf, is to be considered as territorial sea, even though the center may be, in some places, at a greater distance than 3 miles from either shore.

A more accurate translation of this crucial passage from D. A. Azuni's *Sistema universale dei principi del dritto marittimo dell'Europa,* pp. 77, 90 to 91, (1795) would be as follows:

> It is already established among civilized nations that in places where the land curves and opens into a bay or gulf, one must suppose a line is drawn from one point or another of the territory or the islands which extend beyond the promontories of the land; and that thus one should consider all that branch of the sea as part of territory, even when the distance between its center and the neighboring land should in every direction be larger than 3 miles.

in order to protect its own commerce by extending protection to the commercial vessels of belligerents is illustrated by the history of the United States' position in regard to bays. The first important statement by the United States relative to the international law of bays came in a dispute in 1793 involving the type of case which Galiani discussed. While Britain and France were at war with one another, and the United States was neutral, the British ship *Grange* was captured by the French frigate *L'Embuscade* in Delaware Bay. Relying on several of the authorities discussed above, Attorney General Randolph expressed the opinion that this capture was unlawful, because "[T]he United States are the proprietor of the lands on both sides of the Delaware, from its head to the entrance into the sea." [17]

Similarly, in his famous letter of November 8, 1793 to Mr. Genet, the French Minister, in which he inaugurated the three-mile rule (based on cannon shot), Secretary of State Jefferson distinguished the case of rivers and bays over which the various states of the United States have extended their jurisdiction. He pointed out that "for that of the rivers and bays of the United States the laws of the several states are understood to have made provision, and they are, moreover, as being landlocked, within the body of the United States." [18]

It is apparent from the statements of Randolph

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[17] *State Papers and Publick Documents of the United States*, 3d Ed., Vol. 1, (Boston, 1819), p. 72, at 73, 75 to 76.

[18] *Id.* at 195-196.

and Jefferson that the United States in the last decade of the eighteenth century considered "bays" generally to be a special case, separate from the delimitation of the territorial sea along the open coast and that there was no precise test for determining what is or what is not a bay. Such was the finding of the Permanent Court of Arbitration in the *North Atlantic Coast Fisheries Case*, in regard to a treaty of 1818.[19] No geometric test of any sort had been developed. A bay belonging to a littoral State was anything popularly called a bay and having the "general configuration and characteristics of a bay." [20]

B. The Development of the Ten-Mile Rule.

The first appearance of a rule setting a limit on the maximum width of a bay which would be considered subject to the full sovereignty of the littoral state was in the Anglo-French Treaty of 1839 delimiting fisheries on the coasts of the two countries, wherein the ten-mile rule was set forth.[21] This treaty marked an important point in the evolution of the rules of international law concerning bays. It was not declarative of customary international law in force at the time of its adoption, but very formative of customary international law afterwards.

From 1839 onward a consistent pattern of international practice developed whereby states recognized a ten-mile closing line for bays in numerous

[19] *Op. cit.* footnote 1, pp. 183-185.

[20] *See supra*, p. 91.

[21] 3 *Gidel, Le Droit International Public de la Mer* (1934) p. 546.

instances. The first of these was the confirmation of the 1839 convention by a joint Anglo-French declaration of the 23rd of June 1843.[22]

The precise moment when any international practice becomes international law is quite difficult to determine. Theoretically, there are two points, sometimes different in time where the transition may justifiably be said to have taken place. First, one could say that the practice becomes law when the principle underlying the practice is evoked to settle a dispute between parties who have not both adopted the practice. Second, one could say the practice becomes law when it becomes so frequent that an expectation arises amongst members of the community of nations that the practice will be relied upon to settle future disputes.

The first point in time at which the practice of drawing a ten-mile closing line across the mouth of bays could be said to have become law was in 1853 as the result of a dispute involving the United States. The American ship, the *Washington*, had been seized by the British in the Bay of Fundy. The British claimed jurisdiction over the entire area of that great bay from headland to headland, but Umpire Bates of the London Commission, in deciding in favor of this country, applied the ten-mile closing line rule for bays. He stated that the doctrine in question,

> . . . has received a proper limit in the convention between France and Great Britain of Aug. 2, 1839, in which it is agreed that the distance of 3 miles fixed as the general limits for the exclusive

[22] *Id.* at 547.

> right of fishery upon the coast of the 2 countries shall, with respect to bays the mouths of which do not exceed 10 miles in width, be measured from a straight line drawn from headland to headland.[23]

Frank Boas, Attorney Advisor, Office of the Legal Advisor, Department of State, has pointed out that "Secretary of State Bayard in a letter to the Secretary of the Treasury, Manning, dated May 28, 1886, cited with approval the 10-mile rule for bays as used by Umpire Bates of the London Commission of 1853 to set a 'proper limit' upon the headland to headland doctrine." [24]

The ten-mile closing line for bays continued to be adopted in a series of agreements in the mid-nineteenth century. An important modification in the formula of the rule was introduced in the Anglo-French convention on fisheries signed in Paris on the 11th of November 1867. Before that time, the rule had been expressed as one applying to the *mouth* or *opening* of a bay, but under this Anglo-French treaty, if the mouth of the bay exceeded ten miles, a ten-mile closing line was to be drawn *within* the bay. Although this treaty was not ratified by the French, it strongly influenced later formulations of the ten-mile rule which did go into effect.[25]

In November of 1868 Great Britain and the North German Confederation entered into the first of a series

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[23]4 *Moore, International Arbitrations,* 4344 (1898).

[24]Memorandum quoted 4 *Whiteman, Digest of International Law* 218 (1965).

[25]3 *Gidel, Le Droit International Public de la Mer,* 547-550 (1934).

of agreements concerning the fishing rights of the various states. This treaty contained a provision that bays and indentations in the German coast which had a breadth of ten nautical miles or less, counting from headlands, should be considered as being within the territorial sovereignty of the North German Confederation.[26] This arrangement was renewed in 1874 between Great Britain and the Confederation's successor, the German Empire.[27]

The modification in the formulation of the ten-mile rule introduced in the 1867 treaty was confirmed by the adoption of the Hague Convention of 1882 on fisheries in the North Sea. Paragraph 2 of Article 2 of the Convention stated that for bays, the three-mile zone (where fishing is reserved exclusively to the nationals of the littoral state) would be measured from a straight line drawn across the bay, in the part closest to the mouth of the bay where the opening enclosed by the line does not exceed ten miles in breadth.[28] The adoption of this Convention could be considered the point at which the practice of using a ten-mile closing line for bays become so well-established that the expectation arose amongst the community of nations that the rule was a binding one. Hence, if the rule had not become law earlier, it surely became law by 1882.

At the very latest, it must be admitted that the rule was firmly established by 1885. Gidel notes that the ten-mile rule became so well-established that it

[26] *Id.*, at 548.
[27] *Ibid.*
[28] *Id.*, at 549-550.

was even found in agreements between countries which had adopted as the breadth of their territorial sea a distance which, when doubled, would exceed ten miles. Gidel cites as examples the agreements between Spain and Portugal relative to fisheries which these countries entered into in 1885 and in 1893.[29]

There were numerous other instances of the use of the ten-mile rule before the decision of the Court of Arbitration in 1910. The United States' position in regard to the limits for closing lines for bays was strongly colored by its dispute with Great Britain over the fisheries on the North Atlantic Coast. Secretary of State Bayard attempted to settle the dispute by negotiating a treaty recognizing a ten-mile closing line for bays, the so-called Bayard-Chamberlain treaty of 1888.[30] The United States gave some recognition to the ten-mile rule in its own practice even before the Court of Arbitration's decision in 1910, for in the Alaskan Boundary Arbitration, the United States and Britain both approved of the drawing of 10-mile closing lines between headlands.[31]

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[29]3 *Gidel*, 559 (1934).

[30]*Id.* at 552-554. However, the Senate failed to ratify the treaty. Evidently the reason for this failure was the belief on the part of the Senate Committee on Foreign Relations that the United States could obtain a more favorable settlement for its fishermen on the basis of the law of bays in 1818. *See S.Misc.Doc.* No. 109, 50th Cong. 1st Sess., 155, 156, p. 21. This belief was shattered by the decision of the Court of Arbitration in the *North Atlantic Coast Fisheries Case* in 1910. *See Scott, The Hague Court Reports*, 183-88.

[31]7 *Alaska Boundary Arbitrations*, S.Doc. 162, 58th Cong. 2d Sess., p. 844.

The International Law Association in 1895 recommended the adoption of a ten-mile closing line for bays whence to measure the territorial sea in front of them.[32] In 1907 the Second Hague Peace Conference's Third Commission recommended the ten-mile rule in its report on mining of waters.[33] In proclaiming its neutrality in the Russo-Japanese War, the Netherlands adopted the ten-mile rule.[34] Britain confirmed its adherence to the ten-mile rule by adopting it in a treaty with Denmark in 1901.[35] Thus, even before the decision of 1910 in the *North Atlantic Coast Fisheries* decision, the rule that to delimit the inland waters of a bay one drew a line ten miles or less in length across the mouth of a bay, or within the bay if the mouth exceeded ten miles in breadth, was firmly established in international law.

The next major step in the evolution of the geometric tests for bays came in the *North Atlantic Coast Fisheries Arbitration* decision. In that case, on the basis of international law as it existed in 1818, the Court held:

> In the case of bays, the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to

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[32] *Transactions of International Law Association,* 1873-1924, 223.

[33] *Scott, Reports to the Hague Conference of 1899 and 1907,* 664; *Crocker, The Extent of the Marginal Sea,* 491.

[34] *Jessup, The Law of Territorial Waters and Maritime Jurisdiction,* 360; 1904 *For.Rel., U.S.* 27; 3 *Gidel* 555 (1934).

[35] 3 *Gidel* 555 (1934).

have the configuration and characteristics of a bay.[36]

However, in making its recommendation, the Court looked beyond the international law of 1818 and incorporated the ten-mile rule which had developed subsequent to it:

> 1. In every bay not hereinafter specifically provided for the limits of exclusion shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles.[37]

The Court's narrowness, in restricting its view of the law to that which the parties entering into the agreement in 1818 could be deemed to have had in mind, provoked Dr. Drago to dissent:

> It has been suggested that the treaty of 1818 ought not to be studied in the light of any treaties of a later date, but rather to be referred to such British international conventions as preceded it and clearly illustrate, according to this view, what were, at the time, the principles maintained by Great Britain as to their sovereignty over the sea and over the coast and the adjacent territorial waters. . . . I cannot partake of such a view. . . . The treaty of 1818 is . . . one of the few which mark an era in the diplomacy of the world. As a matter of fact it is the very first which commuted the rule of the cannon-shot into three marine miles of coastal jurisdiction. . . . It seems very appropriate . . . to explain the meaning of the treaty of

[36] *Scott, op. cit.* at 187-188.

[37] *Id.* at 188.

> 1818 by comparing it with those which immediately followed and established the same limit of coastal jurisdiction....[38]

Dr. Drago argued that the ten-mile closing line had become adopted in international law by the practice of states after 1818.[39]

> And it is for that reason that an usage so firmly and for so long a time established ought, in my opinion, be applied to the construction of the treaty under consideration, much more so, when custom, one of the recognized sources of law, international as well as municipal, is supported in this case by reason and by the acquiescence and the practice of many nations.[40]

In effect he contended that the Court ought to take into account post-1818 developments in the law of bays and frankly recognize that it was applying the ten-mile rule which had developed subsequent to the treaty, instead of restricting its decision as to what was law up to 1818 and "recommending" that a rule that had developed after that date be applied.

Thus, instead of detracting from the Tribunal's recognition of the wisdom of applying the ten-mile rule, the dissent confirmed that rule. The recommendations of the Tribunal were accepted by treaty between the United States and Britain in 1912.[41] From that date until the adoption of the Geneva Convention, the United States adhered to a rule calling for a ten-

[38] *Id.* at 203-204.
[39] *Id.* at 200-205.
[40] *Id.* at 207.
[41] 37 Stat. 1634.

mile closing line for bays, to be drawn across the mouth of the bay or, where the mouth was greater than ten miles in breadth, then across the first point within the bay where the distance is less than 10 miles.

In 1927 the Harvard Research in International Law was organized to prepare a draft of an international convention of certain subjects. In its draft, published in 1929, the Harvard Research incorporated the ten-mile rule:

> The seaward limit of a bay or river mouth the entrance to which does not exceed ten miles in width is a line drawn across the entrance. The seaward limit of a bay or river-mouth the entrance to which exceeds ten miles in width is a line drawn across the bay or river-mouth where the width of the bay or river-mouth first narrows to ten-miles.[42]

C. Evolution of tests for determining configuration and characteristics of a bay.

The international law of bays as it had evolved up to this point had given some precision to the determination of which waters of a bay were internal waters, but as yet no geometric test had been proposed for determining exactly what a bay was. It was recognized that the ten-mile rule applied to an indentation on the coast if it was "landlocked" or had the general "configuration and characteristics of a bay," but the notion of what was "landlocked" or what were those configurations and characteristics was rather imprecise.

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[42]23 *American Journal of International Law*, Special Supp., 265 (1929).

However, it was generally recognized that the concept of a bay entailed a marked degree of penetration inland in proportion to the width of the bay. Thus, the Court in the *North Atlantic Coast Fisheries Arbitration Case* recognized that the interests of a littoral state varied "in proportion to the penetration inland of the bay" [43] and deemed "the relation of its width to the length of penetration inland" [44] to be one of the most important circumstances to be taken into account in determining whether a body of water was a bay.

At the Hague Conference of 1930 several attempts were made to formulate specific rules making the notion of the necessity of a marked degree of penetration more precise. Thus, at the Hague Conference it was noted that:

> Most Delegations agreed to a width of ten miles, provided a system were simultaneously adopted under which slight indentations would not be treated as bays.[45]

Several nations proposed geometric tests to establish which indentations were sufficiently deep to be counted as bays. Among them were Germany, France, and the United States.

Germany proposed an amendment to the proposed article on bays to the effect that the ten-mile rule would

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[43] *Scott, op. cit.* at 183.

[44] *Id.* at 187.

[45] Report of the Second Subcommittee (Territorial Waters), 3 *Acts of the Conference for the Codification of International Law* (League of Nations Publication 5: Legal), 218.

only apply to bays whose depth was five marine miles or more counted from the closing line inward.[46] This proposed rule had the disadvantage that it would exclude some bays which seemed to have the configuration of bays, simply because the bays were too small. Thus, Germany (together with Great Britain which had proposed an area-measurement test) withdrew its proposal in favor of that of the United States.[47]

The United States proposed the Boggs Reduced Area Formula. Under the Boggs formula arcs of circles whose radius was equal to one-fourth the length of the bay closing line (which was not to exceed ten miles) would be drawn from all points within the bay. The area of a semicircle whose diameter was equal to one-half the closing line would then be compared with the area of water within the bay which was outside the envelope of the arcs of circles and if the latter exceeded that of the former, then the indentation would be considered a bay.[48] The Boggs formula preserved in slightly altered form the notion of the importance of the ratio between depth of penetration and width of entrance. The deeper a bay was, the more area within it would ordinarily fall outside the envelope of the arcs of circles and the narrower the opening the smaller the semicircle to which the reduced area of the bay was compared. However, the Boggs formula had the disadvantage of eliminating from inclusion as part of

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[46]3 *Gidel*, 584 (1934).

[47]*Id.* at 584-585.

[48]Boggs, "Delimitation of the Territorial Sea" 24 *American Journal of International Law* 540, 550-551 (1930).

the area of a bay any pockets of water caused by arms of the land giving to the bay generally actually more of a landlocked character, rather than less.

The French proposed that "in order that an indentation may be properly termed a bay, the area comprised between the curve of the coast and its chord must be equal to or greater than the area of the segment of the circle the centre of which is situated on the perpendicular to the chord in its middle, at a distance from the chord equal to one-half the length of this chord and of which the radius is equal to the distance which separates this point from one end of the curve." [49] The French proposal would have required a lesser degree of penetration inward than either the American or the German proposals.

As Aaron Shalowitz noted, however, "the United States proposal and the French proposal were referred to the Second Sub-Committee of the Conference for consideration. The Committee reported both proposals to the Conference, but expressed no opinion on either one. . . . The Conference adjourned without taking any definitive action on the matter." [50] Thus, neither the Boggs Reduced Area Formula nor the French proposal ever became part of international law.

The failure of the Boggs formula to become part of international law was brought out during the debates over the submerged lands question. On March

[49]3 *Acts of the Conference for the Codification of International Law* (League of Nations Publication 5: Legal), 219.

[50]1 *Shalowitz,* 42 at n. 17.

3, 1953 Jack B. Tate, Deputy Legal Advisor to the Department of State was asked by Senator Kuchel of the Senate Interior and Insular Affairs Committee at a hearing on the question of the submerged lands, "For the Record, the so-called Boggs formula likewise is not obligatory on the United States or any foreign nation?" Mr. Tate replied, "That is correct." [51]

A report of the committee ordered printed that same month mentioned, with reference to a certain amendment by deletion to a definition of "coast line," that the committee was categorically stating that the deletion of the quoted language did not indicate that the Boggs formula was or should be the policy of the United States.[52]

Thus the international law of bays remained the same after the Hague Conference as before. The Preparatory Committee for the Hague Codification Conference in the basis of discussion No. 7, followed generally the Harvard Research format, with the exception that it substituted "opening" for "entrance" in its draft.[53] This basis of discussion was assigned to the second-subcommittee, which drew up an article on bays identical with it, but because this provision was deemed so closely connected with the question of the breadth of the territorial sea, the failure to reach

[51]Hearings before the Senate Interior and Insular Affairs Committee, 83rd Congress, 1st Sess., S. J. Resolution 13 at p. 1070.

[52]Report by the Senate Interior and Insular Affairs Committee, 83rd Congress, 1st Sess., Report No. 133, Part 1, p. 18.

[53]3 *Hague, Conference for the Codification of International Law*, 179.

agreement on that matter prevented the Second Committee from making even a provisional decision on the bay article.

Thus the law of bays up until the adoption of the Geneva Convention was that one drew a closing line of not more than ten miles across the mouth of an indentation having the general characteristics and configuration of a bay. If the indentation was more than ten miles in width, then one applied the ten-mile test within the indentation at the points nearest the opening which were not more than ten miles from each other. The waters behind the closing lines thus drawn were internal waters. In determining whether an indentation was truly a bay, one looked to a variety of factors, including popular usage and cartographic authority, but perhaps most importantly the degree of penetration of the waters into the land.

II. Bays Under Present Day International Law.

The most recent authoritative statement of the geometric tests for bays is to be found in Article 7 of the Geneva Convention on the Territorial Sea and the Contiguous Zone.[54] The Convention made two important changes in the international law of bays theretofore existing. First, the length of the closing line for bays was increased from ten to twenty-four miles. Second, a semicircle test similar to those that had been discussed at the Hague Conference was adopted, but without the Boggs Reduced Area formula. The Convention, however, also restates the custo-

[54]Adopted by the International Law Commission in 1958.

mary formulation of the concept of a bay as something having a certain configuration and a certain degree of penetration inland.

A. Bays within Bays.

The second point is especially worth noting in view of the United States' disregard of established international law in contending that the area of bays within bays may not be included in calculating whether a bay meets the semicircle test.[55] The United States' position in this regard is but a thinly disguised advocacy of the Boggs Reduced Area Formula, which the United States had advocated at the Hague Conference. Neither the International Law Commission nor the Geneva Conference adopted the Boggs' Reduced Area Formula. Instead the semicircle rule, without the reduced area technique was adopted upon the advice of the Committee of Experts.[56] *The present article contains a mandate to follow the low-water mark for the purpose of measurement.*

Neither the Convention nor any other principle of international law permits a littoral State to depart from the low-water mark of the land surrounding the bay in order to apply a reduced area technique. The position taken by the Justice Department in this regard is in flat contradiction to that adopted by the State Department. For example, the U.S. Department of State Geographic Bulletin No. 3 of April, 1965,

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[55]Government Memorandum, p. 73.

[56]*See Yearbook of the International Law Commission* 1953, Vol. 2, p. 78.

entitled "Sovereignty of the Sea" flatly states "[T]he water of bays within bays may be included as water surface of the outer bay in determining the dimensions of any coastal indentation." [57]

Louisiana's position finds further support in Mr. Shalowitz's book, *Shore and Sea Boundaries*, wherein he states:

> In the application of the semi-circular rule to an indentation containing pockets, coves, or tributary waterways, the area of the whole indentation (including pockets, coves, etc.) is compared with the area of a semicircle. If the indentation meets the test, a closing line is drawn across the headlands. But if it fails to satisfy the test and the indentation should become open sea, the semicircular rule should still be applied to any of the tributary waterways for the purpose of determining their status as inland waters.[58]

In a footnote to the above passage, Mr. Shalowitz dealt with the problem of how much of a waterway enclosed within a bay should be counted as part of the area of the bay. He proposed the adoption of a new rule limiting the width of the waterway whose area is included as part of the bay, or alternatively, a rule excluding waters independently meeting the test of inland waters from inclusion within the area of the bay. He recognized, however, that neither of these rules is presently in force in international law.[59]

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[57]p. 11.

[58]Vol. 1, pp. 219 and 220.

[59]*Id.* at p. 220, n. 28.

Louisiana concedes that in some situations not all waters behind the closing line of a bay can be considered as part of the bay itself. From a purely practical standpoint, it would be unreasonable to attempt to include the entire area of a river opening into a bay in calculating the area of the bay itself, since a river can be half a continent long and a mile wide. However, the Convention expressly provides that for the purpose of measurement *the* low-water mark is to be applied. The language of the Convention thus implicitly assumes that there is a single common low-water mark for the purpose of calculation. Such is not the case with rivers beyond their mouths or estuaries, and hence such parts of rivers should be excluded in calculating the area of an indentation. However, by the same token, it would be most unreasonable *not* to include bays within bays in calculating the area of a bay for purposes of the semicircle test, since such inner bays have the same low-water marks and same subjection to the direct ebb and flow of the tide that is lacking in the case of rivers in large part.

Furthermore, the rationale of the rule including islands within bays as water in calculating the area of the bay also applies to including inner bays in such calculation. The rationale of this rule is that the presence of additional pieces of land makes the bay in question even more landlocked than otherwise would have been the case. Similarly, the presence of arms of land enclosing bays within bays would seem to give an outer bay *more* of the character of inland waters, not less as the government would contend.

B. Application of the rules of the Geneva Convention to various types of indentations

The language of Article 7 of the Geneva Convention is very general. Hence it gives rise to several questions of interpretation. The questions may best be considered in connection with various hypothetical types of indentations to which the rules could apply.

1. Indentations across whose mouth a line 24-miles or less in length may be drawn and whose area is as large or larger than that of a semicircle whose diameter is the line across the mouth

This instance is the simplest of those to which Article 7 of the Geneva Convention applies. Under the plain text of paragraphs 2 and 4 of that article, the indentations in question are bays whose entire waters are inland.

2. Indentations which meet the semicircle test at their mouths, but which are wider there than 24 miles

Under Article 7 of the Convention, the semicircle test is first applied to the line drawn *across the mouth* of an indentation. If the area of the indentation is as large as, or larger than, "that of the semicircle whose diameter is a line drawn across the mouth of that indentation," [60] but the line itself is longer than twenty-four miles, then under paragraph 5 "a straight baseline of twenty-four miles *shall* be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length." [61] The

[60] Paragraph 2.

[61] Emphasis added.

Convention does *not* require that the area behind a closing line drawn within an over-large bay meet the semicircle test.

3. Indentations meeting the semicircle test which are located within indentations not meeting the semicircle test

Unlike that discussed in B above, this instance is not specifically provided for in Article 7 of the Convention. Nevertheless, Louisiana agrees with the statement of Shalowitz, quoted above on p. 112, that the semicircle rule should be applied to small indentations within larger indentations that do not meet the test.[62]

There are basically two reasons why the semicircle test should be applied to small indentations within outer indentations that failed to meet the test. The first is that such inner indentations themselves qualify as bays within the language of Article 7, even if their outer indentations do not. Such inner indentations would meet the tests for bays set forth in paragraph 2 of that Article. They would be well-marked indentations with a penetration so great in proportion to the width of their mouths as to constitute more than a mere curvature of the coast and to contain landlocked waters.

The second reason is that throughout the history of the geometric tests from 1867 to the present, it has

[62]Although we do not agree with Mr. Shalowitz that in instance B above, the closing line drawn within the bay which has already met the semicircle test must also meet the semicircle test. His position in that regard is, unfortunately, patently wrong in view of the plain text of the article.

always been considered a principle of international law that if an indentation failed to qualify as a bay at its headlands, then the tests for internal waters should be applied again within that indentation. Thus almost invariably all statements of the ten-mile rule were worded so that if the mouth were wider than ten miles the ten-mile rule would be applied *within* the indentation between the first points where it was not wider than ten miles. This principle still animates the rule that one draws a twenty-four mile closing line within an overlarge bay. Hence, it follows that one must apply the semicircle test a second time also. Thus the relevant rule of international law may be stated as follows: where an indentation does not meet the semicircle test at its mouth, one draws a closing line at the first points within the indentation where the semicircle test is met, and the waters behind that closing line are inland waters of the littoral State.

4. Indentations partially formed by islands

It has been almost universally recognized that part of the perimeter of a bay may be formed by islands. For example, Commander Mitchell P. Strohl in his book *The International Law of Bays*, states:

> Moreover, a bay may have one side partially enclosed by a string of closely spaced islands lying along a gentle curve, such as Buzzards Bay in Massachusetts.[63]

He includes a map of Buzzards Bay[64] to illustrate, "how a fringe of islands can make up one side of a

[63] At p. 60.

[64] *Id.* at p. 77.

bay." [65] One should note that Buzzards Bay was recognized by this Court to be a juridical bay in *Manchester v. Massachusetts.*[66]

Nevertheless, the United States claims that:

> . . . islands cannot be relied on as creating a bay that would not exist without them.[67]

However, the Geneva Convention requires only that a bay be a "well-marked indentation." It does not state that this indentation must be formed solely by the mainland. The United States position in this regard is in flat contradiction to that taken by G. E. Pearcy, Geographer for the Department of State, in his study, "Measurement of the U. S. Territorial Sea." [68] In that study Pearcy uses Florida Bay as an illustration of the rule that for an overlarge bay a baseline of 24 miles is drawn within that bay in such a way as to enclose the maximum water area. That bay is formed by a chain of islands curving south and east along the coast of Florida.[69] Apparently there arose no doubt in his mind that under the Convention a bay could partially be formed by islands. Had he been considering Florida Bay an historic bay, or other historic waters, then a line across the mouth of that bay would have been proper, even though it would exceed twenty-four miles in length, for under Article 7 of the Geneva Convention that article with its restriction on the length of bay

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[65] *Id.* at p. 72.
[66] 139 U.S. 240.
[67] Government Memorandum, p. 71.
[68] 40 Dept. of State Bulletin, 963, 965 (1959).
[69] 40 *Dept. of State Bulletin,* 963, 965 (1959).

closing lines does not apply to historic bays. In addition, Mr. Pearcy treats the Mississippi Sound, which is formed by a series of islands, as a bay within the meaning of the Convention, stating:

> Bays, because of the placement of islands in the vicinity of their entrances, may have several channels of ingress. Under such circumstances an individual closing line is drawn across each entrance. To be identified as a bay, the area of the waters thus closed off must be as large as, or larger than, that of a semicircle the diameter of which is equal to the sum total of the individual closing lines. A bay with islands which give it 5 entrances is shown in figure 4. Situations of this kind abound along some portions of the coast. The one of most impressive dimensions is Mississippi Sound, partially closed off by a series of sandy islands.[70]

Pearcy considers it so well-established that part of the perimeter of a bay can be formed by islands that he asks not *can* islands form the perimeter of a bay, but rather only "*what placement* must an island have to be considered as part of the perimeter of that bay?" [71] He answers his question by an illustration (figure 9) which clearly indicates a bay formed partially by islands off the coast of Maine. Pearcy clearly considers figure 9 an *application* of the Convention, not an exception to it.[72] He asserts that on coasts as irregular as Maine's "(t)he resulting baseline along a coast of

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[70]40 *Dept. of State Bulletin,* 963, 965 (1959).

[71]See *id.,* p. 966.

[72]See 40 *Dept. of State Bulletin* 968.

this type is usually a succession of straight closing lines alternating with stretches of the shoreline itself." [73] Furthermore, Pearcy makes it clear that his construction of a baseline on part of the Maine coast is based upon a "combination of rules" [74] found in the Convention and not upon the "straight baseline" method.[75] His figure 7, illustrating the construction of the baseline which he proposed for the Mississippi Delta area, shows clearly islands as part of the perimeter of bays, and this figure is also based upon the Convention.

The participants in the United Nations Conference on the Law of the Sea were well-aware that part of the perimeter of a bay could be formed by islands, as is illustrated by Mr. Garcia Amador's reference to "such bays as Long Island Sound." [76] Mr. Garcia Amador's treatment of Long Island Sound as a bay is in accord with that of Leo J. Bouchez, who referred to it as such in his book, *The Regime of Bays in International Law.*[77] Although other writers have somewhat more precisely treated the sound as a strait leading to inland waters,[78] to which the rules of bays are of

[73] 40 *Dept. of State Bulletin* 967.

[74] *Ibid.*

[75] *Ibid.*

[76] *Yearbook of the International Law Commission,* Vol. 1, p. 211, Paragraph 58 (1955).

[77] P. 233.

[78] *See Hyde, International Law, Chiefly as Interpreted and Applied by the United States,* Vol. 1 §150, pp. 487, 488 (1945).

> Where a strait such as Long Island Sound separates the territories of a single proprietor, and also forms no

course applicable, the fact that some writers treat it simply as a bay illustrates how common is the belief that islands can form part of the perimeter of a bay.

The United States attempts to cloud the issues involved in this case by asserting, in regard to Caillou Bay, that "the concept of a 'fictitious bay' is not recognized in international law," [79] thus intimating that we have based our case upon the concept of a fictitious bay. Louisiana disagrees with this flat statement by the federal government that the concept of a fictitious bay is not recognized in international law. Even if Caillou Bay were not a bay under the Convention, as we have demonstrated that it is, it would, nevertheless, be inland waters under the concept of a "fictitious bay," found in customary international law. The apparent belief of the government (in this case) that the Geneva Convention *repealed* all the prior international law of the sea is totally untenable. Unless a provision of the Convention is expressly contrary to a previous rule of customary international law, as is the stipulation of a twenty-four mile closing line for bays rather than the previous ten mile rule, the mere fact that an international convention does not expressly restate an accepted rule of customary international law does *not* mean that it rejects it.

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necessary channel of communication for international commerce between the bodies of water with which it forms the connection, the general maritime interests in the extent of the claim of that proprietor becomes relatively small, and does not appear to limit by any exact tests its assertion of rights of sovereignty.

[79]Motion Government Memorandum p. 71.

However, the government's contention is really irrelevant in this regard, since Louisiana's contention is that Caillou Bay is a bay under the Geneva Convention. We need not now pursue the question of the recognition of a concept of "fictitious bay" in customary international law independent of the Convention. The contention of the federal government is the same that it made in the *California* case, where this Court found it unnecessary to decide the question.[80]

C. Selection of Headlands

1. Terminology of the Convention

Article 7, paragraph 4 of the Geneva Convention provides that a closing line shall be drawn between the low-water marks of the natural entrance points of a bay where the line does not exceed 24 miles. The Convention itself offers very little guide as to what are to be considered as "natural entrance points" of a bay. However, some light can be thrown on the matter by considering the history of the provision in question.

The International Law Commission had recommended to the Geneva Conference a provision calling for the drawing of the closing line across the "mouth" of a bay.[81] Earlier versions of this provision had spoken of drawing the line across the "entrance" or "opening" of a bay.[82] The language concerning "natural entrance points" of the bay became part of the Convention as the result of a British proposal using such

[80]381 U.S. 139 at 170, n. 38.

[81]Article 7 (Bays) *2 Yearbook of the International Law Commission* 268, at 269 (1956).

[82]*See 2 Yearbook of the International Law Commission* 36 (1955).

language which Sir Gerald Fitzmaurice described as "largely a re-draft in more precise technical terms of the International Law Commission's test." [83] The chairman agreed that the amendments were of a drafting nature and therefore sent the proposal to the drafting committee,[84] which reported in favor of the British proposal.[85] Hence it is evident that the terminological change in the Convention was not intended to render irrelevant all the previously established rules on selection of headlands. Hence both authorities of the pre-Convention era, and authorities actually commenting upon the Convention, may be of use in determining what are the proper headlands of bays on the Louisiana coast.

2. Outermost Headland v. Nearest Closing Point

The main point of contention between the United States and Louisiana at several points along the coast is the question of the proper selection of headlands. The United States seems to take the position that a line should be drawn between land formations at their nearest closing points. This position is unsupportable in international law. The correct view of this matter was best expressed in the position taken by several delegations at the Hague Conference of 1930 that the baseline dividing the waters of the bay from the territorial sea should be drawn "between the two points jutting out furthest." [86]

[83] Doc.A/Conf.13/C.1/L.62 at 145.

[84] *Id.* at 146.

[85] Doc.A/Conf.13/C.1/L.167 at 255.

[86] 3 Acts, *Conference for the Codification of International Law* 218 (Annex 1) (1930).

Louisiana is in substantial agreement with Mitchell P. Strohl's definition of natural entrance points as "the points at which the coastline can most reasonably be said to turn inward to form an indentation or bay." [87] The federal government is in error in attempting to draw the closing line between points that are well within those at which the coastline turns in to form the indentation.

3. Use of Outer v. Inner Headlands

Dr. Shalowitz has pointed out that there are three possible definitions of "headland":

> A headland may be defined generally as the apex of a salient of the coast; the point of maximum extension of a portion of the land into the water; or a point on the shore at which there is an appreciable change in direction of the general trend of the coast.[88]

Each of these definitions seems to be in accord with the general requirement in international law that bay closing lines be drawn between the two points jutting out furthest. Yet there may be times when application of one of the rules may lead to a result different from that of applying another rule. For example, a "salient of the coast" may occur either landward of seaward of "an appreciable change in direction of the general trend of the coast." The point at which there is "an appreciable change in direction of the general trend of the coast" may lie somewhat landward of "the point of maximum extension of a portion of the land into the

[87] *The International Law of Bays*, p. 68.

[88] 1 *Shalowitz*, 63-64.

water." In such instances the bay may be said to possess more than two headlands. For such cases the *outer* headlands are the proper points between which to draw a bay closing line. As the late S. Whittemore Boggs, former Geographer for the Department of State stated "when an indentation on the coast is regarded as a bona fide bay, it ceases to have the configuration of a bay at its *outer* headland." [89] The outer, not the inner, headlands must be considered the natural entrance points of the bay.

4. The Use of Islands as Headlands

The Director of the Coast and Geodetic Survey, in a memorandum of April 18, 1961, in reply to a letter of March 6, 1961 from the Solicitor General of the United States, stated that:

> . . . the coastline should not depart from the mainland to embrace offshore islands except where such islands either form a portico to the mainland and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters, or they form an integral part of the land form.[90]

Shalowitz points out that "the second part of the recommendation (the exceptional part) deals with situations characteristic of the Louisiana coast and did not arise in the *California* case." [91]

Louisiana's position is that where the coastline

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[89]Boggs, "Delimitation of the Territorial Sea," 24 *A.J. Int. Law* 541, 549 (1930). (Emphasis supplied.)

[90]1 *Shalowitz*, 161 and at n. 125.

[91]*Id.* at p. 162.

does depart from the mainland to embrace offshore islands, such islands will, at times, form headlands for the drawing of closing lines. Where islands form a portico to the mainland one may have a bay whose perimeter is partially formed by islands, or a strait leading to inland waters, or some other similar formation.[92] In any case it is obvious that in such instances the only possible headlands are those formed by islands.

Examples may be given of the use of islands as headlands in both bays whose perimeter is partially insular and straits leading to inland waters. In *Manchester v. Massachusetts*[93] this Court approved the express use by Massachusetts of an island as a natural entrance point for Buzzard's Bay. The headland in this case was located on the island of Cuttyhunk. Dr. Pearcy, Geographer for the Department of State, advocated the drawing of a 24-mile closing line between East Cape and Vaca Key, an island, to close off the maximum amount of water in Florida Bay.[94] Both Buzzard's Bay and Florida Bay are bays whose perimeters are at least partially formed by islands.

Long Island Sound has long been recognized as either a bay or a strait leading to inland waters to

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[92]Off the Louisiana Coast, the Caillou Bay area would be best described as the first, though a description as being the second might also be proper. The two types of configuration are very closely related, and the rules applicable to bays apply to straits leading to inland waters.

[93]139 U.S. 240.

[94]Pearcy, Measurement of the U. S. Territorial Sea, 40 *Dept. of State Bulletin* p. 965 (1959).

which the rules of bays are applicable.[95] In the "Brief for the United States in Answer to California's Exceptions to the Report of the Special Master," in the *California* case the boundaries of the mouth of Long Island Sound, hence the headlands, are clearly given as islands:

> Long Island Sound is bounded on the east by Orient Point (the north headland of Gardiner Bay) on Long Island, and by Plum Island, Great Gull Island, Little Gull Island, and Fishers Island, stretching diagonally in a northeasterly direction toward Watch Hill Point.[96]

It is significant that the northeastern limit of the sound is given as Fishers *Island*, rather than a point on the Connecticut mainland.

Louisiana has also selected points on certain islands as headlands where these islands constitute "an integral part of the land form." Where an island does constitute an integral part of the land form a point on it may meet the definition of a headland. The island may form a "salient of the coast" or part of it, the "point of maximum extension of a portion of the land into the water" may be an island, or the point where "there is an appreciable change in direction of the coast" may be one. In such cases a point on the island would be the proper headland. Dr. Shalowitz himself has recognized that an island constituting an in-

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[95]*See* n. 78, *supra.*

[96]Brief for the United States in Answer to California's Exception to the Report of the Special Master, 108, *United States v. California.*

tegral part of the land form may be used in drawing closing lines.[97]

The concept that an island may form an integral part of a land form and hence be assimilated to the mainland is well established in international law. In the case of *The Anna* the Court held that the right of American sovereignty was to be reckoned from some small mudlump islands off the mouth of the Mississippi since they were "the natural appendages of the coast on which they bordered." [98]

The concept that islands close to shore are sometimes natural appendages of the mainland was supported by Wheaton:

> The term "coast" includes the natural appendages of the territory which rise out of the water although the islands are not of sufficient firmness to be inhabited or fortified; . . . .[99]

The late S. W. Boggs also recognized the concept of islands forming an integral part of the mainland:

> Obviously some islands must be treated as if they were part of the mainland. The size of the island, however, cannot in itself serve as a criterion, as it must be considered in relationship to its shape, orientation and distance from the mainland.[100]

Dr. Boggs proposed a geometric test for deter-

[97] 1 *Shalowitz*, p. 161.

[98] 5 Rob. 373, at 385 (1805).

[99] *Elements of International Law* §178, 215 (1866).

[100] "Delimitation of seaward areas under National Jurisdiction" *45 American Journal of International Law* 240, 258 (1951).

mining whether an island was to be considered a part of the mainland,[101] but this test was never generally adopted in International Law, as Dr. Pearcy noted in recognizing that islands may form an integral part of the land form:

> Islands close to the shore may cause some unique problems. They may be near, separated from the mainland by so little water that for all practical purposes the coast of the island is identified as that of the mainland. . . . The late Dr. S. W. Boggs advocated a principle to determine whether or not an island must be associated with the mainland. . . . Unfortunately, neither this principle nor any other has been legally adopted, although the issue is by-passed in instances where the straight baseline is used. In general, baseline problems involving islands closely offshore must be worked out independently from objective guidance through International Law.[102]

Where an island is assimilated to the mainland as a natural appendage of the coast or as an integral part of a land form, it follows that it should be able to serve as a natural entrance point for the purpose of drawing a baseline in front of a bay. In addition to the fact that a point on the island would then meet the definition for a headland, there is a sound policy reason why the island should be used in drawing the closing line. Drawing the closing line from the island in such cases tends to make the coastline more sym-

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[101] *See ibid.*

[102] Pearcy, "Geographical Aspects of the Law of the Sea" *49 Annals of the Association of American Geographers* No. 1, 1, 9 (1959).

metrical and thus in accord with the policy of international law that any determination of a baseline whence to measure the territorial sea should follow the general direction of the coast. If an island were excluded from being considered as a natural entrance point of the bay, then that island would have its own territorial sea and the limits of the territorial sea would be made more irregular than if the island had been used as a baseline.

An apparent example of use of an island forming an integral part of the land form as a headland is to be found in Commander Strohl's book, *The International Law of Bays*. Strohl includes a "sketch of Saronikos Kolpos (of Greece), which shows the difference an island can make in establishing a 24-mile line." [103] Figure 18, showing the Saronikos Gulf, depicts the drawing of a 24-mile line setting off that gulf from the open sea. That line is drawn from a headland on the Peloponnesus to the island of Patroklou. Significantly, if the island of Patroklou did not serve as a natural entrance point for the purpose of drawing the closing line, the Gulf of Saronikos would apparently be wider at its mouth than 24 miles.

In regard to the Louisiana coast the United States has implicitly conceded that islands can be used as natural entrance points for bays. Not only did the Chapman Line in numerous instances use islands in drawing the closing lines for bays, but also the government in its last memorandum setting out its present position proposed bay closure lines between points

[103] Page 72.

on islands in many areas including the Terrebonne Bay area, the Timbalier Bay area, and the Atchafalaya Bay area.

Other examples of use of islands as natural entrance points for bays may be found readily in official decisions of international tribunals and writings on the international law of seaward boundaries. In the *North Atlantic Coast Fisheries Arbitration*, The Tribunal recommended a closing line for Chaleur Bay to be drawn from "the line from the light at Birch Point on Miscou Island to Macquereau Point Light" and another closing line for Mira Bay to be "the line from the light on Scatari Island to the light on the south point of Cape Sable thence to the light at Baccaro Point." The closing line "at Chedabucto and St. Peters" ran "from Cranberry Island light to Green Island light, thence to Point Rouge." [104] All of these recommendations were incorporated in the 1912 Treaty between the United States and Great Britain.[105] As has been mentioned before, Dr. Pearcy in his "Measurement of the Territorial Sea" gives an example of the use of an island at the mouth of a bay as a baseline for drawing the bay closing line.[106]

Thus Louisiana believes that there can be no serious questioning of the principles upon which we rely in using islands as headlands or natural entrance points for bays in drawing closing lines across them.

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[104] *Scott, The Hague Court Reports (North Atlantic Coast Fisheries case)* 141, 189.

[105] *See* n. 35.

[106] 40 *Dept. of State Bulletin*, p. 968, Fig. 9 (1959).

5. The Use of Low-Tide Elevations as Natural Entrance Points

One of the reasons why the present terminology of the Convention, "natural entrance points," is more accurate than pre-Convention terminology is that the phrase "natural entrance points" lacks the connotation of elevation which the pre-Convention term "headland" carried with it in popular usage. Shalowitz has pointed out that although in ordinary language "headland" means "a land mass having a considerable elevation," "in the context of the law of the sea, elevation is *not* a pertinent attribute." [107]

In Article 7 the Geneva Convention itself emphasizes the lack of importance of elevation as an attribute of natural entrance points by requiring that the closing line for bays be drawn between their *low-water marks.* Thus where "the point of maximum extension of a portion of the land into the water" lies on a low-tide elevation, where that low-tide elevation forms an integral part of the land mass and where vessels must enter a bay by going around the low-tide elevation between that elevation and the opposite shore of the bay, it is proper to use that low-tide elevation as a natural entrance point in drawing a bay closing line.

III. Effect of Islands Fringing the Coast

The Geneva Convention contains various specific rules for the determination of the outer limit of inland waters. However, these rules are but specifications of a broader principle of international law that

[107]1 *Shalowitz, Shore and Sea Boundaries* 63 (1962).

landlocked waters are internal waters of the littoral state. There is no basis for concluding that, in codifying the rules concerning the applicability of the principle in certain particular geographical situations, the Convention repealed the general principle underlying the rule. It is one of the functions of codification to clarify the application of principles in situations where there is uncertainty, and this is what was done in drafting the Convention. The specific rules for bays, harbors, ports, etc., set out in the Convention are merely some particularizations of the more general principle that waters lying *inter fauces terrae* are subject to the sovereignty of the littoral state, which principle was not repealed by the particularizations of that principle found in the recent Geneva Convention. There are still cases of geographical formations where the waters are located *inter fauces terrae* and would thus become subject to the sovereignty of the adjacent state, which do not fit neatly into any particular category set forth in the Convention. Such may be the case with certain of Louisiana's island formations.[108]

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[108]In this regard we should like to call the Court's attention to the observation of G. E. Pearcy, Geographer for the Department of State, on the formulae of the Geneva Convention:

> It must be realized that any given situation may, despite formulae, be sufficiently complex to create perplexing problems. An article in a legal document, consisting at most of a few dozen words, can hardly be expected to cover the variations found in the configuration of thousands of miles of coastlines throughout the world.

"Geographical Aspects of the Law of the Sea," 49 *Annals*

In the federal government's brief in support of its motion for judgment on its amended complaint in *United States v. Louisiana*, 363 U.S. 1, it is stated:

> While the United States denies that the phrase, "including all islands within 3 leagues of the coast" described any land, we do agree that Louisiana is entitled for a different reason to the submerged lands between the islands off the mainland. It so happens that all of the islands on the Coast of Louisiana are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters; consequently, the lands underlying those waters necessarily passed to the state upon its entry into the Union.

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of the Association of American Geographers (1959), 1, 5-6.

An example of an instance of waters not covered by the Geneva Convention can be found in the discussions of the proceedings of the International Law Commission. The Special Rapporteur had proposed certain rules dealing with "groups of islands," that is, mid-ocean Archipelagoes, but no agreement was reached on these rules. Mr. Francois had stated that as a consequence of not having any special article on groups of islands "each island would have its own territorial sea." However, this statement was immediately challenged. To clarify the matter, Mr. Francois backed down from his assertion that each island would have its own territorial sea and proposed to "include in his report a passage to the effect that the Commission had recognized the need to deal with the question, but had lacked the time and the requisite assistance of experts, and had therefore decided to leave the decision to a diplomatic conference." This proposal was adopted. Thus, it is clear that the proposed Convention on the Territorial Sea was not exclusive of all other possible rules of international law concerning the delimitation of inland waters where it can be shown that there was any pre-existing international law on the question. (See 1956 Yearbook of the International Law Commission Vol. I, p. 194, par 80, 82; p. 195, par 89.)

Pollard's Lessee v. Hagen, 3 How. 212. Thus the islands, together with the line marking the outer limits of the intervening inland waters, constitute the "coast" of Louisiana in the sense of the Submerged Land Act. We make this explanation lest the dispute over the meaning of the Act of Admission should give the impression that the submerged lands within the island are contested here. . . .[109]

This Court took special notice of the concession:

> The Government concedes that all of the islands which are within three leagues of Louisiana's shore, and therefore belong to it under the terms of its Act of Admission, happen to be so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters. Thus, Louisiana is entitled to the lands beneath those waters quite apart from the affirmative grant of the Submerged Lands Act, under the rule of *Pollard's Lessee v. Hagen*, 3 How. 212. Furthermore, since the islands enclose inland waters, a line drawn around those islands in the intervening waters would constitute the "coast" of Louisiana within the definition of the Submerged Lands Act. . . .[110]

The United States has asked this Court to relieve it of the fullness of the effect of its concession. Louisiana, however, urges that the United States is estopped to assert a position so inconsistent with one that it had urged earlier so vehemently in these same proceedings

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[109] P. 177.

[110] *United States v. Louisiana*, 363 U.S. 1, at 66-67 n. 108, (1959).

to the detriment of Louisiana. The United States did not make this concession casually or inadvertently. It made it with the specific intent of making its claims appear more reasonable in order to give this Court the impression that it was not arguing for such a drastic contraction of what Louisiana had deemed her territory. Having been successful in its strategy of conveying to the Court "the impression that the submerged lands within the islands" were not "contested here . . .", the government should not now be allowed to retract its statement.

As this Court said in *Davis v. Wakelee*, 156 U.S. 680, 689:

> It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Since this concession was made in this very litigation, it is completely binding upon the United States. However, Louisiana also contends that the principles underlying this concession remain valid principles of international law after the adoption of the Geneva Convention. At any rate, since the principles underlying the concession were at the very least once valid statements of international law the lands in question vested in Louisiana under the rule of *Pollard's Lessee v. Hagen* and cannot be divested without the consent

of the state by any unilateral act of the United States government in adopting a treaty.[111]

[111]This Court has repeatedly recognized that the federal government is without power to alter the boundary of a state to divest it of some of its territory after its boundary has been established. In *Geofrey v. Riggs*, 133 U.S. 258, 267 this Court stated that the treaty power did not permit "a cession of any portion of the territory" of a state without its consent.

In *Fort Leavenworth R.R. Co., v. Lowe*, 114 U.S. 525, 541 this Court discussed the history of a controversy between this country and Great Britain.

> And so when question arose as to the northeastern boundary, in Maine, between Great Britain and the United States, and negotiations were in progress for a treaty to settle the boundary, it was deemed necessary on the part of our government to secure the cooperation and concurrence of Maine, so far as such settlement might involve a cession of her sovereignty and jurisdiction as well as title to territory claimed by her, and of Massachusetts so far as it might involve a cession of title to lands held by her.

In *Washington v. Oregon*, 211 U.S. 127, 131, the Court stated:

> The northern boundary of the state of Oregon was established prior to that of the state of Washington and it is not within the power of the national government to change that boundary without the consent of Oregon.

And in *Louisiana v. Mississippi*, 202 U.S. 1, 40-41, the Court asserted:

> Congress, after the admission of Louisiana, could not take away any portion of that State and give it to Mississippi. The rule, *Qui prior est tempore, portior in jure*, applied, and section three of Article IV of the Constitution does not permit the claims of any particular State to be prejudiced by the exercise of the power of Congress therein conferred.

In *New Mexico v. Colorado*, 267 U.S. 30, 41, the Court's statement of the federal government's incapacity to alter a

IV. Historic Inland Waters

One of the most fundamental concepts in international law is that which recognizes the territoriality of certain waters adjacent to a maritime nation's shore without regard to the geometrical measurements of the body of water. In contemporary circles the concept is denominated under the title of the "historic bay" theory.

Though generally considered to be essentially a body of water which has been treated as internal waters by the maritime nation through the exercise of some form of possession or sovereignty,[112] the historic waters theory has escaped precise definition. Even the recent Convention on the Territorial Sea and the Contiguous Zone[113] failed to define the term, electing rather merely to exclude Article 7's mathematical test from having any application to "historic bays." [114] The lack of precise definition and the repeated exclusion of those

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state's boundary without the latter's consent was one of two reasons given for holding in favor of Colorado which had recognized as its official boundary a line which was later resurveyed and found to be inaccurate, that

> After Colorado had been admitted into the Union in 1876 its right to rely upon the line previously established could not be impaired by any subsequent action on the part of the United States.

[112]Anglo-Norwegian Fisheries Case (*United Kingdom v. Norway*), I. C. J. Reports (1951) pp. 130-31; 1 Hyde, *International Law—Chiefly as Interpreted by the United States*, 469 (1954) (hereinafter cited as *Hyde*).

[113]Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Pt.2) 1606.

[114]Paragraph 6 of Article 7 provides that "the foregoing provisions shall not apply to so-called 'historic' bays. . . ."

bays classified as historic from application of the geometrical tests for bay determination have, for convenience, resulted in this concept occasionally being called an "exception" to the general rules for bays.

The theory of historic title is in fact not an "exception" to the general rule but rather is another principle used in international law for classifying a coastal indentation as a bay. This test is totally separate and distinct from Article 7 of the Geneva Convention, but designation of the theory as an "exception" has resulted in certain authors treating the concept of historic title as "exceptional" from the standpoint of interpretation, application, and burden of proof. However, the large majority of international law authorities clearly understand that the designation is for convenience's sake only and they frequently warn that it should not be interpreted as other than a valid alternative to the geometric test.

A. The concept of historic title is not restricted in application solely to bodies of water considered to be bays

Most authorities recognize that the concept of historic title applies to all bodies of water and is not restricted only to those waters which geographically resemble bays. The point is well made in the treatise prepared by the Secretariat of the United Nations entitled *Juridicial Regime of Historic Waters, Including Historic Bays* (hereinafter called U. N. Treatise) which is an analysis of the background, legal interpretation, and proper application of the theory of historic title.

> [I]t can be said that all those authorities who have directed their attention to the problem seem to agree that historic titles can apply also to waters other than bays, i. e., to straits, archipelagoes and generally to all those waters which can be included in the maritime domain of the State.[115]

That this point has been recognized by the United States is evidenced by the statement of the United States delegate to the 1930 Hague Conference. At a meeting of the Second Committee (Territorial Waters) during consideration of the proposed revision dealing with historic bays, he said that "it is a question so far as the latter word is concerned, of waters, not merely waters that either from habit or some technical definition are called bays, but waters by whatever name they may generally or technically have been called." [116]

B. The concept of historic title is not founded on a prescriptive title in the sense that long possession legitimates possession which originally was illegal

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[115] *U. N. DOC.* A/CN 4/143, 17 (1962).

[116] 3 Acts, *Conference for the Codification of International Law* 107 (Annex I) (1930).

See also the 1951 letter from the Department of State to the Department of Justice which said in part: "In connection with the principles applicable to bays and straits, it should be noted that they have no application with respect to the waters of bays, straits, or sounds when a state can prove by historical usage that such waters have been traditionally subjected to its exclusive authority. The United States specifically reserved this type of case at the Hague Conference of 1930 (*Acts of Conference,* 197)." As cited in 1 *Shalowitz, Shore and Sea Boundaries* 354, 356 (Appendix D) (1962) (hereinafter cited as *Shalowitz*).

There is general agreement among international law authorities that the requirement of proving possession sufficient to legitimate an illegal title should not be implied from the occasional reference to an historic title as a "prescriptive title." The idea is expressed well by Charles H. Hyde in his treatise, *International Law—Chiefly as Interpreted by the United States:*

> The frequent suggestion that a "historic bay" marks the acquisition or perfecting of a right of dominion by way of prescription is not believed to be in complete harmony with the theory on which maritime States have acted. A prescriptive right is one which has grown out of conduct which in its initial stages might have been deemed wrongful by the State or entity in the face of which it was undertaken. . . .
>
> A bay regarded as "historic" doubtless betokens a common acquiescense in the assertion of dominion by the coastal State; but it does not necessarily signify that the original assertion of that dominion constituted a violation of any legal obligation towards any State or to the society of States. When nature made a bay geographically a part of the domain of the littoral State, that State when first asserting dominion did not in fact assume that in occupying the water area as a part of its territory it failed in any international obligation because of the width of the entrance. In a word, the absence in every quarter of a sense that the assertion of dominion amounted to wrongful conduct, distinguished the acquisition of the right from one that might be said to be a

prescriptive character. . . . Vol. 1, 2d ed., p. 469, n. 4.[117]

C. The concept of historic title is not "exceptional" so as to require a stringent burden of proof or so as to change the constituent elements necessary for inland water classification

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[117]Shalowitz concurs in this view: "[A] prescriptive right denotes one which grows out of conduct which in its initial stages might have been wrongful, whereas the assertion of dominion over a bay that is geographically a part of the domain of the littoral nation does not necessarily signify that the assertion is a violation of any legal obligation towards any nation or the society of nations." 1 *Shalowitz*, p. 47 n. 34.

Similarly see the U. N. Treatise; "If, on the other hand, the term 'prescriptive right' refers to the second sub-category of acquisitive prescription, mentioned above, [acquisitive prescription akin to the usucapio of Roman law where the title of the possessor was known to be defective] it is more difficult to accept the concept of prescription as applicable to 'historic waters'. In this case, prescription would mean that an originally *defective* or *invalid* title is cured by long possession. If applied to 'historic waters' that would imply the assumption that according to the general rules of international law the waters were originally high seas, but that through the effect of time (in the proper circumstances) an exceptional historic title to the waters had emerged in favour of the coastal State. In other words, to consider the title to 'historic waters' as a prescriptive right in this latter sense would really be to embrace the idea that the title to 'historic waters' is an exception to the general rules of international law regarding the delimitation of maritime areas.

"68. *It is to be feared that this is usually what is implied when the term 'prescriptive right' is used in connexion with 'historic waters'. In order to avoid that by the use of that term unwarranted assumptions are brought into the argument, it would therefore be preferable not to refer to the concept of prescription in connexion with the regime of 'historic waters'.*" (Emphasis Added.) *U. N.DOC* 4/143, p. 33 (1962).

Procedurally, the concept of historic title should not be regarded as an "exception" so as to require a more stringent burden of proof than would be required of a general rule. Nor should the Geneva Convention be interpreted as changing the legal theory on which the concept is founded. Indeed, the theory of historic title is as viable today as it was in 1957 prior to the Geneva Convention.

These points are cogently made in the United Nations Treatise:

> [T]he problem of the elements constituting title to "historic waters" and the question of proof have to be considered independently and not on the assumption that the title to "historic waters" constitutes an exception to general international law.[118]
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> * * *
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> One can, of course, say in a certain sense that an historic title which is expressly reserved, as is the case in Articles 7 and 12 of the Convention, thereby is implicitly qualified as an exception. . . . It is not the intention, by excepting it, to subject the historic title to stricter requirements but to maintain the *status quo ante* with respect to the title. It would be a fallacy if from the fact that the Convention in certain cases excepts historic rights one would draw the conclusion that the Convention requires stricter proof of the historic title than was the case before the conclusion of the Convention. (Emphasis in original.)[119]

[118] *U. N. DOC* A/CN. 4/143, p. 29 (1962).

[119] *Id.* at p. 37.

The same conclusion was reached with respect to the

D. The concept of historic title is not "exceptional" in the sense that it represents merely an after thought to or outgrowth of the geometrical tests for bays

Finally, the concept of historic title is not "exceptional" from the standpoint that it should be viewed as an insignificant afterthought to or outgrowth of the geometrical rules for bay determination. It is in fact a concept which predates the geometric tests for bays and is as valid and viable today as before the advent of the technical rules for bay determination.

Logic and law dictate the conclusion that historic title is in fact not a subsidiary rule but one equal with and as viable as any geometric test. One of the most basic and universally recognized concepts in international law is the right of a maritime nation to claim sovereignty over a marginal zone adjacent to her coast. This forms part of her national territory and

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attempted codification at the 1930 Hague Conference; "One difficulty which the committee encountered in the course of its examination of several points on its agenda was that the establishment of general rules with regard to the belt of the territorial sea would, in theory at any rate, affect an inevitable change in the existing status of certain areas of water. In this connection, it is almost unnecessary to mention the bays known as 'historic bays'; and the problem is besides by no means confined to bays, but arises in the cases of other areas of water. The work of codification could not affect any rights which States may possess over certain parts of their coastal sea, and nothing therefore, either in this report or in its appendices, can be open to that interpretation." Report adopted by the Committee on April 10, 1930, 3 Acts, *Conference for the Codification of International Law* 209, 211 (Annex V) (1930).

is known as her "territorial sea" or "marine belt." The basis of this claim is the obvious necessity for a maritime nation to control these waters to protect her economy and security.[120] The Report of the Second Committee of the Preparatory Committee for the Conference for the Codification of International Law held at The Hague in 1930 said, "it was recognized that international law attributes to each coastal State sovereignty over a belt of sea around its coast. This

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[120]"It has always been evident [that] it is necessary for a State to retain a certain measure of jurisdiction over the waters adjoining its coast: the nation's defense and safety must be secured; navigation must be made safe for vessels visiting its ports; health must be protected, the revenue safeguarded against smuggling craft, and the coast fisheries must be reserved for its nationals." *Masterson, Jurisdiction in Marginal Seas,* p. xiii (1929).

Moore points out that "Percels in his work on the Admiralty justifies the doctrine of the territoriality of adjacent waters on the three following grounds: (1) the security of a maritime state requires possession of its marginal waters; (2) the surveillance of ships which enter those waters, whether passing through or stopping there, is demanded in order to guarantee the efficient police (sic) and the development of the political, commercial, and fiscal interests of the bordering state; (3) the enjoyment of the possession of terriorial waters serves to sustain the existence of the population on the coast." *Moore,* 1 *International Law Digest* 698-99 (1906) (hereinafter cited as *Moore*).

"The principle that the littoral sea forms part of the territory is justified by the exigencies of the conservation and safety of the state, from the military, sanitary, and fiscal point of view, as well as from the point of view of industrial interests, especially that of fisheries. . . ." *Rivier,* 1 *Droit des Gens* 145, cited in 1 *Moore,* at 699.

must be regarded as essential for the protection of the legitimate interests of the state." [121]

As essential as control of the marginal sea is, it is much more essential to a maritime nation to control the bays, coves, and inlets along the shore. The North Atlantic Coast Fisheries Tribunal noted with particularity that "the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defence, of commerce, and of industry are all vitally concerned with the control of the bays penetrating the national coastline." [122]

The frequent incursion of foreign maritime powers into the coastal waters of other nations prompted the latter to lay claim to such waters in order to protect these vital interests. An excellent description of this process is found in the U. N. Treatise.

> It was natural that States laid claim to and exercised jurisdiction over such areas of the sea adjacent to their coasts as they considered to be vital to their security or to their economy. When a controversy arose after a State had for some time exercised jurisdiction over such an area of the sea, and the opponent State alleged that, according to the general rules of international law

[121]League of Nations pub. C 74. M39. 1929. V (Bases of Discussion), 12, 17.

[122]Award of the Tribunal, 1 North Atlantic Coast Fisheries Arbitration, 94, (The Hague, 1910), as cited in 1 *Shalowitz* 33.

> relating to the delimitation of territorial waters, the area in question was outside such waters, it was also natural for the defendant State to reply not only that it had a different opinion about the content of the applicable rule of general international law but also that by force of long usage it now had an historic title to the area. In the course of time there occurred quite a number of cases in which a State asserted its sovereignty,[123] based on historic rights, over certain maritime areas, whether or not according to general international law rules such areas might be outside its maritime domain. (Footnote Added.) [124]

Such claims were unsatisfactory for both the claimant state, held to the sometimes difficult burden of proving actual assertion of ownership or control, as well as for the other maritime nations of the world who traveled coastal waters in doubt as to whether the waters were national waters or high seas. A system was needed which would impart more certainty to the determination of the status of the waters of coastal indentations.

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[123]The United Nations' Memorandum entitled *Historic Bays* (hereafter U. N. Memorandum), lists more than 45 coastal indentations which, on the basis of historic title, are considered to be part of the national waters of the adjacent maritime state. Among others mentioned, the Memorandum noted that Chesapeake Bay, Delaware Bay, Monterey Bay, and Long Island Sound have been declared as bays to which the United States has historic title. Numerous other bays, some on the North American continent and many with openings in excess of 15 miles, have also been held to be historic inland waters. *U. N. DOC.* A/Conf. 13/1, pp. 3-8 (1958).

[124]*U. N. DOC.* A/CN 4/143, p. 18, (1962).

There was no geometrical test for bay determination as is found today in Article 7. As a matter of fact, the only concept to which a mathematical measurement applied was the developing test for determining the breadth of the territorial sea. But because of the greater importance attached to bays than to the area of the territorial sea, the developing tests for determining the extent of the territorial sea did not provide adequate protection of the vital interests in bays. The extent of the territorial sea, as generally recognized, was simply not sufficiently large to provide the protection demanded by maritime nations in coastal indentations.

We have previously followed the evolution of the geometrical tests for bay determination from their humble beginning prior to the North Atlantic Fisheries Arbitration to their ultimate refinement in Article 7 of the Geneva Convention.[125] As suggested thereinabove one point should be kept in mind; the purpose of the geometrical tests was to provide a tool which would preclude the necessity of proving the vital interests of the coastal nation in order to determine the character of the waters of coastal indentations. Consequently, the purpose and the impact of Article 7 of the Geneva Convention, as was the case with all geometrical tests, was to define those waters in which the nations of the world would recognize the vital interests of the coastal state without requiring proof of such an interest or demanding proof of an actual claim of territoriality by the nation. In

[125] *See* "Development of the International Law of Bays" *supra* p. 90-109.

effect, the geometric rules for bays established a conclusive presumption as to the vital interest of a maritime nation in the waters of a qualifying bay. These tests in no way eliminated from consideration the basic proposition that a body of water, which was in fact vital to the security and economy of a maritime nation, could be claimed by that nation as a part of her national waters. In those bays which did not meet the geometrical test, proof of the vital interests and proof of the exercise of control is required before international law would recognize the indentation as a true bay. Whereas, in those bays which qualify mathematically, the law presumes both the interest and the control necessary to establish title.

In its proper setting, therefore, the concept of historic title should not be viewed as merely an "exception" and as subsidiary to supposedly more important and more "general" mathematical rules.[126] Rather

[126]Reference to the geometrical tests as "general rules" connotes a more basic conceptual foundation than these tests have a right to claim. They merely represent an agreement, contractual in nature, between a majority of the maritime nations concerning the maximum width of ordinary bays. The comment of the United Nations' Treatise, in this regard, cogently describes the "general" character of the geometric test: "If there are general rules in this field, the most that could be asserted is that, within the framework of customary international law, certain maximum limits for the territorial sea and the width of the opening of bays are generally applicable and that in certain cases there exists an historic title to waters which do not come within these limits. *The so-called general rules would then be 'general' in the sense only that they would be more generally applicable than the 'exceptional' title to 'historic waters'. But they would not be 'general' in the sense of having a superior validity in relation to the 'ex-*

it should be viewed as the basic theory from which the mathematical tests evolved, still as viable today in determining the character of the coastal waters as it was before the adoption of the Geneva Convention. The United Nations' Treatise supports this conclusion thereby:

> It must not be forgotten that the whole purpose of making the historic title an exception from the general rules contained in the main provisions of relevant article [Article 7] is to *maintain* the historic title. It is not the intention by excepting it, to subject the historic title to stricter requirements but to maintain the *status quo ante* with respect to the title. . . . In reality, the Convention simply leaves the matter, both regarding the existence of the title and the proof of the title in the state in which it was at the entry into force of the Convention. (Emphasis in Original.) [127]

E. The elements of historic title indicate that the cornerstone of the concept is the "vital interest" of the maritime nation in and to the subject territory

According to the Treatise of the Secretariat of the United Nations there are "at least three factors [which] have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming

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ceptional' historic title. Both the general rules and the historic title would be part of customary international law. . . ." (Emphasis Added.) *U. N. DOC.* 4/CN 4/143, p. 28 (1962).

[127] *U.N. DOC.* A/CN, 4/143, p. 37, (1962).

the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign states." [128]

1. Exercise of Authority
   a. A Claim to Exercise Exclusive Rights Within a Certain Sea Area Necessarily Implies and Involves a Claim to That Area as Territorial or National Waters

There is little agreement as to what acts of authority are required to impart an historic title[129] except that "the authority exercised must . . . be sovereignty, the state must have acted and act as the sovereign of the area." [130] To *act* as the sovereign means that a state *may* exercise the totality of rights which it possesses in its national waters. But to *qualify* as the sovereign does not imply that all such rights *must* be exercised before the sovereignty can be recognized. As Gidel points out, "the fact that a state chooses not to exercise in a given part of its internal waters all the prerogatives vested in it by ordinary international law, neither produces any substantial modification in the juridical status of the state's internal waters nor changes in any way the delimitation

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[128] *Ibid.*

[129] Gidel says, "It is hard to specify categorically what kind of acts of appropriation constitutes sufficient evidence . . ." 3 *Le Droit International Publique de la Mer* 633 (1934) and Borquin comments, "What acts under municipal law can be cited as expressing its desire to act as the sovereign? That is a matter very difficult, if not impossible, to determine *a priori*." "Les baies historiques" in *Melanges Georges Sauser-Hall* 43 (1952).

[130] *U. N. DOC.* A/CN 4/143, p. 40 (1962).

of those waters in relation to territorial waters." [131]

The exclusive control which Norway asserted, as exemplified in the *Fisheries Case*, was limited solely to fishing rights behind designated lines. Norway historically, had not claimed ownership of these waters, but rather had exercised merely one element of sovereignty—the right to control fishing.

While no precise definition of sufficient possession is availing, it can at least be said that to be considered national waters the maritime state must have exercised some form of exclusive control over the territory, be it over fishing, shrimping, navigation, dredging, flying, etc. As put by the eminent international law authority, Sir Gerald Fitzmaurice, Legal Advisor of the British Foreign Office:

> [The] sea beyond territorial waters is *res communis*, in which no exclusive rights—fisheries or other—can be claimed or asserted. Hence a *valid* claim to exclusive rights of any kind involves, and in fact *is* (however it may be framed on paper), a claim to territorial waters. To put the matter in another way, a claim to exclusive rights in any sea area can only be enforced on a basis of dominion over that area, and this involves that the area consists of territorial or national waters, in which alone a State can possess such dominion and exercise rights of jurisdiction. . . .[132]

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[131] 1 *Annuaire* (1954) p. 221; *U. N. DOC* A/Conf. 13/1 para. 129 (1958).

[132] "The Law and the Procedure of the International Court of Justice, 1951-54: Points of Substantive Law," appearing in 31 *British Yearbook of International Law*, 371, 376 (1954).

b. Is the United States the Only Entity Capable of Activities Which May Evidence Historic Title, or May the Activities of States Within This Union be Considered?

The government has continuously asserted that it is the only entity capable of performing acts which may evidence the historic title to a body of water. The Supreme Court in the second *California* case considered this assertion but refrained from any pronouncement concerning its correctness.[133] We believe the position of the government is incorrect for not only is it inconsistent with the prior position of the United States, but more importantly such assertion does not conform to international law.

While some claims of historic title result solely from the action of the central government, McDougal and Burke, in their recent book, *The Public Order of the Ocean*, point out that "the British claim to Bris-

(Fitzmaurice recognizes that international conventions concerning the contiguous zone could, by agreement, modify this concept insofar as the activities affected by the convention were concerned.)

The U. N. Secretariat also points out that the requirement of effectiveness does not "imply that the State necessarily must have undertaken concrete action to enforce its relevant laws and regulations within or with respect to the area claimed. It is possible that these laws and regulations were respected without the state having to resort to particular acts of enforcement. It is, however, essential that, to the extent that action on the part of the State and its organs was necessary to maintain authority over the area, such action was undertaken." *U. N. DOC* A/CN 4/143, p. 43 (1962).

[133] *United States v. California*, 381 U.S. 139, 173.

tol Channel is found in the opinion of a *local tribunal*, as are the claims for Long Island Sound and Monterey Bay in the United States, for the bays of Chaleur and Conception in Canada, and for Laholm in Sweden." [134] (Emphasis added.) Furthermore, the list of historic bays given by authorities commonly include not only those bays claimed by public officials but also others held to be historic simply "because other writers have so regarded them." [135]

The opinion of United States Attorney General Randolph on May 14, 1793, concluding that Delaware Bay was part of the historic national waters of this country, relied not on claims and assertions of the federal government, but rather, to a large extent on the actions and expectations of the states of Delaware and New Jersey. The opinion recognizes "the mutual rights of the states of New Jersey and Delaware, up to the middle of the river. . . ." [136] He considered the United States not as a single entity in its monolithic federal form, but rather as a union of several states. It is significant that the plural was used when the Attorney General said "the cornerstone of our claim is, that the United States *are proprietors* of the lands on both sides of the Delaware, from its head to its entrance into the sea." (Emphasis Added.)[137] He anal-

[134] *McDougal and Burke, The Public Order of the Ocean* 360 (1962).

[135] *Ibid.*

[136] 1 *Opinions of the Attorney General of the United States* 15, 16 (1793).

[137] *Ibid.*

Furthermore Attorney General Randolph recognized the

ogizes Delaware Bay to Chesapeake Bay, which he says "is so fully assumed to be within the United States." [138] But the only piece of evidence cited to support that assumption is that Chesapeake Bay, "for the length of the Virginia territory, is subject to the process of several counties. . . ." [139]

In the case of the "Alleganean," the waters of Chesapeake Bay were determined to be part of the national domain. The decision was rendered by the Court of Commissioners of Alabama Claims, which, among other criteria used in reaching a conclusion therein, considered that "it is part of the common history of the country that the states of Virginia and Maryland have from their earliest territorial existence claimed jurisdiction over these waters, and it is of general knowledge that they still continue to do so." [140]

To attempt to apply overly technical tests to the determination of the status of coastal waters runs the very real danger of overlooking the basis on which the historic title was founded. It is the vital interest

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jurisdiction of New Jersey and Delaware extending to the waters of the bay through taxing authorities and asked these rhetorical questions which, we feel, clearly demonstrate the importance he attached to local activities in establishing an historic title: "Have any local laws, at any time, provided variable arrangements for the river and the bay? Has not the jurisdiction of the contiguous States been exercised equally on both?" *Id.* at p. 37.

[138] *Id.* at p. 18.

[139] *Ibid.*

[140] As quoted in 4 *Moore, International Arbitration* 4332, 4339 (1898).

of the maritime state in the littoral areas off her shore which generate the actions and activities upon which an historic title rests. Practically speaking, particular interests of great importance to the government of the United States prompt it to exert control over coastal waters in order to protect those interests. There are other interests of great importance to the individual state exclusive of the federal government which prompt the state to exert control in its own sovereign capacity over the same waters to protect its particular special interests. Any such exercise of control is designed to protect the special interest which generated the concern and the need for control, and consequently will only be an assertion of sovereignty to the limited extent needed to protect the interest involved. But, each activity of the nation or the state results in some degree of control being exerted over the coastal waters by a duly constituted administrative or political subdivision of the United States. Control deriving from such a source, unless disclaimed at the time by the federal government or objected to by foreign nations, should be viewed as demonstrating the national character of these waters.[141] In short, the activities of the states within this Union should be considered as evidencing control sufficient to support a claim of historic title.

2. Continuity of Authority

It is clear from the general definitions of historic waters as used in the international law that some continuity of exercise of authority is required for

[141] *Op. cit. supra* at note 132.

the establishment of title over a water area. The United Nations' Treatise makes it clear that:

> [A] historic title to a maritime area must be based on the effective exercise of sovereignty over the area by the particular State claiming it. The activity from which the required usage must emerge is consequently a repeated or continued activity of this same State. The passage of time is therefore essential; the State must have kept up its exercise of sovereignty over the area for a considered time.[142]

However, of all the elements of historic title, this one is perhaps the most nebulous. For there are not even general guidelines as to the duration of the exercise of sovereignty required to impart an historic character. Each situation must be viewed separately and independently. As the Treatise states, "no precise length of time can be indicated as necessary to build the usage on which the historic title must be based. It must remain a matter of judgment when sufficient time has elapsed for the usage to emerge." [143]

3. Attitude of Foreign States—The Concept of Historic Title Does Not Require Acquiescence by Foreign Nations Other Than Tacit Acquiescence or Toleration

The third generally recognized element of historic title is the acquiescence of foreign nations in the maritime states' territorial claim. The danger with

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[142] *U.N. DOC.* A/CN. 4/143, p. 45 (1962).
[143] *Ibid.*

the use of the word "acquiescence" is that it may be interpreted as requiring active recognition of the claim by foreign nations. While there are some authorities who suggest that this is the law, the great bulk of international law scholars hold that what is really required is not affirmative recognition but only that there be no opposition by foreign nations to the claim. As Bourquin puts it, what matters is whether the reactions of other states "interfere with the peaceful and continuous exercise of sovereignty [by a coastal state to the point of divesting it of its chance to establish a historic title]. . . . Obviously only acts of opposition can have that effect. So long as the behavior of the riparian State causes no protest abroad, the exercise of sovereignty continues unimpeded. The absence of a reaction by foreign States is sufficient";[144] affirmative or active acquiescence is not necessary.

On this point, the United Nations' Treatise summarizes the authorities saying that "there is substantial agreement that inaction on the part of foreign states is sufficient to permit an historic title to a maritime area to arise by effective and continued exercise of sovereignty over it by the coastal State during a considerable time." [145] Furthermore, the International Court of Justice in the *Fisheries Case* supported Norway's claim to its straight base line method on the principle, inter alia, that there was "general

[144]Bourquin, "Les baies historiques," *Melanges Georges Sauser-Hall,* 46 (1952); *U. N. DOC.* A/CN 4/143, p. 47 (1962).

[145]*U. N. DOC.* A/CN. 4/143, p. 49 (1962).

toleration of foreign states with regard to the Norwegian practice." (Emphasis Added.)[146] As the Treatise by the Secretariat concluded quite positively,

> There seem to be strong reasons to hold that notariety of the exercise of sovereignty, in other words, open and public exercise of sovereignty, is required rather than actual knowledge by the foreign state of the activities of coastal states in the area.[147]

4. Vital Interests

If the three elements of historic title, as described in the United Nations' Treatise—(1) exercise of sovreignty, (2) for long periods of time, (3) with the acquiescence of foreign powers—are viewed in a vacuum, the very foundation of the theory of historic title, the interests of the state in her littoral waters, may be overlooked.

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[146]*Fisheries Case,* Judgment of 18 December 1951, *ICJ Reports,* (1951) p. 138; *U. N. DOC.* A/Conf. 13/1, p. 10 (1958).

It is also significant that James E. Webb, acting Secretary of State, in a letter dated November 3, 1951 to Howard J. McGraph, Attorney General, described an historic title as one which "a state can prove by historical usage that such waters have been traditionally subjected to its exclusive authority" (as quoted in 1 *Shalowitz,* p. 356). The significance of the definition is that it fails to mention any requirement whatsoever concerning the active or passive acquiescence of foreign nations.

This same significant omission occurs in the definition of historic title found in the "Brief for the United States in Answer to California's Exceptions to the Report of the Special Master" at page 141.

[147]*U. N. DOC.* A/CN. 4/143, p. 55 (1962).

Almost without exception international law authorities agree that in examining a claim of historic title, the interest of the claiming nation and the concomitant disinterest of the community of nations in the waters must be considered.[148]

The Permanent Court of Arbitration at The Hague in the *North Atlantic Coast Fisheries Arbitration* in 1910 said the "interpretation must take into account all the individual circumstances which for any of the different bays are to be appreciated, the relation of its width to the length of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is intended; the special value which it has for the industry of the inhabitants of its shore; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general." [149]

In the *Delaware Bay Case* and again the *Chesapeake Bay Case*, the importance of those waters to the nation, to the adjacent states and to their citizens, coupled with the lack of importance to other nations, were considered paramount in reaching the conclusion that the United States had historic title to both bodies of water.[150]

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[148]*See* footnote number 120 *supra*, which cites several authorities who emphasize the importance of vital interests and control.

[149]1 *Hackworth, Digest of International Law*, 692 (1940), hereinafter cited as *Hackworth*.

[150]United States Attorney General Randolph, in the *Delaware Bay Case*, said: "the cornerstone of our claim is, that the

The Central American Court of Justice, in its opinion concerning the status of the Gulf of Fonseca, lying adjacent to Nicaragua, Honduras, and El Salva-

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United States are proprietors of the land on both sides of the Delaware from its head to its entrance into the sea. (at page 34)

* * *

"The remarks may be enforced by asking, What nation can be injured in its rights by the Delaware being appropriated to the United States? And to what degree may not the United States be injured, on the contrary ground? It communicates with no foreign dominion; no foreign nation has, ever before, had a community of right in it, as if it were a main sea; under the former and present Governments, the exclusive jurisdiction has been asserted." 1 *Opinions Attorney General* 17 (1793); 1 *Moore,* p. 735; *U. N. DOC.* A/Conf. 13/1, p. 5 (1958).

Again in the case of Chesapeake Bay, the opinion of the Second Court of Commissioners of Alabama Claims clearly shows that considerations other than mere historic usage were taken into account in the determination that Chesapeake Bay was part of the inland waters of the United States. "Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent States encompass it; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it cannot become the pathway from one nation to another . . . and bearing in mind the matter of the brig *Grange* and the position taken by the government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States and no part of the 'high seas' within the meaning of the term used in Section 5 of the act of June 5, 1872." *U. N. DOC.* A/Conf. 13/1 p. 4 (1958).

dor, concluded, on the basis of the following criteria, that the Gulf was historic inland waters:

> In order to fix the international legal status of the Gulf of Fonseca, it is necessary to specify the characteristics proper thereto from the three fold point of view of *history, geography, and the vital interests* of the surrounding States. (Emphasis Added.)[151]

This principle was likewise recognized by the International Court of Justice in the *Fisheries Case.* In analyzing the criteria to be used in determining an historic title, the Court said:

> [There] is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.[152]

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[151]"Gulf of Fonseca," 2 *American Journal of International Law,* 693 (1917); *U. N. DOC.* A/Conf. 13/1, p. 9 (1958).

[152]*Fisheries Case* (*United Kingdom v. Norway*) Judgment of 18 December 1951: *ICJ Reports* 133 (1951); *U. N. DOC.* A/Conf. 13/1, p. 11 (1958).

The noted authority Bourquin concurs with the view that consideration must be given to the vital interest of the littoral nation. "If the territoriality of a bay is to be determined in the light of all the circumstances which characterize each of them, then clearly the vital interests of the coastal State must be taken into account. . . . But whatever criticisms may be properly levelled at the formula . . . there seems little doubt that it expresses something which is not only common sense but also good law, consistent with the practice of States,

Finally, Aaron Shalowitz, Special Assistant to the Director of the Coast and Geodetic Survey, and one of the federal government's chief witnesses in the second *California* case, admits that "insofar as the United States is concerned, its position regarding historic bays would seem to be predicated upon a consideration of both usage and the *vital interest* of the coastal nation." (Emphasis Added.)[153]

Consequently, to properly evaluate the historic character of any body of water one must examine the vital interests of the coastal state in her adjacent waters, the action which she has taken to protect those interests, the length of time such activities have been maintained, and whether any foreign nation has objected thereto.

SPECIFIC AREAS

Even a cursory examination of the coastline of Louisiana will demonstrate that it is "deeply indented and cut into" and that there are numerous "fringe(s) of islands along the coast or in its immediate vicinity." Since the quoted language is taken verbatim from Article 4 of the Convention,[154] it is obvious that the system of straight baselines authorized by Ar-

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namely, that the vital interests of the State in the possession of a bay constitute, side by side with the historical tradition, one of the bases on which it may rely in claiming sovereignty therein." "Les baies historique," *Melanges Georges Sauses-Hall,* (1951), at p. 51.

[153]1 *Shalowitz,* p. 48.

[154]Convention on the Territorial Sea and The Contiguous Zone, 15 U.S.T. (pt. 2) 1606, Article 4.

ticle 4 would be the most appropriate method for delineating the coast of Louisiana. It would solve most, if not all, of the perplexing problems which confront both the government and the state in trying to apply the balance of the Convention to various areas of the Louisiana coastline.

This Court, however, stated in *United States v. California, supra,* that the choice to use the straight-base-line method is one that rests with the federal government, not the states, and that California could not use such baselines "to extend our international boundaries beyond their traditional international limits against the expressed opposition of the United States." [155]

In view of such statements by the Court, Louisiana has avoided using the straight baseline method of Article 4 of the Convention and, instead, has attempted to apply other criteria recognized by the Convention for determining its coastline. In so doing, however, Louisiana does not admit that Article 4 is not applicable, and Louisiana asserts that its application would not extend our international boundaries "beyond their traditional international limits" off the coast of Louisiana.

The elimination of Article 4 has resulted in perplexities, however, both to the government and to the state, in areas where the system of straight baselines is the more obvious solution. In fact, it has caused the

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[155] *United States v. California,* 381 U. S. 139, 168.

federal government to resort to "minor modifications" of the Convention.[156]

Fortunately, there is basic agreement between the government and Louisiana with respect to many of the segments of Louisiana's alternative coastline. The basic disagreement is over the unduly restrictive and technical approach which the United States has used in applying the Convention to bay closures. Louisiana submits that the Convention must be interpreted with some degree of reasonableness and logic, and that any international boundary resulting therefrom must be reasonable and logical, consistent with the vital interests of the nation. In short, we reject the overly-simplified, superficial, and mathematical approach of the government.

In its original motion, Louisiana described its coastline in an east to west direction from Ship Island, Mississippi, to Sabine Pass, at the Texas-Louisiana border. We have retained that direction in describing the coastline presented herein. The discussion of specific areas consequently begins with the area adjacent to Ship Island.

In order to simplify as much as practicable the central issues dividing the parties, we do not raise sub-alternatives at this time (except in some instances where they relate to contentions of the United States), but we reserve our right to urge sub-

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[156]Memorandum in Support of the Motion of the United States and in Opposition to the Motion of the State of Louisiana, No. 9, Original (1967) at page 38.

alternatives in consideration of detailed points if the occasion arises.

I. Chandeleur and Breton Sounds

The government concedes that Chandeleur and Breton Sounds (Exhibit 34) are inland waters, and there is no disagreement except as to the reason such waters are inland. These sounds exhibit a somewhat unique geographic form in that they are not a bay in the sense of a body of water penetrating inland between the headlands of the shore. Rather, they are a geographically enclosed body of water lying between a fringing chain of islands and the mainland. We have previously reviewed the treatment in international laws of groups of islands lying near shore and shown how their geographic configuration may result in the intervening waters being sufficiently enclosed to be considered as part of the national waters of the coastal state.[157] The Chandeleur Island Chain is such a group of islands generally recognized by international law authorities as forming part of the inland waters of the United States.[158] Moreover, on numerous occasions this unique character of being "enclosed" has been noted by the Courts and the government as a justification for classifying the Sounds as inland waters.

It was more than 60 years ago in *Louisiana v. Mississippi* 202 U.S. 1, that this Court first con-

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[157]*See supra,* page 131 and following, dealing with the treatment of groups of islands adjacent to the shore.

[158]See 1 *Shalowitz* 108-09.

sidered the question of Louisiana's boundary in the Chandeleur and Breton Sound area. In that case the boundary between the States of Louisiana and Mississippi was fixed at the "deep-water channel sailing line," as shown on the map attached to the decree. That map showed the line extending through Chandeleur Sound. Other maps attached to the opinion show that the Louisiana boundary ran on the seaward side of the Chandeleur Island Chain and thus included Chandeleur and Breton Sounds with the national waters of the United States.

This court also considered the character of the waters of Chandeleur and Breton Sounds in *United States v. California*, 381 U. S. 139. The Court noted that "the Breton Sound is a *cul de sac.* The Chandeleur Sound, if considered separately from the Breton Sound which it joins, leads only to the Breton Sound. Neither is used as a route of passage between two areas of open sea. In fact both are so shallow as to not be readily navigable." (381 U.S. at 171.)

The government in 1954 designated a line, known as the Chapman Line, which represented its interpretation of the "ordinary low-water mark and *the seaward limits of the inland waters along the Louisiana coast.*" (Emphasis Added.)[159] At that time,

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[159] *Ibid.*, n. 8.

Shalowitz who assisted the Department of Justice in preparation of the Chapman Line noted that "[i]t was understood at the time that in general the line was being promulgated as the most landward line that the Government would claim for the federal-state boundary. . . ." *Id* at 109.

the line, which treated Chandeleur and Breton Sounds as inland waters, represented the United States' interpretation of internationally accepted legal principles for determining the location of the coast line.

The government's Brief in support of its motion for judgment on its amended complaint in *United States v. Louisiana*, 363 U.S. 1 said, "it so happens that all the islands on the coast of Louisiana are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters" (p. 79-80). This Court in the case took notice of the fact that the government conceded the inland status of Chandeleur and Breton Sounds on the basis of their geographic configuration, stating: "The government concedes that all the islands which are within three leagues of Louisiana's shore . . . happen to be so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters." (363 U.S. at 67.)

Again in its Memorandum in Support of its Motion for Supplemental Decree No. 1, the federal government recognized that Chandeleur and Breton Sounds were not part of the high seas, for the Chapman Line, which represented the government's interpretation of Louisiana's coastline, was not modified in this area.[160] As a result of that motion, this Court, on December 13, 1965 (382 U. S. 288, 292) entered Supplemental Decree No. 1 herein, which recognized that Chandeleur and Breton Sounds were *not* within

[160]U. S. Memorandum in Support of its Motion for Supplemental Decree No. 1. (1965).

the "disputed area" (thus being inland waters of Louisiana), and awarded Louisiana a portion of Isle au Breton Bay, which lay *seaward* of Breton Sound.

Now, in its present Memorandum, the government reverses the position to which it has held since at least 1954, and asserts that Louisiana's right to these sounds, "rests solely on the basis of our adherence to our past concession, *and not on any legal principle*. . . ." (Emphasis added.)[161] At the same time it concludes that it would *not* be "in the public interest" to upset the "fundamental assumption" which has guided the conduct of the parties over a long period of time, and therefore moves for a supplemental decree which will include Chandeleur and Breton Sounds as inland waters.

The dilemma in which the government finds itself is the result of its unreasonably restrictive interpretation of the Geneva Convention, and typifies the government's position in these proceedings. Apparently it regards the Convention as embodying *all* of the principles of international law on the subject of inland waters and as a repeal of *all* international law which may have previously existed through the centuries. But, even worse, it takes the position that *unless* express language can be found in the Convention which, mechanically and mathematically, qualifies a body of water as inland water, then the *absence* of such an express provision, *a fortiori*, must result in the classification of that water as "high seas." At the same time, however, it refuses to apply

[161] *Op. cit. supra* note 45 at page 80.

some of the express provisions of the Convention (*e. g.* straight baseline system of Article 4), and admits that it has been necessary to resort to "minor modifications" of others, all of which serves to unduly restrict this nation's territorial waters.

If the government refuses to use the system of straight baselines authorized by Article 4 of the Convention, "in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast" (as in the case with much of Louisiana's coast), and if it also refuses to apply the international law existing outside the Convention with respect to such deep indentations or islands, a complete void is left. One or the other must be applied, otherwise, along much of the coast of the United States, areas heretofore considered inland waters will now be considered part of the high seas.

We do not believe that Congress so intended to restrict the boundaries of this nation when it adopted the Convention, nor do we believe that the Convention has that effect. All of the history and commentary of the Convention evidences just the opposite—the convention was designed to *broaden* and extend, not restrict, the inland waters of coastal nations. It is entitled to a most liberal interpretation. It must be interpreted with reason, not mechanically, to establish a reasonable and logical coastline, consistent with the vital interests of a nation. It was never intended to divest a nation of waters which had theretofore been considered inland waters under international law.

A proper interpretation of the Convention and

other established principles of international law completely justifies the prior positions taken by the government, the State of Louisiana, and this Court, with respect to Chandeleur and Breton Sounds. Their waters are enclosed and land-locked by the Chandeleur Islands, and are too shallow to be readily navigable. They do not connect two areas of the high seas, but instead, are dead-end waters leading nowhere. They are not useful to foreign commerce but are vital to the interests of this nation and the state. They have, throughout recorded history, been considered as part of the nation which owned the land on either side of the sounds.

We therefore submit that Chandeleur and Breton Sounds have always been considered as inland waters on the basis of recognized principles of international law, that they so qualify today, both historically and geographically, and that they have been so recognized on several occasions by this Court, particularly in Supplemental Decree No. 1, rendered herein on December 13, 1965.

II. Ship Island to Chandeleur Island

Louisiana and the federal government generally concur in the location of this baseline (Exhibit 35). Both recognize that the closing line across the entrance to Chandeleur Sound is a line running between the Ship Island Couplet and Chandeleur Island, and both recognize that the southern terminus of this line is located at the northern tip of Chandeleur Island.

We do, however, dispute the exact location of the northern terminus, which the government locates at the "closest point on . . . Ship Island." This position of the federal government contravenes the well established rules of international law for drawing closing lines across the entrance to a body of inland water. As was pointed out above in the "Bays Under Present International Law," the proper location for the baseline should be between the *outermost* natural entrance points to the body of water and not at the point of narrowest constriction of an indentation, since the latter may not even be near the entrance.[162]

We submit that the northern terminus, the outermost natural entrance into Chandeleur Sound, is the eastern tip of the western island of the Ship Island Couplet.[163] Louisiana's proposed closing line is only 10.5 miles long and so easily satisfies the 24 mile test of Article 7. This basepoint certainly has more legal, geometric, and logical significance than does any other.

III. Isle Au Breton Bay[164]

The government and Louisiana apparently concur in the classification of the coastal indentation

[162] *See supra* at page 122 *et seq.*

[163] It is arguable that the *outermost* natural entrance point is the eastern tip of the eastern island, and if Ship Island were not composed of two smaller islands but were a single geographical body, as existed in times past, we believe this point should be viewed as the northern terminus.

[164] While the name of the coastal indentation is not found on the current nautical charts of the Delta area, it has enjoyed notariety in the past. For example, the Federal Hydro-

lying between the Chandeleur Chain and the Mississippi River Delta as a juridical bay, for both suggest the drawing of a straight bay closing line across the indentation (Exhibit 34). However, we disagree as to the location of the entrance to Isle Au Breton Bay. The government views the entrance as being between headlands at Breton Island and Main Pass, but the government has apparently fallen into the same error in applying Article 7's tests for baseline determination across bays as it made in connection with the closing line between Ship Island and Chandeleur Island. Again the government is taking the unsupportable position that the line crossing the bay at the point of its narrowest constriction is the proper bay closing line for Isle Au Breton Bay. We admit that the basepoints suggested by the government are headlands, but they are *inner* headlands and not the *outermost* headlands of the bay. It has been previously established that outermost headlands are to be preferred over inner headlands.[165]

Therefore, we submit that the proper southern terminus of Isle Au Breton Bay is located at the tip of the most seaward mud lump at North Pass in the Mississippi River Delta. This is a reasonable point as

graphic Chart prepared in 1869 (Register Number H-999) clearly labels the water lying between the Chandeleur Island Chain and the Delta as "Isle Au Breton Bay." *See also:* 1 *Shalowitz* 109, N. 9. The area of Isle Au Breton Bay was once much larger than it is today, having been partially filled by sediment from Main Pass. *See State v. Buck,* 46 La. Ann. 656, 15 So. 531 (1894).

[165]*See* the general provisions of this brief *supra,* at page 123.

it constitutes the maximum extension into the Gulf of an integral portion of the land form, the point where one physically enters the bay on the south. As such it is the natural entrance point required by Article 7. The basis in international law for using an island as a basepoint has previously been established in the section on bays (p. 124). Furthermore, the government apparently agrees and admits the same as many of its closing lines are drawn to islands (*e.g.* Breton Island to an island off Main Pass and the closures at Garden Island Bay and West Bay, hereinafter discussed).

We would add at this point that the mud lump islands lying off the various passes of the Mississippi River are literally and figuratively, a "part of the land form," for they are a surface eruption on the submerged natural levee at North Pass. The banks of the various passes are created by so-called natural levees, formed at flood stage when heavy sediments are dropped from suspension at the river's edge. These natural levees do not terminate at the water's edge but continue seaward substantial distances (in some cases up to two miles), building submerged bars which cause mud lumps. The mud lumps are generated on or near these underwater ridges such that they are directly tied into the natural levee system of the adjacent pass.[166] Geologically these mud lumps form the seaward end of the land mass associated with

[166] *Morgan, Genesis and Paleontology of Mississippi River Mud Lumps, Louisiana Geological Survey Bulletin* 35, pp. 55-59, 93 and 94 (1961), hereinafter cited as *Morgan.*

each pass of the River, and logically are the natural entrance points to the bay formed between the passes.

The comments of Lord Stowell in the case of *The Anna*, involving the capture of an American vessel by an English privateer near a small mud lump, off one of the passes of the Mississippi River, make this point clear.

> But it so happens in this case that a question arises as to what is to be deemed the shore, since there are a number of little mud islands composed of earth and trees drifted down by the river, *which forms a kind of portico to the mainland.* It is contended that these are not to be considered as any part of the territory of America; that they are a sort of "no man's land," not of consistency enough to support the purposes of life, uninhabited, and resorted to only for shooting and taking birds' nests. It is argued that the line of territory is to be taken only from the Balize, which is a fort raised on made land by the former Spanish possessors. I am of a different opinion; I think that the protection of territory is to be reckoned from these islands; and that *they are the natural appendages of the coast on which they bordered, and from which, indeed, they are formed.* (Emphasis Added.)[167]

The character of these mud lumps as "natural appendages" of the land indicate that such a mud lump island is properly considered as the southern basepoint for the bay closing line across the mouth of Isle Au Breton Bay.

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[167]5 Rob. 373 (1805); *Crocker, The Extent of the Marginal Sea* 541-42 (1919).

Additionally, we submit that the northern basepoint occurs at the easternmost tip of Grand Gosier Island. This is also the most reasonable terminus because it is located at the outermost headland to Isle Au Breton Bay. The shore along the Chandeleur Island Chain gently curves downward from Ship Island in a generally north-south direction, while the shore of Isle Au Breton Bay curves upward from Bird Island in a generally east-west direction. Grand Gosier Island is the point at which there is an appreciable change in the general trend of the coastlines of both the bay and the island chain. We have therefore, selected the easternmost tip of Grand Gosier Island as the headland of Isle Au Breton Bay because it is the outermost point which is less than 24 miles from the southern basepoint at North Pass. A closing line constructed using these two points is 21.3 miles long, satisfies the semi-circle test, and qualifies Isle Au-Breton Bay under Article 7 of the Geneva Convention as a valid geometric bay.[168]

Of special significance to the Isle Au Breton Bay area is the Mississippi River-Gulf Outlet, which, as reference to Exhibit 34 will show, obliquely crosses the bay from the vicinity of Breton Island to the forty foot contour near the entrance to the bay. The effect and importance of this and other dredged navigation channels as inland waters will be discussed more fully

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[168]The area of a semi-circle, the diameter of which is equal to the length of the closing line is 151,600 acres while the water area of the bay shoreward of the closing line is in excess of 165,000 acres.

in the subsection dealing with dredged channels, but a few observations are worthy of note at this time.

First, the dredging of the channel demonstrates the shallowness of Isle Au Breton Bay. Not until some distance beyond the bay does the water depth reach forty feet. Much of the bay approximates the depths of Chandeleur and Breton Sounds, which this Court has found to be "so shallow as to not be readily navigable" (*United States v. California*, 381 U.S. 139, 171). In addition, the submerged spoil bank alongside the channel effectively prevents any north-south navigation across the bay. The channel also serves as additional evidence of the control which this nation now exercises and has in the past exercised over the waters of Isle Au Breton Bay.

Second, the outlet is undoubtedly inland waters of this nation for it is under the full control of the Coast Guard. Navigation by all vessels is subject to domestic regulations. Furthermore, no vessel, domestic or foreign may enter the Outlet until a special registered pilot has boarded the ship. Control over pilotage is, of course, inconsistent with the principle of freedom of navigation on the high seas.[169] Consequently, Isle Au Breton Bay is a part of the national waters of the United States and a closing line across its entrance is a part of the Louisiana coastline.

Finally, we wish to reemphasize the fact that in all of the indentations discussed above the only real question raised by either party concerns the location

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[169]2 *Hackworth*, 263-64.

of the basepoints and the specific location of the closing line resulting therefrom.

IV. The Mississippi River Delta

The Mississippi Delta area, or the mouth of the Mississippi River, is a single geographic entity and should be treated as such. Composed of the six dominant passes of the river—North Pass, Pass a Loutre, Northeast Pass, Southeast Pass, South Pass, and Southwest Pass—and the waters of Blind Bay, Garden Island and Redfish Bays, East Bay, West Bay, and other less significant and sometimes unnamed bays and inlets penetrating into the mainland between the various passes, it is unique both geologically and historically: geologically, because of the continuing extension of the overall land mass seaward, the shallow sediment-laden near-shore waters, and the formation and location of mud lumps and other phenomena; historically, because the mouth of the Mississippi River, including its Delta area, is now and always has been considered as being of over-riding importance to the economy and security of the heart of the North American Continent. The value placed on the river and its Delta by the nations which first owned it is well-documented; indeed, the motive force behind the purchase of the vast Louisiana Territory by the United States was the acquisition and control of the river and the Delta area commanding its passes. Since then numerous assertions of jurisdictional authority by both the United States and Louisiana, without protest or complaint by foreign nations, have established the waters of the Delta as historic inland waters.

Each of the Delta bays, although a part of the historic waters of the Delta unit, also has certain distinguishing geographic and historic characteristics which require separate comment. While the government generally concedes the geographic configuration of the Delta bays, it refuses to recognize the historic significance of the Delta area of the mouth of this great river, and its importance to this nation.

Coast Chart 1272 (Exhibit 34) vividly portrays the complexities of this area. One is first impressed with the myriad of islands formed by sediment. Then one notices the shallowness of the water between the various passes of the river, much of which is only a few feet deep. Closer scrutiny reveals the existence of four principal bays, Blind Bay, Garden Island Bay, East Bay, and West Bay, with their numerous inner bays.

Louisiana asserts that all four of these bays are inland waters of the United States. The government concedes that some are true bays under Article 7 of the Convention, but refuses to recognize that any of the bays are historic inland waters. As to those indentations which qualify under the geometric test, we feel it is unnecessary to do more than discuss the application of Article 7. However, our failure to discuss in detail the historic title to those waters should not be understood as an admission that this nation has no such title: for the contrary is true. We emphatically believe these waters qualify as historic inland waters of the United States, but we do not take the Court's time in proving this point because these

bodies of waters qualify geometrically as inland waters and, therefore, no purpose can be served by proving the same fact historically.

(A) Blind Bay

Blind Bay is a shallow water indentation located between Pass a Loutre and Southeast Pass. The United States does not recognize this indentation as inland waters except to the extent that it is encompassed by a line drawn three miles from the main land mass (*see* Exhibit 34). While Louisiana asserts that these waters are historic inland waters forming part of the traditional Mississippi Delta, Blind Bay does in fact qualify as a juridical bay under Article 7 of the Geneva Convention; and, therefore, it is not necessary to prove an historic title.

As the northern-most natural entrance point to Blind Bay, Louisiana has selected the outermost mud lump island lying off Pass a Loutre. This mud lump lies near the end of the seaward projection of the submerged natural levee and is connected to the Pass by a series of islands and low tide elevations lying along the subsurface ridge of that levee. The depth of the water along this natural levee varies from one foot to a maximum of four feet in depth. As large amounts of sediment continue to deposit near its mouth, filling in the very shallow water areas between the islands, Pass a Loutre grows steadily seaward. The island selected, therefore is "the point of maximum extension of a portion of the land into the

water." [170] As such, it forms a portico to the mainland and is the proper location for the basepoint.

The southern natural entrance point to Blind Bay, similarly, is a mud lump located off Southeast Pass. Louisiana has chosen this island in preference to islands at the mouth of Northeast Pass for two reasons. First, the island at Southeast Pass permits a closing which satisfies Article 7 of the Geneva Convention and encloses the full, natural extent of an area whose waters are much too shallow to be navigable by any ocean going vessels. Second, Northeast Pass no longer carries sufficient sediment to maintain its present configuration because its waters and their sediment load have been largely captured by Southeast Pass. While Northeast Pass is regressing and subsiding under the pressure of wind and wave action, Southeast Pass continues to deposit sediment, to generate new mud lumps, and to grow slowly seaward.[171] Thus, a closing line drawn from the island off Southeast Pass to the island off Pass a Loutre is only 6.9 miles long and encloses a water area which is more than sufficient to satisfy the semicircle test of Article 7 of the Geneva Convention.[172]

(B) Garden Island Bay

Louisiana and the United States concur in the conclusion that the coastal indentation, commonly re-

[170]1 *Shalowitz* 63-64.

[171]*Morgan*, pp. 86-90 and 100, n. 9.

[172]The area of Blind Bay is 17,100 acres while the area of a semi-circle whose diameter is equal to the width of the bay at its mouth is 16,100 acres.

ferred to as Garden Island and Red Fish Bays, meets the geometrical test for bay determination, as the distance from basepoint to basepoint is less than twenty-four miles and the water area of the bay satisfies the semicircle requirement.[173] Moreover, both agree that the western basepoint is properly located at the southern tip of the East Jetty at South Pass. The only element of disagreement is over which island should form the eastern basepoint. Louisiana maintains that the natural entrance point is properly located at the most seaward mud lump island off Southeast Pass rather than at the tip of a more shoreward island as proposed by the federal government. Our disagreement as to the eastern basepoint is but a continued reflection of our recognition of islands as a part of the land form off the passes and their use as basepoints. The outermost mud lump off Southeast Pass is a part of the natural extension of the growing Southeast Pass land mass, located at the seaward end of the island chain. It is somewhat closer to South Pass than the island selected by the government, and hence generates a shorter closing line, being only 5.4 miles long. We submit that on the basis of coastal dynamics and pure logic, this point, rather than a point on a more shoreward island, must be recognized as the eastern natural entrance point of Garden Island and Red Fish Bays. The semicircle test is more than adequately satisfied.

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[173]The area of Garden Island Bay is 19,200 acres while the area of a semi-circle whose diameter is equal to the width of the bay at its mouth is 9700 acres.

The United States has also exercised control over these waters, thus endowing them with an historic character. Because, however, these waters qualify under Article 7 as a juridical bay, proof of such control is dispensed with.

(C) West Bay

Louisiana and the United States both agree that West Bay is a body of inland water which satisfies the requirements of Article 7 of the Convention. Again we are in disagreement over the natural entrance points of this body of water; and again this is because the government has failed to select the *outermost* natural entrance points.

There is not too much disagreement over the northern headland. Both of us select the same island off Pass du Bois. The United States selects the southernmost tip of the island, while Louisiana selects the southeasternmost tip of the same island. The government's point is inside the bay, while that of Louisiana is located at the point where the shore begins to curve inward to form West Bay. It is the northern outermost natural entrance point of West Bay.

As its southern entrance point, the government has chosen an island west of Lighthouse Bayou, which is no headland at all, but merely an island within the bay. In so doing, it has not only failed to satisfy the Convention, but again refuses to recognize the history of West Bay.

At one time West Bay was a much larger body of water, extending from Southwest Pass to a point

several miles above the Head of the Passes. As a result of a crevasse which occurred at "The Jump," the river deposited massive loads of sediment in West Bay, filling substantial portions of its waters. (*See State v. Buck*, 46 La. Ann. 656, 15 So. 531 (1894), for a detailed discussion of this deposition.)

The southern entrance point to West Bay has always been the tip of Southwest Pass. This is the point at which the turn in the coastline approximates a ninety degree angle. Louisiana has therefore drawn its closing line from the tip of the western jetty at Southwest Pass to the southeasternmost tip of the island off Pass du Bois. This closing line is only 10.7 miles long, and the area enclosed therein adequately satisfies the semicircle test of Article 7.[174] To draw a closing line any further landward, as the Government has done, would exclude portions of the shallow waters historically included in West Bay.

(D) East Bay

East Bay is the deep, well-marked indentation lying between South Pass and Southwest Pass, the two most important passes of the Mississippi River and the only ones maintained for navigation. (See Exhibit 34) East Bay is a dead-end indentation, leading nowhere, and is completely land-locked by the land masses alongside the two passes. It is not useful to foreign commerce, and much of its water is too

[174]The area of the West Bay is 41,650 acres while the area of a semi-circle whose diameter is equal to the width of the bay at its mouth is 38,375 acres.

shallow to be readily succeptible of navigation. A closing line across the entrance to the bay is 15.4 miles long, and its depth of penetration inland between the passes is approximately 10 miles.

Formed by sedimentary deposits from the two passes of the Mississippi River, the shape of East Bay is not that of a normal rounded coastal bay, but instead, is the shape of a triangle, the waters of which knife deeply into the surrounding land mass of the Mississippi River Delta. This configuration is indeed a rarity along the coast of the United States. As a consequence of its unique triangular shape, only the interior portion of East Bay satisfies the semicircle test of Article 7 of the Geneva Convention. Because the *entire* bay does not satisfy the semicircle test, the government takes the position that *none* of the waters of East Bay qualify as a bay in international law, and that East Bay is no more than "a mere curvature of the coast" and its waters are part of the "high seas".

In taking this position the government fails to recognize that a substantial portion of East Bay *does* satisfy the semicircle test. It has also disregarded the application of other pertinent provisions of the Convention which result in the classification of East Bay as inland waters of the United States.

But, first and foremost, the government completely ignores the fact that, throughout its history, East Bay has not only qualified as a true juridical bay under the well-established rules of international

law existing prior to the adoption of the Geneva Convention, but has also qualified as an historic bay of the United States in the all-important Mississippi River Delta. In this respect, it has fallen into the same error of restrictive interpretation of the Convention which led to its dilemma in Chandeleur and Breton Sounds.

1. Historic Title Test Applied to East Bay

The overall history of East Bay, as evidenced by treaty, legislation, administrative action and executive order, indicate that the waters of East Bay have always been national waters and have been treated as such by the United States and the State of Louisiana, and have never been considered as a part of the high seas as the Government is now contending. Furthermore, from the standpoint of legal title, this coastal indentation, throughout the history of Louisiana, has qualified as a juridical bay under internationally recognized tests for bay determination. The fact that East Bay has legally constituted inland waters during historic times, on the one hand proves the legal title of the United States to these waters and, on the other hand proves the nation's historic title. Consequently, because East Bay has qualified historically as a true bay both under the internationally recognized geometric tests as well as under the historic title test, it is necessary to examine in some detail not only the classical elements of historic title but also the formal geometric tests which traditionally have been used in making bay determinations.

a. Pre-convention International Law—The 10 Mile Rule in East Bay

The government has failed to give any legal significance to the recognized rules in international law for bay determination in existence prior to the adoption of the Geneva Convention. It is evident, however, that to determine the historic status of a body of water one must certainly look back in history beyond 1958, the date the Geneva Convention was adopted. This is particularly true insofar as examining historic title in the light of past legal title is concerned, because an ancient legal title clearly has historic significance.

There were principles in international law applicable to the problem of how to determine bay closing lines prior to the advent of the geometric test of Article 7 of the Geneva Convention. These earlier principles are described in detail in the section on "Development of the International Law of Bays" starting at page 90 *supra*. In general, we noted that bays, because of their greater intimacy with the land than waters adjacent to straight shorelines, are of greater importance to a littoral state, and that greater control is exerted and demanded in these waters.

At the period in history when the United States acquired Louisiana, and in 1812 when Louisiana became a state, the principle, generally in vogue with international law authorities provided that indentations which were "enclosed" and had the "general characteristics and configurations of a bay" were to

be considered as forming part of the territory of the littoral state. As we previously noted (p. 105 *et seq. supra*) the factor which graphically determined if waters were "enclosed" or if they had "the general characteristics and configuration of a bay" was the relationship of the depth of penetration of the water body to the width of the opening across its mouth. Today the Geneva Convention still considers the relationship between depth of penetration and width of opening as paramount in determining the proper characterization of the waters of a coastal indentation. Article 7 provides that "a bay is a well-marked indentation whose *penetration is in such proportion to the width of its mouth as to contain landlocked waters* and constitute more than a mere curvature of the coast." (Emphasis Added.)

The interrelationship between these two variables is applied administratively by use of the semicircle test which, through area comparisons, gives an indirect evaluation of the proportion of depth to width. Furthermore the semicircle concept bears directly on the linear relationship of depth to width for it is clear that a body of water qualifying geometrically as a semicircle is presumed to satisfy the geographic requirements of Article 7 that an indentation contain landlocked waters. In otherwords, a semicircular-shaped indentation, by definition, is one "whose penetration is in such proportion to the width of its mouth as to contain landlocked waters", i.e. it has the general characteristics and configuration of a bay and "constitutes more than a mere curvature of the coast."

But the semicircle test is only significant in that it provides an administratively functional tool to relate depth of penetration to width of opening. This ratio is ½ (depth) to 1 (width). Consequently it should follow that a coastal indentation which meets or exceeds the ratio of depth to width of a semicircle should likewise be considered to have the general characteristics and configuration of a bay. In this connection Mr. Shalowitz states:

> The semicircular rule was devised to provide more specific criteria than were supplied by the [Fisheries] arbitration; in no case should it operate as a contraction of the principle there established. Therefore, those indentations that possess the "configuration and characteristics," referred to in the arbitration, would be classified as inland waters anyway. It is only those for which it may be difficult to determine whether the "configuration and characteristics" are present that more specific criteria are proposed. In other words, the technical method begins where the arbitration left off. (1 *Shalowitz*, p. 40; *see also* p. 41)

The Court's attention is directed to the earliest accurate survey of the Delta—the 1838 survey by Lt. A. Talcott for the United States Army Engineers (Exhibit 26). It is evident that in 1838 East Bay was a substantial coastal indentation, geographically exhibiting characteristics and configurations of a bay. While the semicircle test was not in existence in 1838, a comparison of the ratio of depth of penetration to width of opening of East Bay with the same ratio

of a semicircle clearly shows that the waters of East Bay constituted "enclosed" waters, and consequently East Bay was a true bay and a part of the United States in 1838.

As we noted, in the nineteenth century a desire for greater preciseness concerning the maximum length of a bay closing line began to develop as important policy considerations in the international relations between nations. A length of 10 miles was adopted with increasing frequency. Exhibit 21 is a map of the Delta in 1867 depicting the geography of East Bay in that year. A comparison with the 1838 map shows only minor changes in topography and those mainly at the mouths of South Pass, Southwest Pass, and Grand Pass, a third pass that once projected far into the bay and of which we will have more to say shortly. The 1867 map clearly demonstrates that East Bay was an enclosed body of water which had the general characteristics and configuration of a bay, as illustrated by the fact that the ratio of inland penetration to width of opening exceeds the ½ to 1 ratio of a semicircle. The length of the closing line across East Bay was less than 10 miles in 1867. Hence under either the older general test which specified no maximum length for a bay closing line or the more restrictive 10 mile test, East Bay was a part of the territory of the United States.

By the latter part of the nineteenth century the 10 mile rule was generally recognized as the limiting length for bay closing lines. Exhibit 22 is a map of East Bay in 1895 on which a line representing the

application of the 10 mile rule has been superimposed. As illustrated, the bay closing line ran from South Pass to Grand Pass, a distance of 2 miles, and from Grand Pass to the mud lumps at Southwest Pass, a distance of 10 miles. This closing line encompassed all the waters of East Bay, which clearly was a bay for its waters were enclosed and it exhibited the general characteristics and configuration of a bay. The important criteria of the ratio of depth of penetration to width of entrance showed a factor greater than the ½ to 1 ratio of the semicircle test. Thus in 1895 East Bay continued to qualify as a juridical bay under recognized rules of international law; and, consequently, it legally formed a part of the territory of the United States at this time.

This exhibit also shows another interesting fact. Grand Pass, the third distributary in the East Bay area, no longer carried waters of the Mississippi River to the Gulf. A close examination will reveal that Grand Pass and South Pass were no longer connected and that the upper half mile of Grand Pass had completely filled in with sediment. This was not an accidental or a natural occurrence. It resulted from the construction in 1875 of a dam across the channel of Grand Pass at the point where it separated from South Pass. The dam was built by Captain James B. Eads in connection with navigation improvement work he performed on South Pass for the United States.[175]

[175]Humphreys and Abbot, "Report on the Physics and Hydraulics of the Mississippi River," *U. S. A. Engineers Professional Paper* No. 4, (1876); Corthell, *The South Pass*

The effect on Grand Pass of the artificial stopping of the flow of the life giving waters and sediments on Grand Pass was predictable. Winds and waters ravaged its mouth until this three mile long peninsula was completely destroyed. Today the only remnant of Grand Pass is a sand bar located several miles shoreward from the original location of the mouth.

At the time Captain Eads dammed off Grand Pass, the land on either side of the pass constituted territory of the State of Louisiana. It had been surveyed by the United States and shown on the official township plats of Township 24 South, Ranges 32 and 33 East, (Exhibit 41). It had been transferred to the State of Louisiana under the Swamp Land Act of March 2, 1849, and had been patented by the State to G. W. R. Bayley, agent of Captain Eads.[176] The

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Jetties, Trans. Amer. Soc. Civil Engrs. 7:131—158 (1878); as cited in *Morgan*. Exhibit 30, a copy of the coast chart of 1879, shows the location of Eads' dam at the head of Grand Pass.

[176]United States and Louisiana State Tract Book entries reproduced as Exhibit 42, show that the property bordering Grand Pass was selected by the State of Louisiana under the Act of March 2, 1849, and this selection was approved by the Secretary of the Interior on June 26, 1876 under Clear List No. 22. According to State Tract Book entries, pages 342 and 343, this land was purchased by G. W. R. Bayley under Certificates Nos. 1711 N.S.D., 1781 N.S.D., and 1780 N.S.D. and patents Nos. 2404 and 2407 were issued therefor. These patents are reproduced as Exhibit 43.

The location of the land mass surrounding Grand Pass with respect to the overall geographic configuration of East Bay, as shown on a composite map of the official township plats depicting all of East Bay, (Exhibit 41) illustrates the landlocked character of East Bay at this time.

property was later repurchased by the United States, apparently, anticipating that the effect of divorcing Grand Pass from South Pass would be the destruction of Louisiana's territory. As a result of this closure in 1875, not only were the landed areas along Grand Pass destroyed by action of the United States, but in addition, a principal source of sedimentary deposit in East Bay was eliminated. This fact, coupled with the continuing artificial control and confinement of the waters of South and Southwest Passes by the U. S. Corps of Engineers, and the concomitant control of East Bay, has prevented major sedimentary deposits in East Bay, which would otherwise have accrued, and has artificially changed the configuration of the bay from a "U" shaped indentation to a "V" shaped indentation. The control and confinement of the waters of these Passes, particularly by the jetties at their mouths, had also caused the headlands of East Bay to steadily progress seaward, lengthening the depth of penetration of the bay, but also widening the entrance at its mouth.

A comparison of the 1895 map with the 1922 coast chart of East Bay (Exhibit 23) demonstrates the significant change in the configuration within the bay wrought by the government. The middle headland, Grand Pass, was greatly reduced in size by 1922, displaying but an adumbral remnant of its earlier form. By this point in history the 10 mile rule was firmly entrenched in international law, but, as a consequence of the destruction of Grand Pass, the

closing distance across East Bay, for the first time, exceeded the maximum 10 mile limit.

However, even with its new artificially created shape, East Bay was still clearly a bay. Its waters were landlocked; and it continued to exhibit the general characteristics and configuration of a bay, though not nearly so much so as before the destruction of Grand Pass. But that it maintained the general characteristics and configuration of a bay is clear by a comparison of the ratio of the depth of penetration which, in 1922, remained in excess of the ½ to 1 ratio of a semicircle.

Even when the width of its entrance exceeded 10 miles, East Bay would have been considered an "overlarge bay." As we previously noted, international law recognized the possibility of overlarge bays and provided that in such circumstances the bay closing line was to be drawn at the first point within the bay where the width did not exceed 10 miles. This we have done as shown on Exhibit 23. Consequently, in 1922 all but a small segment of East Bay was recognized as a juridical bay of the United States, hence forming a part of her territory. The small part that failed to qualify did so only because of the government's intervention in changing the bay's natural geography.

The 10 mile closing line rule maintained its international recognition until the Geneva Convention adopted the more liberal 24 mile closing line in 1958. Exhibit 24 is a map of East Bay in 1958 on which

is superimposed the bay closing line under the recognized 10 mile rule. East Bay was still certainly a bay; it had the general characteristics and configuration of a bay; and its waters are clearly more enclosed than those of a semicircle, for the ratio of depth of penetration was still greater than ½ to 1. For the preceding 155 years East Bay was legally recognized as part of the United States, and, under the domestic law of *Pollard's Lessee v. Hagan*, these were inland waters to which title had vested in Louisiana.

According to the Justice Department, all this changed with the advent of the Geneva Convention in 1958. There was no title in the United States, nor any title in Louisiana—solely because East Bay in its entirety did not meet the semicircle test.

There is something basically inconsistent with the proposition that a title, legally recognized for 155 years, is automatically destroyed by the adoption of a legal principle, the history of which clearly shows that it was not intended to *deprive* a nation of pre-existing title, but, on the contrary, to include *additional* waters within the territory of a littoral State over and above those which had heretofore been recognized. We submit that the Geneva Convention should not be interpreted as causing a reclassification of East Bay from a bay to a mere curvature of the coast, which, in the name of foreign policy, results in Louisiana's title being divested.

The principle involved was clearly stated by this Court in *United States v. California*:

> The national responsibility for conducting our international relations obviously must *be accomodated with the legitimate interests of the States in the territory over which they are sovereign.* Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable. 381 U. S. 139, 168.

We recognize that the outer limit of a bay may be altered by a natural change in the geographic configuration of a coastal indentation. We submit, however, that no such change should result from the artificial destruction of the configuration or from a mere change in legal principles, or from foreign policy considerations.

It is true that intervening topographic changes between 1958 and 1968 must be taken into consideration in determining the present bay closing line. Exhibit 36 locates the current position of the 10 mile line in East Bay, which encloses those waters, title to which was legally recognized as belonging to the United States and thus to Louisiana. We submit, however, that the recognized rules of international law in existence prior to the Convention, and under which Louisiana's title to the waters of East Bay were vested, must be viewed as viable and subsisting insofar as East Bay is concerned, if, by application of newer rules, these waters become classified as high seas and Louisiana is divested of her title.

b. Elements of Historic Title

In the subpart of the "Governing Principles" on

"Historic Inland Waters" we considered the evolution and development of the concept which today is denominated the "historic title" theory. We noted that the theory grew out of the practice of nations appropriating the water areas of their coastal indentations to themselves, which appropriation resulted from attempts to protect the vital economic and internal security interests of the littoral nation in those waters. Our examination of the historic title theory showed that the concept is not a mere "exception" to the geometric test for bay determination in the sense that it requires a stronger burden of proof, nor should it be viewed as being of secondary importance, but rather that the historic title test is in fact the basic theory from which the geometric test evolved, and that the theory of historic waters is as viable today in determining the character of coastal waters as it was before the adoption of the Geneva Convention.

Consequently, it was demonstrated that there are two principal tests, recognized in international law, for determining whether a coastal indentation should be considered a bay, and thus whether the baseline should be drawn across its entrance rather than inside along its shore. The first, and more basic test, provides that where a nation has vital economic and internal security interests in the waters of a coastal indentation and, in order to protect these interests, exercises exclusive control over these waters without opposition from foreign nations, then the waters will be considered part of the national waters

of the littoral state. The second test provides that where the coastal indentation displays a certain geometric configuration, the vital interests, the exercise of control in protection thereof and the toleration by other nations are conclusively presumed, and the national character of the water is assumed without resorting to proof of the interest or control.

The first test is the historic title test. The second is the geometric test, the current application of which is found in the semicircle test of Article 7 of the Geneva Convention.

Due to the failure of East Bay to qualify in its entirety under the semicircle test, we recognize the need to examine the status of the waters of East Bay in the light of the first test, the "historic title" test, and consider it necessary to discuss the basic concept of interest and control in the context of the three factors generally conceded as constituent elements of an historic title: (1) that acts of authority have been performed over the claimed waters; (2) that the action continued for an extended period of time; and (3) that foreign states did not object to the actions.

However, more basic even than these three general elements is the perspective in which the court should view their particular application to East Bay. As a practical matter, an assertion of control by a maritime nation will generally be confined to the minimum activity necessary to protect the specific interest which is threatened. As a consequence, it is

rare for an historic claim to be founded on a single act of control or authority which was an assertion of all of the attributes of full dominion or legal sovereignty. Instead the claim results from exercise of control and authority over the waters, which though in limited spheres, are wholly and completely inconsistent with the concept of freedom of the high seas. If the waters are not treated as part of the high seas, but are subjected to some form of exclusive control, then they are not considered part of the high seas. The proper perspective in which to view the question of the legal status of East Bay is to consider whether East Bay has truly been treated as part of the high seas, as the government contends, with foreign nations enjoying the rights of freedom of navigation, freedom of fishing and freedom of flight, or whether East Bay has been subjected to some assertions of control inconsistent with these freedoms. If it has been so controlled then the government has not in fact treated these waters as part of the high seas, and their denials at this date should not be allowed to change the consequences of their prior action.

A review of the history of East Bay will prove that these waters have been considered as part of the national domain of the United States under recognized tests of international law, and that consistent with such classification the United States and Louisiana have over the past 165 years exerted exclusive control over the waters of East Bay in efforts to protect the vital economic and vital security interest of this nation in the waters at the mouth of the Missis-

sippi River. The nature and the gravity of the need to protect those interests are directly related to and dictated by the hydrographic and geographic character or configuration of the coastal waters. Bays are generally more important than waters lying off a straight shoreline; deep water harbor or shallow water fishing grounds are likewise more important because of their greater utility and productivity. Viewed from an historic standpoint East Bay geographically and hydrographically is and has been an area of particular importance to the United States.

(1) Nature of Geography and Hydrography as a Source of National Interest

The unique configuration of a bay has been recognized by the Tribunal in the North Atlantic Coast Fisheries Arbitration (1910) as creating interest of special importance to the territorial sovereign. "[T]he geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defense, of commerce and of industry are all vitally concerned with the control of bays penetrating the national coast line. This interest speaking generally, varies in proportion to penetration inland of a bay." [177]

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[177]1 *North Atlantic Coast Fisheries Arbitration,* (1910), p. 94; 1 *Hackworth,* p. 691.

The unique topographic and underwater configuration of the waters of East Bay, and the other bays of the Mississippi River Delta lying behind the proposed coastline, clearly suggest that the nation should have a special interest in them. First, the waters of West Bay, East Bay and Garden Island Bay encroach very near the banks of the Mississippi River, the lifeline of the central United States. In some cases, particularly in East Bay, the bay waters are separated from the main commercial channels of the River for many miles by only a few hundred feet of river bank, a situation which acutely concerns the security of this nation in regard to its national integrity. Second, these waters, being completely enclosed between the various passes to the Mississippi River, are important to the marine resources industry of the nation. The natural protection provided to fishing vessels in these bays creates a water area of significant domestic economic importance. Furthermore, the waters of the Delta bays are extremely shallow[178] and rich in organic matter, the combination of which creates a fishing area of unparallelled excellence.

The geography which has created these vital interests is not of recent origin. Rather, as reference to coast charts depicting the Mississippi Delta since 1776 will show (*e. g.* Exhibits 25, 31, 29, 22, 23 and 24).[179] Although there have been substantial changes in the detailed topography of the Delta, the basic geographic

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[178]*See* Coast Chart No. 1272, Exhibit 34.

[179]The changes in the Delta topography from the early 1800's to the present are illustrated by Exhibits 33 and 37.

integrity of East Bay and the other Delta bays and their overall shallowness has been preserved since the earliest maps—at least for the past 190 years. Not only has East Bay continually exhibited the general characteristics and configuration of a bay and maintained a substantial depth of penetration inland, but it is significant that this factor of depth of penetration inland, held so important by the North Atlantic Coast Fisheries Arbitration Tribunal, has actually *increased* in the last two hundred years. This is perhaps one of the foremost factors establishing the historic character of East Bay, for the longevity of these geographic and hydrographic features, which generate this nation's internal security and economic interests, establishes that these interests in the waters of the Mississippi Delta have endured for as long as Louisiana has been a part of this nation.

(2) Interests in Internal Security

In connection with this nation's internal security, the United States has always had two major interests in controlling the Mississippi River Delta and the main entrances to the River; first, to protect the prolific commerce which flowed from the interior to the Gulf via the river, and second, to insure the domestic tranquility of the western interior accessible to a foreign enemy by way of the Mississippi Delta passes.

Important as the Lower Mississippi River is to the economy of this nation in the twentieth century it is recalled that in the early days of this Republic

the same area was far and above all else, the single, most important element in the commerce of the United States. Even as late in our history as 1852 it was said that "the commerce of the Mississippi River arises from as many states as border the Atlantic Coast from Maine to the Mississippi line, thereby making the Mississippi River as much a national highway for all the purposes of commerce and national defence (sic) as the Atlantic Ocean itself." [180]

However, even such a strong expression as the one just quoted does not indicate the full importance of a secure Mississippi River to the economy of the "Western" country in the late 1700's. For example, in 1786, the Secretary of Foreign Affairs wrote to Nathaniel Gorham, President of Congress, stating that the value of public lands in the West was directly dependent on the free navigation of the Mississippi River.[181] Furthermore, the United States Minister Plenipotentiary to France wrote concerning the economic importance of the Mississippi River as an element in world trade:

> Its settlement is of importance to all those European countries whose inhabitants are engaged

[180]8 *De Boros, Review of the Southern and Western States,* 532 (1852).

[181]"The States looked to the western lands as a substantial fund for the discharge of the publick (sic) debt. *The value of these lands will depend in a great measure on the navigation of the Mississippi. By suspending this right we depreciate this fund, unnecessarily burden the confederacy with an additional weight, and proportionally injure the publick (sic) creditors.*" (Emphasis Added) 31 *Journals of the Continental Congress* 586 (May 29, 1786).

in manufactures, because it will furnish, in abundance, rude materials for every species of manufacture. To those which have occasion, at times, for the supply of provisions, because it will furnish an exhaustless source of every species of provision; but it is of peculiar importance to those which have islands in the West Indies, because it lies in the neighborhood of those islands, *the mouth of the Mississippi being nearly in the same latitude, and will furnish every thing in demand there, such as lumber, provisions, etc.*

But the commerce of this country, when settled, will depend upon the navigation of the Mississippi, and of course the settlement itself will depend upon the same cause. (Emphasis Added.) *American State Papers, 1 Foreign Relations* 698 January 25, 1795).

So important, in fact, was the river as an outlet for commerce that the records of Congressional debate are replete with expressions of its economic value to the United States. In November of 1802, James Madison wrote to Charles Pinckney:

> You are aware of the sensibility of our Western citizens to such an occurrence [i.e. the closing of the Mississippi River by Spain to Americans]. This sensibility is justified by the interest they have at stake. *The Mississippi is to them every thing. It is the Hudson, the Delaware, the Potomac, and all the navigable rivers of the Atlantic States, formed into one stream. The produce exported through that channel last year amounted to one million six hundred and twenty-two thousand six hundred and seventy-two dol-*

> *lars from the districts of Kentucky and Mississippi only, and will probably be fifty percent more this year* . . . a great part of which is now, or shortly will be, afloat for New Orleans, and consequently exposed to the effects of this extra ordinary exercise of power. (Emphasis Added) James Madison to Charles Pinckney, 1059. *American State Papers, 2 Foreign Relations* 527, (November 27, 1802.)

When, at the turn of the nineteenth century, Spain closed the mouth of the Mississippi and cut off trade by the inhabitants of the interior of the United States, the effect of the closure rocked the foundation of the nation.[182] Thomas Jefferson was ready to go

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[182]"Congress witnessed, at their late session, *the extraordinary agitation produced in the public mind,* by the suspension of our right to deposite (sic) at the port of New Orleans, no assignment of another place having been made, according to treaty. *They were sensible, that the continuance of that privation would be more injurious to our nation than any consequences which would flow from any mode of redress;* . . . .

"Previously, however, to this period, we had not been unaware of the danger to which our peace would be perpetually exposed, whilst so important a key to the commerce of the western country remained under foreign power.

* * *

"Whilst the property and sovereignty of the Mississippi and its waters secure an independent outlet for the produce of the Western States, (sic) and an uncontrolled navigation through their whole course, free from collision with other Powers (sic), and the dangers to our peace from that source, the fertility of the country, its climate and extent, promise in due season important aids to our treasury, an ample provision for our posterity, and a wide spread for the blessings of freedom and equal laws." (Emphasis Added) American State

to war with Spain before allowing the River's commerce to be controlled or aborted by the foreign state. He said, that, ". . . the use of the Mississippi River [is] so indispensible that we cannot hesitate one moment to hazard our very existence." [183] The emphasis in the speeches made by the Senators at this time was upon the economic importance to the Westerners of ingress and egress and the worthlessness of the fertile interior without the access to world commerce which the Mississippi River afforded.[184]

Papers, 1 Foreign Relations 61. Message to Congress, October 17, 1803.

[183] *Writings of Thomas Jefferson,* Vol. IV, page 457.

[184] (1) "This (Mississippi River) was the great and only highway of commerce from the western country to the ocean." 12 *Debates and Proceedings of Congress,* p. 92 (February 16, 1803). Senator Ross of Pennsylvania. *See also* Vol. 12, pp. 83-88.

(2) "Without the free use of the river, and the necessary advantages of deposit below our line, their (Westerners') fertile country is not worth possession, their produce must be wasted in their fields or rot in their granaries. . . ." 12 *Debates and Proceedings of Congress,* p. 112 (February 23, 1803); Samuel White of Delaware.

(3) ". . . our views and wishes are to take possession of the place of deposit guarantied (sic) by treaty, whether it be in the hands of one nation or the other, [Spain or France], and to hold it as a security that the trade of so important a river should not be liable to similar interruptions in future." 12 *Debates and Proceedings of Congress,* p. 238 (February 25, 1803); Jonathan Dayton of New Jersey.

(4) "Half a million of your citizens are cut off from all intercourse with the rest of the world; every kind of business there (West) is at a stand; the farmer's produce is rotting on his hands; industry is paralyzed; emigration discouraged; the value of their lands diminished; all ability to comply with their engagements with each other, with the Govern-

It is first submitted, therefore, that the United States did have vital interests in internal security which sprang from the need to protect the vast amount of commerce dependent upon the free navigation of the river and the approaches to the river; and furthermore, that it was commonly recognized that the means of sustaining those interests in internal security lay in controlling the entrances to the Mississippi River and the waters contiguous therewith. The presence of an interest consistent with the protection of territorial integrity and a general acknowledgement of the means of securing that interest evidence a "vital interest," being one of the elements to a claim of historic title.

However, that the nation had "vital interests" in internal security is also evidenced by the need and desire to insure settlers against interference by a foreign enemy. Because the river did provide excellent access to the frontier, the beginnings of civilization in that wilderness were not only at the mercy of whomever commanded the entrance to the Mississippi from the sea (and therefore controlled the free flow of commerce to the European world) but were also subject to attack at the whim or caprice of France, Spain, and Great Britain, who were not above starting a war to regain their interests in the Lou-

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ment of the United States, or with their own State governments, is taken from them. This is an extremity to which I can never consent to reduce them. Let us, rather, remove the obstruction to the navigation of the Mississippi immediately." 12 *Debates and Proceedings of Congress,* p. 153 (February 24, 1803) ; William H. Wells of Delaware.

isiana territory. While it is true that in our modern civilization the threat of aggression by an invasionary force has been subordinated due to advances in the technology of war and defense, still, as pointed out, this was not always the case. In more unsophisticated times, the vulnerability of this country's rich and vast interior by way of the Mississippi River Delta can hardly be over stressed. Senator Samuel White of Delaware expressed this position very adroitly in a speech made during the debate over ratification of the treaty ceding Louisiana to the United States: "I hope to God, they may, for the possession of it we must have—I mean of New Orleans, and of such *other positions on the Mississippi as may be necessary to secure to us forever the complete and uninterrupted navigation of that river.* This I have ever been in favor of; *I think it essential to the peace of the United States, and to the prosperity of our Western country.*" (Emphasis Supplied.)[185] One month prior to this statement by Mr. White, President Jefferson had addressed the Congress (October 17, 1803) and said:

> *Previous, however, to this period,* [*i.e.* Spain's closure of Mississippi River], *we had not been unaware of the danger to which our peace would be perpetually exposed, whilst so important a key to the commerce of the western country remained under foreign power....*

Whilst the property and sovereignty of the Mis-

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[185]13 *Debates and Proceedings of Congress,* 33 (November 2, 1803).

> sissippi and its waters secure an independent outlet for the produce of the Western States [sic] and an uncontrolled navigation through their whole course, free from collision with other Powers [sic], and the dangers to our peace from that source, the fertility of the country, its climate and extent, promise in due season important aids to our treasury, an ample provision for our posterity, and a wide spread for the blessings of freedom and equal laws. (Emphasis Added.) *American State Papers*, 1 *Foreign Relations* 61.

To these specific statements concerning the importance of the young nation's interests in internal security can be added certain general comments made by the more prominent statesmen of that day. Chancellor Richard Livingston said the people would rather hazard their very existence than suffer the Mississippi to be shut against them.[186] Representative John Randolph of Virginia said that the Mississippi had to be secured to the United States at "every hazard" and "in any mode." [187] Secretary of State Madison, writing to Livingston said that the ". . . United States have the strongest motives of interest, . . . to seek by any means the establishment of the Mississippi, down to its mouth, as their boundary. . . ." (Emphasis Added.)[188] And, finally, President Thomas Jefferson

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[186]R. R. Livingston to *Napoleon Bonaparte*, January 7, 1803, *American State Papers*, 2 *Foreign Relations* 536.

[187]13 *Debates and Proceedings of Congress*, 409 (October 24, 1803).

[188]12 *Debates and Proceedings of Congress*, 1095 (March 2, 1803).

confided to his friend Mr. M. Dupont that the crisis of securing Louisiana to the United States was the most important one that the nation had faced since her independence.[189]

As one might naturally expect, the time of impending war would give rise to the most specific reflections on internal security. We noted above that President Jefferson was prepared to go to war rather than allow Spain to maintain control over the Mississippi River and its entrances. In relation to the security of the City of New Orleans, and the interior accessible via the river, the President said:

> *The possession of both banks of the Mississippi reducing to a single point of defence* [sic] *of that river, its waters, and the country adjacent, it becomes highly necessary to provide for that point a more adequate security.* Some position above its mouth, commanding the passage of the river, should be rendered sufficiently strong to cover the armed vessels which may be stationed there for defence [sic]; and, in conjunction with them, to be present as insuperable obstacle to any force attempting to pass. (Emphasis Added.) *American State Papers*, 1 *Foreign Relations* 68.

Thirty-five years after the Spanish closure crisis and some twenty years after General Andrew Jackson had successfully defended the City of New Orleans from British invasion during the War of 1812, the impending war with Mexico again aroused interest in securing the Mississippi River Delta from

[189] *Writings of Thomas Jefferson*, Vol. IV, page 457. Letter of February 1, 1803.

possible capture by an enemy. In March 1841, the legislature of the State of Louisiana passed two resolutions calling upon the central government of the United States to provide funds for building defenses to guard the numerous approaches to the River from the Gulf of Mexico.[190] These resolutions indicate the importance of adequate defenses in and around the

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[190] (1) *"Resolved by the Senate and House of Representatives of the State of Louisiana in General Assembly convened,* That our Senators and Representatives in Congress be requested to use their best efforts to have passed a law requiring of the Government of the United States to have stationed in the Gulf of Mexico, a steamship of war, and to have built, as soon as practicable, a war steamer within the waters of the river Mississippi, for the protection of the West." 27th Congress, 1st Sess. House Ex. Doc. #9, March 6, 1841.

(2) "Whereas the commercial importance of New Orleans, its situation as the great outlet from all the Western States, the inadequate means of defence (sic) on the numerous approaches to it from the Gulf, and the remembrance of the events which closed the last war, would in case of hostilities with a foreign Power all join to invite the earliest and most violent agression from an enemy, and should therefore lead us to prompt and energetic preparations of defense:

"Be it therefore resolved by the Senate and House of Representatives of the State of Louisiana in General Assembly Convened, That our Senators and Representatives in Congress be requested earnestly to ask of that body that liberal appropriations should be made, for completing the fortifications at and near the mouths of the Mississippi, for purchasing and mounting on them the guns destined for their defence (sic), for the construction of steam vessels of war to protect the coast and inlets and co-operate with the fortifications and troops, and for the collection of a sufficient quantity of arms, ammunition, and other supplies, at convenient depots in the neighborhood, to insure the protection of this important point." 27th Cong. 1st. Sess. House Ex. Doc. #10, March 8, 1841.

Delta area to the internal security of the nation. And, further, they indicate the interests which the United States had in protecting their primary route of commerce, running from the western interior to the open sea, and in preventing invasion, however slight, into the interior of the country.

From what has been said above, it is apparent that the importance of preserving and protecting control of all access to the main body of the river by way of the Mississippi River Delta, so that commerce could proceed unmolested and so that settlement could advance in relative security, uninterrupted by invasions of foreign enemies, generated national interest in internal security. We submit that these interests in internal security coupled with the interests of this nation in the economy of the Mississippi River Delta, past and present, are sufficient grounds for asserting the fulfillment of the "cornerstone" requirement of historic title—"vital interests," described above at page 158 *et seq.*

(3) Economic Interests

The Mississippi River drainage plays a significant role in the biological conditions found in the Delta area. The river water being discharged into the Gulf is high in phosphate content which acts like a fertilizer in promoting a higher plankton growth in the waters of the Delta bays than is encountered in other areas of the northern Gulf of Mexico.[191]

[191] *Gulf of Mexico—Its Origin, Waters, and Marine Life,* Fishery Bulletin 89, U. S. Department of Interior (1954), pp. 165-169.

The abundance of this microscopic fish food has resulted in the creation of an excellent fishing ground in the area around the mouth of the river. Harvesting these marine resources provides a livelihood for thousands of this nation's citizens. While early records are generally unavailable, records of the Louisiana Wildlife and Fisheries Commission indicate that since 1910 Louisiana has produced oysters at an average yearly rate of ten to fourteen million pounds, a substantial percentage of which were produced from the waters of the Mississippi River Delta.[192] The waters of Plaquemines Parish, the local political unit which includes the Delta, produced 14,647,900 pounds of oysters from 1960 to 1966 having a value of $5,745,494.[193]

The salt water fishing industry has also been an important source of income to the inhabitants of the area. As early as 1919 Louisiana was producing more

[192]In 1959 the United States oyster fishery produced 64,710,000 pounds having a value of $29,483,000. [Powers, E. A., "Fishery Statistics of the United States—1959", Washington, United States Fish and Wildlife Service Statistical Digest, Vol. 51 (1961).] Of this production, 60 percent were taken on the Atlantic Coast principally in Chesapeake Bay; 21 percent in the Gulf of Mexico area; and 19 percent on the Pacific Coast. [Stansby, Maurice E., editor, *Industrial Fishery Technology,* Reinhold Publishing Corporation (1963) at page 186.] Approximately one fourth of the oysters taken in the Gulf region were landed in Plaquemines Parish alone (2,824,467 pounds). [Louisiana Wildlife and Fisheries, Oyster Division, Statistics for 1959.] Therefore, in 1959, this single Parish was a significant factor, producing 1/20th of the national yield, in one of the United States' five most valuable marine resources.

[193]Report prepared for Louisiana Tidelands Staff by the Commercial Fisheries Division of the Interior Department of the United States Government.

than twenty-three million pounds of commercial and edible fish annually.[194] This figure has grown to such an extent that from 1962 to 1966 more than one billion pounds, valued at nearly twenty-nine million dollars, were landed in Plaquemines Parish alone.[195] In part composed of sea turtles, crabs, speckled trout, red fish, red snapper, flounder, and mullet, this economic fisheries group is caught primarily in the shallow waters of the Mississippi River Delta.

The most valuable marine resource in the United States today is the shrimp, surpassing even salmon, tuna, and herring. Eighty per cent of the nation's production, which averages between 225 and 250 million pounds per year, is generated in and from the region of the Gulf of Mexico.[196] Of this total production, Louisiana had an average annual yield of 84 million pounds between 1935 and 1960.[197]

The Mississippi River Delta is a significant factor in the Louisiana shrimping industry.[198] From 1960 through 1966 nearly forty-five million pounds of shrimp valued at more than $12,500,000 were landed

[194]Statistical report prepared by Mr. H. Roger Hunter, Jr., Supervisor of Revenues, Louisiana Wildlife and Fisheries Commission (hereinafter "Hunter Report").

[195]*Supra* at note 193.

[196]*Stansby, Industrial Fishery Technology,* (1963) at pages 29 and 163, (hereinafter cited as *Stansby*).

[197]*See* footnotes 193 and 194 *supra.*

[198]There were forty-five shrimp canning plants in the United States as of 1960 of which eighteen were located within Louisiana. These forty-five plants generated an income of $17,232,593 in the year 1960; however, the production from the Louisiana plants alone accounted for more than ten million dollars of that sum.

in Plaquemines Parish.[199] Chief among the harvested shrimp was the white shrimp which is normally taken in waters of less than 10 fathoms.[200]

A survey was made by the United States Department of Interior concerning the number of trips made by shrimp boats (1962-1966) in waters outside the shoreline between Mobile Bay and Galveston, Texas. The report of the survey compared trip frequency by geographical areas. There were a total of 27,384 trips made in the East Bay area between 00 fathoms and 10 fathoms. Comparatively, this number is approximately one tenth (1/10) of the total number of trips made by all boats in all areas. Relative to the total geographical area surveyed and the large number of shrimp boats involved (especially in regard to the Texas shrimp industry), the fact that one tenth of all trips were made in the East Bay area at depth of 10 fathoms or less indicates the intense activity going on in this relatively small area.[201]

No discussion of this area's marine resources is complete without mention of the Menhaden industry.

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[199]*Supra* at note 193.

[200]*Stansby,* at 160; *Gulf of Mexico, Fishery Bulletin* 89, *U. S. Dept. of Interior* (1954) at 211.

[201]This five year study showed that 69.1% of all trips were made in waters of five fathoms or less and an additional 18.2% were made in waters of ten fathoms or less. As pointed out in the text, this shallow fishing fleet is concentrated in Louisiana's waters, especially East Bay.

Report prepared by J. Y. Christmas, Marine Biologist and charts based thereon contained in United States Department of Interior, Fish and Wildlife Service Bulletin, Bureau of Commercial Fisheries, Washington, D. C.

Menhaden are migratory fish which appear in dense schools in the waters of larger bays and along the shore. They generally are found at depths of less than 20 fathoms and occur in greatest concentration in localities with extensive estuarine drainage systems such as the Mississippi Delta and Chesapeake Bay.[202] In the decade between 1952 and 1961, Menhaden accounted for somewhere between 33 and 45 percent of the total annual fish production in the United States,[203] and presently ranks as the fifth most valuable marine resource.[204]

The annual catch of Menhaden made by Louisiana fishermen averages between 250 and 300 million pounds per year.[205] Of this total catch, approximately 200 million pounds are landed in Plaquemines Parish.[206] As an indication of how important the Plaquemines Parish production is, the amount of Menhaden landed there every year ranges from one fifth (1/5) to one tenth (1/10) of the total yearly production in the whole nation.[207] The economic significance of the Delta Bays to the Menhaden industry is reflected in the fact that from 1962 to 1966, 979,529,307 pounds of Menhaden valued at $13,732,000 were landed in Plaquemines Parish alone.[208]

To summarize the economic importance of East

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[202]*Stansby*, at 147.
[203]Id at 152.
[204]Id at 30.
[205]*Op. Cit., Supra* at Note 194.
[206]*Op. Cit., Supra* at Note 193.
[207]*Stansby*, at page 152.
[208]*Op. Cit., Supra* at note 193.

Bay and the waters of the Delta, total figures available for only the years 1962 through 1966 indicate that commercial fishing activities in Plaquemines Parish yielded 2,078,890,307 pounds of produce and generated $56,780,000 in revenues.[209]

(4) Exercise of Authority: Control of Inland Waters

In reviewing an exercise of authority in relation to the interest it is attempting to protect, the question of its effect on historic title turns on the determination of whether or not the nation, through the exercise, treated the waters as part of the national domain or part of the high seas. The high seas are free to all men, except to the extent that certain rights have been modified by international convention. If a nation exercises jurisdiction even in a limited field, which is not permitted by international law, it is either acting illegally or imparting a territorial or national character to the affected waters. Indeed, even if the actions are initially illegal, if unchallenged, national character may be imparted to the waters. Of the three classical elements of historic title,[210] the most important—the one which lies at the heart of the concept—is the assertion of exclusive control and authority. Without the overt attempt to treat the waters as part of the national domain, the element of national sovereignty is missing. In considering evidence bearing on the question

[209] *Op. Cit., Supra* at note 193.

[210] *See* "Principles and Rules" on "Historic Inland Waters" pp. 149-161, *supra* for discussion of the elements of historic title.

of sufficiency of control, it must be remembered that control is exercised in response to the protection of an interest, and nations do not normally exercise more control than is necessary to protect the endangered interest. Consequently, it is unlikely that one will ever find an assertion of control which, in and of itself, can be considered as an assertion of all of the attributes of full dominion and sovereignty. Rather we would expect to find acts of authority over water areas which, while not an assertion of ownership per se, are not consistent with the classification of the waters as the "high seas." This is the critical factor which must be kept in the forefront of any analysis of historic title—a nation may not exercise exclusive control over the waters of a coastal indentation, even in a limited sphere, without evidencing to the world that she does not regard those waters a part of the high seas.

As one would expect from the vital character of the waters of the Mississippi Delta there have been numerous exercises of control in these waters; some by the federal government in areas of concern peculiar to it, and some by the state and local governments in areas of concern peculiar to them. All of which, however, prove that the waters behind our proposed coastline across East Bay have not been treated as if they were part of the high seas and cannot be so classified, as the government attempts to do; but rather these waters have been treated as if they belonged to the United States and should thus be considered as part of her national waters.

We will now review some of the activities of the federal and state governments which have evidenced assertion of control and authority over the waters of East Bay.

aa. Congressional Act of February 19, 1895

We previously pointed out that the control and protection of the mouth of the Mississippi River was of utmost concern to this young nation. As the maritime powers of the United States grew in the 19th Century she began to expend great sums in improving the commercial harbors and ports along her Atlantic and Gulf shores. For example, substantial and expensive improvements were made to New York Harbor, Delaware Bay (and ports therein), Chesapeake Bay (and ports therein), Savannah Harbor, and New Orleans Harbor, including the mouth of the Mississippi River, to name a few.[211]

As the interest of the nation in her ports, harbors and her maritime fleet grew and the dangers of uncontrolled navigation increased through the proliferation of vessels and their growth in size and speed, it became imperative to protect these interests. The concern of the United States for maritime safety was

[211]With regard to the money spent on improvements for the Port of New Orleans, it should be noted that $285,000 was spent in 1837-1838 to improve the entrances to the Mississippi River, principally on Southwest Pass. Between 1852 and 1901 an additional $21,649,988.53 was spent on the harbor works of New Orleans on construction and maintenance of South and Southwest Passes. *Report of The Chief of Engineers,* U. S. Army (1958) (Appendix) at pages 1847-1850.

not limited to its national waters, for on July 9, 1888, Congress approved an act which authorized the President to invite all maritime nations to send delegates to Washington to confer on the revision of uniform rules and regulations to protect life and property at sea.[212] The conference met in Washington in 1889 and as a consequence of its work, Congress, by Act of August 19, 1890, adopted the rules for the prevention of collisions on the high seas which had been presented at the conference. A sufficient number of nations adopted the rules for them to be put into operation on July 1, 1897.[213]

The danger to mariners and port facilities within the jurisdiction of the United States was equally apparent, and as an outgrowth of the attempts to establish rules to govern the navigation of vessels on the high seas, Congress, in 1895, adopted an act which provided rules and regulations for the control of navigation within "the harbors, rivers and inland waters of the United States." [214]

There was, however, apparently some question concerning the applicability of these rules to foreign vessels within this nation's national waters. The 1895 Act did not in itself set forth navigation rules, rather

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[212]President Cleveland, annual message, December 3, 1888, as cited in 2 *Moore* p. 74.

[213]*See* Acts of May 28, 1894, and February 23, 1895; *see also For. Rel.* 1894, 217, 219, 261, 262-270, 270-275; *For Rel.* 1895, 1. 68 30686; report of Mr. Olny, Secretary of State, to President, December 7, 1896, *For. Rel.* 1896, 1 XXIV; as reported in 2 *Moore.*

[214]Act of February 19, 1895, 28 Stat. 672.

it merely incorporated by reference the rules pertaining to navigation on the "Red River of the North and Rivers Emptying into Gulf of Mexico" [215] found in United States Revised Statute 4233, which rules were apparently applicable only to United States' vessels.[216]

All question of the applicability of the inland rules to foreign vessels was, however, shortly clarified by the Act of June 7, 1897[217] which expressly repealed the applicability of Revised Statute 4233[218] to the 1895 Act, adopted in its place a comprehensive set of navigation rules and regulations and expressly made them applicable to "*all vessels* navigating all harbors, rivers and inland waters of the United States. . . ." [219] (Emphasis Added)

In view of the contemporaneous development of the navigation rules for the high seas and rules for inland waters it must be assumed that the use of the terms "high seas" and "inland waters" in the legis-

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[215]United States Revised Statute 4233, Act of April 29, 1864, c. 69, 13 Stat. 58.

[216]However, the legislative history showed an intent to have all vessels on the same waters follow the same rules.

[217]30 Stat. 96.

[218]The repeal was not complete however as the provisions of R. S. 4233 were retained for certain designated inland river areas. 30 Stat. 96, 103.

[219]*Id* at 96.

It must be considered significant that the rules under R.S. 4233 applied only to "vessels . . . of the mercantile marine of the United States", whereas the 1897 rules applied to "all vessels navigating all harbors, rivers and inland waters of the United States . . ."

lation was intentional and advised. In fact, the history of the legislation concerning the rules of the road shows that Congress, when it first established separate international and inland rules, clearly intended that the inland rules were to be applicable only on our internal waters, with the marginal sea to be governed by the rules for the high seas. Fully cognizant that it could impose a special domestic regime for inland waters *and* the territorial sea, Congress elected to make special domestic rules applicable only to inland waters, because it found that "there are no guides to the mariner to show him the boundary between American waters and the high seas." [220] This was in effect the same conclusion arrived at by the 1889 Washington Conference, since it excepted only inland waters from the international rules regime it recommended. A fortiori, Congress must have known it could not unilaterally promulgate navigation regulations over foreign vessels for waters of the high seas. The distinction between the two terms, particularly with respect to the relative rights of navigation on each, was well determined in international law. The high seas were viewed as "those waters which are outside of the exclusive control of any State or group of States. . . ." [221] As

[220]H. R. Report 731 N.O. at 1, 4, 48th Congress 1st Session (1884). The bill which was favorably reported by this committee report was reintroduced in 1885 and became the act of March 3, 1885, (23 Stat. 438) the first "international rules" legislation.

[221]1 *Hyde,* p. 751. This basic principle is explicitly incorporated into the Geneva Convention on the High Seas (Adopted April 26, 1958, U. N. Doc. A/Conf. 13/L 53). Article

a consequence of which, "no State is authorized to interfere with navigation of other States on the high seas in time of peace. . . ." [222] Geographer for the United States Department of State, Etzel Pearcy, defines "high seas" as,

> . . . all water beyond the outer limit of the territorial sea. Here are the vast ocean areas of the world subject to the freedom of the seas—surface navigation, aerial navigation, fishing, laying of cables, and laying of pipelines to name the more important.

It is equally clear that on its national waters a state has jurisdiction to regulate and control navigation by all vessels.[223]

The exercise of exclusive control over navigation and the authority to fine and imprison for violation can only be interpreted as a declaration that the waters to which the inland rules apply were not part of the high seas but rather formed part of the territorial or national waters of the United States. As put by Sir Gerald Fitzmaurice, "a claim to exclusive rights in any sea area can only be *enforced* on the basis of dominion over that area, and this involves

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2 provides that "the high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:

(1) Freedom of Navigation; (2) freedom of fishing

[222] *Le Louis* (1817), 2 *Dobson* 210, 243-244; 1 *Hyde* 471, n. 4.

[223] 2 *Moore*, 272; 1 *Hyde*, 735.

that the area consists of territorial or national waters, in which alone a State can possess such dominion and exercise rights of jurisdiction." [224]

The 1895 Act authorized the Secretary of Treasury to "designate and define . . . the line dividing the high seas from rivers, harbors and inland waters." [225] On June 13, 1895 he issued Department

[224] *The Law and the Procedure of the International Court of Justice, 1951-1954; Points of Substantive Law,* appearing in 31 *The British Yearbook of International Law* (1954), 371, 376.

In this context the decision of the Constitutional Law Court of the German Reich (Staatsgerichtshof) in the case of *Lubeck v. Mecklenburg-Schweerin* is significant. The Court was faced with a boundary dispute in Lubeck Bay between the coastal states of Lubeck and Mecklenburg-Schweerin. In response to the Lubeck claim that its exclusive control over navigation had vested it with certain rights, the Court said "the Constitutional Law Court also considers that proof has been furnished with respect to sovereignty over navigation, that since time immemorial Lubeck has been in possession thereof, and in fact over all the disputed portion of Lubeck Bay . . . Accordingly Lubeck retains the possibility of regulating her maritime navigation in the future also, . . . without having to fear an objection by Mecklenburg-Schweerin."

Note that because of certain dredging activities conducted by Mecklenburg-Schweerin, the bay was divided between the claimants except for exclusive rights in fisheries and navigation which were awarded to Lubeck. As reported in 1 *Hackworth,* p. 711.

[225] There was no concern with the rules applicable to the territorial sea, because for purposes of navigation it was assimulated to the high seas. The territorial sea, like international waters, was open to high seas traffic under the right of innocent passage, and the high seas rules were specifically made to apply outside of inland waters under the international rules agreement.

Circular No. 127, which provided that "pursuant to Section 2 of the Act approved February 19, 1895, the following lines dividing high seas from rivers, harbors, and inland waters are hereby designated and defined. . . ."

The water areas which were so designated reflect that the Secretary understood that his designation had jurisdictional significance. His purpose was to define those waters in which the nation and her citizens had such a vital interest that the vessels of the other nations of the world would be required to comply with American domestic law in order to travel them. Only areas around the most important harbors in the United States were so protected; for example, the first inland water lines (drawn in 1895) included "Philadelphia Harbor and Delaware Bay", "Baltimore Harbor and Chesapeake Bay", "Charleston Harbor", "Savannah Harbor", "New York Harbor", "Portland Maine Harbor", "Pensacola Harbor", "Mobile Harbor and Bay", "San Diego Harbor", and "*New Orleans Harbor and the Delta of the Mississippi*".[226] (Emphasis Added.)

This first dividing line around the mouth of the Mississippi River was described in Circular 127 (1895) as follows:

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[226]It is significant that in application the authority given the Secretary of Treasury was judiciously used only to exert control over waters which were obviously of utmost importance to the commerce of the nation, and which from a technical standpoint were probably internal waters in any event.

NEW ORLEANS HARBOR AND THE DELTA OF THE MISSISSIPPI

From South Pass East Jetty Light N by E 1/2 E to Pass a Loutre Light, thence N to Errol Island, and from South Pass East Jetty Light W 7/8 S to Southwest Pass, thence N to shore. (Emphasis Added.)

From the National Archives in Washington, D. C. we obtained copies of official Coast and Geodetic survey charts of this period which have been reproduced at one-half scale and are included as exhibits to this brief. The Court's attention is directed to Exhibit 6 which is a copy of the 1895 edition of the United States Coast and Geodetic Survey (hereinafter U. S. C. & G. S.) Coast Chart No. 194 covering the area surrounding the mouth of the Mississippi River. The chart, in its lower left hand corner, under the heading of "Lines Dividing High Seas from Inland Waters", contains the same description as found in Circular 127. The described base line is illustrated in red on the exhibit.

The conspicuous inclusion of the Mississippi Delta within the original list of "rivers, harbors and inland waters" is of paramount importance in demonstrating the exercise of control by the United States over East Bay and the other Delta bays at the mouth of the Mississippi River. The government contends that there was no "jurisdictional significance" to the designation of East Bay and the other Delta bays as inland waters. Yet it is clear from even a cursory examination of other designated harbors that

they were inland waters within the jurisdictional sense of that term. Delaware Bay had been held to be a part of the historic national waters of this country for more than 100 years.[227] Chesapeake Bay had been judicially declared to be within the territorial limits of the United States.[228] Similarly, harbors at Charleston, Savannah, Portland, Pensacola, and Mobile were unquestionably part of the inland waters of the United States.

Moreover the government's contention that this assertion of control has no jurisdictional significance is merely a play on words, for, as we have previously noted, *any* control exercised by the United States which is inconsistent with the pre-eminent principle of freedom of the seas *is* in fact an assertion of jurisdiction over the affected waters. In this connection we note the opinion of the eminent international law scholar Sir Gerald Fitzmaurice who postulated that a "claim to exclusive rights of any kind involves, and in fact *is* (*however it may be framed on paper*), a claim to territorial waters." [229] (Emphasis Added.) Consequently, a disclaimer of jurisdictional significance, particularly coming more than sixty years after the fact, cannot alter the reality that exclusive control over these waters has been exercised, which is completely inconsistent with denominating such areas as part of the high seas.

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[227]*See* opinion of Attorney General Randolph, 1 *Opinions of the Attorney General of the United States*, (1793), p. 33-38.

[228]See discussion of the Second Court of Alabama Claims in the *Alleganean Case.*

[229]Fitzmaurice, *op. cit., supra* n. 132.

At this time in history Southwest Pass, South Pass and Pass a Loutre were all used for commercial traffic though the latter was the shallowest and the least important. Exhibit 34 shows that between each of these passes the shallow waters of the Delta bays extended inland providing easy access to the River at places other than at its mouth. With this geographic fact so obvious it was clear that to control the mouth of the River one had to control the bays on either side of each pass. Thus the dividing line was drawn such that West Bay and East Bay on either side of Southwest Pass, Garden Island Bay and East Bay on either side of South Pass and Blind Bay and Isle au Breton Bay, on either side of Pass a Loutre were all placed under control of the United States.[230] Of principal importance, however, were the waters of East Bay for it provides access to the banks of both Southwest and South Pass, the principal arteries of the Mississippi River.

Designation of these waters as belonging to the United States did no violence to principles of international law nor to the concept of freedom of the seas because the only waters which were included behind the dividing lines were those lying within the landlocked bays of the Mississippi Delta, which, under recognized principles of international law, lay within the territorial limits of the United States.

In the context of proof of a historic title, it is singularly significant that the map referred to (Exhibit 6) is the official publication not only of the

[230] *See* Treasury Department Circular No. 127, (1895).

United States but also of the agency of the United States charged with mapping the territory for use by mariners of the world. What else could a foreign captain, using the official chart and nautical handbook, which included Circular 127, have concluded except that the United States was claiming that East Bay and the other waters enclosed behind the described line as part of her national waters; particularly when all vessels, including his, were subjected to the domestic navigation regulations of the United States when traveling within these waters.

Again, the central question in determining the character of coastal waters is whether the coastal nation has respected the concept of freedom of the high seas on these waters or has acted inconsistently therewith by subjecting the waters to its control. As put by Claudis Baldoni, Italian international law expert, the crux of the problem is "whether the zones contained in such bays have ever been subjected to the regime of freedom of the seas." [231] It is clear that control of navigation over all vessels is not subjecting the waters to the "regime of freedom of the seas."

After 1895 there followed a series of official redesignations of the dividing line made necessary by amendments to the Congressional legislation, new topographic surveys which periodically revealed changes in the geography of the Delta area, and the need for

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[231] Il mare territoriale nel dirrito internazionale comune (Padova, 1934), 80. (Translation ours.)

including other harbor areas within the protection of the domestic navigation rules.

Following the amending legislation in 1897,[232] the dividing line was officially redesignated by Treasury re-established the location of the line dividing the of the line around the Delta was left unchanged. Again by Circular 107 of 1900 the Secretary of Treasury re-established the location of the line dividing the high seas from inland waters around the Delta without altering its location.

In 1902 the authority to designate protected areas for the important harbors of this nation was transferred from the Treasury Department to the Department of Commerce and Labor, and in 1905 the latter published Circular 88 which designated the inland water around the Mississippi Delta.[233] As had been the case for the previous ten years, the location of the dividing line around the Delta, including East Bay, was redesignated without changes.

By 1907 a new survey of Southwest Pass and the need to include other ports and harbors within the express protection of the United States' domestic juris-

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[232]*See* footnote 219 *supra* and text therewith.

[233]Circular 88 of 1905 read in part:

> NEW ORLEANS HARBOR AND THE DELTA OF THE MISSISSIPPI—From South Pass East Jetty N. by E. ½ E. to Pass a Loutre Light-House; thence N. to Errol Island, and from South Pass East Jetty Light W. 7/8 S. to Southwest Pass Light-House; thence N. to shore. Pilot Rules for Western Rivers apply in the Mississippi River above the lower limits of the city of New Orleans.

diction resulted in the issuance of Circular Number 158. For the first time the enclosed waters of the Mississippi Sound immediately adjacent to Chandeleur Sound on the north and east were included within the designated dividing line. Due to the proximity of the Mississippi Sound to the waters of the Mississippi River Delta, the 1907 line dividing inland waters from high seas consisted of a continuous line enclosing both.

Circular 158 of 1907 defined the dividing line from the Mississippi Sound to the Delta as commencing at

> Sand Island Lighthouse, WSW ½ W (approximately) to Chandeleur Lighthouse, westward of Chandeleur and Errol Islands and west of a line drawn from the southwest point of Errol Island (approximately) to Pass a Loutre Lighthouse,

and

> from South Pass East Jetty N by E ½ To Pass a Loutre Lighthouse; thence north to Errol Island, and *from South Pass* East Jetty Light W ⅞ *to Southwest Pass* Lighthouse; thence N to shore. (Emphasis Added.)

Exhibit 8 is a copy of the edition of chart 194 in use in 1907 on which the part of the line dividing inland waters from the high seas enclosing the waters of East Bay is super-imposed.

In 1911 the Department of Commerce took cognizance of the importance of the mud lump islands which surrounded the Delta in establishing the territorial extent of this nation's national waters. Circular

230 of 1911 did not change the description of the dividing line between Sand Island and Pass a Loutre, but from Pass a Loutre the national waters of the United States were declared to lie

> . . . inshore of a line drawn from the outermost mud lump showing above low water at the entrance to Pass a Loutre to a similar lump off the entrance to Northeast Pass; thence to a similar lump off the entrance to Southeast Pass; thence to the outermost aid to navigation off the entrance to South Pass; thence to the outermost aid to navigation off the entrance to Southwest Pass; thence northerly about 18½ miles to the westerly point of the entrance of Jaque Bay.

The Court's reference is directed to Exhibit 10 which illustrates the manner in which the dividing line enclosed the waters of East Bay as part of the inland waters of the United States.

Circular 230 of 1911 defined the described lines as "the lines of demarcation of inland waters of the United States bordering on the Gulf of Mexico where the pilot rules for Western rivers apply." The dividing line clearly qualified in international law as a reasonable interpretation of recognized principles of law. The described line was merely a connected series of bay closing lines across coastal indentations, each of which exhibited the general characteristics and configuration of a bay, and a line around an island chain which enclosed internal waters. It seems clear that at this time in history, under recognized tests of international law, these waters were obviously part of the

national waters of the United States regardless of the control exercised by the government.[234]

There followed a succession of circulars and regulations each redefining and redesignating the areas of control around this nation's important harbors (Circular 230 of June 1917,[235] Circular 230 of October, 1927,[236] Circular 230 of December 1928,[237] Circu-

[234]See page 101 *et seq, supra,* "Development of the International Law of Bays."

[235]From Sand Island Lighthouse 259° (WSW. 5/8 W.), 43½ miles, to Chandeleur Lighthouse; westward of Chandeleur and Errol Islands, and west of a line drawn from the southwesterly point of Errol Island 182° (S. ¼ E.), 23 miles, to Pass a Loutre Lighthouse, Pilot Rules for Western Rivers apply in Pascagoula River, and in the dredged cut at the entrance to the river, above Pascagoula River Entrance Light, A, marking the entrance to the dredged cut.

NEW ORLEANS HARBOR AND THE DELTA OF THE MISSISSIPPI RIVER—Inshore of a line drawn from the outermost mud lump showing above low water at the entrance to Pass a Loutre to a similar lump off the entrance to Northeast Pass; thence to a similar lump off the entrance to Southeast Pass; thence to the outermost aid to navigation off the entrance to South Pass; thence to the outermost aid to navigation off the entrance to Southwest Pass; thence northerly, about 19½ miles, to the westerly point of the entrance to Bay Jaque. (Circular 230, June 8, 1917.)

[236]From Sand Island Lighthouse 259° (WSW. 5/8 W.). 43½ miles, to Chandeleur Lighthouse; westward of Chandeleur and Errol Islands, and west of a line drawn from the southwesterly point of Errol Island 182° (S. ¼ E.) 23 miles, to Pass a Loutre Lighthouse. Pilot Rules for Western Rivers apply in Pascagoula River, and in the dredged cut at the entrance to the river, above Pascagoula River Entrance Light, A, marking the entrance to the dredged cut.

NEW ORLEANS HARBOR AND THE DELTA OF THE MISSISSIPPI RIVER—Inshore of a line drawn from

lar 230 of December, 1932,[238] and Federal Regulation

the outermost mud lump showing above low water at the entrance to Pass a Loutre to a similar lump off the entrance to Northeast Pass; thence to a similar lump off the entrance to Southeast Pass; thence to the outermost aid of navigation off the entrance to South Pass; thence to the outermost aid to navigation off the entrance to Southwest Pass; thence northerly, about 19½ miles, to the westerly point of the entrance to Bay Jaque. (Circular 230, October 10, 1927.)

[237]From Sand Island Lighthouse 259° (WSW. 5/8 W.) 43½ miles, to Chandeleur Lighthouse; westward of Chandeleur and Errol Islands, and west of a line drawn from the southwesterly point of Erroll Island 182° (S. ¼ E.), 23 miles, to Pass a Loutre Lighthouse. Pilot Rules for Western Rivers apply in Pascagoula River, and in the dredged cut at the entrance to the river, above Pascagoula River Entrance Light, A, marking the entrance to the dredged cut.

NEW ORLEANS HARBOR AND THE DELTA OF THE MISSISSIPPI RIVER—Inshore of a line drawn from the outermost mud lump showing above low water at the entrance to Pass a Loutre to a similar lump off the entrance to Northeast Pass; thence to a similar lump off the entrance to Southeast Pass; thence to the outermost aid to navigation off the entrance to South Pass; thence to the outermost aid to navigation off the entrance to Southwest Pass; thence northerly, about 19½ miles, to the westerly point of the entrance to Bay Jaque. Circular 230, December 26, 1928.

[238]From Sand Island Lighthouse 259°, 43½ miles, to Chandeleur Lighthouse; westward of Chandeleur and Errol Islands, and west of a line drawn from the southwesterly point of Erroll Island 182°, 23 miles, to Pass a Loutre Beacon. Pilot Rules for Western Rivers apply in Pascagoula River, and in the dredged cut at the entrance to the river, above Pascagoula River, Entrance Light, A, marking the entrance to the dredged cut.

NEW ORLEANS HARBOR AND THE DELTA OF THE MISSISSIPPI RIVER—Inshore of a line drawn from the outermost mud lump showing above low water at the

of December, 1953[239]). Each of these included the waters of East Bay within the area exclusively controlled through the imposition of domestic navigation regulations.[240] Exhibits 12, 14, 16, and 18 are copies of the United States Coast and Geodetic Survey Chart 194 or Chart 1272 (the chart superceding number 194) which relate respectively to the foregoing circulars and regulations. The location of the designated line dividing harbor areas and inland waters from the high seas is superimposed on each chart.

Exhibit 20 is a current coast survey chart on which the lines dividing the high seas from inland

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entrance to Pass a Loutre to a similar lump off the entrance to Northeast Pass; thence to a similar lump off the entrance to Southeast Pass; thence to the outermost aid to navigation off the entrance to South Pass; thence to the outermost aid to navigation off the entrance to Southwest Pass, thence northerly, about 19½ miles, to the westerly point of the entrance to Bay Jaque. (Circular 230, December 8, 1932.)

[239]MISSISSIPPI PASSES, LA., TO SABINE PASS, TEXAS—A line drawn from Pass a Loutre Lighted Whistle Buoy 4 to South Pass Lighted Whistle Buoy 2; thence to Southwest Pass Entrance Midchannel Lighted Whistle Buoy; thence to Ship Shoal Lighthouse; thence to Calcasieu Pass Lighted Whistle Buoy 1; thence to Sabine Pass Lighted Whistle Buoy 1.

[240]Circular 230 of November 1935 contained the following general provision:

> General Rule—
> At all buoyed entrances from seaward to bays, sounds, rivers, or other estuaries for which specific lines are not prescribed herein, Inland Rules of the Road shall apply inshore of a line approximately parallel with the general trend of the shore, drawn through the outermost buoy or other aid to navigation of any system of aids.

waters promulgated since 1895 are superimposed. This Exhibit graphically demonstrates how the location of the outer limit of inland waters has always been directly related to the bay closing line joining South and Southwest Passes, and how administratively this line has been moved progressively seaward to accommodate the seaward growth of the mouths of these passes.

We submit that since 1895, this nation has asserted and exercised exclusive control over the navigation of all vessels on the waters of East Bay and the other Delta bays; that the authority for the exercise of control continues to this very day; and that this exercise of control in and of itself demonstrates that the United States has not treated, and does not now treat, these waters as part of the high seas. Rather this nation continues to exercise control over them as if they were part of her national domain.

bb. The Captain of the Port of New Orleans

Another excellent example of the federal government's treatment of the waters of East Bay as belonging to the United States is the control exercised by the Captain of the Port of New Orleans.[241] Each major harbor in the United States has a Coast Guard official designated as the Captain of the Port. He, with

[241]Coast Guard Officials with the 8th District office reluctantly discussed the authority exercised by the Coast Guard in the Delta Bays, explaining that various forms of authority were exercised over foreign vessels; however, any access to Coast Guard records and files was denied to the State of Louisiana.

his representatives, is "responsible for the performance of those functions of the Coast Guard concerning maritime law enforcement, saving and protecting life and property, control over anchorage and the movement of vessels within his assigned area." [242] His duties expressly include the enforcement of those "functions described in 33 CFR Part 6 (Protection and Security of Vessels, Harbor and Waterfront Facilities), Parts 121, 122, and 124 (Security of Vessels Including Control over Movement of Vessels), 125 and 126 (Security of Waterfront Vessels) and 46 CFR Parts 146 and 147 (Dangerous Cargo Regulations)." [243]

The Captain of the Port of New Orleans has statutory jurisidiction only over the "navigable waters of the United States and contiguous land area" [244]

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[242] *CFR* subpart 67.50.

[243] *Ibid.* The original executive order which authorized the exercise of authority by the Captain of the Port also clearly demonstrates that control was to be limited to the territorial or inland waters of the United States. Executive Order 10173 provides, "the Captain of the Port may supervise and control the movement of any vessel and shall take full or partial possession or control of any vessel or part thereof, *within the territorial waters of the United States under his jurisdiction,* wherever it appear to him that such action is necessary in order to rescue such vessels from damage or injury or prevent damage or injury to any vessel or waterfront facility or waters of the United States, or to secure the observance of rights and obligations of the United States." (Emphasis Added.)

[244] 33 CFR subpart 3.40-75. The Regulations establish a large rectangular area identified by longitude and latitude coordinates which includes a large area of the Gulf of Mexico. The authority of the Coast Guard within this zone is how-

and not over the adjacent waters of the high seas. Consequently the area in which the Captain of the Port exercises control should indicate the Coast Guard's interpretation of the territorial limits of the United States, and further should exhibit to foreign nations the extent of this nation's national waters. In practice, the authority of the Captain of the Port of New Orleans has always been exercised out to the location of the Inland Water Lines surrounding the Mississippi River Delta.

As a consequence, an agent of the United States, whose authority is expressly limited to the waters of the United States, is exercising control over East Bay as well as the other bays of the Mississippi Delta. It is obvious that the Captain of the Port does not treat these waters as part of the high seas but rather as part of the national waters of the United States. His actions clearly support our contention that the federal government has exercised jurisdiction over East Bay and has not treated these waters as part of the high seas.

cc. New Orleans Marine Inspection Zone

A similar example of an exercise of control by the federal government is the authority asserted by the United States Coast Guard within the New Orleans Marine Inspection Zone. Around the shores of the na-

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ever expressly limited to the inland or territorial waters of the coastal states of Mississippi, Alabama, Louisiana, and Texas and the offshore oil platforms.

tion the United States Coast Guard has established numerous Marine Inspection Zones in which designated Coast Guard officials are authorized to enforce domestic regulations concerning navigation.[245] 33 CFR subpart 3.40-10 describes the geographic extent of the New Orleans Marine Inspection Zone as comprising the "land masses, inland and/or territorial waters of the states of Mississippi, Arkansas, Louisiana and Texas, as well as artificial islands in the Gulf of Mexico. . . ."

The jurisdiction of the Coast Guard is thus restricted to the inland waters of the designated states. In practice this jurisdiction is exercised by the Coast Guard out to the statutory line dividing inland waters from the high seas and has so been exercised in the past. Here again we find the United States through its agents exercising control over the waters of East Bay. Such control is completely inconsistent with the contention of the United States that much of its waters are part of the high seas. The fact becomes clear that these waters have not been treated as part of the high seas but rather as part of the national domain.

dd. Other Federal Activity

(i) Tern Island Bird Reservation

Our claim that the Federal Government has always considered the land and water areas of the Mississippi Delta as part of the national waters of the United States is well illustrated by the fact that in

[245] 33 *CFR* subpart 37.50.

1907 the Government created a national bird reservation which geographically covered the entire area. By Executive Order dated August 8, 1907, President Theodore Roosevelt expressly reserved, as a "preserve and breeding ground for native birds" all the small islands near the mouth of the Mississippi River "located at the area segregated and shown upon the diagram [Exhibit 44] hereto attached and made a part of this order." [246] This Order clearly defines the limits of the Reservation as including East Bay and the other Delta Bays.

While it is true that the Reservation affected only islands within the designated area, we submit that it is illustrative of the fact that the government always considered the entire Mississippi Delta, land and water, as an area over which it had exclusive jurisdiction. Moreover, it is totally inconsistent with the concept of freedom of the high seas for any area to be subjected to exclusive Government control through its reservation as a federal game preserve.[247]

(ii) 1940 Remeasurement of the United States by the Department of Commerce

In 1937, three years prior to the 1940 census, the Department of Commerce undertook to measure the area of the United States and the political subdivisions

[246] Executive Order of August 8, 1907, (Exhibit 44).

[247] Louisiana by act 52 of 1921 enacted a similar provision reserving the state owned lands in the same portion of the Mississippi Delta as a game preserve.

within the United States. Vital to this determination was the requirement that the territory of the United States around her shores be defined and measured with precision. The pursuit of that task is described in detail in the Government publication, *Measurement of Geographic Area 33*, entitled, "Remeasurement of the United States: 1940".[248]

In determining which bodies of coastal water lay within the territorial extent of the United States, the Census Bureau attempted to define the actual jurisdictional limits of the nation. It was recognized that, depending on the geographic situation, "the outer limits of inland water [as used in the remeasurement] are either conterminous with the inner limits of coastal or Great Lakes water, with the outer limits of the United States or with the limits of land." [249] To assist in this determination the Bureau entered into "extended discussions with cartographers, geographers, geodesists of the federal map making agencies, and private scientific organizations", with the result that definite criteria were established for determining the territorial extent of the United States.[250] These criteria were derived from the then existing international rules for delimiting national sovereignty, with the result that the designated lines represented the government's interpretation of the territorial sovereignty

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[248]*Proudfoot, Measurement of Geographic Area 33*, U. S. Department of Commerce (1946), hereinafter cited as *Proudfoot.*

[249]Id at page 33.

[250]Id at page 32.

of the United States and thus of the states within the Republic as recognized in international law.

Around the Mississippi Delta the Department of Commerce was faced with determining the proper delimitation of the territorial extent of the United States, and on the basis of their established criteria included the waters of East Bay, West Bay, Garden Island Bay and Blind Bay as being a part of the inland waters of this nation.[251]

The location of the lines establishing the territorial extent of the United States were graphically depicted on maps prepared by the government. Exhibit 46 is a copy of the segment of the official map covering the Mississippi River Delta, which clearly shows that East Bay, West Bay, Garden Island Bay and Blind Bay were considered as part of the inland waters of the United States.

We deem it significant that the federal government, at a point in time prior to the discovery of oil in East Bay, examined the question of the territori-

[251]Shalowitz commenting on this report says that the method used, which included East Bay, was the semicircle test. I Shalowitz p. 41.

The report mentions that certain large water bodies, legally inland in character, were excluded from official classification as inland in an apparent effort to prevent the inclusion of large water areas from injecting a statistical imbalance in to the analysis which the Department of Commerce made. The National Research Council, in a report dated May 3, 1948, explained that this was the basis for excluding the "Great Lakes areas, Long Island Sound, Delaware Bay, Chesapeake Bay, Puget Sound, and the Straights of Juan de Fuca and Georgia, etc."

ality of East Bay and concluded that this bay, as well as the other Delta bays, necessarily belonged to the United States and were not part of the high seas.

ee. State Control Over Natural Resources

Just as the United States has always had a vital interest in protecting the Harbor of New Orleans and the mouth of the Mississippi River and has always acted to effect the control necessary to insure that protection by regulating the coastal waters, so too has the State of Louisiana a vital interest in the natural resources of these same waters, and she too has acted to protect those interests by asserting her domestic conservation regulations in East Bay and the other Delta bays.

(i) Fisheries Regulation

As early as 1870 Louisiana sought to protect her vital natural resources through conservation legislation. For example, Act No. 18 of 1870 provided regulation of the oyster industry by establishing closed seasons during certain times of the year.

The current volume of conservation legislation is staggering, being composed of an excess of four hundred separate legislative acts.[252] These provisions generally regulate the seasons, size limits, permissible equipment, registration and the payment of severance taxes. They affect the oyster industry, the fishing industry, the shrimping industry and the menhaden in-

[252]For example, see LSA RS 56:1-56:1623, RS 9:1101 and 9:2791, RS 14:217, RS 15:48.1, RS 30:211-20:216.

dustry. Regardless of the rules set forth or the industry involved, these statutes are restricted in application to the waters of Louisiana,[253] and have been enforced over the full extent of the coastal waters of the Mississippi Delta Bays.

The shrimp statutes are designated to protect near shore breeding grounds and have attempted through the years to be specific in the area to which the regulations applied. Traditionally, shrimping in so-called "inside waters" of the state has been strictly controlled, while shrimping in "outside waters" of Louisiana was unrestricted. Act 103 of 1926 provided that "in inside waters shall be included Timbalier Bay, East Cote Blanche Bay, Atchafalaya Bay, West Cote Blanche Bay, and *all other bays and sounds found along the Louisiana Coast to the Gulf of Mexico.*" (Emphasis Added). As the shrimping industry expanded in economic importance, more areas were spe-

[253]"The beds and bottoms of rivers, streams, bayous, lagoons, lakes, bays, sounds, and inlets bordering on or connecting with the Gulf of Mexico, *within the territorial jurisdiction of the state,* including all oysters and other shell fish and parts thereof grown thereon, either naturally or cultivated, and all oysters in the shells after they are caught or taken therefrom, are and remain the property of the state until title is divested in the manner and form herein authorized, and shall be under the exclusive control of the commissioner of wildlife and fisheries until the right of private ownership vests therein." LSA RS 56:421.

LSA R S 56:353 provides in part that, "the exclusive control of the fisheries and the fishing industries of Louisiana is vested in the department which shall enforce the provisions of the law regulating them."

cifically designated as "inside waters" under state control, and by Act 51 of 1948, the waters of East Bay and West Bay were specifically included.

An examination of the records of the Louisiana Wildlife and Fisheries Commission reveals that in the decade from 1950 to 1961 there were more than 200 arrests made in the waters of the Delta area for violations of the shrimping statutes alone.[254] In regard to the historic title element requiring assertions of sovereignty, it is clear that the enforcement of these legislative declarations resulting in control of fisheries in waters such as East Bay must be viewed as a significant exercise of sovereignty. The fact that the Louisiana Wildlife and Fisheries Commission enforces the conservation statutes by patrolling the waters of East Bay in armed motor vessels is inconsistent with the classification of these waters as a part of the high seas. Exclusive control traditionally exercised over the aquatic life in these waters cannot be reconciled with the principle of freedom of the seas which, except as modified by treaty, establishes an absolute, unfettered right to take fish from the waters of the ocean outside of the territorial sea of the maritime state.[255]

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[254]Report prepared for State of Louisiana from the Arrest Report Records of the Enforcement Division of the Louisiana Wildlife and Fisheries Commission.

[255]The Geneva Convention on the High Seas expressly provides that one of the rights guaranteed on the high seas is freedom of fishing. Art. 2, U.N. DOC. A/Conf. 13/L. 53. Refer also to footnote 221 and text therewith. However, in 1966 Congress adopted public law 89-658 (80 Stat. 908) which created a 9 mile fishing zone around the United States, contiguous to the territorial sea.

(ii) Pollution Control

As early as 1932 Louisiana recognized the danger to her maritime industries which water pollution presented. Act 68 of 1932 made it "unlawful for any person to discharge . . . into any waters of the state . . . any substance which kills fish, or renders the water unfit for the maintenance of the normal fish life characteristic of such waters. . . ." and charged the Wildlife and Fisheries Commission with enforcing the provision.

While arrests for violation of the statute are rare, (as was the case nationally with all anti-pollution statutes until very recently) the threat of enforcement did much to promote voluntary compliance in the Delta area of Louisiana. When the oil industry began moving offshore in the late 1940's with its pollution potential, state agents began using boats and airplanes to patrol the equipment used for mineral development in an effort to protect Louisiana's important fishing industry. The records of the Wildlife and Fisheries Commission reveal that the waters of East Bay and the rest of the Delta area were patrolled by airplane and that polluting activities were detected. According to Commission agents who have conducted patrols across the Delta bays, the affected oil companies have been quick to remedy the situation by voluntary compliance; and to date, there have been no arrests for offshore violations of this statute.

This example of control over the waters of East

Bay, at a time prior to any international agreement on oil pollution permitting such control over the high seas, is but a further example of the fact that Louisiana has always treated these waters as part of her domain.[256]

(iii) Control of Seismic Operations

Consonant with the interest of conserving the nation's natural resources, Louisiana has required that all geophysical surveying which is conducted within her coastal waters be performed only after a permit for such operations has been obtained from the Wildlife and Fisheries Commission and then only with a Commission agent on board. The Commission places strict limits on the size of the explosive charges so their owner may be identified. Each Commission agent supervises the detonation of explosives during the survey and detailed reports concerning location, charge size and fish kill are prepared by him.[257]

[256]LSA R S 30:211 et seq.

[257]The state's control has proved so effective in preventing fish kill that the Secretary of Interior, charged, under the 1954 Outer Continental Shelf Act (43 U.S.C. 1331, 1340), with the responsibility of seeing that geophysical exploration was "not unduly harmful to aquatice life," entered into an agreement with the Louisiana Wildlife and Fisheries Commission under which the Louisiana Commission is responsible for Geophysical supervision over the entire continental shelf off Louisiana.

The agreement provided that the "regulations of the said Commission governing methods and inspection of and restrictions upon geological and geophysical explorations in the submerged lands of the State of Louisiana, . . . [were]

Since the initiation of these programs in the 1940's no part of East Bay has been exempt from the control of the Wildlife and Fisheries Commission, which control, we submit is inconsistent with the concept of freedom of the seas and can only be considered consistent with the exercise of authority over national waters.

(iv) Control Over Mineral Resources

Since October 12, 1956 exploration for oil, gas and sulphur off the mouth of the Mississippi River has been conducted pursuant to the Interim Agreement entered into between the United States and Louisiana which established, *inter alia*, an offshore line representing the government's interpretation of the line separating the high seas from the nation's territorial sea in East Bay. While Louisiana has not, since the 1956 agreement, exercised exclusive control over mineral activity in that portion of East Bay which the government claims to be part of the high seas, her actions prior to that time indicate that, consistent with her control over other activities in the waters of East Bay, she treated the mineral resources under this bay as lying within her territory. For example, in the spring of 1947 the state advertised a lease-sale affecting certain water bottom tracts lying within the coastal bays of the Delta. Included in this lease-sale

adopted as the regulations of the Secretary of Interior applicable to that part of the Outer Continental Shelf seaward of the submerged lands of the State of Louisiana." 19 Fed. Reg. 1730 (1954); F. R. DOC. 54-2215.

were tracts which covered the *entire bed* of East Bay. While all the leases were not bid in, certain tracts within East Bay more than three miles from shore were leased under the state's authority.[258] Such action is consistent only with a claim of territoriality over those waters.

The exercise of control and authority over this area is but one more example of the fact that neither the nation, the state nor its citizens ever considered the waters of East Bay and the other Delta bays as part of the high seas or treated the area as such.

ff. Other State Activity

The United States is not the only political unit which has concerned itself with the protection of the commercial interests of the nation through maintenance of proper navigation at the mouth of the Mississippi River. In 1921, in a cooperative move with the federal government, Louisiana passed Act 11 of 1921 which authorized the Governor of Louisiana to withdraw from sale or entry, all unappropriated land belonging to Louisiana within a designated area "that may be required to maintain the navigability of the channels of and at the mouth of the Mississippi River."

The purpose for adoption of the act and the defined area which was withdrawn from sale are clearly set forth within the body of the legislative enactment.

Whereas the United States Government through

[258]Information obtained from State Mineral Board files.

its War Department Chief of Engineers, has requested the cooperation of the State of Louisiana in maintaining the navigability of the channels of and at the mouth of the Mississippi River, and

Whereas, the commercial prosperity of the State of Louisiana, of the Mississippi Valley, and of the Nation is dependent upon the maintenance of these channels; and it is necessary that certain of the State's lands be retained in public ownership for said purpose.[259]

The Court's attention is directed to Exhibit 40 which is a copy of the United States Coast and Geodet-

[259]"Section 1. Be it enacted by the Legislature of Louisiana that the Governor of the State of Louisiana be and he is hereby authorized and directed to withdraw from sale or entry any of the vacant and unappropriated public lands belonging to the State of Louisiana, now existing or hereafter acquired by accretion or otherwise, located south of the following lines and described and bounded as follows to wit:

All of that area bounded on the east by the axis of the Mississippi River to the Head of the Passes at the mouth of the Mississippi River bounded on the Northwest by a line, commencing at Cubits Gap Lighthouse and running south thirty-five degrees (35°) west (true bearing) through Cubits Gap Lighthouse, latitude 29° 11′ 36.70″ north, longitude 89° 15′ 53.75″ west; bounded on the northeast by a line beginning on and at the axis of the Mississippi River at a point, north of the head of the Passes of the Mississippi River, and at the juncture of the channels of the Mississippi River and Pass A L'Outre, along and through the channel of the North Pass, north of Pass A L'Outre Lighthouse to deep water in the Gulf of Mexico; and bounded on the south by deep water in the Gulf of Mexico, all as described on the copy of the United States Coast and Geodetic Survey Chart No. 194, to be identified with this Act. . . ."

ic Survey Chart No. 194 upon which the retained area is shown by a line drawn around the Mississippi Delta.

It is significant that the entire Delta was "retained" for it demonstrates that Louisiana, as early as 1921, considered the Delta as a unit subject to control by the State. Furthermore, it is significant that this exercise of control was made with not only the approval but the encouragement of the Federal Government and that no opposition to the legislative enactment was made.

(5) Continuity of Authority: Duration of Exercise of Control

The second element of historic title, continuity of the exercise of control and authority, is a rough guide to the importance which the State places in the affected waters, for the more important the interests in the littoral area, the greater the likelihood of continued attempts to control it.

As was previously discussed, however, (supra p. 155) international law establishes no fixed, definite period in which an historic title is said to mature. Each case must, of necessity, be considered separately.

How long has control been exercised over the waters of the Mississippi Delta? For oil exploration, control has been exercised at least since Louisiana granted leases in 1947; for pollution control, at least since Louisiana's Act in 1932; for wildlife protection, at least since the Tern Island reservation in 1907; for navigation and other sovereign jurisdictional control,

at least since the Inland Water Line of 1895; for control of water flow, sedimentation and configuration, at least since the constructions by Captain Eads in 1875; for fisheries control, at least since the Oyster statute of 1870; for control of internal security, at least since the Civil War of 1861, the Mexican War of 1843, the War of 1812 and the Louisiana Purchase of 1803, which prevented any repetition of the earlier Spanish Closure crisis. In addition to all of which, East Bay has been included within the legal boundaries of Louisiana and has qualified as a true, juridical bay since before the Louisiana Purchase of 1803.

How much continuity is required? Attorney General Randolph, in the Delaware Bay Case,[260] was not very impressed with the need to establish longevity to this nation's claims, being obviously more interested in the practical aspects of protecting the nation's interests in Delaware Bay without the burden of technical points of international law. He did, however, feel that the 1783 treaty of Paris and the 1789 Federal taxing statute were significant in establishing this nation's claim. Moreover, it is interesting to note that his opinion was delivered in 1793, only 10 years after the date of the most ancient exercise of authority on which he relied.

Certainly the control over the Delta bays around the Mississippi River has continued for a period far in excess of that which was considered sufficient in

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[260]1 *Opinions of the Attorney General of the United States*, 34 (1793).

the Delaware Bay decision. It must be concluded, therefore, that the second element of an historic title to East Bay and the waters of the Mississippi River Delta is clearly evidenced by acts of control, both federal and state.

(6) Attitude of Foreign States: Absence of Opposition to Control

The third element of historic title is the attitude of foreign states. The preceding discussion (supra p. 156) made it eminently clear that the attitude which must prevail is one of toleration. In other words, to perfect an historic title the control and authority on which it rests must not have been objected to by foreign nations. More than the mere surface inquiry of toleration *vel non* should be made, however, for certainly a better understanding of the character of the waters and its historic title will follow from an investigation of not merely whether objections have been made but rather, if there were none, why were they not made.

It is not enough to say, as is in fact the case, that no foreign nation has ever raised any objection to the control asserted by this republic over the waters of the Delta bays, especially East Bay. We must also examine why objections were not raised. The United States has subjected all vessels, foreign and domestic, to our domestic navigation regulations, but there has been no objection. Why? We submit it is because all nations recognize the right of a coastal nation to control navigation around her harbors and within her na-

tional waters; and that the area of control conforms to waters which are generally recognized internationally as lying within the territory of the coastal nation.

Similarly no foreign vessels ever fish in the prolific fishing grounds of East Bay and the other Delta bays. Why? They recognize the jurisdiction of this nation in these landlocked waters which are subjected to its control and appear reasonably to qualify as national waters under recognized principles of international law.

Moreover, from a commercial standpoint no foreign nation has cause to raise objection to the appropriation of East Bay by the United States. As this Court noted in the second California Case, with reference to the effect of shallow waters on the inland classification of the waters of Chandeleur and Breton Sounds, the fact that the waters were too shallow for commercial navigation and that they did not provide access to any ports clearly distinguished them from the Santa Barbara Channel. Similarly most of the water area of East Bay is far too shallow to support international commerce, and even if it were not so shallow, East Bay is also a *cul de sac* which leads to no port and thus is of no importance to foreign commercial interests.

In this context one might ask the same rhetorical questions asked by Attorney General Randolph of Delaware Bay:

> "What nation can be injured in its rights by the Delaware (East) Bay being appropriated to the

> United States? And to what degree may not the United States be injured, on the contrary ground? It communicates with no foreign dominion; no foreign nation has, ever before, had a community of right in it, as if it were a main sea; under the former and present Governments, the exclusive jurisdiction has been asserted." [261]

We submit there is but one answer. No nation will be adversely affected or injured by our control of the waters of East Bay just as they have been unaffected and thus unprotesting in the past.

(7) Legal Boundary and Historic Title

Consideration of the historic title to East Bay leads one into an interesting interplay between Louisiana's legal boundary (based on the conveyance instrument from France to the United States and Louisiana's Act of Admission) and Louisiana's historic claim to East Bay. The interplay truly makes East Bay a unique waterbody for the legal title, quite apart from the historic title, suffices to render East Bay part of the nation and the state. Yet the legal title, because its origin is in the early 1800's, certainly imparts an historic character to the title of the waters as well. Proof of an ancient legal boundary, on the one hand proves legal title and on the other historic title.

aa. Louisiana Purchase—1803

By the Treaty of Paris of 1803, the United States

[261] *Id.* at 37.

purchased the Louisiana Territory from France. The boundaries of this vast area were not precisely defined, but it was clear that whatever rights France had were transferred to the United States. The Treaty, dated October 21, 1803 makes this point clear.

> The First Counsul of the French republic, desiring to give to the United States a strong proof of his friendship, doth hereby cede to the United States, in the name of the French republic, forever, and in full sovereignty, the said territory [Louisiana], with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French republic. . . .[262]

Furthermore, this Court has held that the United States not only succeeded to all the rights and title of France, but also of the Spanish Government as well. The supreme Court in the case of *The Mayor of New Orleans v. The United States*, 10 Pet. 662, 9 L. Ed. 573 (1836) said:

> Under this treaty [Treaty of Cession From France to the United States] Louisiana was ceded to the United States in full sovereignty, and in every respect, with all its rights and appurtenances, as it was held by the republic of France, and as it was received by that republic from Spain.

It follows that the United States' succession to territorial sovereignty included the succession to the ownership of the inland waters along the Louisiana shore. Furthermore, the United States succeeded to

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[262]5 *American State Papers*, 276 (1834).

the inland waters as they were claimed by France and Spain. At this point in history, France and Spain claimed several leagues in the Gulf of Mexico, which claim certainly included bays the entrance to which was less than 10 miles across.[263]

As reference to the 1776 and 1838 maps of the Delta will demonstrate (Exhibits 28 and 26) East Bay was the largest of the Delta bays, yet the length of the bay closing line was less than 10 miles. Thus, the waters of East Bay were part of the inland waters claimed by Spain and France prior to 1803. It must be concluded, therefore, that these waters, as well as those of the other Delta bays, became part of the inland waters of the United States and are included in her geographical boundary by the transfer of rights embodied in the Treaty of Cession.

bb. Louisiana's Act of Admission

The Act of Congress admitting Louisiana to the Union in 1812[264] described the southern limit of her territory as being "bounded by" the Gulf of Mexico. Special significance should be attached to the fact that the boundary call was not "to the shore" but rather was to the "Gulf of Mexico", for this clearly implies that the boundary was a "coastline" boundary as distinguished from "shoreline" boundary. "Shoreline" has reference to the place where the land meets the

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[263]12 *Encyclopedia of the Laws of England,* (1897), "Territorial Waters"; 1 *Moore,* p. 703.

[264]2 Stat. 701, 702.

sea as distinguished from the geographic line dividing coastal bays and sounds from the open sea.

Louisiana's southern boundary was intended to be a "coastline" designation, an interpretation concurred in by the government. For example, J. Revel Armstrong, Acting Solicitor of the United States, in a memorandum to the Secretary of the Interior on October 1, 1954 conceded that before the Submerged Lands Act "the Gulf and not the coast was the southern boundary of Louisiana." [265]

What criteria should be used to determine which coastal waters were considered within the territorial definition of Louisiana and which waters were the "Gulf of Mexico" lying outside the state's southern boundary? Neither the Act of Admission of 1812 nor the legislative history of the Act suggest that some unusual definition was intended. Reason dictates that the designation of "Gulf of Mexico" in common use at that time is the proper one to apply in interpreting the Act. The best evidence of which waters were commonly known as the "Gulf of Mexico" are the maps and nautical charts of the late eighteenth century and early nineteenth century such as the British Admiralty map of 1776 (Exhibit 28) and the 1838 survey by A. Talcott of the United States Army Engineers (Exhibit 26). With respect to whether the area between South and Southwest Passes was designated as a part of the "Gulf of Mexico", such maps show that the coastal indentation was considered a bay and *not a part of the "Gulf of Mexico."*

[265]OCS—1959 23, p. 4.

In keeping with this explicit designation of the early cartographers, and the then configuration of East Bay, it must be concluded that the southern boundary of Louisiana, referred to in her Act of Admission, recited as the "Gulf of Mexico", lay seaward of East Bay, and that East Bay was, therefore, a part of the inland waters of Louisiana specifically and of the United States generally.

2. Application of the Convention on the Territorial Sea and the Contiguous Zone to East Bay

We have, examined the law and the facts surrounding our claim that the waters of East Bay constitute historic inland waters of the United States. This, however, is not the only basis for asserting that these waters are inland in character, for in addition to being considered inland waters on the basis of the historic title test, we submit that East Bay, along with the other Delta bays, qualifies as inland waters under the provisions of the Geneva Convention. We will now proceed to examine the application of its specific articles to East Bay, excluding however Article 4 (baseline system), which would undoubtedly apply.

a. Article 8—Harbors

Article 8 of the Convention on the Territorial Sea and the Contiguous Zone provides that the harbors of a coastal nation are to be considered inland waters of that state seaward to "the outermost harbor

works".[266] The question may be asked as to what is the geographic extent of the harbor of the Port of New Orleans as defined by the "outermost permanent harbor works?"

It will be remembered that the Act of Congress of 1895 established the line which divided not only inland waters in general but also specifically the waters of *harbors* from the waters of the high sea, and that the administration of this Act expressly designated the waters around the mouth of the Mississippi River as part of the "Harbor of New Orleans." [267] Such designation was certainly reasonable for it merely included, as being within the harbor of New Orleans, the waters and land areas enclosed within the line drawn through and connecting the outermost permanent harbor works at the various entrances to the Port of New Orleans.

The 1895 line joined the lighthouse at the Pass a Loutre entrance to the harbor with the jetty at the South Pass harbor entrance and this permanent harbor work was joined with the lighthouse at the Southwest Pass entrance to the harbor of the Port of New Orleans. As additional harbor works were built at the various passes, the location of the official line designating the outer limit of the "Harbor of New Orleans" was altered to take these additions into account. For example, the 1907 edition of the line joined the South Pass and Southwest Pass entrances

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[266]See Appendix F.

[267]Treasury Department Circular 127 of 1895.

to the harbor by a line drawn through and connecting the jetties at each pass.[268]

These lines defined the seaward limits of the harbor of the Port of New Orleans; and consequently, we submit that, under the language and spirit of Article 8 of the Geneva Convention providing for the inclusion of harbor areas within the inland water baseline, East Bay lies within the geographic limits of the "harbor" of the Port of New Orleans, and consequently is part of this nation's inland waters.

b. Article 13—Mouth of River

Article 13 of the Convention provides for locating the baseline in the area of the mouth of a river by drawing a straight line "across the mouth of the river".[269] It is obvious that the definition was not made to cope with the complex and unique geographic situation presented by the Mississippi Delta, for in this area there is no single channel of discharge. Rather there are two main passes and hundreds of smaller distributaries which carry the waters of the Mississippi to the Gulf.

The mouth of the Mississippi is not any one of these waterways, but rather the mouth of the Mississippi consists of its two principal outlets—South and Southwest Passes. These are the only entrances to the river for commercial navigation, and they jointly constitute the "mouth of the river".

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[268]Department of Commerce Circular 158 of 1907.

[269]See appendix F.

The uniqueness of the area is further demonstrated by the unusual method in which the passes grow seaward. The history of Pass a Loutre affords an excellent example. As the early maps of the Delta show, for example, Talcott's 1838 Map (Exhibit 26), Pass a Loutre formerly emptied into the Gulf of Mexico through a single discharge channel. In time (see Exhibit 6) a small island formed seaward of the mouth of Pass a Loutre dividing the sedimentary load in two. As Pass a Loutre grew seaward, its northern and southern banks were diverted apart by the ever increasing size of the island. Today what appears to be two separate and distinct entrances to Pass a Loutre are in fact only one entrance divided by an intervening island (see Exhibit 34).

According to geologists experienced in the historic development of the Mississippi Delta, the process at Pass a Loutre is not unique to that locale. A similar bifurcation occurred in early history between South Pass and Southwest Pass through the growth of an island which diverted the then single distributary and divided it in two. As the island continued to grow through sedimentary deposits, the discharge of waters from the mouth of the river became more and more divided, ever increasing the size of the island and ever further diverting the waters of the river. The events producing the large island which today separates South and Southwest Passes occurred before Louisiana was colonized, but these events have been documented by an extensive number of core holes drilled by geologists in an attempt to unravel the history of the

Delta.[270] The control exercised by the United States Corps of Engineers at the mouth of the river has served to exaggerate the natural island formation.

Viewed in an historic perspective, South Pass and Southwest Pass still form the "mouth of the river", separated by an island which forms the banks of the two passes. Because of this unique formation, we submit that Article 13 of the Convention requires the drawing of a baseline from the eastern bank of South Pass, "across the mouth of the river", to the western bank of Southwest Pass.

c. Article 7—Bay Closing Lines

The current geometric test for determining when a body of water is to be considered a juridical bay is found in Article 7 of the Geneva Convention. It basically provides that a coastal indentation is to be considered a juridical bay if the distance across its entrance is less than 24 miles and if the area of water within the perimeter of the bay equals or is greater than the area of a semicircle the diameter of which is equal to the length of the bay closing line.

The length of the closing line across East Bay from the large mud lump island off South Pass, which is the current eastern headland of the bay, and the southern tip of the east jetty at Southwest Pass is 15.4 miles, well under the maximum 24 mile limit. The area of the bay behind this closing line is, how-

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[270]Fisk, *Geological Investigation of the Alluvial Valley of the Lower Mississippi River, War Department, Corps of Engineers* (1944).

ever, insufficient to satisfy the area measurement requirement of the semi-circle test. The government consequently concludes that, since East Bay does not satisfy the area test at a line drawn across its mouth, it is not a bay but a "mere curvature of the coast" and therefore is part of the high seas.

Such contention, however, disregards the fact that a substantial portion of the waters of East Bay *does* satisfy the area rule of Article 7. The Court's reference is directed to Exhibit 36 on which a line is drawn across East Bay which satisfies the semi-circle test. The line intersects the low water line of the shore on the east at a point X=2,678,500, Y=139,250, and on the west at X=2,641,835, Y=129,725. The water area behind this bay closing line is 13,360 acres while the area of the semicircle the diameter of which equals the length of the line is only 12,938 acres.

The Geneva Convention does not deal expressly with the question of how to treat a coastal indentation which fails to meet the semicircle test at its mouth but qualifies at a point within the bay. Despite the lack of express treatment in the Convention, as we pointed out previously in the general provision of this brief on Bays, all authority on this point leads to the logical conclusion that the portion of the indentation which qualifies must be considered as inland waters. This is in keeping with the principle that a bay which fails to qualify under the 10 mile test, or 24 mile test today, is to be considered a bay at the first point within the bay at which the test is met, without regard to the existence of actual headlands. It is also in keeping

with the concept that a bay within a bay is to be considered as inland waters if it qualifies under the area measurement test when the larger indentation does not. Finally, as we noted, our interpretation satisfies the literal requirement of Article 7—the line encloses a well-marked indentation of the coast which is less than 24 miles wide and encloses sufficient water area to meet the semi-circle test.

Louisiana therefore protests the government's restrictive application of Article 7 in such a manner as to exclude from the inland waters of the United States those portions of East Bay which satisfy in every respect the semicircle test of Article 7 of the Convention.

3. Synopsis

From our consideration of the legal principles and historic facts developed over the period since the United States acquired Louisiana, it must be concluded that East Bay forms a part of our national waters. Throughout our history the waters of East Bay have legally constituted a juridical bay.

Further, as we have shown by an examination of the activities of the United States and Louisiana, the waters of East Bay, as well as those of the other Delta bays, have been subjected to the continuous control and authority of both sovereigns for at least the past 70 years—and probably the past 165 years—without opposition from any foreign nation affected thereby.

We discussed the traditional importance of the

Delta bays to the internal security of the United States from the standpoint of securing the interests of its citizens in the free commerce of the Mississippi River and of securing the interests of its citizens from foreign invasion or attack.

We discussed the economic importance of these prolific waters pointing out the great volume of shrimp, oysters and fish which are harvested today and which have been harvested in the past by citizens of the United States. Moreover, the importance of the oil industry in East Bay is well known, providing jobs for hundreds of this nation's citizens.

We looked at the specific acts of control and authority which were and are exercised over these waters: the control over navigation since 1895 under an Act of Congress; the actions of the Captain of the Port of New Orleans, and the Coast Guard in general, in enforcing domestic marine regulations in these waters; the protection of local fisheries through the enforcement of conservation regulations by the Louisiana Wildlife and Fisheries Commission; the control of pollution and geophysical activities through active patrols and personal supervision by commission agents; the control over the wildlife of the area through the establishment of state and federal game preserves.

We noted that despite the extensive control over these waters, no foreign nation has ever voiced opposition to such control; and, in apparent recognition of the national character of the waters of the Delta bays, no nation has ever attempted to expropriate or exploit these prolific fishing grounds.

We demonstrated that under reasonable interpretations of Articles 8 and 13 of the Convention, the waters of East Bay would be considered inland waters as both lying within the limits of the "harbor" of New Orleans and lying behind the line closing across the mouth of the Mississippi River. Furthermore, we showed that the Government was in error in asserting that East Bay did not satisfy the semicircle test of Article 7, for we proved that a substantial portion of the bay did in fact fulfill the requirements of the test thus qualifying those portions as a juridical bay.

We noted that shallow water depth and lack of use as a route of international commerce were deemed important criteria by this Court in concluding that the waters of the Chandeleur and Breton Sounds were not high seas, and that much of East Bay and the other Delta bays were similarly too shallow to support ocean going vessels and that they too did not lead to any port, thus eliminating their importance to foreign commercial interests. Additionally, while the outer portion of East Bay may be deep enough to support deep draft vessels (should there be a reason for one to be there) the great number of oil wells, gas wells, platforms, pipelines and other facilities in the bay eliminates any possibility of navigation by large seagoing ships. Exhibit 38 is a map of a portion of East Bay on which the location of the various oil and gas wells and production equipment operated by Shell Oil Company are shown. As is readily apparent, the surface of East Bay is so studded with obstructions to navigation and the floor is so crisscrossed with pipe-

lines that it would be extremely hazardous for any vessel of ocean going size to navigate or to attempt to anchor. Yet this is the portion of East Bay which the Justice Department contends is part of the high seas.

The Court's attention is now directed to Exhibit 39, which is a map of East Bay showing the location of oil and gas wells without reference to the mass of other production equipment shown in the previous exhibit. Around each well-site is a circle in red with a diameter of 1000 meters (approximately one-half mile) representing the safety zones which, under authority of Article 5, paragraph 3 of the Convention on the Continental Shelf[271] may be drawn around every facility erected for mineral exploration on the continental shelf.[272] An examination of this exhibit shows that most of the water area of East Bay would be included in such zones and thus subject to exclusive control by the United States. This is but another example of the authority of the government over the waters of East Bay.

The paramount legal feature of waters of the high seas is the lack of exclusive control thereover by any single nation. Exclusive control in any given sphere of activity cannot be reconciled with the concept of freedom of the seas. As we review the rights and authority of the federal government in and over the waters of East Bay, it becomes clear that to denominate them "high seas" as the Justice Department

[271]Adopted April 26, 1958, U.N. DOC A/Conf. 13/55.

[272]While the United States has not yet elected to enforce such safety zones, it is clearly within its power to do so.

proposes is meaningless for the United States does in fact exercise exclusive control in several spheres. Foreign ships cannot navigate freely; foreign fishermen cannot fish freely and foreign planes cannot use the air space over this area freely. What greater proof of the failure of the Government to treat these waters as part of the high seas is required, and what greater proof of the national character of these waters is necessary?

In conclusion, it seems appropriate to review a small portion of the legal opinion dealing with another important inland water-harbor area, Chesapeake Bay:

> Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent States encompass it; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it cannot become the pathway from one nation to another; and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig "Grange" and the position taken by the Government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States and no

> part of the 'high seas' within the meaning of the term used in Section 5 of the act of 5 June 1872.[273]

How very appropriate these comments are to a consideration of the problem of East Bay and the other waters of the Mississippi River Delta. Paraphrasing, it is almost as if the Court were speaking of the Delta bays, and East Bay especially.

Considering, therefore, the importance of this question to the general welfare of the nation, the configuration of East Bay, the fact that its headlands are well-marked and but fifteen miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of a single State encompass it; that from the earliest history of our country it has at least been considered to be territorial waters, and that the claim has never been questioned by any foreign nation; that it cannot become the pathway from one nation to another; and remembering the doctrines of the recognized authorities upon international law, as well as the holding of the American court as to Chesapeake Bay, and bearing in mind the matter of the merchant ship "Anna" and the position taken by the Government as to Delaware Bay, we are forced to the conclusion that East Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States and *no part of the "high seas"* within any recognized meaning of that term.

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[273]4 *Moore, International Arbitrations* 4341 (1898).

V. THE ASCENSION BAY AREA

The large bay appearing between the tip of the west jetty of Southwest Pass and the tip of the east jetty at Belle Pass is known as Ascension Bay to the residents of the Louisiana coastal parishes bordering its shores. Old maps have on them the designation "Ascension Bay" at this location indicating that this name was once applied to the waterbody.[274] Accordingly, it will be referred to as Ascension Bay throughout this brief.

A line drawn between the two natural entrance points of this coastal indentation, the tip of the western jetty at Southwest Pass and the eastern jetty at Belle Pass, easily encloses waters sufficient to meet the semi-circle test when the waters of pockets, coves, and tributary waterways are included for measurement purposes as they should be under the provisions of Article 7 of the Convention. 1 *Shalowitz, Shore and Sea Boundaries* 219-20 (1962). Admittedly, the entire indentation cannot be closed under the geometric tests of the Geneva Convention because the Convention only permits a closing line which does not exceed 24 miles in length and the closing line for Ascension Bay proper exceeds that length. Accordingly, Louisiana has drawn a 24-mile line from the southern tip of the eastern jetty at Empire Canal to a point just west of Caminada Pass. This line encloses the greatest amount of water possible with a line of that length, and thus complies with Article 7(5) of the Geneva Convention which reads as follows:

[274] *See* maps at Exhibits 49 and 50.

> Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

Whether the two points between which the 24-mile closing line of an over-large bay is drawn are headlands is irrelevant under Article 7(5). *See* 1 *Shalowitz, Shore and Sea Boundaries* 224 (1962), where the author states that:

> The provision with respect to the closing line being drawn within the bay so as to enclose the maximum area of water possible, with a line of that length (Art. 7, par. 5), is intended to take care of those situations where more than one closing line is possible (see fig. 43). *This provision is wholly independent of the need for headlands in such cases.* (Emphasis supplied.)

On page 11 and pages 24 to 29 of the Government's Motion, lines which follow the shoreline and cross intervening expanses of water between islands are suggested as closing lines in Ascension Bay. These lines ignore the principles of the Geneva Convention and are unacceptable to Louisiana. In explanation of these suggested closing lines opposing counsel says (Motion, 72) that although the shoreline of Ascension Bay is "somewhat curved, its curvature cannot be considered more than slight." A mere look at the map will demonstrate the extent of this understatement. Ascension Bay makes a smooth curve and, irrespective

of the Barataria Bay complex, which is a part of it, the larger bay appears to be a complete semi-circle. The area of the bay landward of a line drawn from the tip of the western jetty at Southwest Pass to the eastern jetty at Belle Pass is 561,726 acres, even excluding the Barataria Bay complex. The area of a semi-circle with such a line as its diameter is 610,037 acres. Thus, the acreage of only the outer portion of the bay is 92.1% of the area of the semi-circle drawn from the same base. If Barataria Bay is included and even if West Bay is excluded from the acreage measurement, the bay has an area of 664,500 acres or a surplus of 54,468 acres over the area of the semi-circle. When the area of West Bay is included, as it properly should be, the surplus acreage in Ascension Bay is even greater. Ascension Bay is something considerably more than a "slight curvature." It fulfills the definition of a bay as contained in Article 7 of the Convention, being a well-marked and defined indentation whose area is greater than the area of a semi-circle drawn on its closing line. Because the closing line is longer than 24 miles, we must move inside the bay to describe a closure of the length.

Plaintiff's counsel urges that the waters behind the 24-mile line from the Empire Canal to the vicinity of Caminada Pass do not meet the semi-circle test. The answer to this unfounded objection is that the waters do meet the semi-circle test. As has been established above,[275] the waters of pockets, coves, and tributary waterways are to be included for measure-

[275] *See* discussion p. 271-72, *supra.*

ment purposes in determining the water area of an outside closure. I *Shalowitz, Shore and Sea Boundaries* 219-20 (1962). When the waters of the pockets, coves, and tributary waterways that are Barataria, Caminada, Bastian, and other bays lying behind the 24-mile closing line are considered for measurement purposes, the waters behind the 24-mile line exceed in area the area of a semi-circle drawn on a 24-mile line. The only way for the area behind the 24-mile line to be less than is required is for the waters of the inner tributary bays to be excluded for measurement purposes. This would clearly be in conflict with Article 7 and the opinion of Aaron Shalowitz.

Additionally, there is no provision in the Geneva Convention requiring the application of the semi-circle test to the area behind the 24-mile line once the indentation has met the semi-circle test at its mouth. Paragraph 5 of Article 7 of the Convention only requires that:

> a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

If the Convention had intended to require the semi-circle test for the over-large bay and also for the waters behind the 24-mile line, it would have said so. It did not say so for the simple reason that such a requirement would have rendered nugatory the provisions of paragraph 5 in Article 7. If the closure within the over-large bay must meet the test again, then the above quoted paragraph is utterly unnecessary and

meaningless. Once an over-large bay is established, nothing more is required but the drawing of a 24-mile line at the appropriate location. This paragraph was intended to enlarge—not restrict—the coast line in the over-large bay. The requirement of Article 7 is only that the line *shall* be drawn so as to enclose the maximum area of water that is possible with a line of that length. There is no further requirement.

At page 72 of its Motion the government contends that the islands fringing the mouths of Barataria Bay, Caminada Bay, Bastian Bay and other smaller but inter-connected bays form a smooth and uniform shoreline broken only by "narrow, well-defined entrances" to the inner bays. This stipulation of facts is used to lead to the "distinct entity" and "unity of configuration" theories that the government devises in an attempt to exclude the waters of the inner bays from consideration in determining the area of Ascension Bay. Certainly, with the many islands present in this area the various parts of the water body appear "distinct" and appear not to share a "unity of configuration," [276] but, without agreeing with the government's stipulation of the facts in this area, Louisiana must disagree with the conclusion reached from the facts as stipulated. Aaron Shalowitz, the chief expert witness for the government in the *California* case and

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[276]Under Article 7(3) of the Convention islands are to be treated as part of the water area of the indentation; in other words the islands are to be treated as if they weren't there—a treatment that would negate the "distinctness" and "lack of unity of configuration" of the water bodies. *See* exhibit 48.

a Special Assistant to the Director of the United States Coast and Geodetic Survey, says in 1 *Shore and Sea Boundaries* (1962) at pages 219-20 that a proper application of Article 7 of the Geneva Convention requires that the area of pockets, coves, and tributary waterways be considered in determining the area of the overall indentation. Certainly these pockets, coves, and tributary waterways must be separate and distinct and outside the unit of configuration of the overall indentation, or no special rule as regards them would be necessary.

An "ideal" bay theoretically has a "narrow, well-defined" entrance leading to land-locked waters. The government tacitly acknowledges, at p. 72 of its Motion, that the Barataria Bay complex and related water bodies satisfy this criterion and are in fact proper bays. Certainly the government cannot contend that these water bodies are not tributary to the outer portions of Ascension Bay. Having shown a coastal indentation between Southwest Pass and Belle Pass, and having established Barataria Bay and the other inter-connected water bodies as bays opening onto the over-all indentation, can the government possibly contend that the area of the inner bays should not be included in figuring the area of Ascension Bay? Certainly the appearance on a map is one of separateness and distinctness, but if this were not the case there would be no reason for the rule stated by Shalowitz at 1 *Shore and Sea Boundaries* 219-20 (1962).

Furthermore, plaintiff's objection that the inner bays that are connected with and tributary to Ascen-

sion Bay are distinct entities whose areas cannot be considered as any part of Ascension Bay is unfounded in another respect. Nothing in the Convention supports the objection. Plaintiff's "distinct entity" idea concerning Barataria, Caminada, and Bastian Bays is predicated upon the fact that the openings of these bays into Ascension Bay are not clear and free of islands, and that the presence of Grand Isle, the Grand Terre Islands, and other island groups between the headlands of these inner bays separate them completely from the larger bay. This predicate is completely destroyed by the rule stated in paragraph 3 of Article 7 of the Convention which provides that:

> Islands within an indentation shall be included as if they were part of the water area of the indentation.

Under Article 7(3) of the Convention the water area of an indentation, for the purpose of determining its status as a bay, "is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points." The same article then goes on to say that "[i]slands within an indentation shall be included as if they were part of the water area of the indentation," as stated above. In other words, the Convention states that the water area of a bay is to be determined at low-water stage and the presence of islands within the indentation is not to serve to limit that area, but rather should serve to enlarge it, the islands being considered a part of the water area of the bay. If we follow the low-water mark around the shoreline of Ascension

Bay, the line will also follow the shoreline of Barataria Bay thus meeting the "unity of configuration" test that the government considers essential and seeks to use in limiting the area of Ascension Bay. Barataria, Caminada, and Bastian Bays are a part of the unit that is Ascension Bay, being tributary to the overall indentation. Such unity exits both as to the larger bay and as to the waters behind the 24-mile closing line. Obviously Barataria Bay with all of its coves and smaller bays would be part and parcel of Ascension Bay if there were no islands within it.

To argue that the presence of islands destroys this geographical fact is to say that the last sentence of paragraph 3 of Article 7 does not mean what it says. The article plainly states without qualification that "[i]slands within an indentation shall be included as if they were part of the water area of the indentation." The proper application of this provision is illustrated in Exhibit 48. Plaintiff would qualify this rule with a proviso that neither the islands nor the waters behind them shall be included if such islands fringe the headlands of the adjacent and inner bays. The Convention contains no such proviso.

From the above quoted rules set forth in Article 7 it follows that the area of the larger bay includes the area of the smaller inland indentations and of the islands within the overall indentation. This being the case the overall indentation is an over-large bay (having met the semicircle test) and the 24-mile line proposed by Louisiana is the proper closure.

Historically, Louisiana has exercised jurisdiction

over Ascension Bay much farther seaward than the 24-mile line suggested by Louisiana as an alternative to the Inland Water Line. Leases for the mining of sulphur, gravel, and shells predated any idea that the United States would ever lay claim to the waters and submerged lands of Ascension Bay. These acts might justify a larger claim by Louisiana; certainly she should not be required to take any less than she is now claiming.

A. Spoil Bank at Pass Tante Phine:

Louisiana, in its Memorandum in Opposition to the Counter-Motion of the United States and in Support of its Alternative Motion, at page 47, pointed out that the spoil bank at Pass Tante Phine is an extension of the land mass to which it is attached, and that the low-water mark, or shoreline, of the mainland should follow along the spoil bank to its seaward-most extension. In the Motion of the United States, page 74-75, it is alleged that the spoil bank at Pass Tante Phine should not be considered a part of the low-water mark along the Louisiana shore in that it is "not a purposeful or useful extension of the land," and that it is of a "transitory and insubstantial character. . . ." These requirements which the United States seeks to impose upon an artificial extension of the land are not to be found in the Submerged Lands Act, the Convention on the Territorial Sea and the Contiguous Zone, or the *California* case, 381 U.S. 139, which interpreted both. Article 3 of the Convention, in speaking of the normal baseline for measuring the

territorial sea, requires only that it be the "low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." Reference to the most recent United States Coast and Geodetic Survey Nautical Chart #1272 (21st. ed., May 6, 1968) will reveal that the spoil bank at Pass Tante Phine is shown quite prominently on that chart.[277] Also, the spoil bank appears on the series of 54 maps of which the United States said, in its Motion, page 40, "there can be no dispute about the geographical facts portrayed by the maps." To depart from these 54 maps which the United States urges must be used elsewhere, and from the official nautical charts of the nation

[277]As the legend on Chart 1272 indicates, soundings are given in feet at mean low-water. The various depth contours are indicated by different types of dotted lines. From the 18-foot or 3-fathom line towards shore, the contour line is given every 6 feet, finally ending with a 0 depth (*i.e.*, mean low-water) contour shown as a "sanded" dotted line "where there is a discernible foreshore between mean low water and mean high water lines" on this chart. The spoil bank at Pass Tante Phine is indicated by the sanded, dotted contour line to indicate that the area behind it is above mean low-water, although colored over with a blue tint. Even though it is the usual modern practice to shade such low-water areas with the same yellow-green tint used to indicate marshland (*see 2 Shalowitz, Shore & Sea Boundaries*, 328, 684 (1964)), the old system of sanded lines or areas to reflect the mean low-water contour and a foreshore above mean low-water is used throughout on Chart 1227, apparently because the upland behind the solid shoreline (the solid line representing the mean high-water line, *see op. cit. supra*, p. 683) was itself marsh and contrast to the upland marsh was apparently desired on this chart. In addition to reference to the Shalowitz work, this explanation of the symbols used on the nautical chart is based in part on interviews with Dr. A. Joseph Wraight of the U. S. Coast & Geodetic Survey.

which Shalowitz says satisfy the requirements of "large scale charts of the coastal State" found in Article 3 of the Convention (*see* 1 *Shalowitz, Shore and Sea Boundaries* 274-75 (nn. 165, 166) (1962)), would not be in keeping with the treatment that has been so strongly urged by the United States in the past and even in other areas in its present pleading.

To adopt the position of the federal government relative to this spoil bank would introduce a great deal of uncertainty into any coast line determination. This would be especially true in a coastal area such as exists in Louisiana. The rapidly changing coastal formations and configurations might well be established or disproved on any given day depending on weather conditions, water conditions, and recent storm action. To require that an artificial extension of the land mass must be "purposeful," "useful," "permanent," and "substantial" would introduce such an element of uncertainty into coast line determinations as to be practically unusable. There is hardly a square inch of Louisiana's coastal area which could be described as "permanent" or "substantial." Most of Louisiana's over 7,700 miles of shoreline is both quite impermanent and quite insubstantial. Many of the coastal formations are composed primarily of fine waterborne sediments, which by their very nature are subject to dislodgement and deposition elsewhere.[278] Especially in

[278]There are places along the coast where oyster-shell growths or deposits are present. An example of this is the oyster reefs and islands in the vicinity of Marsh Island and Atchafalaya Bay. Shell particles are, of course, heavier and less readily transportable by water than fine silt or clay

the Mississippi River Delta area, the land is low-lying with very gentle gradients and is subject to wind and wave attack, as well as to submergence and compaction, both artificial and man-made changes in the courses of waterbodies, and to other vagaries of man and nature.

As regards the federal allegation that extensions of the mainland must be "purposeful" and "useful," there is no such requirement in the Submerged Lands Act, the Geneva Convention, or the *California* case. Additionally, the case of *The Anna*, 5 Rob. 373, which involved mudlumps off the mouth of the Mississippi River, established that such formations need not be purposeful, useful, permanent, or substantial in order to have legal significance in the delineation of the baseline for measuring the territorial sea.

And even though there is no requirement that the extension be purposeful or useful, it must be acknowledged that a spoil bank adjacent to and in conjunction with a dredged channel has both purpose and utility. The bank receives the spoil from the dredging and maintenance operations, and also tends to serve as a barrier to prevent the blocking of the channel. The spoil bank also helps to funnel navigation down the channel and serves as an aid to navigators in locating and negotiating the channel.

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particles, a fact which tends to make shell-land forms somewhat more stable than equivalent land forms composed of finer sediments. It might be noted at this point that the above facts run contra to the federal attempt to discredit the significance of oyser reefs and oyster-shell islands in the Atchafalaya Bay area. *See* discussion at page 320-23.

It is for all of the above reasons that Louisiana contends that the spoil bank at Pass Tante Phine should be considered a part of the shoreline of the State of Louisiana and should thus project a three-mile belt under the Submerged Lands Act.

B. Beach Erosion Jetties at Grand Isle:

Extending seaward short distances from Grand Isle are a number of jetties that were built to protect that island from erosion and from the attack of wind and wave. In its Motion the United States does not describe these jetties as extending the coast line even though it does acknowledge that other jetties on the Louisiana coast have such an effect, U. S. Motion, page 67. In its discussion of jetties the United States concedes that the language of Article 8 of the Convention (the article dealing with the outermost permanent harbor works which form an integral part of the harbor system), when read "in light of the Commission's [International Law Commission] commentary accompanying" the draft Convention submitted by the International Law Commission, justifies an extension of the coast line because of the presence of jetties. A part of the I.L.C. commentary which the United States quotes states unequivocally that:

> Permanent structures erected on the coast and jutting out to sea (such as *jetties and coast protective works*) are assimilated to harbour works. *U. N. General Assembly Official Records*: 11th Sess., Supp. No. 9 (A/3159), p. 16; reprinted in 2 *Yearbook of the International Law Commission* 253, 270 (1956). (Emphasis supplied.)

Surely the beach erosion jetties at Grand Isle are "coast protective works," and should be given treatment consistent with that given other jetties by the United States. Although Louisiana can demonstrate the incorrectness of some of the reasoning of the United States in its discussion of jetties,[279] such matters are irrelevant to the point now under discussion—the beach erosion jetties at Grand Isle.

Additionally, Grand Isle and these jetties which help establish and insure that island's stability protect the waters of Caminada Bay and Bay des Islettes. The waters in these protected bays are used for the cultivation of oysters and as a harbor for fish and shrimp fleets which serve the great oyster, fish, and shrimp industries in this section of the state. The jetties which protect the island thus are necessary and essential for the maintenance of this large harbor and the protection of these activities and industries. An argument might, therefore, be justified on the basis of these jetties' being harbor works of the Grand Isle harbor; however, since the jetties so perfectly fit the government's treatment of other jetties and the definition contained in the I.L.C. Commentary the government quotes, no such argument need be articulated.

Louisiana has not described these jetties in her alternative motion because they do not extend beyond the 24-mile line that is to be drawn within Ascension Bay, and thus the jetties would have no effect

[279] *See generally* Louisiana's discussion of dredged channels at page 333 *infra*.

on the coast line described by Louisiana in the alternative motion. The state, however, must object to the failure of the federal government to deal with these jetties in a manner consistent with its treatment of other similar jetties, and if Louisiana's contentions as regards the 24-mile line in Ascension Bay are rejected and the federal position adopted, Louisiana urges that the coast protective works, or beach erosion jetties, at Grand Isle be given the effect of extending the coast line in that area.

VI. Section of Coastline Extending from the Belle Pass Jetties on the East to Point au Fer on the West

The section of the Louisiana coastline extending from the Belle Pass jetties on the east to Point au Fer on the west presents two primary areas of disagreement between the position which has been taken by the United States in its proposed delineation of this coastline and that which Louisiana submits represents the correct approach in this particular segment. For even if the Court should decline to recognize the Inland Water Line as the coastline of Louisiana and should hold that the coastline is to be determined in accordance with the provisions of the Geneva Convention, we submit that in attempting to fix this line according to those provisions along this particular segment of the Louisiana coast, the United States has misapplied those provisions in two important respects, namely,

1. In drawing the Louisiana coastline along the low-water lines of Timbalier Island and the

easternmost island of the Isles Dernieres chain, and closing this water area between the innermost points of these islands;

2. In failing to recognize Caillou Bay as a true bay and to draw a straight closing line between Raccoon Point at the western limit of the Isles Dernieres chain and the point marking the western headland of this Bay.

These two points of difference between Louisiana's position and that taken by the United States will be discussed in this portion of Louisiana's brief.[280]

A. Timbalier Bay-Terrebonne Bay-Lake Pelto Complex:

In its Memorandum in support of its Motion for entry of Supplemental Decree No. 2, (pp. 71-72) the United States correctly recognizes that these names designate parts of a single body of inland waters constituting an inland water bay under Article 7 of the Convention. In its proposed supplemental decree, however, the United States proposes that the Louisiana coastline be drawn along the low-water line on the Gulfward side of Timbalier Island and the Isles Der-

[280]It may be mentioned here that the United States in proposing to fix Louisiana's coastline in this area has failed to give effect to the two dredged channels in this area. One of these is immediately west of and adjacent to the Belle Pass jetties and the other is a continuation of the Houma Navigation Canal extending Gulfward from the natural entrance point of the Timbalier-Terrebonne Bay complex. Louisiana contends that both constitute "outermost permanent harbor works" within the intendment of Article 8 of the Geneva Convention on the Territorial Sea and the Contiguous Zone. The treatment of dredged channels as integral parts of the coastline is discussed in another portion of this brief.

nieres chain, with closing lines (proceeding in an easterly direction) extending from the easternmost tip of each island in this chain to the westernmost tip of the next adjacent island, asserting that this constitutes compliance with Article 7 (3) of the Convention regarding indentations that have more than one entrance dentation. Article 7(3) states in part:

Actually, the pertinent sentence in the provision referred to does *not* deal with employing islands to draw closing lines more shoreward than a line across the extremities of the indentations, but only refers to using lines across the different mouths formed by islands *for purposes of drawing the hypothetical semicircle.* In fact, there is express language which tends to negate the use of points on islands within the indentation or behind the closing line of the overall indentation. Article 7(3) states in part:

> Where, because of the presence of islands, an indentation has more than one mouth, the *semicircle* shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. *Islands within an indentation shall be included as if they were part of the water area of the indentation.* (Emphasis supplied.)

On the set of 54 maps or on the appropriate nautical charts, numbers 1274 and 1275 (*See Exhibits* 51 and 62) only a small portion of Timbalier Island projects beyond the closing line drawn between the eastern and western headlands urged by Louisiana. (*See* exhibit 51.) This projection is at the southeastern end of Timbalier Island which is famous for the fact that it

consistently erodes at its southeastern end and accretes at its northwestern end. (*See* Appendix A containing a citation of authorities and a discussion by Professor James P. Morgan concerning Timbalier Island.) Because of this movement of the island it is quite likely that at the present time[281] or in the near future the entirety of Timbalier Island will lie shoreward of the closing line between the headlands and thus, unquestionably, the situation will call for the application of the last sentence of Article 7(3) of the Convention. Even if this fact were not true, it would still be a gross perversion of the principal underlying Art. 7(3) [282] to use the fact that a small portion of an island projects beyond the headland-to-headland closing line to contract the extent of inland waters.[283] Logical interpretation of the last sentence quoted above supports treatment of any part of an island shoreward of the normal closing line as if it were part of the water area. The use of closing lines to close off the natural entrances to true

[281]The low-water survey reflected on the set of 54 maps is based upon 1954 photographs of this area; the survey on which the topography shown on the nautical charts is based is not up to date either.

[282]This principle being that islands link waters more closely with the mainland and should serve to expand the extent of inland waters. *See* p 131 et sec.

[283]This injury to the principle of Article 7(3) is compounded further by the fact that the proposed federal line would use another island which is almost wholly within the indentation formed by the headlands. Reference is made to the easternmost of the Isles Dernieres, which is barely brushed by the closing line between outer headlands. *See* exhibit 51. It is at best problematical whether any part of this island is now or will long remain in contact with the closing line between headlands.

bays is calculated to enlarge rather than to restrict the extent of territorial waters, and Dr. Shalowitz (in his work entitled *Shore and Sea Boundaries*) [284] recognizes that a closing line may properly be drawn so as to include the largest possible water area.

A study of the map of this area reveals that East Timbalier Island is actually an extension of the land mass running southwesterly from the vicinity of Belle Pass and forming the natural entrance point of this bay area on its eastern flank. On the western flank, the island of the Isles Dernieres chain situated immediately to the west of Whiskey Pass is a southward extension of the land mass which forms the western natural entrance point of this bay area and separates it from Caillou Bay.

Thus, the western natural entrance point for this bay complex is to be found on this last mentioned island while the eastern natural entrance point occurs at the southernmost point of East Timbalier Island. (*See* Exhibit 62.)

Between these two natural entrance points a closing line less than 24 miles in length can be drawn behind which this water area would qualify fully as a bay, absent the existence of the two intervening islands—Timbalier Island and the easternmost of the Isles Dernieres—which lie athwart the entrance to this water area. Accordingly, if these islands were not present at the mouth of this bay complex, the coastline of

[284] Published by the U.S. Department of Commerce, Coast and Geodetic Survey.

Louisiana would follow such a closing line. (*See* Exhibits 59, 60, 61.)

Almost all of Timbalier Island and of the easternmost of the Isles Dernieres lie inside such a closing line. The United States seeks to go behind the headland-to-headland line and to restrict the area of this bay by following the low-water line along the outer edges of these two islands and drawing its closing lines between their innermost points.

However, according to the International Law Commission, the presence of islands at the mouth of a coastal indentation tends to link it more closely to the mainland;[285] thus, it would be that the presence of islands near the mouth of an indentation should *increase* rather than *decrease* the area of the inland waters lying behind them. It is submitted that no closing line for this bay complex may be drawn properly landward of a headland-to-headland line between the two natural entrance points above identified.

Since portions of these two islands lie seaward of a closing line drawn between the two natural entrance points of this water area, there becomes applicable the statement in *3 Gidel, Le Droit International Public de la Mer 726 (1934):*

> The placement of islands in front of a bay permits an extension of the so-called ten mile rule. In effect the transversal determining the base line for the territorial sea can, instead of being a single

[285] *See* Comment 2 to draft Article 7, 2 *Yearbook of the International Law Commission* 268, 269 (1956).

straight line of 10 miles, be a broken line composed of so many segments of 10 miles at the maximum so that it can be drawn with straight lines from one shore of the bay to the other *while connecting between them the islands placed in front of the bay or certain of them.* (Emphasis supplied. Translation ours).

Note that the rule as viewed by Gidel for connecting the islands does not provide for connecting islands which lie behind the bay closing line formed by the two outermost natural entrance points, but only provides for the islands *in front.*[286]

And Shalowitz,[287] the United States' chief witness in the California case, provides a recent affirmation of Gidel's doctrine that lines should be drawn seaward to connect islands in front of a bay:

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[286]Gidel's use of the 10-mile distance was, of course, prior to the Geneva Convention's 24-mile rule, but in principle, the problem is the same, except that 24-mile distances between islands may now be appropriate. In this connection see *Strohl, The International Law of Bays,* figure 18, p. 76 (1963), where for a situation off the shore of Greece, he applies the 24-mile rule to draw a closing line from the mainland to an island 24 miles distant, thus recognizing that closing lines connecting islands that form bays may in the aggregate exceed 24 miles. Likewise, the Florida Keys and Mississippi Sound present situations which, after the 1958 Convention, were recognized by the United States State Department publications as creating bays or inland waters although they have openings that in the aggregate exceed 24 miles. See discussion p. 299. This situation of openings which in the aggregate exceed 24 miles is not present here, but is only mentioned to show the extent to which authorities have recognized that islands may have an expanding effect, but a contracting effect has never been recognized.

[287]1 *Shore and Sea Boundaries* 225 (1962).

> Another facet of the closing line rule that requires interpretation is where islands are situated close to the entrance of an indentation that satisfies the semicircular rule for bays. How is the closing line to be drawn where an island lies to the landward of the line joining the headlands? And what is the treatment for an island lying to seaward of such line? Neither situation is provided for in the Convention or in the draft rules of the I.L.C. A reasonable interpretation would be to draw a direct line between the headlands for the first case (*see* fig. 44), *but to the island from each headland for the second case* (*see* fig. 45). (Emphasis supplied.)

In the footnote to this statement,[288] Shalowitz recognizes that the rule proposed would leave open the question of how far seaward from the headland line islands could be in order to be incorporated under the rule, and he suggests that each case be considered on its merits and a rule of reason applied. In this footnote, he also points out that,

> The basis for this interpretation is the observation of the I.L.C. that the presence of islands at the mouth of an indentation tends to link it more closely to the mainland (see text following note 29 *supra*). *It would seem to follow that where a choice of lines exists that line be selected that encloses the greatest area of inland waters. . . .*" (Emphasis supplied.)

Clearly the presence of Timbalier Island and the easternmost of the Isles Dernieres calls for an extension of the closing line across the Timbalier Bay-Terre-

[288] *Id.*, n. 38.

bonne Bay-Lake Pelto complex to meet the outermost portions of the islands seaward of the closing line.[289] Certainly these islands cannot justify a closing line across this bay complex more landward than the direct closing line between the natural entrance points. There is no support for such a restriction.

The discussion of the natural entrance points and closing line alternatives earlier in this section noted that Louisiana contended that the eastern natural entrance point was on the western portion of East Timbalier Island. The federal Memorandum heretofore filed does not indicate western or eastern headlands which it considered to be the natural entrance points of this single body of water. It was contended, however, that there are "six openings into this body of water, having a combined length of 50,574.9 feet." (U.S. Memorandum, p. 71.) Unless the United States considers some of the petty indentations on East Timbalier Island to be "openings" into Timbalier Bay, we do not find as many as 6 openings between the Timbalier Islands and the Isles Dernieres in front of the waters which are commonly known as Lake Pelto, Timbalier Bay, and Terrebonne Bay. This suggests that the United States may contend that the eastern headland is east of the point at X=2,311,205.47; Y=141,867.20, the eastern headland urged by Louisiana. To negate any implied contention to this effect it is necessary to bring the Court's attention to some of the detail on maps #14 and #15 of the set of 41 maps which comprise a portion of the overall set of 54 maps

[289] *See* Exhibit 62.

referred to in the United States Memorandum. Note that the low-water line is not shown on these maps at the rear of the land form, but is only shown at the front portion as a dotted line. Therefore, if any apparent cuts are shown the maps do not clearly establish their existence *at the low-water stage.*

The possible cut in the vicinity of X=2,320,164; Y=143,811 has the appearance of an artificial cut possibly created when certain oil wells shown on the map were drilled. The survey of the low-water line reflected by the dotted lines terminated before it is clear that there was any channel open at low-water mark, which further seems improbable because of the great mass of land to the rear partially fragmented by canals. Even if any of these small canals were openings at mean low-water, they could hardly be considered natural entrance points of the bay.

There is also a negligible indentation shown in the vicinity of X=2,338,031; Y=150,726, but again the survey of the low-water line terminates prior to reaching the rearward land masses and behind this negligible cove marsh is shown which hardly suggests that this is any sort of natural entrance point or opening into the bay.

There is a small pocket or cove shown at the vicinity of X=2,347,871; Y=153,564, but again this can hardly be considered the natural entrance point of the bay. Again, the low-water survey line terminates before it reaches the more inward portions of the land masses and there are numerous land masses, very close

together, if not continuously joined at low water to the rear of this petty cove. Note again that the low-water line of these rearward blocking land masses is not provable by these charts.[290] Where the low-water survey lines terminate at the mouths of these indentations, or coves, none appear to be much wider than 100 yards.[291]

In summary, the existence of openings at low water on the East Timbalier land form is doubtful and not proven by the United States; but if such openings do exist, they are at most narrow canals, streams, coves, or artificial cuts. In any event, none would constitute the eastern headland of the bay complex, and all the parts of the East Timbalier Island land form would constitute an integral part of, or natural extension of, the mainland.

Louisiana has described its alternative coastline

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[290]No material assistance can be gained from examining the Nautical Chart in this area, U.S.C. & G.S. Chart No. 1274, because it apparently only shows the berm or high-water line. *See* U.S.C. & G.S. Chart No. 1 for the explanation that solid lines represent berm (vegetation) or high-water lines.

[291]By scaling on maps 14 and 15 of the set of 41, from the set of 54 maps which comprise the low-water survey charts, the cove opening in the vicinity of X=2,320,164; Y=143,811, is perhaps 50 yards wide. In the vicinity of X=2,338,031; Y=150,726, where there is marsh or grass to the rear of the cut, the distance between the low-water lines is approximately 100 yards. The marshy land masses to the rear of the area in the vicinity of X=2,347,871; Y=153,564 have openings at what is apparently high water which do not materially exceed 50 yards. Of course, all of these may be closed at low-water on the rearward side because the low-water line, as noted previously, is not reflected on these charts.

in this segment as running from the eastern natural entrance point to the outermost point on Timbalier Island, thence to the most southerly point on the easternmost of the Isles Dernieres, and thence to the western natural entrance point of the complex.[292]

If this closing line should be rejected by the court, Louisiana still submits that the closing line suggested by the United States is not proper in this bay complex. *Certainly, a closing line more restrictive than the straight closing line between the natural entrance points should not be adopted.*

If Louisiana's alternative coastline in this area is rejected, Louisiana suggests in the further alternative, that the straight closing line between the two natural entrance points be drawn, and that where this line intersects Timbalier Island or any of the Isles Dernieres, the coastline shall be described along the seaward low-water marks of such islands back to the straight headland-to-headland closing line. While such a closing line is more restrictive than is justified under the applicable rules of international law as embodied in the Convention on the Territorial Sea and the Contiguous Zone, certainly a line more restrictive than this one cannot be justified.

Caillou Bay:

In its Motion at pp. 70-71, the United States contends that Caillou Bay is not a bay. There it is asserted:

. . . Nevertheless, the area does not constitute

[292] *See* Exhibit 62.

> internal waters, within the meaning of the Convention on the Territorial Sea and the Contiguous Zone, because it is not a "well-marked indentation." Indeed, it is not an indentation at all, but is merely part of the open Gulf, partially screened by the Isles Dernieres. It is, in that respect, essentially like the Santa Barbara Channel, for which California unsuccessfully asserted the status of a "fictitious bay."

Prior to its present Motion, the United States had uniformly taken the position that a straight closing line should be drawn across the mouth of Caillou Bay. On page 78 of its Memorandum in Support of its Motion for Supplemental Decree No. 2 and in Opposition to Louisiana's Motion, the United States points to the so-called "Chapman Line" as "representing the federal position as to the proper coast line of Louisiana...." It is true that at that point in its Memorandum, the United States was dealing with Chandeleur and Breton Sounds but the Chapman Line draws a straight closing line across the entrance to Caillou Bay, and if this line represents the "federal position as to the proper coast line of Louisiana," it is difficult to see why it should be departed from in the particular area now under discussion.

The confectors of the so-called "Chapman Line" used as the western terminus of the closing line across Caillou Bay (or in other words, as the western headland of the entrance to this bay) a point on the mainland at the 91st Meridian designated as X=2,106,412, Y=143,491; and while we do not agree that the use of this point is proper, nevertheless, it is clear that at all

times prior to the filing of its present Motion, the United States has agreed that a straight closing line should properly be drawn across this bay entrance, with one headland at Raccoon Point and the other at some point on the mainland.

The fallacy of the comparison sought to be made between this area and the Santa Barbara Channel is easily seen by a cursory glance at the charts of Caillou Bay and the Santa Barbara Channel. Caillou Bay is more similar to the Chandeleur-Breton Sound *cul de sac* than to the Santa Barbara Channel, which is a deep-water protected passage or strait. The nature of the Santa Barbara Channel compared to the Breton-Chandeleur Sound is discussed by the Court in *United States v. California*, 381 U.S. 139 at 171. The comments as to the Chandeleur-Breton Sound are factually applicable to Caillou Bay also. The Court said, 381 U.S. 139 at 171:

> By way of analogy California directs our attention to the Breton and Chandeleur Sounds off Louisiana which the United States claims as inland waters, *United States* v. *Louisiana*, 363 U.S. 1, 66-67, n. 108. Each of these analogies only serves to point up the validity of the United States' argument that the Santa Barbara Channel should not be treated as a bay. The Breton Sound is a *cul de sac*. The Chandeleur Sound, if considered separately from the Breton Sound which it joins, leads only to the Breton Sound. Neither is used as a route of passage between two areas of open sea. In fact both are so shallow as to not be readily navigable.

In the footnote to this statement the Court further remarked (381 U.S. 139 at 171, note 40):

> The depth in general ranges between 6 and 12 feet according to Coast and Geodetic Survey Chart No. 1270, but there is no passage as much as 12 feet deep connecting the ends of the sounds. The sounds are "navigable waters" in the legal sense even in the parts too shallow for navigation. See *United States* v. *Turner*, 175 F.2d 644, 647, cert. denied, 338 U.S. 851.

To say that Caillou Bay is a route of international commerce like the Santa Barbara Channel would be to ignore completely the facts of geography. The waters in and surrounding Caillou Bay range from 6 to 10 feet. At no point do the passes between the islands forming a part of the perimeter of Caillou Bay reach a depth sufficient to allow the passage of any but the smallest of vessels.

The United States concedes that a closing line of less than 24 miles can be drawn across Caillou Bay in such a way as to enclose a water area greater than that of a semi-circle having a diameter of the same length; but it contends that this area, which it denominates "an area of the Gulf of Mexico commonly designated 'Callou Bay,'" [293] is not a bay because a part of the perimeter of the bay is formed by a screen of islands.

It further contends that, under the Convention, islands cannot be relied on "as creating a bay that would not exist without them." [294] This is inconsistent

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[293] U.S. Motion, p. 70.

[294] *Id.* p. 71.

with the government's recognition that the Timbalier Bay-Terrebonne Bay-Lake Pelto complex is a true bay and that the western perimeter of this bay is formed in part by a fringe of islands. It is also inconsistent with the position taken by the Department of Commerce, Coast and Geodetic Survey, which has recognized the true character of this area by placing the name "Caillou Bay" on its charts;[295] and with that taken by the Department of State through its Geographer, G. Etzell Pearcy.

In his article entitled "Measurement of the U. S. Territorial Sea" [296] Dr. Pearcy treats the indentation formed by the chain of Keys off the Florida coast as constituting a bay under the Convention's provisions without deeming it necessary to substantiate his conclusion with any argument or citation. There, in discussing the rule which limits the entrance of any bay to not more than twenty-four nautical miles, Dr. Pearcy points out that when the distance between the natural entrance points of a bay exceeds that distance, a straight base line of twenty-four miles may be drawn within the bay in such a way as to enclose the maximum water area which is possible with a line of that length; and illustrative of that rule he points out that it has practical application in Florida "where a closing line twenty-four miles in length extends from East Cape to Vaca Key to close off the maximum amount of water between the coast of Florida and the chain of Keys

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[295] *See* Chart No. 1275 at Exhibit 51.

[296] 40 *Department of State Bulletin* 963, 965 (1959).

curving south and east." [297] A reference to the official charts of the area here referred to by Dr. Pearcy[298] discloses that one perimeter of this bay is completely formed by a series of small, scattered Keys much less compactly formed and much less closely associated with the land form than are the Isles Dernieres which form the southern perimeter of Caillou Bay.

Another inconsistency in the United States' position is its treatment of the Isles Derneires as forming part of the coastline of Louisiana. In paragraph 15 of its Proposed Supplemental Decree, the United States states that:

> The coast line . . . is defined by points on the mean low-water line, and by straight lines between points on the mean low-water line.... Where straight lines are indicated, they are either *across entrances to inland waters*, or between points on the low-water line.... (Emphasis supplied.)

In the description of the Caillou Bay area (paragraph 15 (s)) the United States has described a continuous line beginning at the westernmost point on the Isles Dernieres and continuing along that chain of islands to the easternmost point on East Timbalier.

If, as the United States contends, Caillou Bay is not a bay, and therefore not part of the inland waters of the United States and the State of Louisiana, what could be the explanation for having drawn a series of closing lines between islands forming Caillou Bay's southern perimeter?

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[297] *Id.* p. 965, Exhibits 53, 54, 55.

[298] Exhibits 53, 54, 55.

The original designation in the Chapman Line enclosed this embayment; the Coast and Geodetic Survey of the Department of Commerce has denominated it a bay on official charts; the State Department's official Geographer has recognized that an island chain may serve as a closure for a true bay; and the United States in its Motion for Supplemental Decree No. 2 has recognized the waters behind the island chain to be inland waters.

We submit that no proper treatment can be given to this bay other than to classify it as inland waters with a closing line such as is suggested in Louisiana's proposed alternative decree. Whether it be denominated as a bay, a strait leading to inland waters, a *cul de sac*, or by any other name, the basic truth is that the waters of Caillou Bay are sufficiently enclosed to constitute inland waters and this has been judicially admitted by the United States, in a binding assertion exploited by it at an earlier stage of the litigation. (*See* discussion pages 133-36, *supra.*)

As to the headland at the mainland urged by Louisiana, this point is the location of a pronounced change in the direction of the shoreline and thus forms the natural entrance point of the bay.

Appendix A, attached hereto, develops considerable scientific and historical detail relating to the dynamics of particular locales. It demonstrates with greater particularity how and where hundreds of square miles of coastal waters would be subject to the probability of wholesale, dramatic changes in owner-

ship, or disputes as to ownership, if the coast line is determined by shoreline configurations. Some of this potential is for sudden change: *e.g.*, the frequent hurricanes and the peculiar susceptibility to hurricane damages; the effects of stream and river crevassing; the mudlump island phenomena; islands with continually varying elevations; and the ever increasing works of man. Some of this potential is for relatively gradual, but still frequent and dramatic change: *e.g.*, the great mud flats of the western coastal sector; the probability of a new, major delta building out from the Atchafalaya; the peculiar deltaic and sub-deltaic processes of the unique Mississippi "bird-foot" delta, with its ever extending mouths and ephemeral cycles of retreat and growth that continually modify the geometrics of its indentations; the moving islands; the ecologically related changes, which occur as the aftermath of artificial works, storms, or other natural phenomena. Even these relatively gradual propensities for change portend frequent litigation, if shoreline configurations are permitted to control the location of the coast line; *e.g.*, as the 80 or more square miles created by "The Jump" crevasse, erode, and submerge, West Bay will progressively enlarge, with its northern headland probably moving 10 to 12 miles to the northwest over the next 20 to 30 years. If the headlands of the indentation determine the location of the coast line, litigation can be expected every few years as the closing line progressively lengthens and marches seaward to affect the title and jurisdiction to scores of square miles in the area behind the closing line.[73a] And

this is but one of many locales with great propensity for change.

Incidentally, this is also illustrative of the fact that in spite of shoreline retreat at many places, the Appendix A study shows that the net combined effect of retreat and advance will ultimately cause much of the area which is encompassed by the Inland Water Line unquestionably to be inland waters even through resort to shoreline configurations. This is true even for some areas of major shoreline retreat.[299]

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[299]Over the past 300 years, the area has gone through three complete cycles of land building, followed by submergence, and it is now at the dramatic final portion of the active retreat phase, as more fully shown in Appendix A. Since the inner portions of the land are contracting quite rapidly and the direction of the submergence trend is generally from the south to the north, West Bay's northwardly expanding configurations should continue to meet the semi-circle test, as it merges with expanding lakes and ponds forming in the marsh to the north. The seaward movement of the closing line of the bay would result from the net westward movement of the northern headland, due to the angle of the disappearing shoreline, although there might be transitory phases of temporary inward movement of the line.

[73b]As with West Bay. The retreat of the peninsula which partly divided the Delta's Garden Island Bay and Redfish Bay (which led the Justice Department to abandon its contention that these water areas should be treated as separate embayments, thus justifying a more inward closing line) is another illustration of how retreat of land may cause unquestioned recognition of a more outward extent of inland waters. Expansion of a shoreline-determined coast line can be expected from a number of other phenomena. The passes of the great river are building ever outward. Scores of new mudlump islands can be expected seaward of the Mississippi passes. At the mouth of the Lower Atchafalaya, we can expect a great new deltaic growth, comparable to the sedimentary land build-

VII. AREA FROM POINT AU FER TO TIGRE POINT

A. Closing line across Atchafalaya Bay:

The United States recognizes the Atchafalaya indentation to be a bay under Article 7 of the Convention on the Territorial Sea and the Contiguous Zone (Geneva Convention),[300] but we submit that it does not correctly apply the rules of that article to determine the natural entrance points and consequent closing line of the bay.

The United States had formerly contended for much more restrictive lines across Atchafalaya Bay[301] than the line it now seeks in its Motion for Supplement Decree No. 2, filed January, 1968. In 1965, the United States did concede that under the rules of the Geneva Convention, the closing line across the bay was at least at the points noted in its present Motion, and included three-mile belts extended from certain islands and low-tide elevations within three miles of the mainland or of islands. This concession was incorporated in this Court's Supplemental Decree No. 1 of December 13, 1965.

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ing this river accomplished in the last several decades. (Increased flow of the Atchafalaya, in recent decades, has virtually filled its former lake system some forty miles long by an average four or so miles wide.) East Bay, if the Court does not now recognize it as inland water, will unquestionably attain that character when anticipated changes in configuration cause it to satisfy the semi-circle test. These and other similar facts are supported in Appendix A.

[300] *See* Pages 68-69 of the Government's Motion and Supporting Memorandum filed January, 1968.

[301] *See* 1 *Shalowitz, Shore and Sea Boundaries* 110 (1962).

Nevertheless, the United States has not correctly applied the rules of the Convention in reaching its conclusions. With respect to the closing line of the bay, the natural entrance points of the indentation are clearly X=1,987,371; Y=241,272 on the east, and X=1,834,-019; Y=270,301 on the west,[302] rather than the points contended for by the United States.[303]

The natural entrance point, or headland, on the east is formed by an extension of elevations and reef structures off Point au Fer proper. Because of these obstructions, vessels entering or leaving Atchafalaya Bay must pass westward of this point; the waters between the true eastern headland as set forth above and that suggested by the United States are so obstructed by reefs and are so shallow that they cannot be traversed by vessels.[304]

The west headland is at the tip of a group of islands and low-tide elevations extending from the mainland and Marsh Island, collectively known as "The Shell Keys," and which are natural extensions of the land mass from which they project. Because of the existence of these shell reefs and the very shallow waters, it is navigationally impossible for vessels to enter the bay landward of the point above described. Vessels may enter Atchafalaya Bay only by passing around, rather than through, the formations. Consequently, the point

[302]*See* Pages 84-85 of Louisiana's Response and Memorandum filed May, 1968.

[303]*See* Page 18, Item (j) of Government's proposed decree filed January, 1968.

[304]Affidavit of Professor Alexander Melamid, dated July 24, 1968; attached hereto as Appendix D.

described at the tip of these formations is necessarily the western natural entrance point of the bay.[305]

The headland-to-headland closing line drawn by Louisiana between the natural entrance points of Atchafalaya Bay encloses waters sufficient to meet the semi-circle test of the Geneva Convention, but it is more than 24 miles long. Under such circumstances, the rules of Article 7 (5) of the Convention provide that a straight line 24 miles in length shall be drawn within the bay so as to enclose the maximum amount of water possible with a line of that length. Louisiana has applied this rule in describing its bay closing line, by moving northward from the true western entrance point (X=1,834,019; Y=270,301) to X=1,855,055; Y=296,154, which is the first point on land where a line drawn from the true eastern headland (X=1,987,-371; Y=241,272) does not exceed 24 miles and encloses

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[305]*Ibid.* Reference should also be made to the most recent (*i.e.*, 1967) United States Coast & Geodetic Survey Nautical Charts of this area, Nos. 1276 and 1277, which show this entire coastal area, the reefs, the islands, and other integrated formations, as a solid and continuous extension of the Marsh Island onshore area. (*See* Exhibits 63 and 64.) The nautical charts show this entire area shaded with the same color used onshore on Marsh Island which, according to the legend, designates the entire area as marsh land. While the set of 54 maps shows the reef structures and formations in greater detail, the nautical charts treat them in a very practical manner, certainly as far as navigation is concerned. These nautrical charts, by showing the reef formations and islands as virtually solid extensions of the mainland form, go far toward establishing the natural entrance point of this waterbody at the southern extremity of the Shell Keys island and reef complex.

the maximum amount of water possible with a line of that length.[306] In support of its position, Louisiana attaches hereto as Appendix D, an Affidavit by Professor Alexander Melamid, of the faculty of the graduate school of New York University and an expert in economic geography, dated July 24, 1968, and also photographs of the pertinent headlands as Exhibit 68.

It is therefore submitted that the bay closing line of Atchafalaya Bay as drawn by Louisiana meets the tests set out in the Convention, is properly and correctly located, and should be recognized as the closing line for the Atchafalaya Bay.[307]

B. The Effect of Elevations Within Three Miles of the Atchafalaya Bay Closing Line:

The concession of the United States that certain elevations in the Atchafalaya Bay area project three-mile belts of their own did not include some low-tide elevations within three miles of the closing line which it conceded across Atchafalaya Bay. Article 11 of the Convention, which provides that low-water elevations "situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island" shall be used as a baseline for measuring the territorial sea, might, at first blush, seem to be subject to two interpretations, in view of the further

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[306] *See* Pages 84-85 of Louisiana's Response and Memorandum of May, 1968.

[307] *See* Illustration of Atchafalaya Bay closing line on U.S.C. & G.S. Charts 1277 and 1116 attached hereto as Exhibits 64 & 65.

provision of Article 11 that if a low-water elevation is "wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island" it does not generate a territorial sea of its own. The narrow interpretation of Article 11, clearly contradictory to its legislative history, is that the low-water elevation must be wholly or in part within the territorial sea as measured from the *actual land mass* of the mainland or an island, in order to have a territorial sea of its own. The other interpretation of Article 11—which, we will show, is in complete accord with the history leading to the enactment of that Article—is that the low-tide elevation need only be situated within the *territorial sea as it is measured from the mainland or an island.*

The United States construes Article 11 of the Convention in the narrow and strict manner first above set forth, thus giving effect only to low-tide elevations within three miles of the mean low-water mark on the mainland or on islands. Consequently, it disregards low-tide elevations in the Atchafalaya Bay area which are more that three miles from the mean low-water line on Marsh Island or Point au Fer Island, *but which are within three miles of the closing line of Atchafalaya Bay,* and therefore within the territorial sea *as measured from the mainland* or an island. This position, Louisiana submits, is inconsistent with the clear meaning and intent of the Convention. Even if the closing line for Atchafalaya Bay urged by the United States is accepted over that urged by Louisiana (which, we respectfully submit, would be erroneous),

these additional low-water elevations should be recognized and included as a part of the coast line of Louisiana since they are within three miles of the Atchafalaya Bay closing line, as suggested by the United States (as well as the line proposed by Louisiana).

The ancestry of Article 11 of the Geneva Convention appears to be traceable to the Second Sub-Committee of the 1930 Hague Conference. The Hague Conference provided that a low-water elevation "situated *within the territorial sea off the mainland* or off an island is to be taken into consideration on the analogy of the North Sea Fisheries Convention of 1882 in determining the baseline of the territorial sea." [308] (Emphasis supplied.) There can be little argument that under this statement the territorial sea is to be measured from the proper baseline on the mainland or an island which baseline would include bay closing lines, and the low-tide elevation need only be within that territorial sea to project a belt of its own. Indeed, the United States has previously adopted this position when, in answering an inquiry from the United States Attorney General about the principles followed by the United States in delimiting territorial waters, the Acting Secretary of State replied on November 13, 1951, that:

> While the Second Sub-Committee declined to define as islands natural appendages of the sea-bed which were only exposed at low tide, it agreed,

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[308] Conference for Codification of International Law (3d), *Territorial Waters* 217 (1930).

> nevertheless, that such appendages, provided that they were *situated within the territorial sea of the mainland,* should be taken into account in delimiting territorial waters. (*Acts of Conference,* 217).
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> * * *
>
> The principles outlined above represent the position of the United States with respect to the criteria properly applicable to the determination of the baseline of territorial waters and to the demarcation between territorial waters and inland waters.[309] (Emphasis supplied.)

The first draft article in 1954 of the International Law Commission on the effect of low-tide elevations similarly reads:

> Drying rocks and shoals which are wholly or partly *within the territorial sea* may be taken as points of departure for delimiting the territorial sea.[310] (Emphasis supplied.)

The comment to the draft article points out that the Commission considered the article to express the international law in force.[311] Under this draft it is clear that a low-tide elevation within the breadth of the territorial sea (in this case 3 miles) as measured from the mainland or an island, including, of course, bay closing lines of either, shall be taken as the baseline from which to measure the territorial sea. Subsequent

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[309]4 *Whiteman, Digest of International Law,* 176-77 (1965).

[310]1954 *Yearbook of the International Law Commission,* vol. 1, p. 156.

[311]"Comment . . . The Commission considers that the above article expresses the international law in force." *Ibid.*

changes to the article do not indicate any intent to change its meaning in this respect.[312] To the contrary, the intent of the redactors of the Geneva Convention is eminently clear that no change was intended, and that a low-tide elevation within the territorial sea generated a territorial sea of its own even if more than three miles from the low-water line on the mainland or an island; that is, the territorial sea is to be measured from the baseline along the mainland or an island, and a low-tide elevation need only apppear within this "primary" territorial sea to project a territorial sea of its own.[313] The reason the wording of the 1954 draft article was not used in the final draft of the Convention was simply that some members of the International Law Commission were concerned that the draft article might be taken to allow a state to extend indefinitely its territorial sea by use of a succession of drying rocks and shoals to delimit its territorial sea. The evil sought to be prevented by the final version of Article 11 was "leap-frogging" low-water elevations by measuring three miles out from a low-tide elevation which was located within

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[312]*See* 1956 *Yearbook of the International Law Commission,* vol. 2, p. 270.

[313]The 1955 version of Article 11 reads as follows:

Drying rocks and drying shoals which are wholly situated within territorial sea, as measured from the mainland or an island, may be taken as points of departure for further extending the territorial sea. . . . Comment: The modification in the 1954 text of this article (article 12 of the 1954 draft) does not affect the substance of the article. 1955 *Yearbook of the International Law Commission,* vol. 2, p. 38.

three miles of another low-tide elevation, but not within the territorial sea as measured from the baseline on the mainland or on an island.[314] The Commission

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[314]*See* the article by Sir Gerald Fitzmaurice in 31 *British Yearbook of International Law* 371, 394 (1954), wherein he says,

> [t]he object of the limitations . . . is to prevent the practice of so-called "leap-frogging". This was the point referred to in the above-quoted passage from the judgment of the Court, on which Norwegian and United Kingdom views differed. If, in delimiting the territorial sea off a coast, or islands proper, it were permissible to take account of low-water elevations situated within three miles (or whatever breadth is applicable) *of one another*, instead of as measured from the mainland coast or island proper concerned (or rock permanently above high water), then a series of such low-water elevations in the seaward direction would lead to great extensions of territorial waters at many points. Such extensions can be accepted when caused by a chain of islands or rocks above high-water mark, off a coast, but are inadmissable when the elevations in question are only visible at low tide—unless within the requisite distance from permanently dry land or rocks. The United Kingdom point of view on this matter was endorsed by the Committee of Experts abovementioned (p. 393, n.5).

From this quotation it can be seen that the object of Article 11 was and is to prevent any leap-frogging or undue extensions of the territorial sea by means of low-tide elevations beyond three miles from the baseline of the territorial sea along the mainland or an island. It is admitted that there are references in this quotation to "permanently dry land or rocks," and there are references on the same page of the Fitzmaurice article to measurement of the territorial sea "from permanently dry land." It should be noted, however, that these references are coupled with a discussion of "the territorial sea of some *coasts*, or islands proper . . ." (Emphasis supplied.) and goes on to say that "the low-water elevation may be taken into account for the purposes of delimiting the

sought to make clear that only those elevations which would be in a territorial sea delimited without reference to low-tide elevations could be used to expand the territorial sea. So, at the 1954 session of the International Law Commission, Mr. Lauterpacht suggested that the words "if within the territorial sea as measured from the mainland or from an island" be substituted for the words "situated wholly or partly within the territorial sea" as contained in the 1954 draft article.[315] As stated previously, the amendment was inserted in the 1955 draft of the article, with the comment that the change did not affect the substance of the article.[316] And, indeed it did not; a low-water elevation within three miles of the bay closing line is "within the territorial sea as measured from

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territorial sea of the *coast* or island concerned. . . ." (Emphasis supplied.) Certainly, the *"coast"* of a state includes the seaward limit of inland waters or the proper closing lines across bays. Since the closing lines across bays form a part of the *"coast"* of a nation, the territorial sea of the mainland or island is projected from this bay closing line, and a low-tide elevation within three miles of this "coastline" or baseline for the territorial sea should project a territorial sea of its own. It is only where the low-tide elevation is beyond the territorial sea as measured from the "coastline" or baseline for the territorial sea, that the low-tide elevation projects no belt of territorial waters.

[315]1954 *Yearbook of the International Law Commission,* vol. 1, pp. 96, 97.

[316]*See* Footnote 14, *supra.* The Special Rapporteur, Mr. Francois, offered no opposition to Mr. Lauterpacht's amendment, as he considered the change in verbiage to be the same as his 1954 draft article, except that it removed any possibility of "leap-frogging" low-water elevations. 1954 *Yearbook of International Law Commission,* vol. 1, pp. 96-97.

the mainland," for, clearly, the bay closing line is a part of the baseline of the mainland.[317]

The 1956 and final draft of the Commission was substantially the same as the 1955 text. Comment (1) thereto reflects the position of Louisiana that low-water elevations within the territorial sea, as measured from the mainland or an island, project a three-mile belt of territorial waters. Comment (1) reads as follows:

> Drying rocks and shoals situated wholly or partly *in the territorial sea are treated in the same way as islands.* The limit of the territorial sea will make allowance for the presence of such drying rocks and will show bulges accordingly. *On the other hand, drying rocks and shoals situated outside the territorial sea, as measured from the mainland or on islands, have no territorial sea of their own.*[318] (Emphasis supplied.)

The draft article was changed to its present form at the 1958 Conference on the Law of the Sea on the proposal of the United States.[319] The reasons given for the United States' proposal do not indicate an intent to change the article with respect to the substance under discussion,[320] nor an intent to change

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[317]1955 *Yearbook of the International Law Commission,* vol. 2, p. 38. *See also* the article by Sir Gerald Fitzmaurice cited in Footnote 314, *supra.*

[318]1956 *Yearbook of the International Law Commission,* vol. 2, p. 270.

[319]*See* 3 *Official Records, United Nations Conference on the Law of the Sea,* 243 (U.S. Proposal) and 187 (adoption) (1958).

[320]*See Id.* at 186, 243.

the United States' position in positive international law expressly accepted by the United States prior to the Geneva Convention.[321] The United States representative (Mr. Dean) objected to the words "point of departure," as contained in the 1954 draft article since a low-tide elevation might be so extensive as not to be a "point" and because he regarded the phrase as confusing, but neither reason affected the substance of the draft article as it related to low-water elevations located wholly or partially within the territorial sea as measured from a bay closing line.[322] Additionally, Mr. Francois, expert to the Secretariat of the Conference and former Special Rapporteur to the International Law Commission, right after Mr. Dean's remarks and shortly before voting on the United States' proposal stated that all of the proposed amendments to the article corresponded entirely to the intentions of the International Law Commission.[323] These remarks of Mr. Francois could hardly lead to an interpretation that the United States' proposed amendment was meant to modify what had been the explicit intention of the Commission throughout the history of the Article.

What the United States, the International Law Commission, and the Geneva Convention sought to avoid, Louisiana submits, was the mere possibility that a succession of low-water elevations within three miles of each other be utilized to enlarge the terri-

[321] *See* Footnote 309, *supra.*

[322] *See* 3 *Official Records, United National Conference on the Law of the Sea,* 186 (1958).

[323] *Id.* at 186.

torial sea. The broad interpretation of Article 11 as hereinabove advanced by Louisiana negates this possibility by requiring that a low-water elevation be located within the territorial sea as measured from the mainland or an island, including of course, a bay closing line. To adopt the strict and limited interpretation of Article 11 as proposed by the United States and to require that the low-tide elevation itself be situated within three miles of the actual land mass of the mainland or an island, would be not only superfluous (as unnecessary to guard against the evil—*i.e.*, "leap-frogging" of low-water elevations—sought to be avoided by the final draft of Article 11), but would also be contrary to the previously accepted United States' position in international law and would conflict with the legislative history of the article as above set forth.

The broad interpretation of Article 11 and the position adopted by Louisiana seems to be the consensus of the international law authorities and writers. Thus, according to McDougal & Burke,[324] if a low-tide elevation "is wholly or partially within the territorial sea of an island or a mainland" the elevation may be used as the baseline for measuring the territorial sea, the American amendment merely accomplishing "in a considerably more awkward fashion" what the I.L.C. had proposed. Similarly, such an eminent authority as Sir Gerald Fitzmaurice, presently a member of the International Court of Justice,

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[324] *McDougal and Burke, Public Order of the Oceans* 396, 397 (1962).

and who, while Chief Legal Advisor of the British Foreign Office, was a member of the International Law Commission and served as the Alternative Chairman of the United Kingdom's delegation to the Geneva Conference, maintained that:

> The Convention (Article 11, paragraph 1) permits one exception which has come to be recognized as reasonable, namely, that where a low-tide elevation is situated within what is already territorial sea (off a mainland coast, or off the coast of an island permanently above sea level), it can then generate some (as it were) extraterritorial sea. In such a case, the low-tide elevation theoretically has its own territorial sea; but, as the elevation is within what is already the territorial sea of the mainland, or of an island, the practical effect is simply to cause a bulge in the seaward direction of *that* territorial sea. On the other hand, if there is a further drying rock, situated—not within the original or basic territorial sea of the mainland or island—but within the extension of such territorial sea (bulge) caused by the presence of the "inner" drying rock, then this "outer" drying rock will not lead to any further extensions of the territorial sea; nor does an "outer" drying rock, so situated, generate any territorial sea of its own. This rule is intended to prevent the practice known as "leap-frogging", which, by making use of a series of drying rocks, banks, etc., extending seaward, might result in artificial or unjustified extensions, of natural territorial waters.[325]

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[325]Fitzmaurice, "Some Results of the Geneva Conference on the Law of the Sea," 8 *Int. & Comp. L.Q.* 73, 86-87 (1959).

The same conclusion is stated by Shalowitz when he says:

> [T]he important distinction between an island and a low-tide elevation, insofar as the law of the sea is concerned, is that an island, no matter where situated, carries its own territorial belt, while a low-tide elevation generates such a belt *only if it lies within the territorial sea.*[326] (Emphasis supplied.)

It is apparent, then, that the present Article 11 of the Convention has the same intent as the first draft of the International Law Commission on the point, and that low-tide elevations within the territorial sea, as measured from the baseline on the mainland or an island, including of course, the closing lines of bays, may be used to extend the territorial sea. Only those low-water elevations more than three miles from the baseline of the mainland or an island do not generate a three-mile territorial sea of their own. The additional low-tide elevations contended for by Louisiana are within three miles of the closing line of Atchafalaya Bay, *even as* conceded by the United States,

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[326]1 *Shalowitz, Shore and Sea Boundaries* 228-29 (1962). Shalowitz reiterates his position in volume 2 of his treatise where he says that,

> [t]he basic principle of delimitation of the territorial sea in the vicinity of islands and low-tide elevations is that an island, no matter where situated, carries its own territorial belt, while a low-tide elevation generates such belt only if it lies *within the territorial sea.* (Emphasis supplied.) 2 *Shalowitz, Shore and Sea Boundaries* 379 (1964). *See also,* Pearcy, "Measurement of U. S. Territorial Sea," 40 *Dept. of State Bull.* 963, 966 (1959).

and are thus within the territorial sea of the mainland.[327]

Even if the contention of the United States as to the effect of low-tide elevations were correct (and we submit it is not), low-tide elevations additional to those used by the United States should be part of the coast line because they are within three miles of the low-water mark on islands within the bay. The survey maps (that is, "the series of 54 maps accompanying the 'Report of the Determination of the Contact Line of Mean Low Water on the Gulf of Mexico with the Mainland and Adjacent Islands of the State of Louisiana by a Committee Representing the U. S. Dept. of Interior and a Committee Representing the State of Louisiana', dated December 20, 1961, . . ." as referred to and relied upon by the United States in its Motion and Memorandum of January, 1968; *see e.g.*, page 9 thereof) show two islands within the meaning of the Convention at X=1,899,110; Y=282,309 and X=1,896,099; Y=289,481, and the data from which the joint surveys of 1961 were made indicates several other islands not shown on maps at all or incorrectly placed on the maps as low-tide elevations. There are a number of low-tide elevations within three

[327]The coast line description previously filed by Louisiana in paragraph 10 (ii) of its Response and Memorandum of May, 1968, lists all low-tide elevations within three miles of the closing line of Atchafalaya Bay which would affect the three-mile boundary if the federal closing line were adopted. If the alternate Louisiana closing line is recognized the elevations at X=1,933,172; Y=264,238; X=1,924,399; Y=268,936, will not affect the three-mile boundary as they lie landward of the Louisiana closing line.

miles of one or both of the islands above designated which will project the territorial sea in this area. These low-tide elevations are found at the following coordinates:

X=1,916,059;	Y=275,636
X=1,907,640;	Y=275,971
X=1,905,068;	Y=276,942
X=1,900,127;	Y=276,469
X=1,896,827;	Y=275,747
X=1,892,509;	Y=278,202
X=1,881,420;	Y=279,350.

Additional low-tide elevations that appear within three miles of the two islands at X=1,899,110; Y=282,309 and X=1,896,099; Y=289,481 are found at:

X=1,903,907;	Y=277,230
X=1,902,588;	Y=281,023
X=1,899,076;	Y=281,102
X=1,896,171;	Y=276,994
X=1,896,066;	Y=282,821
X=1,894,281;	Y=282,401
X=1,887,477;	Y=288,182
X=1,887,398;	Y=285,222.

Lying shoreward of some of the low-tide elevations first described, these low-tide elevations will have no effect on the territorial sea in this area unless the Court decides that some of the former low-tide elevations should not be used. In that case Louisiana urges that the second listing of low-tide elevations should be used to project additional bulges in the territorial sea.

The contention of the United States[328] that the

[328]Motion, 69-70.

high-water elevation shown on the map at X=1,899,-110; Y=282,309 is not an island utterly disregards the express rule of Article 10 of the Convention. Size, amount of elevation above high water, and composition have nothing to do with whether an elevation is an island within the meaning of that article.[329] Further, the attempt of the United States to distinguish the elevation from an island is inconsistent with its statement that it should be considered a low-tide elevation.[330] An island is defined in Article 10 of the Geneva Convention as "*a naturally formed area of land*, surrounded by water, which is above water at high tide." (Emphasis supplied.) As previously discussed, Article 11 distinguishes an island from a low-water elevation by defining the latter as "*a naturally formed area of land*" surrounded by water and, while above water at low-tide, submerged at high-tide. (Emphasis supplied.) Thus, under the Articles of the Convention on the Territorial Sea and the Contiguous Zone, both an island and a low-tide elevation are defined as "a naturally formed area of land"—the distinction between an island and a low-tide elevation lies in their elevation or lack of elevation above mean high-water. An island is exposed at high tide, while a low-tide elevation lies below the surface of the water at mean high-tide. The distinction between the effect upon the territorial sea of islands and low-water elevations has previously been discussed. Louisiana submits that

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[329]*See e.g., McDougal & Burke, Public Order of the Oceans* 397 (1962).

[330]Motion, 70.

the only criterion upon which the distinction between a natural formation at sea as an island or as a low-tide elevation may be based is whether such natural formation is above or below mean high-tide.

The question of size was decided many years ago in the case of *The Anna*[331] wherein a British Court held that the capture by an English privateer some five miles from the Louisiana shoreline, but within two miles of minute mudlump islands, was not a capture upon the high seas, and that the minuteness and lack of utility of the islands did not preclude a claim by the United States that the waters within three miles of the islands were the territorial waters of the United States.[332] Subsequently, the United States attempted to back off somewhat from the position it took in the case of *The Anna*, and at the 1930 Hague Conference suggested that a use criterion be interjected into international law in considering whether high-tide elevations were islands. This proposal was rejected, and the Hague Conference continued to follow the distinction between islands and low-water elevations simply on the basis of whether or not they bared at mean high-water.[333]

Mr. Francois, the Special Rapporteur of the In-

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[331]5 Rob. 373 (1805).

[332]*See also* 4 *Whiteman, Digest of International Law* 278-79 (1965), wherein an 1875 opinion of the Law Officers of Great Britain followed the decision in *The Anna*, and stated that land not submerged at mean high-tide was an island, however small in extent.

[333]3 *Acts, Conference for Codification of International Law, Territorial Waters*, 217 (1930).

ternational Law Commission, was the redactor of Articles 10 and 11 of the Geneva Convention, and he followed the formula set forth at the Hague Conference. Despite an attempt by Mr. Lauterpacht to insert a use criterion with respect to islands, the International Law Commission reaffirmed its position, in its Report to the General Assembly, by stating that "an island is understood to be any area of land surrounded by water. . . ." [334]

Louisiana submits, therefore, in accordance with the overwhelming weight of authority,[335] that the questions of size and use are completely immaterial with respect to identification of an elevation as an island or a low-water elevation; the test is not one of big—small or use—non-use, but rather simply whether the formation is above or below mean high-water; if the former, it is an island; if the latter, it is a low-tide elevation.[336]

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[334] 1956 *Yearbook of the International Law Commission*, vol. 2, p. 270.

[335] *See e.g., McDougal & Burke, Public Order of the Oceans* 397 (1962); 1 *Shalowitz, Shore and Sea Boundaries* 226 (1962); Fitzmaurice, "Some Results of the Geneva Convention on the Law of the Sea: I," 8 *Int'l. & Comp. L.Q.* 73, 85 (1959); Pearcy, "Geographical Aspects of the Law of the Sea," 49 *Annals Am. Ass'n. Geog.* 1, 8 (1959).

[336] It is interesting to note that the United States does not attempt to place a size limitation upon low-water elevations. Consequently, a low-water elevation of a few feet would generate a three-mile territorial sea of its own if situated within three miles of the mainland or an island, whereas an island of the same size, according to the contention of the United States in its Motion and Memorandum of January, 1968, would generate no territorial sea of its own. To attempt to

Like size and use, neither is texture to be considered in a determination of whether an elevation is an island or a low-tide elevation. While Article 10 of the Convention does refer to an island as a naturally formed area of "land," it is clear, from the international law in force prior to the Convention and from the conferences and reports leading up to the Convention itself, that the term "land" was used to distinguish a natural formation from an artificial formation.

Involved in the case of *The Anna*[337] were mudlumps in the Mississippi River which may appear and disappear with the passage of time, or even quite suddenly.[338] The claim of the United States that the water surrounding the mudlumps was its territorial water was upheld on the basis that the mudlumps were created by natural alluvium and increment. As recently as 1930 in the Second Sub-Committee of the Hague Conference, the rule of *The Anna* was approved by the United States.[339] It is clear from these proceedings that while island is defined as an "area of

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convert a high-water elevation from an island to a low-water elevation simply because of its size and usability, is completely unsupported by any authority, national or international, whatsoever. For an interesting discussion of the Gardener Pinnacles of Hawaii, *see* Pearcy, "Hawaii's Territorial Waters," *Professional Geographer* 2, 5 (Jan., 1959).

[337]*See* Footnote 331, *supra.*

[338]*See* Appendices A and B for a fuller discussion of mudlump phenomena.

[339]3 *Acts, Conference for Codification of International Law, Territorial Waters,* 219 (1930).

land," this does not mean "earth," but may mean mud, rocks, stones, shells, or any other natural substance. Were this not the case, even the Shell Keys which are composed largely of loose shell, would not be islands, but the government clearly recognizes their character as islands in this litigation, as indeed, could not be denied since they have been the subject of military land reservations in the past. Moreover, the government clearly recognizes the innumerable low-water elevations of Diamond Reef, and other reefs south of Marsh Island, in the Shell Keys, and in the reef system at the mouth of Atchafalaya Bay and East Cote Blanche Bay as being juridical low-water elevations. These are made of shell growths or deposits and are accepted by the government as "naturally formed areas of land."

While there was some conflict at the International Law Commission leading up to the Geneva Convention concerning whether artificially made islands should be included within the Convention's definition of island, there was unanimous agreement that naturally created islands, irrespective of the substance of which they were composed, would be entitled to a territorial sea of their own and otherwise treated as islands.[340]

Louisiana submits that not only is it clear from the express language of Article 10 of the Convention itself that size, use, and texture have no place in the

[340] *Francois,* "Report on the Regime of the Territorial Sea," 1954 *Yearbook of the International Law Commission,* vol. 1, pp. 90-94.

determination of whether a formation is an island—the sole criterion being that such formation be above water at mean high-water—but also that the legislative history of the enactment of Article 10 (and Article 11) of the Convention sought only to include natural formations, and exclude artificial formations.

C. General Issues in Atchafalaya Bay Area:

In the foregoing discussion we have not considered the question of whether certain elevations behind the closing lines proposed are islands or low-tide elevations under the Convention. However, should this Court reject Louisiana's argument that low-tide elevations within three miles of a bay closing line, but not within three miles of actual land forms, project three-mile belts of territorial sea, then Louisiana contends that as a matter of fact, the following elevations are islands and, thus, generate a three-mile belt of their own:[341]

(a)	X=1,887,000;	Y=295,500;
(b)	X=1,896,700;	Y=289,900;
(c)	X=1,887,400;	Y=288,000;
(d)	X=1,900,600;	Y=289,900;
(e)	X=1,899,000;	Y=282,100;
(f)	X=1,900,000;	Y=281,700;
(g)	X=1,906,400;	Y=284,300;
(h)	X=1,905,150;	Y=282,650;

[341] *See* affidavit of Professor James P. Morgan of Louisiana State University and Mr. Curtis L. Buttorff of Geophoto Services, Inc., Appendix C. It will be observed that the island located as shown in (e) is discussed on page 69 of the Government's motion of January, 1968.

(i)	X=1,905,300;	Y=281,350;
(j)	X=1,906,400;	Y=281,100;
(k)	X=1,907,650;	Y=281,600;
(l)	X=1,916,750;	Y=275,600.

Additionally, there exist the following low-water elevations located within three miles of the above described islands, which will, of course, in turn project three-mile belts of territorial sea of their own under Article 11 of the Convention. These low-water elevations are located as follows:

X=1,930,705;	Y=268,549
1,924,399;	268,936
1,921,754	273,162
1,920,462;	273,536
1,917,490;	274,855
1,916,774;	275,137
1,916,059;	275,636
1,914,373;	270,380
1,907,640;	275,971
1,905,068;	276,942
1,903,907;	277,230
1,902,588;	281,023
1,900,127;	276,469
1,899,076;	281,102
1,896,827;	275,747
X=1,896,171;	Y=276,994
1,896,066;	282,821
1,894,281;	282,401
1,892,509;	278,202
1,887,398;	286,222
1,882,306;	270,590
1,881,683;	271,397
1,881,420;	279,350
1,880,206;	275,656

1,877,582;	283,274
1,876,853;	278,346
1,875,200;	285,729
1,874,281;	286,856
1,873,749;	288,451
1,872,418;	277,460
1,872,083;	278,083.

Of these low-water elevations, those that will have an affect on the outer extent of the territorial sea are found at the following locations:

X=1,930,705;	Y=268,549
1,924,399;	268,936
1,914,373;	270,380
1,907,640;	275,971
1,905,068;	276,942
1,900,127;	276,469
1,896,827;	275,747
1,892,509;	278,202
1,882,306;	270,590
1,881,683;	271,397
1,880,206;	275,656
1,872,418;	277,460
1,872,083;	278,083.

The low-tide elevations additional to the last described ones have been listed in case some from the latter list are rejected.

Should this Court accept the bay closing line for Atchafalaya Bay as proposed by the United States, and reject Louisiana's argument that low-water elevations within three miles of a bay closing line project a three-mile belt of territorial sea of their own irrespective of whether they are within three miles of actual physical land forms on an island or the

mainland, then factual disputes between Louisiana and the United States will arise as to the existence of certain low-water elevations and/or islands, and also legal disputes with respect to the government's contention that high-water elevations must be of sufficient size, usability, etc., in order to be considered as islands.

D. The Closing Line for Outer Vermilion Bay:

The area between the southernmost point of the Shell Keys complex on the east and Tigre Point on the west constitutes an indentation enclosing a water area, including the water area of tributary waters, greater than the area of a semi-circle drawn on a line between the two points. The line between headlands is less than 24 miles long and should be recognized as the closing line of the bay under the Convention.[342]

Contrary to the federal position it must be recognized that the group of islands, low-tide elevations, and reefs extending to the south from Marsh Island known as the "Shell Keys" are natural extensions of the land mass from which they project, and the only entrance to the area west of the Shell Keys is around the southern point of this extension of the land mass. The tip of the "Shell Keys," X=1,834,091; Y=270,031, constitutes the east headland and Tigre Point, X= 1,708,756; Y=318,661, constitutes the west headland.

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[342]*See* U.S.C. & G.S. Chart 1277 attached hereto as Exhibit 164 and U.S.C. & G.S. Chart 1116 attached hereto as Exhibit 65.

The closing line drawn across this indentation is less than 24 miles long and encloses waters, including waters tributary to the outer indentation, sufficient to meet the semi-circle test.

This area was considered a bay by Louisiana long before this litigation arose, and the United States at least tacitly agreed. In 1937 the Louisiana Attorney General informed the State Commissioner of Conservation that the area constituted Louisiana territory and that the Commissioner was entitled to require the purchase of leases from the state for oyster development of the area.[343] The claim was never challenged by the United States until it took special interest in the offshore oil deposits.

Vermilion Bay is clearly tributary to the outer indentation between Shell Keys and Tigre Point. The connecting passage known as Southwest Pass, at the west end of Marsh Island, is approximately 3 miles wide along the greatest portion of the pass, with half-mile or greater openings at its narrowest points. The water depths in the pass are great—as much as 149 feet—indicating great flows of water between the tributary inner bay and the outer bay, resulting in a deeply scoured natural channel.[344] Unquestionably then, the inner bay is tributary to the outer indentation, and the rule that bays within bays or tributary waterbodies within an outer indentation are to be used for purposes of measurement in determining

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[343]April 1, 1936—April 1, 1938 *Op. La. Atty. Gen.* 959.

[344]*See* U.S.C. & G.S. Chart No. 1277 (1967).

whether the outer indentation satisfies the semi-circle test of Article 7(3), becomes applicable. The result, then, is that irrespective of whether Vermilion Bay and the outer indentation form a single waterbody, the outer indentation satisfies the semi-circle test.[345]

Question might arise as to whether West Cote Blanche Bay should also have its water area included for purposes of determining whether Outer Vermilion Bay satisfies the semi-circle test. Resolution of that question is unnecessary, however, as Louisiana need rely only on the waters of Vermilion Bay westward of Terrapin Reef, for sufficient water area; when the waters of Vermilion Bay are added to the waters of the outer indentation between Tigre Point and the tip of Shell Keys, they fully satisfy the semi-circle test.[346] However, if it were necessary to debate whether there are circumstances which would identify West Cote Blanche Bay as tributary to the Vermilion Bay water system, or as tributary to the East Cote Blanche-

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[345]*See* discussion, p. 111, *supra,* concerning the rules that bays or tributary waterbodies within bays are to have their area included for purposes of measurement for the semi-circle test.

[346]The waters of West Cote Blanche Bay are also not needed and are not relied upon by Louisiana to satisfy the semi-circle test for any of the closing lines urged by Louisiana or the Justice Department in the Atchafalaya Bay-East Cote Blanche Bay indentation. This is true even as to the over-large bay closure from the tip of Shell Keys to the reef off Pt. au Fer. Semicircles drawn on U.S.C. & G.S. Chart No. 1276 clearly show there is ample water in East Cote Blanche Bay-Atchafalaya Bay to satisfy the semi-circle test for the single, combined bay, however the closing line is drawn.

Atchafalaya Bay system,[347] there would be ample evidence to associate more closely West Cote Blanche with East Cote Blanche-Atchafalaya Bay, than with Vermilion Bay.[348] The same evidence would show the

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[347]In its Memorandum of January, 1968, at p. 73, note 18, the Justice Department contended that whether certain contiguous waterbodies were actually separate bays or parts of a single bay might be debated, but the question need not be answered "as they all fully qualify as inland waters, whether considered severally or in the aggregate." While we disagree with the particular usage of the observation by the Justice Department in its Memorandum, we do agree that if contiguous waterbodies qualify severally, it is unnecessary to determine whether they qualify as inland waters in the aggregate; or vice versa. It is interesting to note that this federal observation, instead of supporting the federal position (that if waters are distinct entities they may not, for purposes of measurement, have their water area included with the water of an outer indentation), tends to refute the federal contention, for it implicitly recognizes that contiguous waterbodies may qualify severally or in the aggregate, as inland waters.

[348]Geological, hydrological, navigational, and other factors tend to associate more closely Vermilion Bay with the Outer Vermilion Bay, and negate any tributary relationship to the Cote Blanche waters. Nautical Chart 1276 shows an absence of deep channels connecting Vermilion Bay with West Cote Blanche waters, because of the presence of Terrapin Reef, which forms an effective barrier to efficient water passage or important navigation. Waters from distinct, separate drainage systems enter Vermilion and Cote Blance Bays. The geological history shows that Vermilion Bay was once totally separated from West Cote Blanche Bay by the natural levees of Bayou Cypremort, which extend southerly from the present Cypremort Point. This natural levee system submerged, becoming Terrapin Reef, which still serves as an effective hydraulic barrier. The waters of Vermilion Bay have comparable salinity with Outer Vermilion waters in front of Marsh Island and are inhabited by the same type fish—salt water fish. West Cote Blanche Bay is generally fresh or brackish, more like

hydraulic, geographic, geological, and ecological unity of Vermilion and Outer Vermilion waters in front of Marsh Island.

E. General:

We here mention simply by reference the fact that there are in the Point au Fer to Tigre Point area dredged channels leading out of Atchafalaya Bay and Fresh Water Bayou. Our legal argument with respect to the effect of these dredged channels is discussed on Pages 333-354 of this brief. We do, however, attach hereto as Exhibits 63, 64, and 65 U.S.C. & G.S. Chart No. 1276 whereon Louisiana's proposed bay closing line for Atchafalaya Bay is illustrated, U.S.C. & G.S. Chart No. 1277, whereon Louisiana's bay closing line for Outer Vermilion Bay is depicted and U.S.C. & G.S. Chart No. 1116 whereon the bay closing lines of both Atchafalaya Bay and Outer Vermilion Bay are illustrated in color. The Court will note that these exhibits show not only the bay closing lines for the Point au Fer-Marsh Island area, but also the "bulges" in the base line caused by low-water elevations, islands, and dredged channels.

VIII. DREDGED SHIP CHANNELS

There are nine ship channels along the coast of Louisiana serving inland ports which extend into the Gulf of Mexico. These channels have been dredged

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East Cote Blanche and Atchafalaya Bays, all of which receive tremendous volumes of fresh water, whereas the Vermilion waters are constantly interchanged with the salty Gulf waters. See Appendix B.

and maintained, in the main, by the United States Army Corps of Engineers under various River and Harbor Acts passed by Congress. The only channel not dredged and maintained by the Corps of Engineers is the Bayou Lafourche Waterway project which was partially constructed[349] by the Greater Lafourche Port Commission under a license granted by the Corps of Engineers. As we will demonstrate, under the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Pt. 2) 1606, these channels are the outermost permanent harbor works of the ports they serve and form part of the coast line of Louisiana. For this reason they must be used to determine the extent of the grant by Congress to the State of Louisiana in the Submerged Lands Act to conform with this Court's decisions in *United States v. California*, 381 U.S. 139 and in *United States v. Louisiana* 389 U.S. 155 (dealing with Texas).[350]

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[349]For a full explanation see pp. 348-49 herein.

[350]In the recent decision establishing the baseline for measuring the grant to Texas under the Submerged Lands Act, this Court said, 389 U.S. p. 158.

> The decision in the second *California* case, *supra*, held that Congress had left it up to this Court to define "coast line" from which the standard three-mile grant was to be measured. The Court then borrowed the international definition of coastline in the Convention on the Territorial Sea and the Contiguous Zone, [1964] 15 U.S.T. (Pt. 2) 1607, T.I.A.S. No. 5639, used by the United States in its foreign relations with other countries, reasoning that "(t)his establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations. . . . Furthermore the comprehensiveness of the Convention provides answers to many of the lesser problems related to coastlines which,

In its Memorandum in support of Supplemental Decree No. 2, (U.S. Memorandum, p. 67), the United States conceded that the word "coastline" includes the outermost permanent harbor works which form an integral part of the harbor system within the meaning of Article 8 of the Geneva Convention and the decision in the *California* case. The government then conceded that the dredged ship channels at Southwest Pass, the Empire Canal, Belle Pass, Calcasieu Pass, and Sabine Pass, to the seaward end of the jetties, were the outermost permanent harbor works that formed an integral part of the harbor systems that they served.[351] This leaves dispute only as to the dredged ship channels on which there are no jetties and those portions of the dredged ship channels which extend beyond the seaward ends of the jetties where they have been constructed.

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absent the Convention, would be most troublesome." *United States v. California*, 381 U. S. 139, 165 (1965).

Article 8 of this Convention makes the following provision for artificially constructed extensions into the sea: "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast." [1964] 15 U.S.T. (Pt. 2) 1607, 1609. Thus, it is clear that in the case of the three-mile unconditional grant artificial jetties are a part of the coastline for measurement purposes, and if Texas were claiming under the standard three-mile grant, its argument regarding the jetties would be far more persuasive. *United States v. Louisiana* 389 U. S. 155 at 158. (In this case Texas was only concerned with the jetties. No issue concerning the dredged channels was raised).

[351]Pages 67 and 68 of the original "Motion" filed by United States in support of its entry of Supplemental Decree No. 2.

A. History of the Submerged Lands Act Re Dredged Channels:

The Congressional history of the Submerged Lands Act clearly shows that both the Senate and the House of Representatives considered the dredged ship channels to be part of the inland waters of the United States. In its consideration of the Submerged lands Act, Congress initially defined "coast line" for purposes of the Act. This definition, however, was deleted during executive sessions of the Senate Committee because of fear that any such attempt by Congress might result in confusion or in a limitation rather than an extension of the grant to the states. The possible danger that a detailed list of things which would be included within inland waters, or which would be a part of the coast line, might contract rather than extend the states' territory was pointed out by Senator Cordon:

> I would like to see general language used for general purposes, realizing always the hazards of including a few specific references and thereby excluding others, even when we seek to indicate that there are others.[352]

An explanation of the definition referred to by Senator Cordon is found in the *House Report, H.R. Rep.* No. 215, 83d Cong., 1st Sess. p. 4 (1953):

> Section 2(b) defines "coastline" which is the baseline from which the State boundaries are projected seaward. It means not only the line of

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[352] *Executive hearing before the Interior and Insular Affairs Committee of the Senate on S.J. Res.* 13, p. 1380.

ordinary low water along the coast which directly contacts the open sea but it also means the line marking the seaward limit of inland waters.

Inland waters include all ports, estuaries, harbors, bays, *channels*, straits, historic bays, sounds, and also all other bodies which join the open sea." (Emphasis supplied.)

The Senate Committee on Interior and Insular Affairs which reported on the Submerged Lands Act, deleted the above definition with the following explanation, *S.Rep.* No. 133, 83d Cong., 1st Sess. p. 18 (1953):

The words "which include all estuaries, ports, harbors, bays, *channels*, straits, historic bays, and sounds and all other bodies of water which join the open sea" have been deleted from the reported bill because of the committee's belief that the question of what constitutes inland waters should be left where Congress finds it. The committee is convinced that the definition neither adds nor takes away anything a State may have now in the way of a coast and the lands underneath waters behind it.

In this connection, however, the committee states categorically that the deletion of the quoted language in no way constitutes an indication that the so-called "Boggs Formula," the rule limiting bays to areas whose headlands are not more than 10 miles apart, or the artificial "arcs of circles" method is or should be the policy of the United States in delimiting inland waters or defining coast lines. The elimination of the language, in the committee's opinion, is consistent

with the philosophy of the Holland Bill to place the States in the position in which both they and the Federal Government thought they were for more than a century and a half, and not to create any situations with respect thereto. (Emphasis supplied.)

Additionally, during the hearings in Congress on the Submerged Lands Act, Mr. Jack B. Tate, the Deputy Legal Advisor of the Department of State, who appeared representing that Department, outlined the United States' position as regards this country's relations with foreign nations as follows:

> The position of the United States with respect to the control which a coastal State may exercise involves three areas: Inland Waters, territorial waters, and high seas.
>
> The relevance of considerations concerning inland waters is this: The belt of territorial waters is measured from the coast. On the land portion of the coast, the line from which territorial waters are measured is the low-water mark of the tide. Since bodies of water such as bays, gulfs, rivers, etc., also open on the coast, it is necessary in such cases to use a fictional line from which to measure the territorial waters. The position of the United States is that the waters of bays and estuaries less than 10 miles wide—or which are, at the first point above such opening, less than 10 miles wide—are inland waters of the United States, and the territorial limit is measured from a straight line drawn across these openings. *A strait or channel, or sound which leads to an inland body of water is dealt with on the same ba-*

> *sis as bays.* But the waters of a strait which connect two seas having the character of high seas are not inland waters.[353] (Emphasis supplied.)

It must be assumed that Congress was familiar with the jurisprudence that established dredged channels leading to ports as part of the inland waters of the United States. This Court in *The Delaware*, 161 U.S. 459, involving a collision which occurred in a dredged channel leading to New York Harbor, said at 463:

> We are of opinion, however, that the dredged entrance to a harbor is as much a part of the inland waters of the United States within the meaning of this act as the harbor within the entrance, and that the real point aimed at by congress was to allow the original code to remain in force so far as it applied to pilotage waters, or waters within which it is necessary for safe navigation to have a local pilot.

Prior to the adoption of the Submerged Lands Act both the Executive and Judiciary branches of the federal government had long considered dredged channels to be part of the inland waters of the United States. It is apparent that Congress concurred with the Executive and Judicial branches in the opinion that the dredged ship channels had always been considered part of the inland waters of the United States, and that they were to remain so.

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[353]Hearings before the Committee on Interior and Insular Affairs, United States Senate on *S.J.Res.* 13, 83d Cong., 1st Sess. p. 1052 (1953).

B. The Channels are Federal not State Extensions of the Coast Line

These channels are extensions of the coast line constructed under authority of the federal, not the state, government. Thus, this Court is not presented with action by the State of Louisiana unilaterally attempting to extend its coast line by the construction of harbor works out into the Gulf of Mexico. Plenary power to regulate commerce, both interstate and foreign, is vested in the federal government under the Constitution. In addition, section 10 of the Rivers and Harbors Appropriation Act of 1899, as amended, 33 U.S.C. 403, gives the United States authority over the erection of harbor installations or other works which will obstruct navigable waters. This Court here is asked to consider only those structures which have been constructed or erected by the United States or licensees of the United States.

C. Article 8 of the Convention on the Territorial Sea and the Contiguous Zone is Mandatory

It is important to note that Article 8 of the Convention on the Territorial Sea and the Contiguous Zone provides:

> For the purpose of delimiting the territorial sea, the outermost permanent harbor works which form an integral part of the harbor system *shall be regarded as forming part of the coast.* (Emphasis supplied.)

When this article was under consideration an amendment was offered by Mr. Stabell of Norway to change

the mandatory term "shall" to the permissive "may." Mr. Stabell said that this would be more appropriate as the state could not reasonably be required to advance the baseline or outer limit of the territorial sea against its will. Mr. Shukairi, of Saudi Arabia, opposed this amendment on the basis that it would leave the text open to various interpretations and detract from its clarity. Mr. Stabell replied to the Saudi Arabian representative that in the Norwegian delegation's view the permissive form would be desirable, and that there was certainly no justification for requiring coastal nations to avail themselves of a provision which was an exception in its favor.[354] Mr. Verzijul, of the Netherlands, stated that it would be helpful to know what result the commission wished to achieve. The official report states that Mr. Francois, who was the expert to the Secretariat of the Conference, said:

> That the Commission had deliberately drawn the provision in mandatory terms in order to eliminate every shadow of doubt. *States had long regarded harbour works such as jetties as part of their land territory and that practice should be universally recognized as unchallengeable.* The Norwegian amendment would thus tend to introduce an element of uncertainty which the Commission had wished to avoid.[355] (Emphasis supplied.)

The Norwegian amendment was rejected by 54 votes to 6 with 10 abstentions.[356] Thereafter, the text of

[354] *Official Records of the United Nations Conference on the Law of the Sea* A/Conf. 13/39, p. 142.

[355] *Ibid.*

[356] *Ibid.*

Article 8 of the ILC draft was adopted by 70 votes to none, with but one abstention. This Article is self-operative and was treated as such by this Court in the *California* case and in the present case dealing with the claim of the State of Texas, 389 U.S. 155.

D. The Channels are Necessary to the Louisiana Port System

The dredged ship channels specified in the description of Louisiana's alternative boundary are absolutely necessary to the service of the ports. In each instance regular dredging is necessary to provide adequate channels to accommodate deep draft vessels which otherwise could not enter Louisiana ports due to the shallow waters surrounding the shore. If the Corps of Engineers did not regularly maintain these channels, ports could not function adequately.[357] It is the costly maintenance by the federal government which keeps these channels open to navigation.

To allow the channels to be declared "high seas" would deprive the United States of jurisdiction over them, possibly to the extreme detriment of the Louisiana port system. Such danger to channels is internationally recognized. Many nations extend their inland waters as far out as channels are necessary in order to prevent interference with channels essential to maritime trade. For example, Denmark has established "Special Rules for Navigation" which are to

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[357]As we will show in a discussion of each channel, the United States has expended in excess of 295 million dollars in dredging and maintaining these channels.

apply in "rivers, lakes, canals, harbours, entrances to harbours, roads, bays and inlets and such part of Danish territorial waters as lie within and between islands, islets and reefs (ridges and rocks), which are not constantly submerged, *and also to dredged channels and excavated waterways maintained at the instance of Danish authorities.*" (Emphasis supplied.) The Danish Navigation rules closely regulate use of the channels by ships of all nations.[358]

The position taken by the U. S. Attorney General in regard to dredged channels would commit this nation to opposing the entirely justifiable assertion of jurisdiction by a friendly nation and thus would promote international disharmony. *See also:* Responses to Department of State Airgram, "Subject: Procurement

[358]SPECIAL RULES FOR DREDGED CHANNELS

Section 12

The following special rules shall further apply to dredged channels and excavated waterways maintained by artificial means:—

(a) Power driven vessels shall with due regard to safe navigation regulate their speed so as not to cause damage to the channel and its sides.

When special conditions apply there may be fixed maximum speed by local rules for the channel concerned.

(b) Stones and sand shall not be removed from channels or cargo, ballast, ashes or the like dropped therein, and nor shall any discharge or escape of oil or oily residue take place.

(c) Fishing gear shall not be used in the channel or its immediate vicinity in such a manner as to obstruct navigation or so as to break up the bottom and thereby shift sand and stones.

FINAL PROVISIONS

Section 13.

The provisions of this Order shall also apply to vessels which are not registered in this Kingdom.

of Documents Relating to Special Rules of the Road (Prevention of Collisions at Sea)," by India, Italy, and U.S.S.R.

E. Government Expenditures Evidence the Fact that Channels are Inland Waters

The expenditures of large sums of money in maintaining these navigation works is strong evidence of the fact that these waters are inland waters of the country making the expenditures. In this connection see the case of the *Grisbadarna, The Hague Court Reports* (1916), p. 121, involving an area off the shores of Norway and Sweden. In that case the Hague Court held the Grisbadarna area to belong to Sweden, in part because of the expenses incurred by Sweden in maintaining the Grisbadarna area for navigation. The Hague Court said, at 131:

> The stationing of a light-boat, which is necessary to the safety of navigation in the regions of Grisbadarna, was done by Sweden without meeting any protest and even at the initiative of Norway, and likewise a large number of beacons were established there without giving rise to any protest; and
>
> This light-boat and these beacons are always maintained by Sweden at her own expense; and
>
> Norway has never taken any measures which are in any way equivalent except by placing a bell-buoy there at a time subsequent to the placing of the beacons and for a short period of time, it being impossible to even compare the expenses of setting out and keeping up this buoy

with those connected with the beacons and lightboats; . . . . [*The Hague Court Reports* (1916), p. 131].

F. As a Practical Matter the Channels are the Outermost Permanent Harbor Works

From a practical standpoint the dredged channels leading to the harbors on the Louisiana coast must be considered the outermost permanent harbor works within the meaning of Article 8 of the Convention. Professor *Melvin Fair*, in his book, *Port Administration in the United States* (1954), page 4, lists as one of the three elements of a port "(1) A harbor which provides sufficient channel and adequate shelter, ..." Throughout the book the idea of practical necessity and continuity of the harbor and channel systems is repeated, making it impossible to conclude that the dredged channels are not the outer-most harbor works within the meaning of the Convention on the Territorial Sea and the Contiguous Zone.

We will comment briefly on each channel so that the Court may appreciate the extent of these works and their cost to the United States.

1. *Mississippi River-Gulf Outlet:*

This is the most easterly dredged ship channel into the Gulf of Mexico along the Louisiana coast. Work was begun in 1957 and was essentially completed in 1966. This channel serves the Port of New Orleans. The cost of the work on the project to the end of fiscal 1966 amounted to $57,372,908. The cost of maintenance in 1966 amounted to $2,996,984. Prior

to 1966 the maintenance work was included in the cost of the channel.

The channel extends, essentially, from New Orleans Harbor through Isle au Breton Sound, passing between Grand Gosier and Breton Islands through Isle au Breton Bay to the 40-foot contour for a total distance of approximately 76 miles. The depth of this project is 36 to 38 feet from the New Orleans terminus to Grand Gosier Island and 38 feet from there to its Gulfward end. The depth of the water beyond Breton Sound along the course of the channel ranges from 14 feet at Breton Island to the 40-foot contour. The depth of the water in Breton Sound ranges from approximately 5 feet near the shore to about 20 feet at its deepest point. If this channel had not been dredged into the waters beyond Breton Island, only those vessels with a draft of less than 14 feet would have been able to use this important waterway to the City of New Orleans.

For detailed data and drawings concerning the nature and use of this channel we refer the Court to Exhibits 72-77.

2. *The Passes of the Mississippi River:*

These passes serve the Ports of New Orleans and Baton Rouge and various other ports along the Mississippi River. Most of the figures for the Passes of the Mississippi River as found in the Corps of Engineers' Reports include both South and Southwest Passes. The cost of new work done on the Passes of the Mississippi River amounts to a total of $34,916,997.

The total maintenance cost of these Passes amounted to $66,404,917 through 1966. The cost of maintenance in 1966 was $6,773,865.

From the Waterborne Commerce Records compiled by the United States Corps of Engineers the tonnage passing through the channels at the mouths of these Passes amounted to 112,011,827 tons in 1965. Ships with a draft up to 40 feet passed through these channels and it is necessary, therefore, that the channels be dredged and maintained. If the channels were not maintained beyond the jetties only ships of less than approximately 15 feet draft would be able to use the Mississippi River.

For detailed data and drawings concerning the nature and use of these channels we refer the Court to Exhibits 78-83.

3. *Empire Waterway:*

This project extends from Empire, Louisiana, to the Gulf of Mexico, connecting Empire with the Gulf. The depth of the project is 10 feet. The Empire Waterway was constructed at a cost of $1,068,142, and the maintenance cost on this channel to date amounts to $114,913.

As the water close to the shore in Ascension Bay is extremely shallow, it appears that without the channel's extension into the Bay the use of this waterway would be limited to vessels with drafts of 3 feet or less.

For detailed data and drawings concerning the

nature and use of this channel we refer the Court to Exhibits 84-88.

4. *Barataria Bay Waterway:*

Barataria Bay Waterway was first constructed under a Congressional Act in 1919. The latest project was begun in 1958. The total cost of the new work to the end of the fiscal year, 1966, amounted to $1,572,-685; maintenance costs to the same date amounted to $555,998. The length of the entire project is 37 miles. It extends through the pass between Grand Isle and Grand Terre Island to the 12-foot contour. It connects the Intercoastal Waterway and Lafitte, Louisiana, to the Gulf. It also has a side channel to Grand Isle. The depth of the water at the entrance to Barataria Bay between Grand Terre and Grand Isle is generally 4 to 6 feet. Thus, if the channel had not been dredged and were not maintained, ships of a draft of only 4 to 6 feet would be able to navigate there.

5. *Bayou Lafourche-Belle Pass:*

A new project constructed by the Greater Lafourche Port Commission, at a cost of $1,063,196, now connects the Gulf of Mexico with the interior waterway of the old Bayou Lafourche-Belle Pass channel. This project was licensed by the Corps of Engineers and, subsequent to the completion of the project, a dam was built blocking the old channel at the landward end of the jetties.

This new project enters the Gulf slightly west of the channel previously constructed by the Corps of

Engineers and uses the old west jetty, built by the Corps of Engineers, to protect the channel from the prevailing westerly current in the Gulf. The project begins at the existing channel at a point 1.2 miles from the Gulf of Mexico and extends seaward to the 20-foot contour. The channel must be maintained at its project dimensions, by the Port Commission, or the Corps regulations require that it be abandoned and the federal project be re-opened.

The prior Corps of Engineers channel connected Donaldsonville, Napoleonville, Thibodaux, the Intercoastal Waterway, Leeville, LaRose, and Lockport and other intermediate ports with the Gulf. This project was first authorized by an Act of Congress in 1878. The last work done by the Corps of Engineers was begun in 1963. As of 1966 the Corps of Engineers estimated the cost of the entire project to be $7,092,000. To the end of fiscal year, 1966, new work on the project amounted to $1,166,486. Maintenance cost of the project to that same date was $94,742. The entire project length amounted to a total of 139.6 miles starting at the Intercoastal Waterway.

Water depths at the shore range from 4 to 6 feet. If this channel were not dredged and maintained only boats of less than 6 feet draft could enter.

For detailed data and drawings concerning the nature and use of this channel, we refer the Court to Exhibits 88-93.

6. *Houma Navigation Canal:*

This channel extends from Houma to the Gulf of

Mexico, a total distance of 36.25 miles. The last 9.5 miles of the channel extend across Terrebonne Bay. The channel was originally constructed by the Louisiana Department of Public Works under a permit granted by the Corps of Engineers.

Since completion this channel was taken over by the United States Corps of Engineers and is presently being maintained by the United States.

The River and Harbor Act authorizing this project called for a channel 150 feet wide by 15 feet deep to be completed by local interest.

Maintenance work to be done by the Corps of Engineers was estimated at $150,000 per year and was begun in November, 1964, when the channel was completed.

7. *Atchafalaya River Channel:*

This project was first surveyed in 1899. Work was begun in 1911. The work was completed in 1914 at a cost, for new work, of $501,963. This waterway extends from Morgan City to the Gulf of Mexico. The length of the project beyond the shoreline beginning in Atchafalaya Bay is approximately 15.75 miles. Originally the project was to have had a depth of 20 feet but the present maintained depth is 16 feet. The depth of the water through which the majority of the channel runs is approximately 5 feet. If this channel had not been dredged and maintained no vessel with a

draft greater than 5 feet would have been able to use the port.

For detailed data and drawings concerning the nature and use of this channel we refer the Court to Exhibit 97-100.

8. *Freshwater Bayou:*

This project was begun in 1961. It was opened for use on July 27, 1968. This project extends from a point in the Gulf to the Intercoastal Waterway. The cost of the work to the end of fiscal 1966 is $2,789,753. To date there has been no maintenance work on the project. The project length is 22.6 miles and the channel is to extend to the 12-foot contour in the Gulf. The estimated cost of this project is $9,573,000. The Corps of Engineers' report indicates that if it proves to be more feasible to maintain jetties to the 12-foot contour they will be built rather than continuing to dredge and maintain the channel.

For detailed data and drawings concerning the nature and use of this channel we refer the Court to Exhibit 101-103.

9. *Calcasieu Ship Channel and Passes:*

This is a direct ship channel from Lake Charles into the Gulf. The present project which was begun in 1966 is to extend from Lake Charles to the 42-foot contour in the Gulf for a distance of approximately 35.9 miles. The cost of new work on this project to date amounts to $24,962,363. The total cost of main-

tenance on this project to date amounts to $7,549,656. Prior to this channel Lake Charles' sole deep-water access to the Gulf was via Calcasieu Deep Water Sailing Channel to the Sabine-Neches Waterway.

The deepest draft vessel which used the Calcasieu ship channel from 1960 to 1964 was 36 feet. In 1965 two 37-foot draft vessels used the channel.

The number of ships able to enter and leave Lake Charles would be negligible without the jetties and dredged channel into the Gulf. Water along the shore at the mouth of the Calcasieu River ranges from 3 to 6 feet.

For detailed data and drawings concerning the nature and use of this channel we refer the Court to Exhibit 104-111.

10. *Sabine-Neches Waterway:*

The first major work on this waterway was begun in 1899. The most recent project concerning this waterway was authorized by the United States Congress in 1962, to be completed in 1970. The cost of the new work on this waterway to date amounts to $32,123,347. The total maintenance cost to date has amounted to $34,907,216.

This waterway connects Orange, Beaumont, and Port Arthur and intermediate ports with the Gulf. It is possible to travel from Lake Charles to the Gulf through this via the Intercoastal Waterway or the Lake Charles Deep Water Channel, which now forms

part of the Intercoastal System. The Lake Charles Deep Water Channel has not been used for deep draft vessels since 1959, when Lake Charles acquired a deep-water channel directly to the Gulf. Vessels with a draft up to 39 feet use the Sabine-Neches channel.

As with the Calcasieu Pass, the water along the shore of the Sabine Pass is of negligible depth. Where this waterway passes between Louisiana and Texas Points the water is approximately 2 feet deep. This fact establishes the conclusion that without dredging and maintaining the channel to the 42-foot contour line there would be practically no tonnage transported on this waterway to the important ports of Port Arthur, Beaumont, and Orange.

For detailed data and drawings concerning the nature and use of this channel we refer the Court to Exhibit 112-118.

From the brief resumé of each of the dredged channels, it will be observed that the United States has spent to date approximately $295,484,564 in the construction and maintenance of these channels. In addition, the United States each year will continue to spend large sums of money in maintaining the channels. Without such dredged and maintained channels, the large ocean-going vessels presently serving the ports along the Louisiana coast would be unable to reach these port facilities. What greater proof could be made to show the vital connection between these channels and the ports they serve. It becomes obvious that these channels are the outermost permanent har-

bor works which form an integral part of the port systems they serve. Under Article 8 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, they, therefore, form part of the coast line.

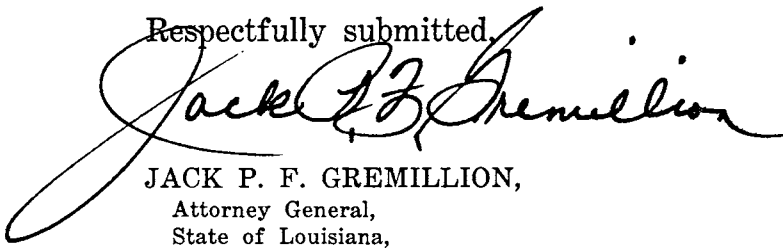
CONCLUSION

It is respectively submitted that the Court should recognize that the Inland Water Line designated and defined by the United States under applicable Acts of Congress, placed on large-scale charts duly published by the government, and accepted and approved by Louisiana under Act 33 of 1954, is the coast line of Louisiana; that Louisiana is the owner of all submerged lands rights to a line three miles seaward of this coast line, in accordance with the Submerged Lands Act; and that this line three miles distant from the coast line is the boundary between the submerged lands granted to the State of Louisiana by the Submerged Lands Act and the submerged lands of the outer continental shelf retained by the United States.

It is further respectfully submitted that, in the event the Inland Water Line is not recognized as the coast line of Louisiana, the coast line proposed by the United States should also be rejected, and the Court should adopt instead the alternative coast line suggested by Louisiana, in that that line results from a proper application of the relevant rules of the Geneva Convention on the Territorial Sea and the Contigious

Zone and other relevant and applicable principles of international law.

Respectfully submitted,



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