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.

Reply Brief of the State of Louisiana to the Brief of the United States on Cross-Motions for the Entry of Supplemental Decree No. 2 as to the State of Louisiana

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REPLY TO STATEMENT OF QUESTIONS PRESENTED

Louisiana takes issue with the federal formulation of the questions and issues presented. The principal questions and issues are better stated as follows:

1. Whether the "coast line" of Louisiana includes the outer limit of inland waters as designated and defined by federal agencies under laws passed by Congress, and accepted and approved by the State of Louisiana (the Inland Water Line); or a highly unstable, ephemeral line determined by exceptionally dynamic and complex shore line configurations, and by interna-

tional law, including the Convention o the Territorial Sea and Contiguous Zone.[1]

The principal issues embraced within the foregoing question are:

(a) Whether Congress intended to create highly unstable and uncertain title conditions in offshore Louisiana which would so seriously affect the value and development of large areas that additional joint federal-state legislation would be required to avoid continuous and harmful litigation.[2]

(b) Whether this Court, in interpreting the Submerged Lands Act and adopting general definitions of inland waters for a particular case, intended that the general definitions would be applied even under factual circumstances where they would not be the

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[1]The federal statement of question 1, U. S. Brief 2, ignores the fact that the Inland Water Line resulted from the authority of an Act of Congress, signed by the President, under a provision which was concerned with the extent of the nation's inland waters so that the extent of U. S. assertions of inland waters' regulatory jurisdiction over foreign vessels would become established and known to the world. It also erroneously implies that the Inland Water Line resulted from some arbitarary line drawn by the Coast Guard only for shipping purposes, and having nothing to do with inland waters.

[2]The mere fact that Louisiana points to the utter unworkability of ambulatory complexities of a shore-determined boundary under Louisiana conditions does not mean that the issue is *simply* whether the Convention ought to be rejected because it results in an ambulatory boundary. To couch the issue in this manner benefits the United States, because, of course, all shore line determined boundaries have *some* limited propensity for change. The issue is whether the *combination*

best and most workable definitions available and where they would not serve the requirements of definiteness and stability which should attend any congressional grant of property rights.

(c) Whether the Submerged Lands Act division of the bed of the continental shelf between the United States and its member States is domestic legislation, and as such, should be construed in pari materia with previously existing law on the scope of coastal "inland waters", and especially in pari materia with the scope and definition of inland waters pursuant to the Act of February 19, 1895 and the previous Supreme Court decision on the subject.

(d) Whether the Inland Water Line, or any line designated and defined pursuant to the Act of February 19, 1895, should be recognized as the coast line for purely domestic law reasons; or whether it should, in any event, be recognized as delimiting inland waters, either because of its international context, its jurisdictional significance, or for any other reason related to international law or policy.[3]

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of other coastal complexities with EXCEPTIONALLY dynamic propensities for change presents reason for recognition of the Inland Water Line as the coast line under the Submerged Lands Act, or even, possibly, under the Convention.

[3]It is at least a gross oversimplification to say that the issue is whether the rules of the Convention are to be rejected because they result in an ambulatory boundary. See U. S. Brief 2. It would not necessarily be a *rejection* of the rules of the Convention to recognize that the Convention is not the *sole* or *exclusive* source of rules and principles for coastline determination. The question is not so much whether the Convention is to be rejected; more fundamentally, it is a question of

2. Where is the exact boundary line between the submerged lands which are part of the territory[4] of Louisiana and belong to Louisiana, and the submerged lands which are part of the Outer Continental Shelf and belong to the United States.

If question 1 is decided favorably to the contentions of the State of Louisiana, no other principal issues will arise in resolving question 2 other than those noted under question 1. Otherwise, the following principal issues will also exist.

(a) Whether the Convention on the Territorial Sea and Contiguous Zone is the exclusive source of

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whether the rules of the Convention are to be exclusively, strictly and mechanistically applied with total disregard of the principles of practicality, certainty and stability which caused this Court to adopt those rules for determining California's coast line. It is true that Louisiana contends that the Inland Water Line should be recognized as its coast line, as a matter of domestic law, independently of and without reliance on the Convention or any other rules of international law; but Louisiana has also demonstrated that the Inland Water Line is sustainable for reasons consistent with international law and the Convention—e.g., it is a long-established jurisdictional assertion of the limit of inland waters, acquiesced in by other nations, irrespective of the immediate needs which caused the line to be drawn.

[4]The second question as stated in the U. S. Brief at 2 is incompletely stated, for the boundary line to be drawn will not only be an ownership boundary, but also a jurisdictional territorial boundary for various regulatory and legal purposes, which cannot be ignored in considering property problems. Nonetheless, the most immediate question is the boundary for ownership rights to development and exploitation of the resources of the bed, a fact the unworkable federal approach inadequately treats.

authority for rules and principles which determine the extent of inland waters, or the location of the coast line or whether resort may be had to general international law and principles, the intent of the Submerged Lands Act, or other applicable sources of law, for questions not expressly resolved by the Convention.

(b) Similarly, whether the Convention was intended to be a general code of principles and rules, which did not attempt to deal with all special or unique problems under its express provision.[5]

(c) Whether, for the domestic purpose oft he Submerged Lands Act, the Convention or other applicable rules are to be strictly construed without any regard for the purposes and problems of the Submerged Lands Act; or whether they should be construed in a manner to minimize unique problems under the Submerged Lands Act, such as giving consideration in the selection of headlands to the desirability of minimizing the ambulatory boundary problem.[6]

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[5]As in the case of the effect of groups of islands near the mainland, the issue as to some of the Louisiana alternative contentions is whether it is appropriate to look to authority beyond the Convention, for resolution of problems not decided by the Convention; or, more broadly, whether the Convention is the exclusive source of authority.

[6]This issue also relates to Louisiana's primary contentions on the Inland Water Line. The federal statement of issue (a) on page 2 of the U. S. Brief, neglects whether it is reasonable and appropriate to so interpret the Convention to take into account ambulatory considerations connected with the need for workable, stable boundaries, as Louisiana does in her alternative contentions. Although the United States has used this principle, (e.g., see U. S. Memorandum of January,

(d) Whether the 54 maps which were prepared by the United States Coast and Geodetic Survey are the *only* evidence which may be considered as to the location of low and high water lines, or whether omissions or errors in the maps may be proved by Louisiana by federal photographic survey material made for but not used in the preparation of the maps, and whether relevant map information not included on the set of 54 maps may be considered.[7]

(e) Whether the United States may reject information shown on the 54 maps not related to any survey error or omission and use unproven contrary information.

(f) Whether the dredged channels, maintained or constructed pursuant to Acts of Congress concerned

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1968, at 77) it denies the principle when Louisiana seeks to employ it.

[7]The federal statement of issue (b), U. S. Brief 2, is oversimplified in erroneously suggesting that the issue is whether the maps prepared under "joint Federal-State supervision . . . should be rejected". First, we correct the implication that there was State "supervision" of the survey. The set of 54 maps were made by a federal agency, although partially financed by the State to have access to information which might be useful to both sides. Secondly, we note that Louisiana does not seek any simple "rejection" of the maps. We have merely pointed out that there are facts *de hors* the maps or not reflected on the maps, by error or otherwise, and it is appropriate to consider the other information where the maps are silent or in error. However, it is true that the United States seeks to reject the maps and use unproven later hearsay information not established by survey and contrary to all current large-scale charts, as at Pass Tante Phine, which approach Louisiana disputes.

with improvements to the harbour system of the United States, are "permanent harbour works which form an integral part of the harbour system" within Article 8 of the Convention, and whether such dredged channels constitute inland waters.[8]

(g) Whether a waterbody which satisfies the semicircle test under Article 7 of the Convention is a bay within the meaning of that article.[9]

(h) What are the circumstances or criteria which permit islands or low-tide elevations to be used as the

[8]The statement of issue (c), U. S. Brief 3, erroneously implies that the dredged channels are marked only by buoys, when in truth and fact many are marked either by lines of large structures permanently attached to the bed and permanently above water, or by lines of pilings; and by submerged banks which rise above the bed of the channels and are shown on charts. Moreover, the issue as to the dredged channels is not only whether they are permanent harbor works, but whether they are inland waters under the Submerged Lands Act.

[9]The government, in its issue (d), U. S. Brief 3, is apparently and erroneouly implying, as later amplified in its argument, that if the semicircle test is satisfied, a certain waterbody is not a bay. Louisiana contends that if the semicircle test is satisfied, there is no issue as to whether the waterbody is a well-marked indentation containing landlocked waters, because a bay satisfying the semicircle test ipso facto meets any such criteria. However, the issue as viewed by the United States may exist in connection with the question of whether East Bay satisfied the general requirement of a well-marked indentation containing landlocked waters, and whether the attempted new specification of that general principle resulting from the semicircle test of the Convention would constitute an invalid attempt to divest or limit state territory without its consent, in the name of foreign relations, and contrary to the stability of title purpose of the Submerged Lands Act.

headland of a bay, and what are the islands which satisfy the relevant test.[10]

(i) Whether the presence of islands near or at the mouth of the bay might be employed to contract the area of a bay.

(j) Whether islands which lie entirely, or nearly entirely, landward of the closing line of a bay formed by its headlands or outermost natural entrance points, should be employed to pull the closing line into the most shoreward possible closing lines between the islands.[11]

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[10]As to issue (e), U. S. Brief 3, we are confused by the federal statement of the issue, because it seems so at variance with what the federal position seems to be at other places in the U. S. brief. We refer to the federal statement of the issue "whether an island or low-tide elevation *completely surrounded by water* may be used as the headland of a bay. . . ." (Emphasis added.) Of course, this correctly implies that an island or low-tide elevation is something that is completely surrounded by water. Presumably, the United States is attempting to convey the impression that Louisiana seeks to employ such headlands, but the United States does not. Actually, the United States also uses islands completely surrounded by water as headlands, or natural entrance points, (Marsh Island, Point au Fer Island, an island shoreward of the Isles Derniere and Whiskey Island, Breton Island, an island in Garden Island Bay, at the mouth of Southeast Pass, an island at the mouth of Main Pass and an island at the mouth of Pass du Bois at West Bay) as will be more fully discussed infra. So the issue is really what are the criteria to permit such use and whether various islands satisfy the criteria.

[11]We believe our (i) and (j) better reflect the issues which the government sought to deal with in (i) at p. 3 of the U. S. Brief. However, we note that the apparent government contention in connection with its issue (i) apparently recognizes that islands may form the natural entrance points of

(k) Whether low-tide elevations situated within the breadth of the territorial sea from the mainland or an island, project a three-mile belt of their own.[12]

(l) Whether pockets, coves, or tributary waterbodies, or bays within bays, are to have their water area added to the area of an outer indentation, for purposes of measurement, in determining whether the outer identation satisfies the semicircle test under Article 7, or whether a modified version of the rejected Boggs' Reduced Area Method is to be substituted contrary to the express provisions of Article 7 of the Convention and the intent of its redactors.[13]

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bays, and this hardly seems consistent with its contention that island may not form the natural entrance points, i.e., headlands, of a bay.

[12]The federal statement of this issue at (g), U. S. Brief 3, erroneously assumes that inland waters are not a part of the mainland or the islands, in stating the issue as to the effect of low-water elevations which are within the breadth of the territorial sea from the mainland or an island, but more than three miles from any low-water line. This assumption—and later federal semantical argument—is quite imaginative. It would, for example, have this Court hold that the Mississippi River is not a part of the mainland of the United States, a view which would undoubtedly surprise the residents of Missouri and Illinois.

[13]In its formulation of this issue under (h), U. S. Brief 3, the federal attorneys speak of "separate landlocked bays", seemingly forgetting about whether they must also be "well-marked indentations", as at (d), U. S. Brief 3. So apparently the government follows a less stringent bay test than it says Louisiana must satisfy, when it is trying to establish the existence of bays within bays. Be that as it may, the issue on bays within bays is not whether they are "separate" waterbodies geographically or otherwise. All pockets, coves, tributary waterbodies, or bays that are within a bay are, of course,

(m) Whether beach erosion jetties extending from the shore of a narrow island which forms a harbor, and which protect the very existence of the island are, or are assimilated to, "permanent harbour works which form an integral part of the harbour system" within Article 8; and if not, whether they are, nonetheless, an extension of the coast line.[14]

(n) Whether, independently of any reliance on prior federal assertions or admissions, islands may

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separate waterbodies tributary to the outer indentation, or they would not be a pocket, cove, etc. The question is whether the plain language of the Convention, in Article 7, calls for following the low-water mark of pockets, coves, inner bays and so forth *for purposes of measurement,* even though for other purposes they are not part of the bay; or whether a formula to exclude separate pockets, etc. (which was rejected by the Convention's redactors, and is contrary to views of a State Department publication) ought to be followed.

[14]Federal issue (j), U. S. Brief 3, is another example of the false assumption of fact in the statement of an issue, which would color the case for the United States. While Louisiana contends that the very nature of coast protective works makes harbour association with beach erosion jetties immaterial (because coast protective works are assimilated to harbour works irrespective of proximity to harbours) it so happens that the beach erosion jetties at issue are for the purpose of protecting a narrow island (Grand Isle) which forms a major domestic sport and commercial fisheries harbor, and also a harbour for various types of vessels which serve the local oil, gas and sulphur industry in the swamplands, bays and offshore waters. Were Grand Isle not so protected, and subjected to the dangers of being severely eroded or cut into fragments—as is common with similar Louisiana coastal islands—its safety and value as a local harbour would be materially reduced. Moreover, natural or artificial extensions of the shore have been held to expand the coast line, independently of any provision of the Convention.

have the effect of forming inland waterbodies, and if so, whether certain Louisiana islands have this effect.

(o) Whether the United States is estopped, or otherwise precluded, from now attempting to withdraw from or deny the truth of its judicial assertions, or admissions, which were recognized by this Court, to the effect 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."

(p) Whether there are historic inland waters whose outer limits form part of the coast line of Louisiana, and if so, the location and extent of such historic inland waters.

(q) Whether certain islands which are naturally formed and project above mean high tide are islands in legal effect.

(r) Whether the State of Louisiana can lose title to the beds of entire bodies of inland waters which have been recognized as such by the United States, or whether such waterbodies retain their legal character as inland waters, especially in spite of physical changes and configurations caused by the United States, or changes in policy or international law recognized by the United States.

(s) Whether a spoil bank which extended the shore of the mainland and which was lawfully created under a permit issued by the United States, and never objected to as unlawful by the United States, may be part of the coast.

(t) Whether the peculiarities of the Mississippi Delta may be considered in interpreting and applying the Convetion or other applicable principles of law.

(u) Whether East Bay, which satisfied the geometrics of the semicircle test until modified by engineering works of the United States, and which has also always continued to satisfy applicable tests related to the ratio of its depth of penetration to the width of its mouth, is to be fully treated as a bay despite failure to satisfy the semicircle test as to the entirety of its area at the present time.

(v) Whether East Bay, if it is not decreed to be a bay in its entirety, should have some portion of its waters recognized as constituting inland waters, either by reason of satisfaction of the semicircle test or other applicable criteria.

(w) If in the event any of the disputed areas are recognized as not being within the coast line of Louisiana, but as part of the territory of the United States and are beyond three miles from the coast line, whether the boundary of the State of Louisiana may be considered as extending to include such areas, at least as to any such areas within three leagues of the coast.

(x) Whether (considering the United States' recognition of the correctness of using straight base lines around portions of the seaward areas of Louisiana under Article 4 of the Convention and the fact that certain lines now or formerly designated and deifned pursuant to the Act of February 19, 1895, qualify thereunder as straight baselines) certain waters,

especially in the Mississippi Delta, should be recognized as constituting inland waters by use or application of the principles of Article 4 of the Convention.

(y) What is the mouth of the Mississippi River.

(z) Whether overlarge bay principles are applicable to a segment of the Louisiana coast, and whether a certain area is inland water as a result thereof.

(aa) Whether certain waterbodies are bays or in any event bodies of inland water, and what are the correct limits of such waterbodies.

Although there are aspects of the formulation of issues raised under Question 3 in the federal brief, with which Louisiana might differ, it seems premature for either side to be unduly quibbling about the accounting and other incidental provisions which should be in the decree, prior to the adjudication of the more basic issues. It seems more appropriate to reserve full treatment of these issues until after opinion on the basic issues is rendered, when the Court considers the form of decree to be rendered and the objections thereto.

GENERAL REPLY TO FEDERAL ARGUMENTS ON THE INLAND WATER LINE

The federal position fails to meet the very serious problems raised by the unique, complex and ultradynamic shorelines of Louisiana. The United States apparently attempts to meet this problem in two basic ways. First, it seems to contend that the matter will be quite easily minimized by administrative agreement, or

resolved by legislation[15]; secondly, that the Inland Water Line does not reasonably resolve the problem.[16] An examination of the legal and practical context of the contentions demonstrates their failure to adequately deal with this extremely serious problem.

Neither party disputes the fact that if the Inland Water Line is not adopted, the shoreline-determined boundary will be ambulatory with physical changes,[17] although differences exist as to the effect of particular changes.[18] The government recognizes the applicability of *Hughes v. Washington*, 389 U.S. 290, 293, to Louisiana's rights under the Submerged Lands Act grant. See U. S. brief, p. 48. Under the basic principles of that case, and other authorities recognizing that a state's boundary rights may not be changed without its consent,[19] not even the Congress could unilaterally divest the state of its right to the highly probable future expansions in its coast line;[20] and to the extent that contractions might occur which would be recognized under the law, Louisiana could not divest future federal

[15] See U. S. Brief at 47.

[16] See U. S. Brief at 42-43.

[17] See U. S. Brief at 46-47.

[18] E.g., the United States denies that certain additions to the shore at Grand Isle and Pass Tante Phine effected changes in the coast line, U. S. Brief 107, 109; and Louisiana denies that federally caused changes in the shore configuration of East Bay caused it to lose its status as inland waters. La. Brief, 195.

[19] See authorities at pp. 54 to 59, La. Brief.

[20] See Appendix A of the Louisiana Brief for a discussion of some major changes that are anticipated in the shores of Louisiana.

rights. As suggested by the United States,[21] additional legislation would be necessary to resolve the unworkable, impractical impact of an ambulatory shoreline-determined boundary under the highly dynamic Louisiana conditions.

For reasons mentioned above, this legislation would have to be enacted by both the Congress and the legislature of Louisiana. Even then questions would exist as to the validity of such legislation in attempting to modify prior rights of mineral lessees. Moreover, Louisiana legislation might be questioned on state constitutional grounds.[22] Any attempt by Louisiana officials to enter into administrative agreements with the United States, waiving Louisiana boundary rights, might also be questioned.[23]

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[21]U. S. Brief 47.

[22]Article 4, Section 2, of the Louisiana Constitution prohibits the sale of mineral rights by the state. "In all cases the mineral rights on . . . property sold by the State shall be reserved. . . ." Under Louisiana law, the exchange of future rights might be included in the rules of sale. See Louisiana Civil Code Article 2667, "All the other provisions relative to . . . sale . . . apply to . . . exchange."

[23]We are not aware of any state or federal legislation to authorize such agreements. Louisiana law might even prohibit agreements which would detract from Louisiana's boundary rights. See La. R.S. 30:179.12 which provides no final agreements can be made on Louisiana's seaward boundary until "ratified by a majority of both Houses of the Louisiana Legislature." Section 7 of the Outer Continental Shelf Lands Act authorizes the Secretary of the Interior to enter into agreements concerning "a controversy between the United States and a State as to whether or not lands are subject to the provisions" of the Outer Continental Shelf Lands Act, but the problem is that huge investments must be made to

But apart from the legal complexities and uncertainties connected with any attempt at a legislative solution to the problem, it is speculative to assume that the state legislature and the Congress will agree on appropriate legislation.[24] It is patently erroneous to assume that Congress,[25] in enacting the Submerged Lands Act, and this Court,[26] in interpreting it, intended

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develop large areas with assurance that no controversy will exist one, five, ten or twenty years later.

[24]As shown in Appendix A, Louisiana can expect substantial net future additions to any shore-determined coast line e.g., a major new delta system extending dozens of miles into the Gulf at the mouth of the Atchafalaya, mud lump islands, expanding bays, seaward moving mouths of the Mississippi and ever-growing mud flats along 60 miles of its western coast. Louisiana's attorneys can hardly assume that her legislature or people will be willing to sacrifice future territory of the state. Whether Congress would agree to sufficient compensatory provisions to induce the people of Louisiana to sacrifice their rights to the new territory and the resources thereof is also a matter the federal attorneys can hardly assume. So the federal view (U. S. Brief, 47) that the mutuality of interest in a stable boundary is sure to produce legislative agreement after this immediate litigation ends, cannot be squared with reality; in fact, if anything, termination of this litigation by a decree rejecting long-standing coast line claims of the state is hardly likely to induce the people of the state to sacrifice remaining coast line rights, in order to promote development of the lost areas. If mutuality of interests in a stable boundary would alone produce agreement, the United States would have long ago recognized Louisiana's coast line claim.

[25]See La. Brief 77-79, for quotations from legislative history of the Submerged Lands Act.

[26]This Court, in discussing the Submerged Lands Act. has recognized that there are "requirements of definiteness and stability which should attend any congressional grant of property rights," *United States v. California,* 381 U.S. at

to create a need to again call on Congress to avoid interminable boundary litigation and instability of titles which would seriously hinder development of the resources.

From the preceding discussion, it is quite evident that this great problem cannot be lightly dismissed as quite easily cured by agreement or legislation. The present Interim Agreement came about only after an injunction, applicable to both parties, totally shut down operation in the then disputed areas, and only because it was purely an *interim* agreement, whereby funds were escrowed and no surrender of future rights was involved. At that the Interim Agreement of 1956 has prevented new leasing in the disputed area, except under restricted circumstances concurred in by both governments. After the decree to be rendered herein, neither party will be able to enjoin the other because of probable future physical shore-line changes in the mainland or islands, but present or potential lessees will be concerned—in calculating whether to make lease bids, and the amount thereof, or in deciding upon drilling

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167; that Congress did not "tie our [the Court's] hands", and that the Court best fills its "responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available." 381 U.S. at 64, 165. It can hardly be assumed that a general approach used in one case to serve such reasons and to avoid problems in the case which would otherwise have been "most troublesome", 381 U.S. at 165, should thereafter be held to have tied the Court's hands, freed it of any responsibility for considering its reasonableness and workability under exceptional circumstances, and required that considerations of definiteness and stability be ignored.

programs—with the instability of title to many hundreds of square miles. Prior to the Interim Agreement, grantees sometimes resolved the uncertainty and instability problem by obtaining leases or right-of-ways from both governments; this will be questionable procedure after the decree is rendered, prohibiting each party from interfering with the rights of the other on the other's side of the boundary described in the decree, and especially if the United States' contention is recognized, to the effect that funds realized by one government from the granting of a quit-claim type of protection leases or grants in the other's area must be paid to the government whose present area is affeced, even to the extent of doubly paying that government, if it is not refundable to the grantee.[27]

The result will be either serious impairment of the value of hundreds of square miles or serious impediments to future development of vital resources, unless the Inland Water Line is recognized. This brings us to the second basic aspect of the federal position, regarding the effecacy of the Inland Water Line in resolving the problem.

In this connection, the government says that those charged with responsibility for demarking the extent of inland waters under the Act of February 19, 1895, have, from time to time, demarked new lines or changed the location of old lines.[28] The government does recognize, however, that if an Inland Water Line were

[27]See U.S. Brief 132-135.

[28]See U. S. Brief, 42 to 46.

recognized which was in effect as of a particular date, the fact that changes might occur thereafter would pose no complication under the Submerged Lands Act. The government fails to acknowledge the fact that the theory behind Louisiana's Inland Water Line calls for exactly that result. The line was designated and defined and accepted and approved, and its location—absent concurrence of both parties to changes thereafter made—would be permanently fixed.

Moreover, just as this Court ruled that changes in the definitions of inland waters in International Law, after the decree in the California case, would have no effect in modifying the California coast line thereafter,[29] it would seem in order to provide that changes in the designations and definitions of inland waters under the 1895 Act after the date of the decree, would have no effect in modifying the Louisiana coast line. Such a holding would clearly overcome the difficulties the government has imagined might occur relative to reasons which might hereafter arise to modify the location of the line, which the government contends ought to be independent of proprietary and jurisdictional considerations under the Submerged Lands Act.[30]

The federal suggestion that if stability is required, it might be achieved by freezing the line according to the present shore line configurations,[31] runs counter to the fact that neither party actually urges this as a valid

[29]See 381 U. S. at 166, 167.
[30]See U. S. Brief 42-43.
[31]U. S. Brief 48.

legal possibility, and it is clearly inconsistent with future jurisdictional needs. Since both parties recognize that an ambulatory coast line will result if a purely shore-determined coast line is recognized, there is no dispute before the Court on this point, and Courts, of course, do not render decrees contrary to points upon which the parties agree and for which no dispute exists. Were this not the cast, it would be a highly anomalous and impractical result to hold that land which hereafter attaches to the State's shores would not be a part of the State, but part of the high seas or open sea.

No one has ever challenged that former accretions to the earlier shores of Louisiana, projecting ten or more miles out, added hundreds of square miles of territory. It is inconceivable to believe that future additions would not be part of the state. Would a new territorial government have to be formed to govern this new land? Who would record deeds, autopsy bodies, test x-ray equipment, license physicians or perform many other functions of state government?

The Inland Water Line coast line is so situated that shoreline changes would be wholly within the boundary of the state, and they would therefore pose no title instability problems.

PARTICULAR ARGUMENTS ON THE INLAND WATERLINE

In its analysis of *United States v. California,* 381 U. S. 139, at page 16 of its brief, the government erroneously implies the Court was there adjudicating the location of the coast line of all of the coastal states of

the United States, when in fact only the coast line of the State of California was being adjudicated. Of course, it is true that usual rules would apply in determining the extent of the precedent value of the decision in *United States v. California.* It is fundamental, horn book law that in determining the extent, if any, of the precedent value of a prior decision, it is appropriate to compare the issues and the facts of the prior decision to the case at bar. Louisiana has proven, and indeed the United States has admitted, that neither party in the California litigation relied upon any lines designated and defined pursuant to the Act of February 19, 1895, and it is therefore quite obvious that the effect of such lines was not an issue, and not adjudicated. The coast-line claims of California were quite different from the contentions of Louisiana under the Inland Water Line. It should be remembered that California was attempting unilateral claims by it alone as the basis for recognition of inland waters, especially with respect to the Santa Barbara Channel, whereas the Inland Water Line does not represent a unilateral act or declaration by the State of Louisiana. Louisiana merely accepted and approved federal action authorized by Act of Congress.

Moreover, the United States' statement at page 17 of its brief to the effect that "there is no material difference between the situation of Louisiana and that of California and all the other coastal states" is not only patently erroneous, but inconsistent with prior federal assertions in this litigation and findings of Congress contemporaneous with the passage of the Submerged

Lands Act, and this Court reached the opposite conclusion in the *California* case. See Louisiana Brief 63, 64, 66 and 77. No other state in the Union has the combination of immensely complex present geographical configurations with a dramatic, ultra-dynamic propensity for change, such as is found along the 7,700 miles of shoreline of the mainland and islands of Louisiana.

The federal discussion of the California decision also fails to point out that the prior judicial determination in the Delaware, 161 U.S. 459, should have been considered but was not pointed out by either party. That case was an adjudication concerning the extent of inland waters of the United States, and therefore, under the reasoning of the California opinion, *The Delaware* should be followed.

At pages 40 and 41 of its brief the government discusses *The Deleware*, 161 U. S. 459, but seeks to avoid its present applicability by attempting to ascribe to it a limited purpose. While pilotage was there involved, as it could only be involved in inland waters, what this Court actually held was "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 [the 1895] Act as the harbor within the entrance". The essence, the principle, is that lines designated and defined under the Act of 1895 do establish the outer limit of inland waters. International law would prohibit any inland rules jurisdiction except on inland waters.

The federal analysis on page 16 and 17 of the

United States brief also ignores the fact that the Inland Water Line does, in fact, have an international content, as a line which represents U. S. jurisdictional assertions over inland waters. International questions *are* involved in the demarcation of the line. See Louisiana Brief 25 to 49, and especially 36, 37 and 41 to 49. Similarly, the federal analysis ignores the more basic aspects of the decision in the *California* Case, which was that the best and most workable definition of inland waters should be adopted under the Submerged Lands Act, and that the Congressional grant of property rights thereunder should be construed as carrying with it certain requirements of definiteness and stability that ought to accompany any Congresssional grant of property rights.

The federal argument commencing at page 18, to the effect that the Inland Water Line is irrelevant to the Submerged Lands Act has already been amply disproved by various arguments made in our original brief, and we will not now attempt to deal with it in full.

However, in connection with the exchange between Mr. Madden and Senator Anderson quoted on page 22 of the United States brief, it is pertinent to note that Senator Anderson wholly opposed the Submerged Lands Act, but it was enacted nonetheless; that he supported a shoreline definition, which the Congress rejected, and he was completely in error in the quoted statement for, as the result of hearings in 1949, the Congress, despite the opposition of the Justice Department, rejected the term *shore* as the basis for measure-

ment and chose instead the term *coast* and did so precisely because of the Act of 1895.

That Congress was informed about and did not reject the use of the 1895 Act lines for Louisiana's special circumstances is substantiated by the legislative history which also shows that Congress contemplated a need for special treatment of the Louisiana complexities.

Bolivar Kemp, then Attorney-General for the State of Louisiana, noted in testimony:

> The administration bill (S. 923) defines "submerged coastal lands" of the United States as "submerged lands seaward of the *shores* of the United States" and "all other submerged lands of the entire Continetal Shelf seaward of such *shores*, within which submerged lands the natural resources *appertain* to the United States and are subject to its jurisdiction and control, but which resources are not owned by any State or person." [Emphasis added.]
>
> ***
>
> This position of the heads of the Federal departments mentioned who are sponsiring S. 923 and S.2153, is inconsistent with the established lines dividing the high seas from inland waters.
>
> In February 1895 Congress passed an act (28 Stat. 672) authorizing the Secretary of the Treasury to designate and define by suitable bearings or ranges the line dividing the high seas from rivers, harbors, and inland waters.
>
> (HEARINGS before the COMMITTEE ON INTERIOR AND INSULAR AFFAIRS UNITED

STATES SENATE, Eighty-First Congress, 1st Sess. on S. 923 and S. 2153 and others, p. 179.) Additionally, the following rewards were made:

Mr. PEREZ. . . .

* * *

There is a law of Congress to establish the lines between the inland waters and the high seas, an act of February 1895, which first gave authority to the Secretary of the Treasury, and later, by the Reorganization Act of 1946, to the Coast Guard of the United States, and under that authority there have been administrative rules of the effect of laws which have been adopted, and there have been boundaries established—lines—between the inland waters and the high seas—. . . ."

* * *

. . . I am sure when the Solicitor and the Attorney General drew up this bill they overlooked that law of Congress, and they overlooked the great volume of work which has been done in defining and marking the inland waters from the high seas. In that respect Senate bills 923 and 2153 are certainly in error. (Id., at 194).

Later in the course of the testimony, Mr. Perez added:

I would like to file with the committee charts of the Coast Guard showing the fixing of the line between inland waters and high seas, especially pertaining to the coast of Maine, New York, Massachusetts, and Louisiana, sir.

The CHAIRMAN. Those papers may be filed.

Mr. PEREZ. Together with a pamphlet pub-

> lished February 1, 1949, C.F. 169 by the United States Coast Guard, showing the rules or administrative law fixing all others lines of demarcation between the inland waters and the high seas off the coastal States.
>
> ***
>
> (Id., at 195.)

While the Submerged Lands act bill was pending, Senator Long participated in exchanges with witnesses and attached significance to the Inland Water Line. It will be remembered that at the time Senator Long was making remarks quoted at 381 U. S. 158 to 160, the Chandeleur Sound area was closed off by the Inland Water Line, which, as of that time had been only partially drawn along the eastern portion of Louisiana. He pointed out in those remarks that the U. S. had agreed those waters (which were the principal waters then enclosed by the line on charts) were inland waters and the language arrived at by the committees was "upon the advice of . . . *all* the witnesses who testified. . . ." Obviously, then none of the witnesses' testimony was actually considered of no help whatsoever.

There is nothing in any of the reports pertaining to the Submerged Lands Act bill, or prior similar legislative efforts, which in any way tends to substantiate the off-the-cuff remarks of Senator Anderson that there was no value to the line. To the contrary, the House Committee on Interior and Insular Affairs, reporting pursuant to *H. Res.* 676, 82nd Cong., 2d Sess., on its "Investigation and Study of the Seaward Bound-

aries of the United States," *H.R. Rep. No.* 2515, 82nd Cong., 2d Sess., (1953), stated, at p. 19:

> There is a startling difference between the shore and coast of Louisiana and Florida on the one hand and that of Texas and California on the other hand. *To say that these contrasting coastal areas should be treated exactly alike with reference to the definition of inlands waters would ignore geographical factors that are wholly different.*

Additionally, we note that the same remark could be made with respect to the rules for bay determination, headland selection problems, and all of the other great multitude of specific rules that had been urged upon the Congress, for the decision of the Congress was that it would be of no great help to specifically state precise tests, guides or nomenclature of the waters which were inland waters, since it was the intent of the Congress to leave this matter as it found it, to be guided by the laws then in force as discussed in the cases then decided. See 381 U.S. 157, quotation of Senator Holland. The Act of 1895 was such a law and *The Delaware* was such a case.

The argument on page 25 of the federal brief that Congress would not have given the Secretary of the Treasury any power to define major portions of the boundaries of the United States simply does not accord with the legislative history of the Act of 1895 and its plain language. Moreover, it neglects to consider that the Executive and the Congress joined in delegating the power to the Secretary of the Treasury, inasmuch as the President signed the Acts in question.

The designation of inland waters involved a factual undertaking and it is not, we submit, within the province of the Attorney General to say that the Congress and the President could not and did not select the proper federal agency from time to time to undertake this factual task. Indeed Congress and the President from time to time designated the agencies most likely to have the detailed information required for this purpose and the legal responsibility for law enforcement based upon the line.

On page 26 of the government's brief reference is made again to the statement in 1953 of the Commandant of the Coast Guard. We refer the Court to pages 14 and 15 of Louisiana's May memorandum and to pages 20 and 21 of Louisiana's brief filed in August. Much of the line had been designated and defined and placed on charts *before* the Commandant of the Coast Guard had anything to do with the matter. The remainder had been designated and defined, though not placed on charts, before 1953 (see e.g. "General Rule" in Exhibit 17) and had been the subject of administrative law authorized by Congress. See Exhibits 6-20. Appendix G of Louisiana's Brief. The quotation, therefore may describe the views of the Commandant, but not his directive. Louisiana quotes again from his directive in Code of Federal Regulation 33 CFR 82.1 (January 1967),

The waters inshore of the lines described in this part are "inland waters" and upon them the inland rules and pilot rules made in pursuance thereof apply. The waters outside of the lines described in this part

are the high seas and upon them the international rules apply. . . . (Emphasis supplied.)

On pages 27 through 30, the government contends that various lines designated and defined by the agencies having that power under the Act of 1895 would not comply with the bay test or straight baselines tests under the Geneva Convention. The action of the United States pursuant to the Act of 1895 was clearly within its power as recognized by international law. Louisiana discusses the legislative history of the Inland Rules Legislation on pages 34-41 of its Brief and reiterates that even the Geneva Convention on the Territorial sea and the Contiguous Zone expressly leaves in force other international agreements or conventions which, of course, protects prior determinations of inland waters made under the International Rules agreements. (*See* page 42 of Louisiana's Brief.)

Prior to the Geneva Convention there was no rule that buoys and aids to navigation could not be used in demarking the extent of inland waters. Nor do we consider valid the contention of the government at page 30 of its brief that the Inland Water Line is unacceptable as a straight baseline because it uses buoys. The historic designations and definitions of the line around the Delta of the Mississippi, its inclusion on carts, the general definition calling for the use of certain markers for the remainder of the line, (the remainder of the line was not physically drawn on charts until 1953), show the waters landward of the line to be inland waters of the United States. We direct the Court's attention to exhibits 6 through 20 inclusive in appendix "G" which

show historic inland water lines designated and defined around the Delta of the Mississippi River from and after 1895. See especially exhibit 20 which compiles various designations and definitions of the extent of inland waters around the Delta of the Mississippi under the Act of 1895 and shows that the great bulk of these designations and definitions of the extent of the line, which were shown on published large-scale charts employed islands, or points on the land such as lighthouses, as points on the line. Of course, due to the unstable Louisiana conditions, it is far more reasonable to use buoys, which are more visible and permanent than any Louisiana land, but there can be no question that the lines not using buoys were valid straight baselines.

It will be recalled that the line in the Fisheries case was for fishery purposes; it is thus immaterial that a straight baseline may have been drawn for one particular purpose, such as navigation or fisheries.

At page 31 the United States seeks to use the instability of the Louisiana shore to somehow argue that this has caused revisions in the designation of the markers of the Inland Water Line, designated and defined pursuant to the Act of February 19, 1895, and so to disregard it. It is common knowledge that the conditions in the Mississippi Delta constantly change and it only makes sense that the designations and definitions of markers should change with changes in the physical conditions.

Whatever may now be said by the Commandant of the Coast Guard, indeed whatever the Commandant

may have said since the enactment of the Submerged Lands Act and the Outer Continental Shelf Lands Act dividing the minerals of the Continental Shelf between the states and the federal government, the Court will note the clear inconsistency between such statements with the statement of an earlier Commandant of the Coast Guard in 1925, quoted on page 36 of the government's brief. Clearly he then understood the line had jurisdictional significance, as further explained on page 45 of Louisiana's brief.

The Submerged Lands Act, Sections 2(b) and 4, recognizes that state boundaries may extend out to the United States international boundary, not to exceed three leagues in the Gulf of Mexico. Louisiana did this when it accepted and approved the Inland Water Line and a boundary based thereon.

We have pointed out already that the order of May 20, 1925 and also the Treasury Department publication of March 1, 1932 did, in fact, show that the Coast Guard, at least between 1925 and 1952, considered such lines as including territory of the United States. See Louisiana Original Brief 44, 45, and footnote 16 on page 37 of the United States brief where the United States contends that some regulation in 1952 had the effect of repealing the prior regulations of 1925 and 1932. Reference is made to the June 4, 1929 letter from the Assistant Secretary of the Treasury to the Norwegian Minister discussed on pages 35 and 36 of the federal brief. The quoted portion on 38 merely stated that the line does not represent a territorial boundary, and of course Louisiana does not con-

tend that it does but rather that it represents the seaward limit of inland waters. The territorial boundary lies at least three miles seaward of the outer limit of inland waters. Therefore, the letter should be understood as correcting the erroneous administrative understanding of the Coast Guard Order which had confused the concept of the outer limit of the territorial boundary and the outer limit of inland waters.

It should be emphasized that the Secretary of State's office had been informed about the 1925 letter, which attached territorial significance to the Act of 1895 lines around the Mississippi Delta, and did not advise the Treasury that its position violated international law. He was stating an understanding to correct the order and show that the lines related to the outer limit of inland waters and not the territorial boundary, just as we have shown that Congress understood the significance of the 1895 Act lines.

The United States failed to bring out that this same letter stated, concerning the lines under the Act of 1895:

> As having a possible bearing on the inquiry of the Norwegian Sea Territory Commission, I have the honor to enclose a copy each of the following publications:
>
> 1. "Pilot Rules for certain inland waters of the Atlantic and Pacific Coasts, and of the Coast of the Gulf of Mexico."
>
> On page 11 of this publication under the heading "Boundary Lines of the High Seas", will be found the designation of the lines dividing the high seas

from rivers, harbors, and inland waters. *Within these lines are inland waters* upon which inland rules and pilot rules apply. Outside of these lines are the high seas upon which the international rules apply.

2. "Pilot Rules for the Rivers whose waters flow into the Gulf of Mexico and their tributaries and the Red River of the North."

On page 21, of this publication under the heading "*Boundary Lines of Inland Waters*", will be found the designation of the boundary lines of the high seas and *lines of demarcation of inland waters of the United States bordering on the Gulf of Mexico* where the pilot rules for rivers emptying into the Gulf of Mexico apply. (Emphasis added.)

Note that the Assistant Secretary of State's letter to the Norwegian Minister did declare that the lines have "a possible bearing on the inquiry of the Norwegian Sea Territory Commission," and note also that he did specifically state that the waters within the lines in question were inland waters.

Of course, the question of where inland rules begin and international rules cease to apply turns upon the location of the inland waters of the nation and consequently irrespective of whether the lines are for navigational purposes, the statement quoted at page 38 of the U. S. brief and the language quoted above both show that the Secretary of State was representing that the lines had jurisdictional significance in delimiting the extent of inland waters.

In construing this letter it should also be noted that the inquiry of the Norwegian Minister was un-

doubtedly related to the long-pending dispute between Great Britain and Norway and the fact that Norway had apparently been attempting to gather information to be used as ammunition in its dispute with Great Britain. Of course, the Assistant Secretary of State would have so toned his statements to avoid, if possible, coming between two friendly nations in their disputes, so he would not have expressed himself in the bluntest available language, and that is why the language must be carefully analyzed, as we have done above.

On page 45 in the United States brief the government contends that Louisiana's claim on the Inland Water Line would encourage controversy by creating two standards for determining the coast line. If there was any validity to this concern, the analysis of the United States neglects to point out that the State of Louisiana is the only state in the Union which accepted and approved the designations of the Inland Water Line prior to the effective date of the Geneva Convention, and therefore there is ample basis for distinguishing the Louisiana case on legal grounds.

Additionally, there would be ample basis to distinguish the Louisiana situation from that of other states because in fact Louisiana, unlike any other state, has the great Mississippi River and related river systems combining with unique geographic complexities which create overwhelming need to recognize a coastline that would not be dependent upon the ephemeral and ultradynamic shoreline configurations of the mainland and the countless hundreds of islands and

low-water elevations. Of course, under the ruling of the Court in the Texas matter, Florida and Texas would have their historic boundary measured from their coast lines as they existed at the time their historic boundaries were created or approved.

The government repeats, at pages 45 and 46 of its brief, the contention that attributing jurisdictional significance to the Inland Water Line would be inconsistent with international obligations under the Convention. We have previously pointed out that the Inland Water Line in no way involves the United States in a violation of its international obligations. See footnote 51 on page 43 of Louisiana's original brief. We there pointed out that recognition of the Inland Water Line as the outer limit of inland waters for purposes of the Submerged Lands Act would not necessarily entail a decision based upon international law, but could be based solely upon domestic law considerations. The converse is not true—if it is held that the Inland Water Line is not a valid demarcation of inland waters pursuant to international law, and encloses high seas, there would be no question but that the United States will be embarrassed in its international relations for failure to have the International Rules of the Road in effect in these waters, and for having required foreign vessels to follow inland rules in these waters.

EFFECT OF THE CONVENTION

In its brief the federal government has taken the position that if the Inland Water Line is rejected, then this Court should apply the Geneva Convention on the

Territorial Sea and the Contiguous Zone. Louisiana agrees with the federal government in this regard. However, the federal government also indicates its belief throughout its brief that this Court must look *exclusively* to the text of the Convention in considering Louisiana's claims in determining what are her inland waters. The federal position in this regard is completely untenable.

In *applying* the Convention, the Court must *interpret* it, and in interpreting it, the Court must consider it in the context of the principles of international law which are modified, clarified, or unaffected by the Convention. As Lord McNair states in his *Law of Treaties*:

> Treaties must be applied and interpreted against the background of the general principles of international law. Their very existence and validity rests on one of the earliest and most fundamental of those principles—*pacta sunt servanda.* Moreover, those principles are always available for the purpose of supplementing treaties, and for interpreting them, when interpretation is necessary. . . .[32]

It is evident from the Convention itself that there was no intention on the part of its redactors to repeal

[32]McNair, *Law of Treaties* p. 466 (1961). In support of his position the author quotes the following statement from the *Georges Pinson* case, 50, Franco-Mexican Commission (Verzijl, President), A.D. 1927-8, No. 292, "Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolved in express terms and in a different way."

all of the pre-existing international law of territorial waters. Articles 1, 17, and 22 of the Geneva Convention all refer to "other rules of international law" outside of the Convention, yet nevertheless relevant to the rules set forth in the articles of the Convention. Article 7 refers to the body of principles on historic bays outside the Convention.[33]

Article 1 states:

> 1. The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.
>
> 2. This sovereignty is exercised subject to the provisions of these articles *and to other rules of international law.* (Emphasis added).

Thus the Convention itself recognizes that the exercise of a State's sovereignty over a belt of sea adjacent to its coast may rest on principles of international law outside the Convention. The references to "other rules of international law" in Articles 17 and 22, while not so directly on point, confirm Louisiana's position that the provisions of the Convention are not exclusive. Other principles of international law must also be considered. The discussions of the International Law Commission in considering various articles proposed for inclusion in the Convention clearly demonstrate that the partcipants in the conference were well aware that their codification of the international law of the territorial sea was not all-inclusive. (See discussion sum-

[33]See Article 7, paragraph 6 of the Geneva Convention on the Territorial Sea and the Contiguous Zone.

marized in footnote 108, pp. 132-133 of Louisiana's Brief).

In the *California* case the United States failed in its attempt to get this Court to approve its assertion that the provisions of the Geneva Convention were exclusive of all other rules of international law as to what constituted inland waters. The United States had proposed that the second sentence of Par. 4 of the Decree in the *California* case read: "The inland waters referred to in Par. 2(b) hereof consist of—listing the inland-water rules of the Convention.[34] However, California proposed to change the phrase, "consist of" to "include",[35] in order to establish that the listing was not necessarily all of the inland-water principles which could be applied. In its Decree, this Court adopted the non-exclusive term, "include",[36] rather than the exclusive term, "consist of", thereby rejecting the United States' contention that the Geneva Convention was exclusive of all other rules of International Law as to what were inland waters.

The Court's opinion evinced an awareness of the need to go beyond the plain text of the Convention in finding a solution to some of the problems of baseline determination. Thus it held that artificial accretions to the shore have the effect of changing the baseline whence

[34]Decree proposed by the United States and memorandum in support of proposed decree at 3, *United States v. California*, 382 U.S. 448.

[35]Decree proposed by the State of California and memorandum in support of proposed decree at 3 and 9, *United States v. California*, 382 U.S. 448.

[36]*U. S. v. California* 382 U.S. 448, 450.

the territorial sea is measured, although there is no specific provision in the Convention recognizing such a rule.[37] The Court approved the Specal Master's finding in this regard, which had been made on the basis that such artificial changes were clearly recognized by international law to change the coastline.[38] The Court also rules in its decree that "an estuary of a river is treated in the same way as a bay," [39] despite the fact that the text of the Convention does not so state.

Louisiana views the Convention on the Territorial Sea and the Contiguous Zone as analogous to a civilian "Code" of laws. Codes are intended, in the traditional understanding of Code Law, primarily to set forth broad principles and general rules, with a minimum of specificity and detail related to peculiar situations.[40]

In connection with the work of the International Law Commission, the function of codification in international law has been described thus:

> In the sphere of codification . . . the main purpose . . . is not that of an international legislature. Its function is essentially and in the first instance that of a judge. It has to find what the law is and to present it in a form which is precise, systematic and *as detailed as the overriding principles of the*

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[37]*U.S. v. California*, 381 U.S. 139, 176-177.

[38]*Ibid.*

[39]*Ibid.*

[40]See Tate, "Codification and International Law," in *The Code Napoleon and the Common Law World* (Schwartz ed. 1956).

> *necessary generality of the law allows.* (Emphasis added.) [41]

In such a general work, it is ofttimes necessary in unusual cases to go beyond the letter of the Code in reaching a decision. This is especially true of the Convention in question in this case. The Court should bear in mind the words of Dr. Pearcy, Geographer for the Department of State, about that Convention which the federal government is now urging should be construed strictly and literally.

> It must be realized that any given situation may, despite formulae, be sufficiently complex to create perplexing problems. An articles in a legal document consisting at most of a few dozen words, can hardly be expected to cover the variations found in the configurations of thousands of miles of coastlines throughout the world.[42]

For such a document, only a broad construction is workable.

Louisiana contends that the Geneva Convention neither repealed the general principles of law upon which its rules are based nor the exceptions to the general principles of law that may be established by the practice of States. With regard to the first proposition, Louisiana would like to call this Court's attention to Lord McNair's discussion of "the need of express

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[41] *Id.*, at 345, quoting *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, p. 16 (1949).

[42] Pearcy, "Geographical Aspects of the Law of the Sea", 49 *Annals of the Association of American Geographers* 5 (1959).

terms to alter an existing rule of law" in which, because of "the high authority" of Sir Leoline Jenkins, Judge of the Admirality Court, McNair quotes "in spite of its antiquity" an extract from an opinion of Sir Leoline in which the Judge states that:

> First, as it is a certain rule in Law, that no Statute or Constitution [is] universally received, further than the Words of such Statute are express and decisive: *So it is in Treaties, they are not to be understood as altering or restraining the Practice generally received, unless the Words do fully and necessally infer an Alternation or Restriction. . . .*" [43]

Support for Louisiana's second proposition, that such Conventions as the one on the Territorial Sea and the Contiguous Zone or the one on the High Seas are not designed to cover all the exceptional situations which may arise, may be found in Volume IV of the Official Records of the United Nations Conference on the Law of the Sea. In discussing a Danish proposal for an amendment dealing with navigational regulatory problems caused by shoaling or other navigational conditions existing outside of the territorial sea of a littoral state, the Soviet and French Ambassadors cautioned against hasty consideration of a general provision dealing with such a special problem. Mr. Keilin of the Soviet Union stated:

> . . . If the regulations for the issuance of which the proposal sought to obtain authority were necessary, agreement could doubtless be reached

[43] *McNair, Law of Treaties,* p. 463 (1961).

with regard to them. *A general provision in international law was not required.* [44] (Emphasis added.)

Mr. Gidel of France "urged the Committee not to adopt any decision capable of having far-reaching consequences on a matter which, by its special nature, required thorough consideration." [45] Although the specific remarks mentioned were made in connection with consideration of the Convention on the High Seas—they are equally pertinent to the Convention on the Territorial Sea.

Thus Louisiana urges that this Court recognize the continuing validity of principles of international law on the delimitation of inland waters not specifically included within the Convention and also the fact that the long practice of the United States in recognizing certain waters *inter fauces terrae* off the Louisiana coast as inland, even though they fall within no specific article of the Convention, is valid owing to the continuing validity of the principles upon which the practice is based and the very special geography of the Louisiana coast. Hence, Louisiana is entitled to owenrship to these waters for this reason, as well as others discussed elsewhere.

LOW-TIDE ELEVATIONS WITHIN THREE MILES OF A BAY CLOSING LINE

In its brief the United States takes the position

[44] IV U.N. Conference on the Law of the Sea, Official Records, A/CONF. 13/40, p. 95.

[45] *Ibid.*

that low-tide elevations within three miles of a bay closing line have no territorial sea of their own. Louisiana, on the other hand, contends that under Article 11 of the Geneva Convention such low-tide elevations do have a territorial sea of their own, for they must be deemed to be within the territorial sea of the United States "as measured from the mainland or an island." The dispute on this point between the United States and Louisiana is over interpretation that should be given Article 11. The United States urges that the phrase "mainland or an island" be interpreted to mean dry land. Louisiana submits that such an interpretation is unjustified in the light of the history of Article 11 and the conceptual unity of the Convention.

The United States supports its case in this regard by referring to several dictionaries' definitions of the words "mainland" (or *continent* in the French text) and "island" used in Article 11 of the Convention, by means of which it seeks to establish that the Convention does not permit one to take into account low-tide elevations that are within the breadth of the territorial sea of a nation as measured from inland waters. Louisiana is quite skeptical of the utility of a dictionary-oriented approach in establishing the point at issue. The question really is what effect is this Court to give to the fact that the low-tide elevations in question are within three miles of inland waters? Louisiana submits that as a matter of law that question can only be answered in her favor, for the essence of the concept of inland waters is that such waters are fully assimilated to the land area of a na-

tion for all legal purposes.[46] To say that certain waters of a nation are inland waters is to say that those waters have exactly the same juridical effect as the dry land of the nation.[47] The United States admits that, if the elevations in question were within three miles of dry land, they would have the effect that Louisiana urges, but the government attempts to establish that for this one purpose alone the inland waters of the United States have a different juridical effect. Louisiana can find no support for this view in international law. Louisiana submits that for purposes of law Atchafalaya Bay is as much a part of the mainland of the United States as the dry land surrounding that bay. To hold otherwise would be to render nugatory the entire concept of inland waters.

The United States' position does not even make sense as a matter of ordinary language usage, for to be consistent the United States would have to contend that other inland waters, the various rivers, lakes, ponds, streams and bayous of this nation, were not located on the mainland of the United States, but were merely surrounded by it. The Mississippi River would not be part of the mainland of the United States, but merely a long gash of water dividing it. Perhaps the United States would answer that some inland waters of the United States are part of the mainland, whereas others are not. Then the juridical effect of the status of cer-

[46]See Gidel, "Principes Dominant La Condition Juridique Des Eaux Interieures," 3 *Le Droit International Public de la* Mer, 35-37, especially 36.

[47]See *ibid.*, for Gidel's discussion of Vattel on this point.

tain waters as "inland" would vary with the type of geographical entity in question. There is no limit to the nonsense that follows from the federal view.

The United States seeks to buttress its position by discussing the history of the debates over Article 11 of the Convention. Louisiana urges that this Court read Appendix B of the federal brief very carefully. It gives a fairly good account of the evolution of that Article. Unfortunately for the federal government, that account supports not the federal, but the Louisiana, position. The federal account of the history of Article 11 of the Convention contained in that appendix makes it utterly clear that the sole reason the words of the draft article "situated wholly or partly within the territorial sea" were replaced by the words "within the territorial sea as measured from the mainland or an island" was to prevent extensions of the territorial sea by "leapfrogging."

Unfortunately in the *text* of its brief the United States attempts to cloud the issue by discussing he usage of the terms "mainland" and "islands" in connection with issues unconnected with the history of that article, specifically that of the unadopted amendment proposed to another article by the United States, on March 29, 1958.[48] On page 79 of its brief the United States asserts:

> The present reference to "mainland" in Article 11 derives from the proposal made by the United States on April 1, 1958 (*supra*, p. 73).

[48]U.S. Brief, p. 80-81.

This statement is false. The final draft of Article 11 proposed by the Commission already contained the phrase "as measured from the mainland or an island." [49] The United States' amendment of April 1, 1958 did not change the article with respect to its usage of the term "mainland." That usage was already present. Hence the discussion of the purpose of the use of the term "mainland" in the United States' proposed (and unadopted) amendment of March 29 to Article 4 of the Convention is at best irrelevant. The true history of Article 11 is to be found in Louisiana's brief and in Appendix B of the federal brief, not in the misleading text of the federal brief.

The federal government also relies partly on *its* construction of certain language in the *Fisheries* Case (*United Kingdom v. Norway*). The language quoted from the opinion of the International Court of Justice (to the effect that one can only use a low-tide elevation "as a basepoint for calculating the breadth of the territorial sea" if it is within 4 miles of permanently dry land) does not refer to the question of whether low-tide elevations have their own territorial sea in such circumstances, but rather to the question whether such low-tide elevations can be used as *basepoints* for drawing a straight baseline.[50]

Even if this interpretation were not correct, the language of the opinion would have to be understood as not having dealt with the issue of whether a low-tide

[49]See U.S. Brief, p. 73 for quotation of Article 11 as it existed at the time of the proposed amendment.

[50]U.S. Brief, p. 83, f.n. 39.

elevation within four miles of a closing line has effect in projecting additional territorial sea, but rather as only pertaining to the "leapfrogging" problem in situations where low-tide elevations are not, in fact, within four miles of a closing line.

Although, at first blush, the language of the British memorial may seem to support the federal position, the official submissions of the United Kingdom show the validity of the Louisiana contentions by making clear that the British did *not* contend that low-tide elevations had to be within four miles of dry land to have a territorial sea of their own. Paragraph 4 of the United Kingdom's submissions in the case asserted:

> (4) That, where there is a low-tide elevation situated within 4 sea miles of permanently dry land, *or of the proper closing line of Norwegian internal waters*, the outer limit of territorial waters may be 4 sea miles from the outer edge (at low tide) of this low-tide elevation. In no other case may a low-tide elevation be taken into account. (Emphasis added.) [51]

From this submission it is obvious that the United Kingdom would recognize the propriety of a territorial sea for a low-tide elevation located within the breadth of the territorial sea from a bay-closing line, delimiting the outer limit of inland waters, and therefore the Court was not opining about this uncontested question.

Louisiana's reading of the case is confirmed by the Conclusions of the Agent of the United Kingdom

[51] *Fisheries Case (United Kingdom v. Norway)*, I.C.J. Reports (1951) 116, 120.

presented at the end of his oral reply and quoted by the Court:

> (4) That, where there is a low-tide elevation situated within 4 sea miles of permanently dry land, *or of the proper closing line of Norwegian internal waters*, the outer limit of Norwegian tertorial waters may be 4 sea miles from the outer edge (at low tide) of this low-tide elevation. In no other case may a low-tide elevation be taken into account. (Emphasis added).[52]

It is interesting to note that the British took the position now codified in Article 11 that a low-tide elevation within the territorial sea of another low-tide elevation had no territorial sea of its own. (See paragraph 107 of the British Memorial). The United Kingdom even expressed this rule in terms, quite similar to the present language of Article 11, of the necessity of a low-tide elevation's being located "within the territorial belt of a *mainland* (or of a permanently dry island)" in order to have its own territorial sea. From the fact that the British did recognize the use of low-tide elevations within the breadth of the territorial sea from "the proper closing line of Norwegian internal waters", one can see that the term "mainland" as used in international law must connote the internal waters of the littoral state as well as its dry land.

The use of the French word *continent* to correspond to the English word *mainland*, which the federal government has used to buttress its dictionary-oriented approach to solving complicated legal prob-

[52] *Id.*, 121.

lems, actually confirms Louisiana's position. If one considers the full implications of the federal government's translation of the Petit Larouse's definition of that word, it is obvious the Atchafalaya Bay is part of the "*continent.*" The federal government's translation was a "vast expanse of land that one may travel over without crossing the sea." [53] Under that definition one could cross over the Ohio River and still be on the same *continent* because the Ohio is not the sea. Thus the Ohio is part of the *continent* of North America, though it is not dry land. Similarly, one can cross from one shore of Atchafalaya Bay to the other "without crossing the sea", because that bay is part of the internal waters of this country. Hence, like the Ohio, Atchafalaya Bay is fully a part of the *continent* of North America, though it is not physically dry land. Similarly, one can cross from one shore of Atchafalaya Bay to the other "without crossing the sea", because that bay is part of the internal waters of this country. Hence, like the Ohio, Atchafalaya Bay is fully a part of the *continent* of North America. Therefore, low-tide elevations within three miles of Atchafalaya Bay are within three miles of the *continent* and do have their own territorial sea.

The discussion of the language in the decree in *United States v. California*, 382 U.S. 448, 449, at pp. 86-87 of the U. S. Brief, somehow implies that the decree is authority for a point not at issue in the case. The U. S. Brief correctly points out the language in the decree calling for the use of low-tide elevations within

[53] U.S. Brief, p. 78, f.n. 36.

three miles of low-water lines was not a subject of disagreement between the parties; obviously, then, it represents no reasoned decision on any contested issue.

The federal brief conveniently neglects to point out *why* there was no disagreement between the parties. The simple truth is that an examination of the record and briefs in that case fail to reveal the existence of a single low-tide elevation which was within three miles of a bay or other inland waterbody closing line, and more than three miles from the low-water line of the California mainland or islands. We searched maps in vain to discover any such situation. Additionally, we contacted the California Department of Justice, which had state engineers investigate to see whether such a situation existed. None were known and it was for this reason that California's attorneys had no objection to the decree's language. The problem was unknown because no facts existed, to their knowledge, which raised the issue. Certainly, no such facts were before the Court. Be that as it may, Louisiana is not bound by admissions of California on legal questions.

The United States also contends that low-tide elevations may not be used as headlands for bays. The federal argument raises no new points, and therefore we refer this Court to the discussions in our Brief, pp. 131 and 305.

ISLANDS

The government has asserted that "[t]he Convention does not permit the use of island or low-tide

elevations as headlands for bays",[54] but repeatedly contradicts this assertion by using islands as headlands.

Article 10 of the Geneva Convention states that "[a]n island is a naturally formed area of land, surrounded by water, which is above water at high tide." [55] Under this definition Point au Fer, the eastern closing point for the federal government's closing line across Atchafalaya Bay,[56] is an island.[57] In its brief, the government describes the western closing point for that bay as "the extermity of South Point on Marsh Island."[58] Needles to say, Marsh Island is an island. Although the United States attempts to save itself from inconsistency be refraining from actually using the word "headland" in describing these closing point on islands, when one considers the very concept of headlands" the contradiction becomes patent. When one draws a line across the mouth of a bay, the terminal points of the line are the headlands of that bay. It is clear that the United States considers the line it describes as one drawn across the mouth of Atchafalaya

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[54]U.S. Brief, p. 60.

[55]Geneva Convention on the Territorial Sea and the Contiguous Zone, Article 10, paragraph 1.

[56]U.S. Brief, p. 66.

[57]Point au Fer Island is denominated as an island on all government charts. See e.g., U.S.C. & G.S. Chart No. 1276, used as a base map for Exhibit 63, and Map No. 23 of 41 in the set of 54 maps, in Exhibit 119. For the bulk of its distance on its northern and eastern side, Four League Bay—some two or three miles wide-separates it from the nearest land, and at its eastermost end, a waterbody some 700 to 800 feet wide, known as Oyster Bayou, separates it from other land.

[58]U.S. Brief, p. 66.

Bay. In its memorandum of January, 1968, the government describes its line as drawn across the "mouth" of Atchafalaya Bay.[59] Hence the United States itself is using islands as headlands.

In the Terrebonne Bay complex, one of the federal government's lines is drawn "from the mainland north of Caillou Boca to a point just west of Bay Marchand."[60] An examination of any map showing the area north of Caillou Boca (e.g., Map No. 19 of 41 of the set of 54 maps, Louisiana exhibit no. 119) reveals only a cluster of islands, unless one gets considerably further north than is indicated by the federal line. Hence it appears that the federal government is actually drawing its line from some point on a land formation which would qualify as an island under the Convention, or perhaps even as a low-tide elevation. The federal government defends its action by saying that the situation in question resembles the St. Bernard Peninsula, quoting this Court's decision in *Louisiana v. Mississippi* to establish that in such situations "what might technically be called islands" are not "true islands," but part of the mainland.[61] We agree with the federal government in this regard, but are unable to see how the federal government can rely on this decision and at the same time maintain that islands cannot be used as headlands. The decision is actually a recognition of the principle that islands can form an integral part of the mainland. In our brief we have pointed out that it is upon this

[59]U.S. Memorandum, January 1968, pp. 68-69.
[60]U.S. Brief, p. 93.
[61]Id., at 93-94.

principle that Louisiana selects as headlands some of her islands. (*See* Louisiana Brief, pp. 126-129). The government's use of island headlands is actually a recognition of the validity of Louisiana's position that where islands form an integral part of the land form they may be used as headlands. As a practical matter the federal government is not disagreeing in principle, but merely in its application. Its denial in principle is merely a means of avoiding a discussion of the specific criteria which are to be employed in selecting islands as headlands, which criteria Louisiana fully discusses in its brief, (pp. 124-129).

A further example of the use of islands as headlands by the federal government is to be found in its selection of a headland at Redfish Bay. On page 117 of the federal brief there is a map of the headland so selected. The government admits that "[a]s appears from Figure 9, our own headland is on what is technically an island, as it is separated by a narrow channel from the adjacent land." [62] Although the federal figure does not show it, the government admits that even the land formation closest to their island headland is, itself, an island.[63] Again the federal government is recognizing the principle that islands forming an integral part of the land form may be selected as headlands, but without considering explicitly the criteria for determining what islands can be used as headlands on that basis.

From its *application* of the principle that islands

[62]Id., at 116.
[63]Id., at 118.

forming an integral part of the land form can be used as headlands, it appears that the federal government has ignored the weight that must be given to geological and hydrological conditions in selected islands as headlands. All of Louisiana's island headlands are closely linked to the main shore, separated from it by only the shallowest of waters and, in the main, connected with the mainland by underwater levees. Most of the islands in question are either formed from sediment deposited by Louisiana's rivers or formed as islands by the process of erosion. The recognition of the relevance of such geological factors to determining what islands are an integral part of the land form is traceable to *The Anna.*[64] There, the Court held that the "number of little mud islands" forming a "portico to the mainland" at the mouth of the Mississippi were "the natural appendages of the coast on which they border, and from which, indeed, they are formed. since their elements are derived immediately from the territory." [65]

Once it is understood what the bases for Louisiana's selection of headlands are, the fallacy of the federal contention that an additional closing line must be drawn from the headland to the "mainland" becomes apparent. For where an island headland forms an integral part of the land form, whatever shallow waters slightly separate it from that land form must be considered on the mainland. They are fully assimilated to the mainland, just as an inland lake or bayou. The federal *practice* in this regard again makes it clear

[64]5 Rob. 373 (1805).
[65]Id., at 385.

that their asserted *principle* is not even followed by those who assert it, since the federal government does not link its island headlands to the main landform with a line (e.g., the headland near Redfish Bay discussed infra, pp. 92-96).

The federal government apparently recognizes that under Article 7, paragraph 3, the presence of islands may cause a bay to have more than one mouth.[66] Obviously then headlands may be located on islands, since, by definition, the mouth of a bay is the opening in it between headlands. Hence, it is impossible to understand the federal government's flat assertion that the Convention does not permit the use of islands as headlands.

In its brief Louisiana contends that islands can also be used as headlands where part of the perimeter of a bay is formed by islands. Since the federal government contests Louisiana's position that islands can form part of the perimeter of a bay under Article 7 of the Convention, it also implicitly rejects the use of islands as headlands in such circumstances.

Article 7, paragraph 2 of the Convention defines a bay as "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." The federal government seeks to add to this definition a requirement that the bay penetrate the *mainland* coast. It states that "[a]n off-shore area formed by drawing lines to and between

[66]See U.S. Brief, p. 63.

islands is a projection, not an indentation, unless the islands are in the mouth of an indentation in the mainland coast." [67] However, Article 7 does not say the indentation must penetrate the mainland. The English text merely says that a bay is an *indentation.* There is nothing in it to indicate that the indentation qualifying as a bay could no penetrate into islands as well as mainland.

Moreover, in the French text of Article 7 we find positive evidence that the federal interpretation is patently erroneous on this point. The federal government in connection with another provision of the Convention has informed us that the French word corresponding to the English "mainland" is "continent".[68] Unlike the English text, the French text of Article 7 tells us into what must the indentation penetrate, and it is not the "mainland", the "*continent*", that the French text requires to be penetrated. Instead, the French text speaks of the penetration of an indentation "*dans les terres*", that is, "in the lands." The expression "*les terres*" is considerably broader than "*le continent.*" *Terre* denotes land of any sort, an island as well as a mainland.[69]

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[67]Id., at 61.

[68]Id., at 78, f.n. 36.

[69]The *New Cassell's French Dictionary* (1962), p. 716, defines "*terre*" as "Earth, the world; land, shore; ground, soil; loam, clay, etc.; dominion, territory, grounds, estate, property. . . ." See also *Petit Larousse* (1959), p. 1036. The use of the plural "*les terres*" seems in context to indicate that the article is speaking of more than one piece of land, whereas under the federal interpretation of the article, the penetration could only be into a single piece of land, the mainland.

Once it has been established that the word "mainland" has been improperly read into the text of Article 7, the circularity of the federal argument becomes obvious. Drawing lines between the islands forms a *projection* only if it is first established that the coast is landward of them, which in turn is the very thing that the argument is supposed to establish. However, if the term *coast* is not restricted to the "mainland coast", then it then includes the low-water line on those islands, plus the lines drawn between them. If those islands are so situated as to form an indentation with the requisite configuration and characteristics of a bay, then that indentation is a bay under Article 7, regardless of the fact that its perimeter is partially formed by islands.

The federal government's avowed position regarding islands forming part of the perimeter of a bay is also inconsistent with its practice. We have pointed out several instances in which the United States has actually selected island headlands. In each of these the island must form part of the perimeter of a bay, albeit small part. Of course, the instances in which the United States has done this are restricted to those in which the island-headland may be said to form an integral part of the mainland. From the numerous instances which Louisiana has found in international law where it has been recognized that the perimeter of a bay may be partially formed by islands, (see pp. 116-121 of Louisiana's Brief) the principle does not appear to be restricted to such instances. However, if one examines the instances in which Louisiana has applied the principle that islands may form the

perimeter of a bay it appears that most of them are instances where the entire insular perimeter of the bay forms an integral part of the land form. For example, those islands forming the southern perimeter of Caillou Bay appear to be clearly an integral part of the land form. They are just as closely connected with each other as the islands of the St. Bernard peninsula, which the federal government asserts must be considered a single land formation.[70] However, Article 7 does not require that islands forming the perimeter of a bay be an integral part of the land form, it only requires that the entity in question have the general characteristics and configuration of a bay and meet the semi-circle test, which is a considerably broader test.

Furthermore, the federal government's present position is inconsistent with its argument in its memorandum in support of its proposed decree in the California case in which it stated:

> The situation is the same with respect to straits leading to inland waters. Where they come within the Article 7 definition of a bay, they are inland waters to the extent provided by that Article . . . .[71]

Since the phrase "straits leading to inland waters" applies to certain insular formations (e.g., Long Island

[70]See U.S. Brief, p. 93. To compare the Caillou Bay area with the St. Bernard Peninsula see Exhibits 3 & 4 of Louisiana Original Brief.

[71]Decree proposed by the United States and memorandum in support of proposed decree, p. 10.

Sound, see Louisiana Brief, p. 119, f.n. 78) the language of the federal government clearly recognizes the possibility that islands may form part of the perimeter of a bay. It is submitted further that Caillou Bay is a paradigmatic instance of a strait leading to inland waters which satisfies the criteria for a bay.[72]

In its memorandum in support of its decree in the *California* case the federal government stated:

> Where they [straits] do not come within the provisions of either Article 4, 7, 8 or 13, we understand that the Convention denies them the status of inland waters (at least for purposes of defining the baseline of the territorial sea) and that the Court, by its adoption of the principles of the Convention, has so ruled.

This position is reflected throughout the government's brief in the present case. We have already demonstrated in our brief that the Convention cannot be deemed to have repealed the general principle that landlocked waters, or waters *inter fauces terrarum*, are inland. (See pp. 131-136). Louisiana recognizes that the Convention failed to include a specific provision concerning groups of islands that would clarify the matter somewhat. However, it is submitted that in the absence of a specific provision on islands, the Court must look to three sources of norms.

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[72]One should note that the question presented by Caillou Bay is considerably different from that which was presented by the Santa Barbara Channel in the *California* case. The island of the Santa Barbara Channel closest to the main land formation, Anacopa Island, lies further than ten miles from the continent. The distances between the continent and the

The first is the Convention itself. As the federal government has pointed out, other specific provisions of the Convention may be relevant to a situation where islands are involved. The straight baseline method of Article 4 is only one of these. Article 7 is another.

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rest of the islands of the Santa Barbara Channel is much farther.

Furthermore, the waters of the Santa Barbara Channel between the islands and the continent are deep, whereas those of Caillou Bay are shallow. Mr. Shalowitz has pointed out that "the *Corfu Channel* case was relied on by the Government in the *California* case to uphold its contention that the waters between the southern California coast and the offshore islands are not inland waters but high seas." (1 Shalowitz 237, f.n. 67). In this case the government does not rely on the principle of the *Corfu Channel* case because Caillou Bay is utterly useless to international cmomerce, hence there is no necssity of denying to it the juridical status of inland waters on the ground that the right of innocent passage must be preserved.

In view of these differences, it is no wonder that the Justice Department in its Memorandum of January, 1968, included a map showing the coastline as proposed by the United States running the length of the southern and insular perimeter of Caillou Bay, and a proposed decree describing a continuous line around the southern perimeter of that bay (see p. 21.) In its brief the United States now declares "there is an inadvertent error in the decree proposed by the United States, which describes in this area [Caillou Bay] a continuous line along the southern side of the Isles Dernieres and across the openings between successive islands. U. S. Mot. 21-22. Since Caillou Bay is not inland waters, there is no basis for drawing closing lines between the islands, and our description should be amended by omitting those closing lines." (U.S. Brief, pp. 89-90.) We can well understand the "error" because for more than fourteen years the Justice Department and the Interior Department have treated Caillou Bay as a bay. In view of Caillou Bay's obviously having the characteristics and configuaration of a bay, the habit must have been doubly hard to break.

Thus, although the adoption of the proposed article on islands would have given sanction to the concept of a "fictitious bay" composed of islands, which would have been much broader than Article 7, nevertheless some formations of islands do meet the test for bays under Article 7.[73]

Second, the Court must look to general principles of international law outside the Convention, for rea-

[73]In footnote 28 to p. 64 of the U.S. Brief the federal government sets forth its version of the history of the proposed article on groups of islands. It is accurate in reporting, but misleading in emphasis. For example, while it is true that the Special Rapporteur proposed a text on groups of islands "not as expressing the law at present in force, but as a basis of discussion should the Commission wish to study a text envisaging the progressive development of international law on this subject," and cited a passage from the *Fisheries* case to support him, nevertheless, the discussion cannot be taken to mean that international Law did not recognize certain configurations of islands as enclosing landlocked waters. Such an interpretation would make the citation to the *Fisheries* case meaningless because that case did hold certain waters to be landlocked because of island formations. The passage quoted by the Special Rapporteur from that case clarifies his meaning (See p. 65 of the Federal Brief). The International Court of Justice states that attempts "to subject groups of islands to or coastal archipelagoes to conditions analagous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters or ten or twelve sea miles) have not got beyond the stage of proposals." The key word is "limitations." The decision of the Court recognized the inland character of waters behind and between islands; it simply did not recognize any limitation in International Law upon a state's right to claim such waters as its own, or at least, that the limitations imposed by bay rules were not recognized as limitations for waters claimed as inland because of the presence of groups of islands.

sons discussed in this Reply Brief, pp. 35 *et seq.* For the substance of the general principles at issue see pp. 131-136 of our Brief.

Third, the Court must look to the practice of this nation in foreign affairs. For if the Convention contains no provision dealing with a subject, it must be assumed that the practices of various states are as valid after the adoption of the Convention as before.

While it is true that the straight baseline method may apply to groups of coastal islands, it does not follow that Article 4 of the Convention is the only possible norm. Even Shalowitz, admits:

> This question of groups of islands cannot be considered as settled. The International Law Commission, while recognizing the importance of the question, was unable to reach a decision because of disagreement on the breadth of the territorial sea and because of a lack of technical information on the subject. . . .[74]

The United States' position prior to the adoption of the Convention was set forth in the State Department's letter of November 13, 1951 as follows:

> . . . With respect to a strait which is merely a channel of communication to an inland sea, however, the United States took the position, with

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[74]1 Shalowitz, *Shore and Sea Boundaries* (1962) 228. Although he indicates that he believes that generally where straight baselines are not drawn each island has its own territorial sea (p. 227), he also recognizes the relevance of the rule that straits leading to inland waters are themselves inland waters to the Louisiana coast, though that rule was not relevant to the simpler coast involved in the California case.

which the Second Sub-Committee agreed, that the rules regarding bays should apply (Acts of Conference, 201, 220).

* * *

The principles outlined above represent the position of the United States with respect to the criteria properly applicable to the determination of the base line of territorial waters and to the demarcation between territorial waters and inland waters.[75]

The pre-Convention position of the United States is also illustrated by the statement of Mr. Jack B. Tate, Deputy Legal Advisor of the Department of State that:

> . . . A strait or channel, or sound which leads to an inland body of water, is dealt with on the same basis as bays. . . .[76]

It is also to be found in the report by Assistant Secretary of State, Thruston B. Morton to the Chairman of the Senate Committee on March 4, 1953:

> . . . With respect to a strait which is only a channel of communication to an inland body of water, the United States has taken the position that the rules governing bays should apply. . . .[77]

Before the Convention the United States had recognized claims by various countries based upon a rule similar to that given above. The United States has long

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[75]Quoted in 1 *Shalowitz, Shore and Sea Boundaries* 356 (1962).

[76]Hearings before the Committee on Interior and Insular Affairs, United States Senate, 83d Congress., 1st Sess., on S.J. Res. 13 and other bills, 1051-52.

[77]*Id.*, at 27-28.

recognized that the waters landward of the keys off the mainland island of Cuba were inland.[78] As late as 1961 a federal district Court recognized the inland character of those waters. In the *Sabbatino* case, the district court stated:

> . . .Defendants contend that the sugar was loaded onto the vessel outside of Cuban territory at a distance of four to six miles off the Cuban port of Santa Maria, which is a subport of the main port of Jucaro, on the southern coast of Cuba. *I take judicial notice that the sitie at which the ship was loaded is inside a well-defined archipelago and that the line of keys forming this archipelago is part of Cuban territory. Given this state of facts, there can be no doubt that the waters between the keys and the mainland where the ship was loaded are part of Cuban territory.* See 1 Moore's Digest of International Law 711, 713, containing statements by the United States Government which recognized these waters as part of Cuban territory when Spain was in possession of Cuba. I must therefore find that the decree purported to affect interests in sugar which was situated within Cuban territory on the decree's effective date.[79] (Emphasis added.)

In 1964 this decision was affirmed by this Court in an opinion which did not question the District Court's taking judicial notice of the status of waters in question, and noted that the lower Court "found that

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[78]For examples, see 4 Whiteman, *Digest of International Law*, p. 274.

[79]*Banco Nacional de Cuba v. Sabbatino*, 193 F.Supp. 375 379 (1961).

the sugar was located within Cuban territory at the time of expropriation. . . ." [80] This Court had already noted the similarity between the Cuban waters above discussed and many of those on the Louisiana coast in *Louisiana v. Mississippi*, 202 U.S. 1 (1906).

In the United States Brief of June, 1964, in the *California* case, filed about six years after the adoption of the Convention on the Territorial Sea and the Contiguous Zone,[81] about three years after its ratification by the United States in 1961,[82] and over a year after the United States Secretary of State stated that the Convention was "expressive of its [the United States'] present policy" [83] the government used the following language:

> (e) *Strait leading to inland waters.*—Wherever the United States has insisted on the right of innocent passage through straits, denying them the status of inland waters, the claim has rested on the character of the strait as a passageway between two areas of high seas. No such right is claimed as to a strait leading only to inland waters. Such a strait is treated as a bay. Examples of this have already been discussed, including the straits leading in the Alaskan Archipelago . . . straits leading to waters between

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[80] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 406 (1964).

[81] U.N. Doc. A/Conf. 13/L.52.

[82] 44 Dept. of State Bulletin 609.

[83] Letter, U. S. Secretary of State to U. S. Attorney General, January 15, 1963, 2 International Legal Materials 527, 528 (1963).

> Cuba and its encircling reefs and keys . . ., and Chandeleur Sound. . . ." [84] (Emphasis added).

Hence, it is evident that the United States did not consider the Convention inconsistent with its previous position on straits leading to inland waters. An interpretation such as the Justice Department now urges is in direct contradiction to that taken by the State Department in explaining the Convention to the Senate Foreign Relations Committee while it was considering the ratification of the Treaty. In "Answers to Questions of Senate Foreign Relations Committee Concerning the Law of the Sea Conventions," prepared by the Department of State prior to Senate approval of the Convention, we find this question:

> Are there any examples of water which are now internal waters, but which would become territorial waters or high seas under the rules prescribed by the Convention on the Territorial Sea and the Contiguous Zone?[85]

The State Department's answer to the question was as follows:

> Application of the rules of the Convention on the Territorial Sea and the Contiguous Zone concerning straight baselines *would not have the*

[84] Brief for the United States in Answer to California's Exception to the Report of the Special Master." (Filed June, 1964), pp. 130-131.

[85] Portion of Question No. 6 prepared by Senate Foreign Relations Committee, Hearings S. Foreign Relations Committee, Convention on the Law of the Sea, Executives, J, K, L, M, N, 86th Cong., 2d Sess., 82-111, inclusive.

effect of changing the status of waters which are now internal. (Emphasis supplied.)[86]

Although the State Department's answer was expressed in terms of the effect of the straight baseline rule, the Senate Committee's question was directed to the whole Convention, and the clear implication of the answer is that the Convention would not transform any of this nation's internal waters into high seas or territorial waters. Yet such is the effect of the Justice Department's present interpretation. In effect the federal government is contending that the adoption of a treaty containing a straight baseline article repealed the previous United States' position in regard to straights leading to inland waters.

Such an interpretation by the Justice Department seems quite odd for several reasons. First, it gives to Article 4 an effect clearly contemplated neither by the State Department nor by the Senate in adopting the Convention, as witness the question and answer above. Second, it would mean that all waters of littoral states hitherto considered internal on grounds other than one set forth in the Convention would cease to be internal and resume that status only upon adoption of the straight baseline method. If such were the case, then all waters behind straight baselines not already inland by reason of the application of some other article, would have been territorial sea or high seas at some time before the drawing of the straight baselines. Hence, wherever straight baselines were needed to establish the inland status of such waters,

[86]Id., at 84.

paragraph 2 of Article 5 would apply and a right of innocent passage would exist through them. But clearly that paragraph was intended to apply only to some such waters behind straight baselines, and clearly the Convention did not intend to produce an immediate contraction of the inland waters of a state, and then a re-expansion. Finally, the federal interpretation is stained because the clear undisputed purpose of the straight-baseline article was to *expand* the areas of water which would be deemed inland, and the Justice Department's interpretation would give it the effect of *contracting* such waters. There is nothing in the Convention to prevent this country's continuing to employ its traditional approach to straits leading to inland waters which is much more restrictive than the straight baseline article. No waters which could not be inland under express articles of the Convention would become inland under the United States' traditional rule. It is submitted that there is nothing in International Law, either in the Convention or outside of it, which could be construed to condemn the traditional practice of the United States in applying the rules concerning bays to straits leading to inland waters and that this Court should recognize the validity of such practice and its applicability to the waters of Louisiana.

DREDGED CHANNELS

In its brief relating to this section (Fed. Brief 50-56) the federal government points out that there is little conflict in the Sabine Pass to Tigre Point except

as to the dredged channels at Sabine Pass, Calcasieu Pass, and Freshwater Bayou.

At page 51 the government states: "Louisiana claims that the dredged channels, *marked only by buoys*, are 'harbor works' within Article 8 of the Convention, ..." This statement is patently erroneous. A reference to Appendix G, exhibits 110, 111, 117, and 118 of Louisiana's brief quickly points out that there are numerous structures erected on the Saline and Calcasieu Chanenls. The above mentioned exhibits include both plans and pictures of rather massive structures erected by the federal government, the Corps of Engineers, to assist in the continued maintenance of these channels. Buoys are merely floating objects anchored to the floor of the Gulf. Reference to the plans of structures, exhibits 110 and 117, immediately show that these sructures are sunk deep into the floor of the Gulf and are truly permanent in nature.

The federal arguement that there is a total absence of jurisdiction over mere buoyed channels does, however, suggest some highly relevant questions. It is absolutely clear that the harbor systems of Louisiana would not and could not exist as a modern port system, without the great dredged channels that make entrance to the port system possible. The nearly $300 million investment in these channels, an integral part of the harbour system, obviously requires U. S. jurisdiction to protect the channels and the use thereof. The federal argument furnishs no legal construct whereby such jurisdiction could be possible. The harbour work approach is the only legal means for recognition of needed

jurisdiction. Inland jurisdiction is a practical necessity.[112]

The federal government sets out its interpretation of the rationale of Article 8 of the Convention at p. 51 et seq. Louisiana submits that this view is entirely incorrect. The basic purpose behind Article 8 of the Convention is best pointed out by the statement of Mr. Carmona (Venezuela). His statement contained in the U. N. Conference on the Law of the Sea, Official Records, vol. 3: First Committee (Territorial Sea and Contiguous Zone), Summary Record of Meetings and Annexes (U.N. Doc. A/Conf.13/39), p. 142 is as follows:

> 4. Mr. Carmona (Venezuela) stressed that the International Law Commission approved the text of Article 8 only after the most exhaustive study. *The construction of harbor works being of vital importance not only to the coastal state but also to the ships of all nations, no doubt should be allowed to subsist regarding the status of such works.* Governments which had made heavy economic sacrifices to secure their port facilities against the elements had always acted on the assumption that the legal position was precisely as stated in the Commission's text. In those circumstances, any interference with that text might have very serious consequences. (Emphasis added).

The rationale of Article 8, as pointed out by this

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[112]See the portion of this brief replying to the federal arguements on the Inland Water Line, for a discussion of the practical need for inland classification of the channels, rather than territorial sea or extra-territorial classification.

statement, is to allow a nation to maintain jurisdiction over major improvements necessary to the navigation of the nation which have been secured at enormous effort and expense. Were it not for the artificial channels, continuously maintained, the natural elements of storm, wind, wave and current would silt and render useless the avenues of access to the various points.

As pointed out by the federal government (p. 52) the commentary to Article 8 gave some examples of the sort of improvements comprehended by the term "harbour works" in the Convention that is, jetties and breakwaters. There was no indication that the examples included were exclusive. On the contrary, it is obvious that the examples given were meant only to be illustrative. Louisiana submits that jetties were used as an illustration simply because they are the most obvious and readily apparent harbor work.

The federal government (p. 52-53) quotes the statement by Mr. Carmona set out *supra*. They extract two ideas from his statement, one, the idea of securing the port from the elements; and two, the idea that the Article represents a state of existing law. The federal contention as regards that statement relating to securing the port against the elements, Louisiana feels, is far too restrictive an interpretation of that statemen. A brief glance a the relevant U. S. C. & G. S. charts, Appendix G, exhibits 64, 66, and 67 of the brief by Louisiana will show that the waters through which the channels in question extend, through their greatest extent, are entirely too shallow for use by vessels of any appreciable sizes in their natural state. On the other

hand a reference to the commercial statistics contained in appendix G, exhibits 106 and 113 of the brief by Louisiana (The Freshwater Bayou Channel has only recently opened and as yet there are no meaningful statistics available on commerce through this channel.) will show that both the Sabine and Calcasieu Channels carry a vast amount of tonnage. Without these channels the streams with which they connect would be able to carry practically no tonnage.

The shallowness of these near shore waters, the general western current in the Gulf and the large quantities of silt carried by the streams in question all combine to create a condition which would prevent entry into these waters by vessels of any size without the channels. Louisiana submits that the federal governments evident failure to include these conditions within the purview of Mr. Carmona's reference to the "elements" is patently erroneous.

The federal government, in addition, places some emphasis on Mr. Carmona's statement that the article represented existing law. The federal government contends that there was no existing law relative to channels and therefore channels could not be considered as extending inland waters. Louisiana admits that this is a matter of first impression; however, the fallacy in the federal government's point of view is indicated by the fact that although they did make the blanket statement that there was no prior or subsequent law on the subject, they at the same time could show no authority to support the proposition that dredged channels do not extend a state's inland waters.

The federal government failed to consider that which was truly the heart of Mr. Carmona's statement, i.e., the vital importance of the construction to the coastal nation as well as the ships of all nations, and the heavy economic sacrifice which the coastal nation had undergone.

Louisiana contends that the federal government had utterly failed to grasp the true importance of the statement by Mr. Carmona, which failure reappears all through this section of the brief.

The federal government (pp. 53-54) makes an arguement in opposition to the dredged channels which, at best, is inadequate. It contends that a dredged channel is a singular object and therefore there are no outermost points between which to draw a line. This overlooks the obvious fact that a dredged channel is an artificial cut into the floor of the Gulf of Mexico with banks on both sides. Since it is a cut there is a point on either side at which the cut into the floor ceases to exist, and there are two banks enclosing the length of the cut. At the seaward most end, the cut again ceases to exist. The coastline therefore, follows the edges of the channel from a point 3 miles seaward of the shore, one each side to the seaward ends of the channel and there from one side to the other.

In a footnote the federal government attacks the dredged channel inferentially. They state (p. 54) that Louisiana did not use these channels as headlands for bays where they might have been used. From this the federal government draws a conclusion that Louisiana

itself realized that these channels are not, in fact, harbor works.

The federal arguement ignores the differences in the language of the Convention pertaining to bays in Article 7, and the Article 8 language pertaining to harbor works. Article 8 contains no requirements the outermost permanent harbor works be "well marked" or that the line enclosing harbor works follow the "low water marks of its natural entrance points" or the "low-water mark around the shore." Therefore, it is perfectly natural and correct for Louisiana, where it has employed harbor works in connection with the delimitation of bays, to follow the low-water mark in accordance with the provisions of Article 7. Incidentally, this analysis further fortifies the position of Louisiana on dredged channels—that is, that harbor works may be submerged. The principle expressio unius est exclusio alterius is plainly applicable to the manifest differences in language between Article 7 and Article 8. It was an express requirement that the low-water mark be followed in the selection or placement of headlands or in the location of the shore of an indentation. This requirement is excluded from the provisions of Article 8 with the result that the Convention plainly calls for an interpretation to the effect that the presence or absence of the low-water mark for harbor work under Article 8 is immaterial. Comparison of Article 8 to other provisions of the Convention supports this analysis. Article 9, dealing with roadsteads, through which low-water marks are clearly irrelevant, makes no express mention of the requirement following any

low-water mark. Articles 10 and 11 discuss and make requirements pertaining to high and low-water marks for islands and low-tide elevations. Indeed, dealing with the normal manner of delimiting the baseline of a mouth of a river refers to the low-tide line. It can hardly be considered accidental that Article 8 imposed no requirement for following any sort of law-water mark in connection with harbor works in view of the very careful draftsmanship of the other articles which impose the requirement of low-water mark.

Evidently the federal government feels that the term "harbor work and entrance point" are synonymous. If the Court finds this to be so then Louisiana does indeed urge that its proposed decree to be amended in this regard.

The federal brief (p. 54-55) attempts to attack Louisiana's position with regard to dredged channels by constructing Article 8 together with Article 3. They point out that there is no low-water mark along a channel and therefore this could not be a baseline for measurement under the Convention. The federal government, however, has overlooked the provision of Article 3 which makes it inapplicable. Article 3 begins:

> "Except where otherwise provided in these articles, . . ."

Louisiana contends that Article 8 is one of the provisions covered by this exception to the Article 3 mandate as regards the baseline for measurement.

In this same regard the federal government puts forth the spectre of a state extending its baseline great

distances on the basis of "the most perfunctory sort of dredging." This spectre is, at best, illusory. While a true harbor-work, which is necessary to the continued, safe, and efficient operation of a port system might extend the coast line some distance to sea, as is the case with the Sabine and Calcasieu Channels, Louisiana contends that this extension is so only in the case of an actual navigational improvement, and that Article 8 would not apply to a mere "perfunctory sort of dredging" as the federal government contends. The 300 million dollar investment in dredged channels in offshore Louisiana can hardly be considered a "perfunctory sort of dredging".

The federal government concludes this portion of its brief by pointing to the proposal by Argentina to revise Article 9 to include buoyed channels within the territorial sea. As stated in the federal brief (p. 55-56) this proposal was not adopted. It did receive a simply majority vote, but fell short of the two-thirds majority needed to place it in the Convention.[113] From this the federal government concluded that since the proposal relative to buoyed channels had not been adopted there would be no justification for extending the much more

[113]Actually, the federal position that mere buoyed channels are not a part of the territorial sea is subject to serious questions. McDougal & Burke, in *Public Order of the Oceans*, P. *426*, suggest that the very substantial majority vote, 41 in favor, 26 opposed, shows an international consensus or strong majority view that mere buoyed channels extend the territorial sea. Thus, even though the Conference did not adopt the suggested provisions, the consensus is so strong that the provisions may nevertheless reflect the international law on the subject.

privileged status of inlad waters with its three-mile territorial sea to a dredged channel.

Again the federal government has failed to distinguish between the two completely different types of channels. As was pointed out, supra, in the statement by Mr. Carmona, the true thrust of Article 8 and the true thrust of the reasoning behind Article 8 is to allow a coastal nation to maintain jurisdiction over those improvements upon which they have lavished much effort and expense. In the case of a buoyed channel there is relatively little expense or effort, and no engineering or construction "works". The buoyed channel is simply the marking of the most convenient path for traffic to use. Dredged channels on the other hand are extremely expensive and complicated "works", in the language of Article 8, difficult to construct and maintain. The complications and expense involved in such a structure rival, if they do not, in fact, surpass the complications involved in constructing jetties. Thus it is apparent that dredged channels are included as "works" within Article 8 of the Convention, but mere buoyed channels are not. The fact that the provision raised by Argentina was limited to mere buoyed channels rather than to dredged channels suggests that the dredged channels were considered by all to have been covered by Article 8.

SPECIFIC AREAS

Subject to the Inland Water Line advocated by Louisiana and its position with respect to the use of the system of straight baselines under Article 4 of the Convention, there is basic agreement between the par-

ties with respect to many of the segments of the alternative coastline of Louisiana. With few exceptions, disagreement is caused by the complexities of the coast and the principles to be applied.

For the convenience of the Court, we have annexed to this brief, by way of a pocket part, copies of the various exhibits showing both the Government's and Louisiana's alternative coast lines. We now reply to the government's arguments on specific areas involved in the alternative positions.

DELTA AREA

Chandeleleur and Breton Sounds

Louisiana and the United States are in basic agreement that the waters of Chandeleur and Breton Sounds (Chart No. 2 attached) are to be treated as inland waters of the United States. However, Louisiana treats these waters as inland under recognized principles of international law, whereas the Government denies this, asserting instead that these waters are inland only because of the Government's prior treatment and concessions. The basic fallacy in the Government's argument is their failure to go beyond the fact of the concessions to determine the bases of the concessions.

It is certain that the Government did not act without forethought and careful consideration of the principles of international law when, in the past, it determined the location of portions of the coast line of Louisiana. Even the Chapman Line enclosed these waters as inland waters. According to Aaron Shalowitz who assisted in its delimitation, it was arrived at by application of the recognized principles of international law

such as the 10 mile rule for bays, the rule for straits leading to inland waters and the rule dealing with fringing island chains, and was the work product of the combined technical, legal, and political resources of the Department of Justice, the State Department, the Bureau of Land Management and the Coast and Geodetic Survey.[87] It is no mean consequence that Chandeleur and Breton Sounds were considered inland waters. It clearly demonstrates that the Government, applying international law principles adopted by the United States, considered the waters lying between the island chain and the mainland as sufficiently enclosed to constitute inland waters. Professor Shalowitz notes that the coast line was drawn between the offshore islands on the theory that these were channels or straits leading to inland waters to which the rules for bays were applicable.[88] He also notes that the Chapman Line was the "most landward line" that the Government would claim.[89]

Similarly the Government and this Court, on numerous occasions, have recognized the inland character of Chandeleur and Breton Sounds, not on the basis of a concession, but on the basis of a recognized principle of international law—that the waters between the islands and the mainland are sufficiently enclosed or landlocked to constitute the intervening waters as inland waters [e. g. *Louisiana vs. Mississippi*, 202 U. S.

[87] 1 Shalowitz, 109, n. 8.

[88] *Id.*, at 108, n. 7 and 161. See also paragraph "f" of letter dated November 13, 1961, from the Department of State to the Department of Justice, found in 1 Shalowitz 354 at 356.

[89] *Id.*, at 109.

1 (1905); *United States v. Louisiana*, 363 U. S. 1, 67 (1960); *United States v. California*, 381 U. S. 139, 171 (1965); *United States v. Louisiana*, 382 U. S. 288, 292 (1965)].

The Government ignores the basis for the inland classification of Chandeleur and Breton Sounds by dogmatically insisting that the sounds do not qualify as inland waters under its literal interpretation of the Geneva Convention. The difficulty with the Government's position stems from their misunderstanding concerning the intended exclusiveness of the Convention. There is nothing in the Convention which suggests that it is to be the exclusive source of all international law. Moreover, there is nothing in the transcripts of the Convention to suggest that the delegates intended such an interpretation. All of the evidence suggests the opposite conclusion—that the preexisting concepts of international law, not expressly inconsistent with those provided for in the Convention, were to retain their prior viability.

The situation at Chandeleur and Breton Sounds illustrates, we believe, how this can be the only reasonable interpretation of the intent of the Convention's redactors. All of the history and commentary of the Convention evidences that it was designed to broaden and extend, not to restrict, the inland waters of coastal nations. To interpret it as the Government suggests, as illustrated by their comments on Chandeleur and Breton Sounds, is to produce the exact opposite effect. We submit that the Convention was never intended to divest a nation of waters which had theretofore been

considered inland waters under international law, and it should not be so interpreted now. Such an interpretation would authorize the Federal Government to take away territory belonging to a state under the guise of foreign policy, and, as this Court said in the second California case, "a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable" [90]

However, even if the Convention were interpreted as being exclusive, there can be little question that after qualifying as inland waters under recognized tests of international law for so long a period, a fact admitted by the Government, these waters must, at the very least, be considered to be historic inland waters of the United States.

Ship Island to Chandeleur Island

The only difference between Louisiana and the Government in this area is the location of the northern terminus of the closing line, and this difference is not substantial. Louisiana does, however, protest the Government's principle of drawing the closing line to the "closest point" on Ship Island.[91] Not only is there no authority for this principle in international law,[6] but it

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

[91] See Louisiana Original Brief, p. 121, et seq. (hereinafter abbreviated La. Orig. Br.)

[92] Strohl, *The International Law of Bays* (1963) p. 68, cited in the Government's brief, p. 131, does say that this is a "logical method" in some situations. But, he does not say that this is a principle of international law, and he questions whether any nation would ever use this principle, adding:

is entirely inconsistent with the position advocated by the Government for drawing closing lines across the entrances to inland water, i. e., between headlands, or if no headlands then to the point of intersection of the bisector of the angle formed by the general trend of the open coast and the general trend of the tributary waterway.[93]

Louisiana selected as its northern terminus the eastern tip of the western island of the Ship Island Couplet.[94] The Government has asserted that at some time between the publishing of the 1957 and the 1967 Coast Charts, the channel separating the island became filled in, creating a single island. If this fact caused a change in the coastline, the exact date of the filling of the channel may be of considerable significance if any money had been impounded in this area. These facts, however, have not altered Louisiana's position that her

"If this shortest line is over twenty-four miles in length, then the littoral State will no doubt use it to determine the existence of a bay under the semi-circle rule. If the shortest possible line [between the headland and the opposite shore] is under twenty-four miles in length, the littoral State may be expected to so locate the terminus of the closing line as to ensure a length of exactly twenty-four miles, on the seaward side. By so doing, the State acquires the greatest possible area of internal waters." Strohl's hypothesis, then, would apply only in the case of a closing distance exceeding 24 miles and not in a situation similar to that at Ship Island where the closing line is less than *10 miles*.

[93]U. S. Motion, p. 9.

[94]This point was erroneously designated in Louisiana's Motion and Original Brief as X=2,759,565.13 and Y=571,-621.89. The correct position is X=2,762,908 and Y=572,905, which creates a closing line of 9.95 miles. The Motion and Brief should be corrected accordingly.

northern terminus is the more logical one. If there were two islands, obviously the western island created a headland. If there is but one island, the point selected by Louisiana is the westernmost point which can be considered as the natural entrance point of Chandeleur Sound.[95]

Isle Au Breton Bay[96]

The Government's treatment of Isle Au Breton Bay (Chart No. 2, attached) evidence a complete misunderstanding of the content of Article 7 of the Geneva Convention. First, the use of islands to form a part of the perimeter of a bay has been well established in international law, has been recognized by this Court, and has been adopted by the Government in the present litigation. In our original brief (pp. 116-121), we noted several cases in which international law recognized the use of islands as forming the perimeter of a bay.[97] We

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[95]As pointed out in our Original Brief, p. 171, it is arguable that the outermost entrance point is the eastern tip of eastern island of the couplet.

[96]The Government notes (U.S. Orig. Br. p. 127, n. 59) that they are unable to find authority for denominating the bay lying between Mississippi Delta and the Chandeleur Island chain as Isle Au Breton Bay. We direct the Government to the following references: I Shalowitz, p. 109, n. 9; Official United States Government Hydrographic Survey, Register No. H-999; Louisiana Original Brief p. 171, n. 164.

[97]Additional, Hall's text, on *International Law,* in regard to the islands off Cuba's southwest coast, states that:

> '. . . on the south coast of Cuba, the Archipiélago de los Canarios stretches from sixty to eighty miles from the mainland to La Isla de Piños, its length from the Jardines Bank to Cape Frances is over one hundred miles . . . there can be little doublt that the whole Archipiélago . . .

reiterate that the case of *Manchester vs. Massachusetts*, 139 U. S. 240, recognized Buzzards Bay as a juridical bay and that the eastern part of its perimeter is formed by a chain of five islands. Finally, the Government itself recognizes the validity of using islands as a part of the perimeter of a bay because it follows this principle in defining the western limits of the Timbalier Bay complex which is formed by what may "technically called islands." [98] We sumbit, therefore, that the Government's position in regard to the northern shore of Isle Au Breton Bay is inconsistent with international law, with the law of the United States, and with the Government's own interpretation of those laws in Timbalier Bay.

Second, the length of the lines joining the various islands around the perimeter of a bay should not be added to the length of the closing line across the mouth of the bay to satisfy the 24 mile closing line test. The sole purpose of Section II of the Convention, which includes Articles 3 through 13 (including Article 7), is to set forth rules to determine the location of the base line of the Territorial Sea. Indeed, Section II is even entitled "LIMITS OF THE TERRITORIAL SEA".

None of these articles, nor any other part of the Convention for that matter, has any bearing on deter-

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is a mere saltwater lake, and that the boundary of the land of Cuba runs along the exterior edge of the banks.' [(8th ed.) p. 149]4 Whiteman, Digest of *International Law*, p. 275.

[98]United States Original Brief, 94.

mining the division line between adjacent bodies of inland water, for quite clearly such a line is not part of the base line of the Territorial Sea. It thus certainly follows that when Article 7 sets forth principles for locating the base line between the natural entrance points across the mouth of the bay, it has reference to the line dividing the territorial sea from inland waters, and not any shoreward lines dividing inland waters from other inland waters. The only entrance or mouth referred to in the Convention is the one leading from the territorial sea.

The Government, however, erroneously interprets paragraph 5 of the Article 7, dealing with the 24 mile maximum closing distance across the mouth of the bay, to require aggregation of the distance across the entrance from the sea with the interior distances dividing one body of inland water from another. It is clear that only the base line of the Territorial Sea is to be taken into account in arriving at the distance across the mouth of the bay, and certainly fictitious lines separating bodies of inland water cannot logically be aggregated with the true base line.

This, however, is exactly what the Government attempts to do in dealing with Isle Au Breton Bay by suggesting that the distance across the water areas separating Breton Sound from Isle Au Breton Bay must be added to the distance across the mouth of Isle Au Breton Bay to determine if the 24 mile rule is satisfied. To argue that these distances must be aggregated is to argue that these lines all form part of the base line of the Territorial Sea, which leads to the illogical

conclusion, under the Government's argument, that the base line of the Territorial Sea in this area runs in a circle.

We submit that only the entrance to Isle Au Breton Bay from the sea forms part of the base line of the Territorial Sea and that only this entrance is intended to be measured to determine if the 24 mile closing test is satisfied.

The third error in the Government's argument is that their contention that Isle Au Breton Bay is not "landlocked" because the perimeter is composed of islands. While the Convention does establish that the ratio of depth of penetration to width at the mouth as a criterion for determining the "landlocked" character of a bay, no article, indeed no international law authority, has ever to our knowledge advanced the requirement suggested by the Government that to determine landlocked character one is to stand in the center of the bay and compare the water areas on the horizon, including inland waters, with the land areas in terms of degrees of the compass and percentages of the circumference. Clearly, under a strict interpretation of Article 7, Isle Au Breton Bay "constitutes more than a mere curvature of the coast" because its closing line is 21.3 miles long and because it contains sufficient water area to satisfy the semi-cricle test.[99]

[99]It is arguable that the water area from Ship Island to North Pass is primarily composed of two separate coastal bays each with a separate and distinct entrance from the sea and each, therefore, entitled to a 24 miles closing line. Chandeleur Sound, the northern bay, may be closed with a base

Fourth, the Government refers to the line from Main Pass to Breton Island as merely a means of "rounding out" their concession in Breton Sound. This is inexact since, under international law, the Government has closed off an indentation which would qualify as a independent bay. Their closing line from Main Pass to Breton Island is in fact a base line closing across inner headlands of Isle Au Breton Bay, lying between the Chandeleur Island chain and the Mississippi Delta, shoreward of Louisiana's suggested closing line across the same coastal indentation. This is clearly inconsistent with the Government's assertion that no such indentation exists.

In addition, the Government, in closing off coastal indentations between the Delta and the Chandeleur Island chain has overlooked a well marked indentation less than 24 miles across at its mouth which satisfies the semicircle test. The coastal bay lies between North Pass (X = 2,734,900; Y = 209,275) and Dead Woman's Pass (X = 2,709,100; Y = 220,995) behind a closing line approximately 4.66 miles in length. The area of the semicircle is 7,240 acres, while the area of the bay is 9,360 acres. This is but another example of the Government's failure to apply consistently rules which it

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line traversing the Chandeleur Island chain from Ship Island to Grand Gosier Island. Isle Au Breton Bay, the southern coastal indentation, is closed by a line across its mouth from Grand Gosier Island to North Pass. Breton Sound may be viewed as an enclosed body of inland water with no entrance to the territorial sea except through the adjacent inland waters of Chandeleur Sound and Isle Au Breton Bay, and consequently would be a tributary bay to the outer coastal bays.

impose upon Louisiana. This tributary bay lies completely within Louisiana's closing of Isle Au Breton Bay; and, consequently, we have not described this area in our motion. However, Louisiana protests the failure of the Government to recognize this small bay as a part of its coast line.

Louisiana also protests the Government's closing from Main Pass to the closest point on Breton Island, instead of the Eastern tip of the island, which is the natural entrance point to the bay suggested by the Government. In fact, many other alternatives are available as baselines, running from Grand Gosier Island, which would be more realistic than the Government's baseline.

The Mississippi River Delta

In our original brief (p. 177) we asserted that the Mississippi River Delta, or the mouth of the Mississippi River, (Chart No. 3) is a single historic and geographic entity, formed by sedimentary deposits from the river into an interlacing network of distributaries, islands, mud-banks and bars, separated only by shallow, sediment-laden waters, some portions of which are regressing while others were progressing—but all ever changing. The Government appears to deny its uniqueness, but fails to point to any comparable area elsewhere in the world that would be considered to be "high seas", as the Government now claims with respect to portions of the Mississippi River Delta.

The Government also denies the historical significance of the Mississippi Delta, yet the historical

importance of this, the mouth of the greatest of all rivers in the world, is common knowledge to all men, found in virtually every book ever written on American history.

The principal areas of dispute in the Mississippi River Delta area are Blind Bay, Garden Island Bay, East Bay and West Bay.

Blind Bay

We fail to understand the Government's reasoning in its treatment of Blind Bay (Chart No. 3) for it appears to be so obviously inconsistent with their argument in other areas. On the one hand, the Government contends that Article 7 must be strictly and literally interpreted, while on the other it is argued that Louisiana's suggested bay, one which unquestionably satisfies the letter of Article 7, is not a true bay. Despite the fact that Blind Bay satisfies the semicircle test and is only 6.9 miles across, the Government denies that this is a juridical bay, asserting that Blind Bay, as drawn by Louisiana, encompasses two bodies of water; and also that Louisiana's islands cannot be used as headlands.

The Government's first argument denies the propriety of including pockets, coves, or tributary waterways in determing the area of a complex indentation. This position is inconsistent with international law and their own position in other areas. Not only does Shalowitz recognize this principle as valid and viable;[100] but

[100] I Shalowitz, pp. 219, 220; See also La. Orig. Br., p. 111, et. seq.

the Government has added the tributary waters of Red Fish Bay and North Shore Bay in determining the area of Garden Island Bay as well as Scott Bay and Dixon Bay in the area of West Bay.

Their second argument is likewise inconsistent with international law and their own position in other areas. Both Shalowtz and Pearcy recognize that when an island is in fact a projection of the mainland, it may be used as a headland.[101] When it suits the Government, "what are technically called islands" are used as headlands; for example in Breton Sound, Garden Island Bay, West Bay and Timbalier Bay. But when Louisiana attempts to use similar islands in Blind Bay, Isle Au Breton Bay and Garden Island Bay, the Government blandly says Louisiana's islands may not be headlands.

It is well recognized in international law that islands may be used as headlands when they are part of the land form, or appendages to the mainland, or form a portico to the mainland.[102] In such cases the islands are considered as part of the main land and as such form a proper headland for the bay. This is what this Court meant in *Louisiana v. Mississippi*, 202 U.S. 1, 45-46, (cited in U.S. Br. p. 93) when it said that portions of the St. Bernard Peninsula "might technically be called islands, because they are land entirely sur-

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[101] I Shalowitz, p. 161, n. 125; Pearcy, *Measurement of the United States Territorial Sea*, 44 Dept. of State Bulletin 963.

[102] I Shalowitz, 161-62; *See also*, discussion of Islands, supra. page 50 et seq. and La. Orig. Br. p. 124, et seq.

rounded by water, but they are not true islands." But they are a part of the St. Bernard Peninsula, and in effect constitute a part of the mainland. Additionally, in *The Anna,* it was held that these small mud islands off the passes to the Mississippi River were "natural appendage" of the coast.[103]

If by "technical" islands, the Government refers to islands which form part of the land form, are appendages to the mainland, or form a portico to the mainland, as pointed out in *The Anna,* we agree with this concept. No hard and fast rules can be laid down for defining which islands fit this definition. Each must be considered separately. Certainly proximity is a factor, but not all-controlling. Depth of water, geologic formation, character of the submerged connection, and other associations are equally as important factors. But when the determination is made (as was the case with the small mud islands, or mud lumps, off the

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[103]In the case of the Anna, it was said:

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

(See also, 71 *Interior Decisions* 22, holding that the mud lumps off the mouth of the Mississippi River belong to Louisiana.)

passes of the Mississippi River in *The Anna*), the islands are considered as *part* of the mainland, and can be used as headlands without the necessity for drawing closing lines to connect the two.

All of the islands used as headlands by Louisiana (and the Government) off the passes of the Mississippi Delta are in effect part of the mainland. They are all situated within the 6 foot contour of U.C. & G.S. Chart 1272 (Chart No. 3), and appear to be separated from the mainland by depths of from 1 to 4 feet of water. All are situated on the natural levees of the passes and were formed by sedimentary deposits from the passes. These natural levees project a continuous land mass from the mainland, and the submerged portions are constantly being elevated by continuing sedimentation. None of the islands is so far removed from land as to be a separated geological formation. They are literally and figuratively "part of the land form", and are quite properly headlands, being the natural entrance points of the bays.

We therefore submit that Louisiana's closing line for Blind Bay clearly satisfies the requirements of Article 7 of the Convention, and that the position advocated by the Government in this area is without merit.

Garden Island and Red Fish Bays

At no point in its brief is the Government more inconsistent than in its treatment of the eastern headland of Garden Island and Red Fish Bays (Chart No. 3 attached). First, the Government with one breath

denies that Louisiana may use inlands as headlands and with the next admits that its own suggested headland "is technically an island". (U. S. Orig. Br. p. 116). Louisiana's headland, located on an island slightly seaward of the Government's island, is rejected because it is too small and too far from the mainland. Size has never been established in international law as a relevant factor in defining an island or in locating a headland. Most authorities indicate that the proper location of a headland is on the outermost extension of the mainland into the sea. Louisiana's suggested headland is located on that island which is the seaward-most extension of the land form and is the outermost island in a group which is part of the land form and forms a kind of portico to the mainland.

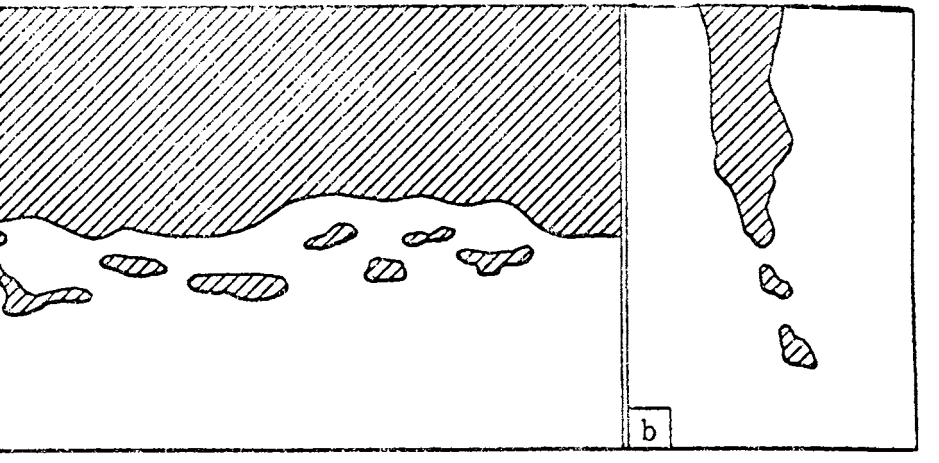

Figure 25.—Islands forming a portico to mainland (a), and islands as part of a land form (b).

The Director of the Coast & Geodetic Survey in a memorandum to the Solicitor General of the United States, dated April 18, 1961, clearly recognized the

use of islands as forming part of the coast line under the Submerged Lands Act. In interpreting that act he said, "The coast line 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 suffciently enclosed to constitute inland waters, or they form an integral part of a land form," 1 Shalowitz, 161.

Shalowitz continues on the next page, (162), "With regard to determining which islands are part of a land form and which are not, no precise standard is possible. Each case must be individually considered within the framework of the principal rule. (*See* Fig. 25.)"

A comparison of figure 25, depicting a typical situation of islands as part of a land form, with figure 9, on page 117, Fed. Br., indicates that the islands lying off of Southeast Pass are a typical example of islands constituting a part of the land form.

Second, the islands of this portico are separated from one another by narrow threads of shallow water. (See Chart No. 3) As mentioned above, there is some discrepancy in the Government's opinion as to what constitutes a "narrow channel". In Outer Vermillion Bay, a channel 3715 feet wide is a "narrow channel"—merely a "connecting door". (U.S. Orig. Br. pp. 58-59). However, a "narrow channel" in Garden Island Bay is thirty feet wide, compared to which the aggregated length (approximately 3200 feet) of not one but four channels between the islands is such as expanse of open sea that Louisiana's headland is an "isolated point".

(U.S. Orig. Br. p. 118). Coast Chart 1272 (Chart No. 3) shows all of these islands as being within the six-foot contour line, and the waters separating the islands appear to range from one to four feet in depth. The widest of the channels is in the neighborhood of 1500 feet, with a depth of about one foot. It is hardly open sea.

Third, by drawing their closing line to an island as the northern terminus of Garden Island Bay, the Government has openly contradicted a major principle in their argument against Louisiana. The Government objects to Louisiana's line, wherever a projection of the mainland is used as a headland, arguing that Louisiana must aggregate the length of the closing line across the mouth with the lengths of all the lines connecting the islands forming an extension of the mainland. (U. S. Orig. Br. p. 60). However, we wish to point out that the Government does not close across the 30 foot channel from their islet to the mainland (U. S. Orig. Br. p. 117, fig. no. 9) apparently recognizing and admitting that when an island is a natural appendage to the mainland, the openings in the perimenter of the bay are not included when calculating the total length of the closing line across the mouth of the indentation between its headlands.[104]

[104]We believe that the Government's diagram on page 117 of its original brief (figure 9) is misleading because its scale exaggerates the distances between the islands, and the diagram fails to show the locations of the islands with respect to the mainland, or with respect to the bay itself. It also fails to show water depths which, as Louisiana has pointed out in its

Considering that Louisiana's headland is a natural appendage of the coast, a part of the land form, that the intervening waters are so shallow that a man can traverse the distance by foot, and that the land mass of an island has no significance in international law, Louisiana asserts that its island is the outermost headland and further asserts that the islet of the Government is inconsistent with established principles of international law.[105]

West Bay

Both parties agree that West Bay is inland water, but disagree upon the location of the closing line (see Chart No. 3 attached). On the north both parties use the same island off Pass du Bois, with Louisiana selecting the outermost headland of the island as its natural entrance point and the Government selecting an interior headland. International law favors the *outermost* natural entrance point.[106]

On the south Louisiana selects the tip of the jetty at Southwest Pass, while the Government seletcs an island inside the bay more than four miles northeast

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Original Brief, (La. Orig. Br. 180) play a prominant role in substantiating that these islands are merely a natural extension of the mainland.

[105]Louisiana's line exhibits a shorter closing distance than does the Government's. In a similar situation concerning the Ship Island—Chandeleur Island closing line, the Government agreed that it would be arbitrary on its part to insist on the use of its original line when a shorter line more favorable to Louisiana could be drawn. (U.S. Orig. Br. p. 130).

[106]See La. Orig. Br., p. 121, et seq.

of the tip of the jetty. The Government contends that a person passing the tip of the jetty cannot be said to have "entered" West Bay. Yet, the coastline turns more than 90° at the tip of Southwest Pass, and no one can enter West Bay from the Gulf, either from the east or from the south without going around Southwest Pass. It is obviously the outermost entrance point.

The Government also contends that, while Louisiana's closing line is only 10.7 miles long, there is insufficient water in West Bay to satisfy the semicircle test, "unless one includes such areas as Bob Taylor's Pond, Zinzin Bay, or Riverside Bay" (U.S. Orig. Br. p. 112). Louisiana asserts that these "areas" are part of West Bay. Only scattered islands justify giving them names. Even if they could be considered as separate but connecting tributary bodies of water, we know of no rule of international law which requires the drawing of closing lines to separate one body of inland water from a tributary body of inland water. Quite the contrary, Article 7 of the Convention provides that, for the purpose of measurement, the area of an indentation is that lying between the low water mark around the shore of the indentation and its closing line, and further that, "Islands within an indentation *shall be included* as if they were part of the water areas. . . ." Authorities uniformly agree that under the Convention, it is proper to include for measurement purposes the *whole* of the indentation, including "all pockets, coves or tributary waterways." [107] In so doing, Louisi-

[107] I Shalowitz, p. 219-220; seen also La. Orig. Br. p. 111 et seq.

ana's closing line in West Bay more than adequately satisfies Article 7 of the Convention.

D. East Bay

The Government's brief (p. 115) states that it is unable to find any place in East Bay where a line could be drawn so as to enclose enough water to meet the semicircle test of Article 7 of the Geneva Convention. Louisiana has found such a place and has previously discussed it at pages 262 et seq. of its original brief. The location is also known on Exhibit 36 filed with that brief.

We have also noted that all of East Bay qualifies as inland water, under other provisions of the Geneva Convention and other tests of international law. We have aserted in this brief that, under Article 4 of the Convention dealing with the system of straight base lines, the entire Mississippi River Delta, including East Bay, qualifies as inland waters as a result of the publication of such baselines by the United States pursuant to the Act of Congress of February 19, 1895. (pp. 101 *et seq.* this brief; see La. Orig. pp. 218-235).

In our original brief (pp. 177-269) we discussed in great detail the historical character and significance of East Bay as a part of the Mississippi Delta (See Chart No. 3 attached). We showed that prior to the Geneva Convention, East Bay had qualified as a true juridical bay. We also pointed out that, presently, only the interior portions of the bay satisfied the semicircle test of Article 7 of the Convention, eventhough the Bay is only 15.4 miles wide at its entrance, with a depth

of penetration of approximately 10 miles. We mentioned its shallow waters, its landlocked condition, and the fact that it was not a channel of communication to any portion of the high seas. We called attention to the national importance of East Bay from the standpoint of geography, security and economics. We treated at some length the various assertions of sovereignty, both Federal and State, over East Bay, including sovereign jurisdictional control of navigation,[108] fishing and harvesting of oysters, shrimp and other marine resources, control over wildlife, pollution, mineral leases and mineral exploration, as well as control over water flow, sedimentation and configuration. We also noted the control of internal security during the Civil War of 1861, the Mexican War of 1843, the War of 1812, and the Louisiana Purchase of 1803, which prevented repetition of the prior Spanish closure of the river.[109] In addition, we pointed out that East Bay was included within the legal boundaries of the State of Louisiana in her act of admission, being then inland waters which inured to the State under *Pollard v. Hagen.*[110]

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[108]The regulation of navigation in East Bay, applicable to *both foreign and domestic vessels,* was repeatedly asserted, not only by the Coast Guard, but also by the Secretary of the Treasury, the Secretary of Commerce and Labor, and the Secetary of Commerce, beginning at least as early as 1895.

[109]The territory of Louisiana had been claimed for France by La Salle in 1682 "as far as [the Mississippi's] . . . mouth. . . ." I Shalowitz 142, n. 75.

[110]3 How. 212 (44 U.S., 1845) The avowed purpose of the Submerged Lands Act was to "restore" to the States the ownership of the submerged lands within their respective boundaries. *U.S. v. Louisiana* 363 U.S. 1, 28.

The Government, however, blandly asserts that it is aware of no historic assertions of jurisdiction by the United States and thus dismisses the matter peremptorily. In so doing, it is in error in framing the problem. The issue is not whether the State Department or Chief Executive has ever asserted an express claim of United States' *ownership* over East Bay, but rather if the Government, through its various agencies, has acted consistently with the Justice Department's current claim that East Bay is part of the high seas. The salient legal feature of the concept of "high seas" is the prohibition against exclusive control over such waters in any sphere. Yet, as we reviewed the authority exercised by the Federal Government in and over the waters of East Bay, it became clear that, in spite of their claim that these waters were high seas, the United States had in fact exercised exclusive control in several spheres and continues to do so. Foreign ships cannot navigate freely, foreign fishermen cannot fish freely and foreign planes cannot use the airspace freely.

We submit that the Government in the past, present and future has not, does not, and will not in fact treat these waters as part of the high seas. The United States and Louisiana have always had vital economic and security interests in the waters surrounding the entrance of the Mississippi River, and both have historically exercised exclusive control over East Bay in order to protect these interests since the earliest territorial existence of Louisiana. We, therefore, submit that the presence of such paramount interests, coupled with the exercise of exclusive control, being inconsist-

ent with the concept of the freedom of the high seas, have resulted in a single accomplished fact—East Bay is a body of historic inland water to which the United States has valid title to the exclusion of all other nations.[111]

SYSTEM OF STRAIGHT BASELINES

Our original brief (p. 162 et seq.) called attention to the fact that the system of straight baselines authorized by Article 4 of the Geneva Convention would be the most appropriate method delineating the majority of the Louisiana coast, in view of the fact that it is "deeply intended and cut into" and that there are numerous "fringe(s) of islands along the coast or in its immediate vicinity." The Government seems to admit that the straight baseline method would be preferable in many instances, but denies its applicability on the ground that the "United States has not drawn such baselines," citing *United States v. California*, 381 U.S. 139, 167-168. (U.S. Brief, p. 113-114, see also pp. 60, 106, and 125).

In the *California Case* this court pointed out that

[111]The statement of United States Attorney General Randolph, in the Delaware Bay case is appropriate:

> "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)

Article 4 would permit the United States to use straight baselines, but that California may not use such baselines "to extend our international boundaries beyond their traditional limits against the expressed opposition of the United States," concluding that the choice rests with the Federal Government. (381 U.S. 139, 168) Louisiana therefore has not used the straight baseline system for delineating its coastline, but instead has applied other recognized criteria. Considering the statements made by the Government in its original brief and its apparent approval of straight baselines for much of Louisiana's coast, we now ask the Court to reconsider this matter.

In so doing, we point out that this is purely a domestic controversy between the United States and the State of Louisiana (*United States v. Louisiana*, 363 U. S. 1). While rules of international law may be applied to resolve such a domestic issue, the decision will not bind any foreign nation, nor will it bind the United States in dealing with any foreign nation. It will only be binding as between the United States and the State of Louisiana, in a purely domestic sense. irrespective of the rules to be applied, and the decision will be so limited.

We also call the Court's attention to the unliklihood that the United States will publish straight baselines while its controversy with Louisiana persists, for any such system would of necessity include areas beyond the coastline advocated by the Government in these proceedings. We can conceive of no other reason for its failure to use such baselines. The Convention

authorizes *all* nations to use this procedure. Many have already done so; others will. It no longer serves any useful purpose for this nation to restrict its own boundaries in the hope that international law will preclude other nations from expanding theirs. The matter is now after the fact. The Convention expressly sanctions it. The present litigation is obviously the only obstacle preventing our country from following suit.

Under such circumstances any requirement of the Convention that the United States publish such baselines should be excluded as a criterion in these proceedings. A party litigant will not often perform a voluntary act which causes it to be defeated in the litigation. Since this is purely a domestic matter, the Court should itself draw the baselines for the plaintiff United States. In so doing, it would only conform to procedures normally applicable to private litigation. Such a procedure would not only resolve the controversy with Louisiana by the establishment of a more stable and definite line than could otherwise be obtained. It would also remove any inhibition which the present situation causes the United States "in the conduct of its foreign relations by making its ownership of submerged lands *vis-a-vis* the States continually dependent upon the position it takes with foreign nations." (*U. S. v. California*, supra, p. 166-167). In short, it would permit the United States to establish straight baselines as international boundaries, free of the fear of losing revenues to Louisiana by having done so.

While Louisiana has not used the straight baseline method of delineating her alternative coastline, it

should be noted that many segments of the closing lines advocated by Louisiana do in fact qualify as straight baselines under Article 4, in addition to their qualification under other criteria. Louisiana further asserts that none of its closing lines serves to "extend our international boundaries beyond their traditional international limits", but to the contrary, serves only to maintain their traditional limits against unjustified contraction by the United States "in the name of foreign policy" (*U. S. v. California*, supra, p. 168).

Not only do many of the alternative closing lines advocated by Louisiana conform with Article 4 of the Convention, but Louisiana asserts that in some areas, particularly the Breton Sound, Isle au Breton Bay, and Mississippi River Delta areas, the United States has in the past published inland water lines which are in fact straight baselines and qualify as such under Article 4. These lines were established by various agencies of the Executive Department pursuant to the Act of Congress of February 19, 1895, and were published on numerous occasions, commencing in 1895 (See La. Orig. Brief, p. 218-235).

Ascension Bay

In footnote 9 (in Louisiana's reply to the federal statement of the questions presented) we have summarized Louisiana's position to the effect that if a water-body meets the semicircle test it is *ipso facto* a well-marked indentation containing landlocked waters, and therefore there can be no additional issue concerning requirements that the indentation be well-marked

and contain land-locked waters. The United States brief, page 99 *et seq.* takes the contrary position and employs its subjective views to assert that this area, between Southwest Pass of the Mississippi River, and Belle Pass of Bayou Lafourche does not meet the general requirements for a bay, and therefore, overlarge bay principles are not applicable. It is very interesting to note, however, that the United States proposes no real test or criteria for determining what generally constitutes a well-marked indentation or landlocked waters. The general test of width compared to depth would defeat its argument.

The nearest the United States comes to furnishing some specific test is its resort to dictionary definitions on page 101 and the creation of a hypothetical man who emerges from the inner portions of the indentation to view segments of the shoreline of the outer indentation. Let us place this hypothetical man on the shores of Lake Ponchartrain as he exits from Pass Manchac connecting Lake Ponchartrain with Lake Maurepas; or on any of the exits along the northern shores of Atchafalaya Bay and West Cote Blanche Bay; or for that matter at any of various other locations where one enters from the more shoreward area of unquestionably recognized inland waterbodies. At all of these locations, entering from the landward side, a person would, to borrow phraseology from the United States brief at page 102, see long, smooth shores stretching in one direction and then in the other direction, and the water distances and elevations of land are such that all the person would observe is open water, and there would

be no physical observation of any "distinctive or strongly pronounced character" of the bays or of Lake Ponchartrain.

Thus, by the federal analysis, there is no "geographic reality" to these bays and lakes and we would have to contend that Lake Ponchartrain, for example, is high seas. This is all quite ridiculous, so of course, the proper way to view the matter, even if additional requirements were imposed beyond the semicircle test, would be to ascertain the reaction of a mariner looking at a map, or coming around the natural entrance points of an indentation. At both Southwest Pass and Belle Pass the shore turns sharply inward, and it would be obvious that there had been "an appreciable change in the coast." See 1 Shalowitz, *Shore and Sea Boundaries* 64.

It is true that a mariner using mere visual techniques would not observe land if he entered the bay from the mid-point of the closing lines, but this is true in Atchafalaya Bay, and at West Bay, and at many other recognized bays in the world.

It is immaterial whether a person coming out of an inner indentation within an outer indentation would consider himself within the same waterbody, because of course all pockets, coves, tributary waterbodies, or bays within bays are per se geographically different or separate waterbodies from the outer indentation; else, they wouldn't be a pocket, cove, etc., but merely part of the bay. The United States implicitly concedes the correctness of Louisiana's position that tributary water areas within an outer indentation are used "for the purpose

of measurement" under Article 7 of the Convention. See United States brief at the bottom of page 103.

The statement that the "question of how far to include subsidiary or tributary water areas, in measuring an indentation for purposes of the semicircle test, has not yet been definitely answered" to be found at that point in the federal brief, relies on only a part of Mr. Shalowitz's views which were expressed in a footnote to the more clear and positive statement in the text that the status of the present law is to the effect that the pockets, coves, or tributary waterways are included. What Shalowitz was discussing was an imagined problem created by the question of how far up the tributary waterway one should go in computing the area of the outer indentation. As discussed at page 113 of our original brief, this problem really only arises in connection with rivers to which a common-sense solution is available. In any event, what Shalowitz was saying was that "an *additional* rule" might be needed to deal with the problem, not that there was any *present* rule under the Convention or general international law. His primary recommendation was that an arbitrary width-test be fixed and, of course, this would be the sort of thing that would have to be done by international upon by the United States patently flies in the teeth of the direction of the language in Article 7 requiring that for purposes of measurement the low-water mark around the shore of the indentation is to be followed; and as we have explained in our original brief at page 113, bays within bays, pockets, coves and tributary water-bodies share a common low-water mark with the

outer indentation. This "alternative" is similar to the *rejected* Boggs reduced area method, rejected by Congress and the Convention. See La. Orig. Brief 107-109, 111.

As to the federal remark at page 104 that it takes more than a connecting channel to make two bays into one bay, just as it takes more than a connecting door to make two rooms into one room, we know of no rule pertaining to houses to the effect that rooms within outer rooms are to be employed for measurement of the area of the outer room, as is the case with bays. Again, we emphasize that the problem is *not* whether a bay within a bay is *part* of the outer bay, but rather the question is should the plain language of the Convention follow the low-water mark be disregarded, and a rejected formula contrary to present law be substituted. See pages 111 through 116 of our original brief.

In footnote 47 commencing on page 104 the government attacks the use of the overlarge-bay theory in the area under discussion, first on the grounds that Louisiana is allegedly using the overlarge-bay theory to close off 8 closing lines within the outer identation, all in excess of a total of 24 miles; and secondly it argues that the "problems" that arise as the result of its creative effort in footnote 47 are matters which constitute a choice for the nation and not the state, similarly to the ruling of the Court concerning straight baselines under Article 4 of the Convention, citing the *California* case. See page 106, United States brief.

Paragraph 5 of Article 7 of the Convention states "where the distance between the low-water marks of

the natural entrance points of a bay exceeds 24 miles, a straight baseline of 24 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." (Emphasis added).

Article 4 of the Convention states in paragraph 1 that the method of straight baselines *may* be employed. Therefore, any implication or assertion that decisions concerning application of the overlarge-bay straight-baseline technique are discretionary questions for the United States, like the Article 4 question, is expressly negated by the very language of the Convention itself.

As to the first point, to the effect that Louisiana uses 8 closing lines based upon the overlarge-bay theory, which exceed 24 miles, this is patiently erroneous. Louisiana employs only one closing line based on the over large bay theory and it is *the* one *required* by paragraph 5 of Article 7 of the Convention; *the* one which is 24 miles long and encloses the maximum area of water that is possible. The other lines are on the basis of the waters behind them *independently* qualifying as inland waters without any reliance, whatsoever, upon the over-large bay provisions of Article 7, paragraph 5. It is perfectly obvious that the Convention contemplated that in addition to the straight baseline which would result from the application of Article 7, paragraph 5, there would be other closing lines within the overlarge indentation lying outside of the 24-mile straight-baseline closure. It is difficult to imagine any coast so smooth, so hypothetically perfect, that it would not have some long recognized stream or river, inlet,

pocket, cove, or bay within an over large bay lying outside of the 24-mile straight baseline. If the United States' position in this connection is accepted, it would lead to the rediculous result that even rivers and streams entering an overlarge indentation outside of the 24-mile straight baseline would not be part of the inland waters.

The quite obvious purpose of paragraph 5 of Article 7 was to provide an *additional* method for asserting claims to inland waters. Certainly the measure was not designed to take away waters long recognized as inland waters as a prerequisite to employment of the provision.

As to the discussion in footnote 47 about imagined problems concerning breaking up the 24-mile line into smaller lines not to exceed in the total a maximum of 24 miles, we don't see how any of their imaginative discussion can be squared with the simple, clear language of Article 5 which states that *a* straight baseline of 24 miles *shall* be drawn, nor can we understand how the United States then further imagines that use of this mandatory provision would require coastal nations to give up waterbodies long recognized as inland water bodies.

It is to be remembered that the line called for by paragraph 5 of Article 7 is a mandatory straight baseline. The State Department itself, before the Convention was approved, in direct response to a question of the Senate Foreign Relations Committee, informed the Senate that "application of the rules of the Convention on the Territorial Sea on the Contiguous Zone concern-

ing straight baselines would not have the effect of changing the status of waters which are now internal." Hearings before the Senate Foreign Relations Committee, concerning Executives J, K, L, M, N, 86 Cong., 2d Sess., 84. The government's imaginative creation of problems, based on the assumption that previously qualified bays would cease to be inland waters, flies squarely in the teeth of the State Deparment's advice to the Senate.

At page 101, the federal government attempted to find what it would consider the proper position in this area. It is stated that the area which includes Barataria Bay, Caminada Bay, Bay Ilettes, Bay Ronquille, Bay Chenier Ronquille, and Bay Long is a highly broken area. In addition the federal brief states "geographically, this whole area might well be considered a single bay. Although it contains many islands that tend somewhat to subdivide it, the configuration is so haphazard and the lines of subdivision could be drawn in various ways with equal justification. As a whole, it is certainly a well-marked indentation."

The federal government then goes on to set out the headlands for this bay at Caminada Pass, X=2,410,-949; Y=194,412 on the west, and at Bay Chenier Ronquille, X=2,479,442; Y=237,526 on the east. A line drawn between the two points selected by the federal government as the proper hearlands of this bay would place that line at the nearest approximately 600 yards seaward of Grand Isle and more than 1900 yards seaward of the Grand Terre Islands. The average distance of the islands which are *all behind* the line is approxi-

mately 1,000 yards. It is inconceivable to the State of Louisiana that the federal government has completely overlooked the provisions of the Convention pertaining to bay closing lines and islands *within* a bay, found in Article 7, paragraph 3:

> Islands *within* an indentation shall be included as if they were part of the water area of the indentation. (Emphasis supplied).

Exhibit 48 of Appendix G of the brief by the State of Louisiana shows the Barataria Bay complex as it should be viewed with the island removed, as should be done under Article 7, paragraph 3. Without these islands there is no question that a straight line should be drawn at least no further shoreward than a line between Caminada Pass and the small point of land immediately north and east of the "Q" of Quatre Bayous Pass, on Exhibit 48.

The federal government at page 102 in the portion quoted above apparently uses their hypothetical man as the basis for modifying the clear intent of the Convention. Section 1 the federal Brief states:

> "INLAND WATERS" ARE TO BE DETERMINED IN ACCORDANCE WITH THE CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE

While the State of Louisiana does not agree that the Convention provides the sole criteria for the determination of inland waters, apparently the federal government does, except when a fictitious "person" could be used to determine inland waters in a manner more advantageous to the federal government. Louisiana

contends that should the Court fail to adopt the position as set out by it, on he basis of the overlarge-bay theory, still the position of the federal government is in error and as a subalternative to Louisiana's overlarge-bay position, the Court should adopt a closing line no more shoreward than from X=2,479,422; Y=237,526 on the east at Bay Chenier Ronquille and X=2,410,949; Y=194,412 on the west at Caminada Pass.

As to the beach erosion jetties at Grand Isle discussed at page 105 of the U. S. brief, we believe we have already adequately answered the federal argument in footnote 14 under our reply to the statement of questions presented, and also in our original brief beginning at page 282. We direct the Court's attention to our formulation of issue (m) under question 2, which is more accurate than the federal formulation of issue (j). As our original brief plainly shows, jetties and coast-protective works are *assimilated* to, and need not actually be permanent harbor works. However, the fact of the matter is that the particular jetties in question protect an island which is a harbor; and therefore by any view of the matter they fall within the application of Article 8 of the Convention. Moreover, they are in any event an artificial extension of the shore which this Court in the *California* decision recognized as having the effect of extending the coast line.

The federal position on the extension of the shore at Pass Tante Phine, which is discussed at page 109 and following pages of the federal brief, would have this Court rule that in any subsequent litigation affecting the 7,700 miles of Louisiana shoreline under the

Submerged Lands Act—and there will be plenty of such litigation if the federal view of the case is accepted —[it] will be [necessary] to make factual investigations to ascertain whether particular land forms, or extensions of land, were brought about artificially or naturally, and the limits of the natural and artificial extensions. These investigations might oftentimes have to be many years after the fact when the origins of the changes are obscure. Disputes would also have to entail investigation of permits and legal interpretations of statutes authorizing the various permits, all of which seems a rather unreasonable burden to impose upon this Court which would have to hear these factual disputes in suits of original jurisdiction involving the state and federal government. This is but another illustration of the unwisdom of the federal view that a shoreline determined boundary should be recognized instead of the much more sensible inland water line. It is also inconsistent with the federal government's position in other areas. For example, spoil which expanded the shoreline at the dredged mouth of Calcasieu River was recognized by the United States as expanding the coast line. Whenever any "illegal" spoil is deposited the U.S. could always demand its removal.

As to the unsupported allegation that the deposit of the spoil at Pass Tante Phine was "unauthorized" we are puzzled as to how the government arrived at this unsupported allegation because the permit itself contemplated that dredged materials would be deposited in the prosecution of the work authorized by the permit. It contained a provision "any material to be deposited

or dumped under this authorization, either in the waterway or on shore above high-water mark" was to be deposited in the locality shown on the drawings, and part of the locality shown on one of the attached drawings was the mouth of Pass Tante Phine area, which was included in the [general] area covered by the permit. The permit also contained language that the work was to be "subject to the supervision" of the Corps of Engineers and also other language concerning "material dredged in the prosecution of the work" which could be deposited or removed so long as it did not have "a tendency to cause injury to navigable channels or to the banks of the waterway."

In response to our inquiry, Gulf Oil Corporation; by letter dated January 24, 1968 advised that there never has been any protest or allegations of illegality concerning the spoil bank, received from the Corps of Engineers, which had supervision of the project, or from any other person or agency. Incidentally, the federal description of the projection of the shore as a "spoil bank" may be technically true in regard to the composition and source of its materials, but it neglects to consider the fact that a spoil bank along a channel extended out from the mouth of a pass or stream, is at least analagous to, and perhaps legally constitutes, a jetty.

As to the unproven allegation that the Corps of Engineers has advised that the spoil bank is no longer there, we have not seen any documentation of this unproven assertion and we deny the validity of the federal efforts to depart from use of the set of 54 survey maps

without any proof by actual survey but merely hearsay observations of people in a federal agency, all without calculation of the current mean-low-water datum to be employed, or the running of any elevations, where the technical placement of the actual low-water line is an exceedingly complex survey question, not under Army jurisdiction. Why didn't the government ask the U. S. Coast & Geodetic Survey about the matter? That agency shows the low water spoil jetty on the large scale official nautical charts. Could it be because the Convention and the Court in the California case, 381 U.S. at 176, held that "the U.S.C.&G.S. large scale charts would control," rather than unofficial hearsay of an employee of an agency not charged with coastal survey responsibility? It is possible that one may pass an area exposed at mean-low-water during some stage or season or time of the tide when the land involved may be submerged, especially under the very flat and low Louisiana conditions and fail to observe land exposed at mean low-water. And this is possible in connection with the spoil jetty at Pass Tante Phine. All of which shows that, absent a detailed survey, facts shown on the official coast charts of the Ascension Bay area, as well as the set of 54 maps should be accepted rather than the unsupported hearsay advanced by the federal government.

If, in fact, the United States can prove that this land is now gone, apart from it being an unfair departure from the surveys at one place and one place only, inconsistent with the information reflected upon nautical charts and all other available large-scale

charts, the most the disappearance of the land could establish would be that at some particular point in time Louisiana might have lost its title to the lands lying 3 miles therefrom. Therefore, the decision, even under the federal view of the facts, would have to be that Louisiana was entitled to all oil and gas proceeds which would be attributable to the area affected by the existence of this spoil jetty, prior to disappearance of the spoil jetty.

As to the discussion of the Tigre Pass headlands found at page 111 of the United States brief, and also the north headland for West Bay, and various other headlands, the totally new and entirely subjective "visual impression" test proposed by the federal counsel flies in the teeth of more objective headland selection criteria. At best, the U. S. statement of the problem is a suggestion to use "visual impression" in determining whether the nearest closing points or the outermost headland, or the outer or inner possible headlands, ought to be employed. We have presented ample authority at pages 122 through 124 of our original brief to show that it is the outermost headlands that should be followed. Other more objective tests also exist. Shalowitz, in *Shore and Sea Boundaries*, Volume 1, at pages 63, 64 states:

> A headland can then 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 the direction of the general trend of the coast. (Emphasis added.)

He states further:

> Where the headland is of considerable extent with the gently rounded and featureless shore it is appropriate to use the bisector of the angle method illustrated in figure 12.

By any of these methods, not discussed in the federal brief, the Louisiana selections prevail.

Timbalier-Terrebonne Bay-Lake Pelto Indention

As to the different headlands urged for the Whiskey Island terminus shown at page 91 of the United States brief, we point out again that the Louisiana line follows the principle of employing the outermost headlands and also satisfies the bisector of the angle method. On the other hand the alleged headland employed by the United States follows no headland selection rule whatsoever. The only averment made is the unsupported subjective assertion at page 95 that some of the waters behind the Louisiana line are not landlocked. Where the headlands are determine what waters are landlocked and not vice versa.

Similar criticisms could be made of the various closing line possibilities between various islands which are slightly shoreward of the mouth of Timbalier-Terrebonne Bay. However, observations made above, and at page 285 and following pages of our original brief, adequately support the Louisiana contentions and refute the federal arguments on minutia pertaining to this sector. However, certain of the more basic aspects of the federal argument in this deserve fuller treatment, if for no other reason than to point to the

gross inconsistencies in the federal position. For example, the United States contends, on page 96, that the eastern headland of this bay complex is part of the mainland *west* of the eastern end of Timbalier Island, apparently referring to a piece of land which juts out from the mainland some 1 and 1/2 to 2 miles to the rear, or shoreward of, East Timbalier Island, far removed from the vicinity of the mouth of Belle Pass where the land first turns sharply inward (assuming there is no connection at low water between the mainland and Timbalier Island which is not at all certain). That is the only point of land which is not a part of East Timbalier Island and is west of the eastern end of East Timbalier Island, and contrary to statements made in footnote 43 at page 94 of the federal brief, the highly imaginative closing line using this headland does not intersect Whiskey Island. No sketch was attached which would show this fact. So what we have in footnote 43 of the federal brief is a beclouding of the facts to explain away what is the truth of the matter—that the United States has recognized that islands seaward of the closing line, and seaward of the headlands of a bay which it recognizes, have the effect of projecting outward additional headlands or natural entrance points of the bay. Were it not for this mistaken treatment of the facts by the United States it would have been apparent that even under its own reasoning it is using islands as headlands of the bay.

Perhaps the government meant it was using some or all of East Timbalier Island as the eastern headland. If this is so, then it has acknowledged the use

of islands as headlands, unless it acknowledges principles which would make the western Isles Derniere proper headlands and perimeter of a bay.

Moreover, to get itself out of recognizing basic principles concerning the effect of islands, the government gets itself into additional inconsistencies in discussing the eastern headland of this great bay complex. At the western side it somehow found that Caillou Boca formed a break of sufficient size to cause Whiskey Island to not be a natural extension of the mainland although it recognized that islands shoreward of Caillou Boca formed a natural extension of the mainland. Here it is interesting to note that the various separations in East Timbalier Island are so petty that they are many times smaller than the openings between islands immediately north of Caillou Boca, islands which the government treats as an integral part of the mainland and the western headland of the bay. Indeed, it is questionable (as we have pointed out in our original brief, see pages 292 to 294) whether the small cuts in East Timbalier Island are open at low-water stage. Certainly the petty size of the small cuts on East Timbalier Island show that it is more a natural extension of the mainland than the various islands north of Caillou Boca which have openings between them and the mainland many, many times greater.

Pelican Lake, to the north, is a far longer water body than Caillou Boca. Therefore, even by the federal logic, Whiskey Island is a natural extension of the mainland and the proper western headland of the bay.

This is in addition to the various reasons we have argued elsewhere to show that islands may be employed, as headlands or as the perimeter of a bay.

All of this leads to the inevitable conclusion that Louisiana's point-of-view is much more solidly grounded—that is, the eastern headland of the bay is to be found on East Timbalier Island and the western headland is the outermost island of the various islands which project downward and form a natural extension of the mainland along the western side of the bay complex.

Caillou Bay Area

In discussing general principles concerning islands and bays, we have heretofore treated Caillou Bay and have little need for additional detailed treatment of the subject matter.

We do wish to point out here, however, that the federal explanation for not departing from its prior concessions to the effect that all of the waters between and behind islands off the Louisiana shores are sufficiently enclosed to constitute inland waters, applies with equal force to Caillou Bay, irrespective of whether it is a true bay, a strait leading to inland waters, or inland waters by whatever test. The Chapman Line recognizes this waterbody as a bay and it has never been in dispute in this litigation until the rather surprising change in the federal position in its memorandum of January 19, 1968. We can understand that it was rather surprising to those charged with drafting the federal position on the closing lines

between the Isles Derniere to find that the new federal theory called for not closing between the last several islands of the Isle Derniere chain, because it is so clearly reasonable and sound to connect islands separated only by a foot or so of water or less; islands which so plainly form a portico to the mainland and which are such a clear, natural extension of the mainland, anyone merely looking at the map would realize that they must somehow have the effect of causing the waters behind them to constitute inland waters because of the great extent of the enclosure. One can understand that it would be essential for the government to change its position at Caillou Bay in order to avoid recognizing basic principles that are unquestionably applicable and which would result in the recognition of inland waters in other areas where oil is to be encountered.

As to the line shown on the chart at page 89, and the related figures given on page 88 of the federal brief, apparently in an effort to show that Caillou Bay is a mere curvature of the coast, the federal government conveniently uses some islands and ignores another island which is the obvious headland of the bay at Raccoon Point on the last of the Isles Derniere.

Concerning footnote 41 on page 88 pertaining to the proper headlands if Caillou Bay is recognized as a bay, we have already noted various rules pertaining to headland selection which the United States has ignored and does not discuss. the northwesterly headland selected by Louisiana is the point where there is

an appreciable change in the direction of the general trend of the coast; it is the outermost of the possible headlands; it is the apex of the salient of the coast by use of the bisector of angle method. These tests are discussed on pages 63 and 64 of Volume 1 of Shalowitz and all of these technical methods result in the conclusion that the northern headland of Caillou Bay urged by Louisiana is the correct solution to be made. The federal brief conveniently failed to consider applicable specific tests and resorted to subjective argumentation—the federal headland is allegedly "more natural."

Atchafalaya Bay to the Texas Border

The basic problems involved in these areas have been treated in our discussion in reply to federal contentions, or other general commentary related to the selection of headlands and dredged-channel problems. We here note, however, that there are various dredged channels which exist not only in the western portion of the coastal area, but also in the eastern portion and for convenience we have not discussed the various particular channels, but treated the subject matter generally, using three in this area as examples only.

We do wish to note, however, that in connection with Atchafalaya Bay and some of the island problems found there, apparently the United States has abandoned its former contention that an island above mean-high-water is not an island if the area above mean-high-water is not very large, although it has not yet acceded to modifications in its proposed decree which

would call for more expansive determination of the boundary. No mention of its former assertions are raised in its brief.

Incidental Provisions of the Decree

As we have noted in discussing the issues, it seems inappropriate, at this stage of the litigation, to get into details of the decree and administrative problems that will arise after the resolution of the more basic issues before the Court, since the Court is already overburdened with having to weigh the many issues concerning the determination of the coast line and the boundary. There will be time enough to consider the form of the decree and incidental details in connection with it after resolution of the basic problem of ascertaining the coastline and the boundary. However, we do not wish to voice our general opposition to most of the contentions of the United States at pages 132 and following, and make a few brief comments, in the event the Court should decide to consider these matters in its basic opinion. Concerning the matter discussed from page 132 to page 136 of the federal brief we note especially that the federal argument would be exceedingly detrimental to the sound administration of the submerged lands because it would prevent the granting of protection-type leases or right-of-ways which would be useful to alleviate the problem of an ambulatory boundary, in the event the Court decides to adopt a shoreline-determined boundary, there will be no more interim agreement, after the decree, to defer such problems.

In the final analysis what the United States is seeking is to be paid twice, without any obligation to recognize the validity of transactions whereunder it claims a right to dual payment. It does this by somehow asserting at page 135 that the State of Louisiana was "wrongful" in granting quit claim instruments excluding warranty which related to *its* claim and which enabled development of the resources of the submerged lands pending resolution of this dispute. The State of Louisiana has not waived sovereign immunity from tort liabiltiy and the federal contention is ex delicto.

As to the federal argument on page 136 to the effect that the decree should determine the rights of both parties only in the areas actually disputed in this case, we note that the areas of the dispute under the Interim Agreement do not include Caillou Bay. Therefore, under this reasoning the United States should not be entitled, even if Louisiana is unsuccessful in asserting that Caillou Bay is indeed a bay or otherwise constitutes inland waters, to a decree in any way recognizing United States title to Caillou Bay, shoreward of the Chapman Line, as that line forms the baseline of the disputed lands. Further, in connection with the erroneous federal argument that Louisiana is not entitled to have the decree recognize its title to its inland waters, we point out that what is and has been involved in this litigation is the ownership of the waters granted or quit-claimed to the state *under the terms of the Submerged Lands Act*, and the Submerged Lands Act itself in its Section 2 definition of the term

"lands beneath navigable waters" included *all* lands under navigable waters, such a decree will preclude later possible federal effort to somehow urge that the rule of *Pollard's Lessee v. Hagen* concerning state ownership of inland waters is no longer applicable. If, as the United States says, there is no dispute to these inland waters, we don't see how the United States can object to including the waters, unless it has in mind later bringing up additional and never-ending controversy in a whole new subject matter, precluded by the Submerged Lands Act. The absence of dispute, if anything, is reason to recognized the claim of Louisiana. The federal government is protected under Section 5 as to any inland waters to which it might have exceptional claim, by purchase or otherwise as there provided.

On page 138 the argument is made that there should be no injunction against the United States. If this is technically correct (and we don't see how it can be correct for the United States to seek injunction against the State of Louisiana while yet claiming that it is to be immune from like injunction arising out of the same issues and problem before the Court) then the injunction should at least be directed to the responsible officials of the United States government, to-wit, the Secretary of the Interior and the Attorney General of the United States, who have heretofore been asserting the claims against Louisiana in fulfilling proprietary functions. It is horn book law that while a sovereign may be immune from certain types

of injunctions, its agents are not, especially as to proprietary functions. In its footnote 63 the United States attempts to distinguish the injunction granted in 1956, 351 U.S. 978, by saying the government desired the injunction at that time. This was undoubtedly done because the States have the same sovereign immunity as the government, and to do otherwise would have defeated the federal desire to enjoin the State. Be that as it may the precedent has been set for purposes of the Submerged Lands Act. The point should have been thought of before the precedent had been set in this very dispute. If we are incorrect, then the State cannot be enjoined, for identical legal reasons.

The matter of the split-lease problem, discussed on page 138, and the validity of leases issued pursuant to the Interim Agreement have already been discussed by us in our memorandum accompanying our motion. We do note, however, that the discussion of the zones at pages 140 and following, in connection with the Chapman Line somehow lacks a certain ring because of the fact that the United States is now asserting claims more shoreward than the Chapman Line. We do agree with the federal statement at page 142 that further exploration of the details of the problems of draftmanship of the decree now seems premature, and that the overall matter ought to be postponed and considered in appropriate memoranda to be filed at the time the decree is to be rendered following the basic opinion of the Court on the coast line questions and the boundary questions.

As to the federal contention at page 143 that it

is appropriate to in include definitions of relevant terms, the federal arguments well make the point that if the shore-determined boundary it seeks is recognized as the boundary, instead of a boundary determined by the Inland Water Line, we can well look forward to recurring litigation. In spite of the truth of that fact, it seems more appropriate to us, since the specific areas in dispute involve the entire coast line of Louisiana, to have the decree only recognize the location of the coast line and boundary—the real issue in dispute—and not be an advisory opinion for some future disputes whose precise facts are not yet known. The United States proposal could lead to some highly ill-considered results in the future, if adopted. The function of any court is to adjudicate disputes based on actual facts; not to legislate general rules for facts not yet in existance.

CONCLUSION

For the foregoing reasons, the Court should enter the Supplemental Decree proposed by Louisiana, recognizing the Inland Water Line as the coast line of Louisiana, and it should reject the proposed decree submitted by the United States; if in the event the Court decides that the Inland Water Line should not be adopted as the coast line of Louisiana, the alternative decree proposed by Louisiana should be adopted.

Respectfully submitted,

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PROOF OF SERVICE

I, the Attorney General of the State of Louisiana certify that copies of the foregoing reply brief of the State of Louisiana to the brief of the United States on cross-motions for the entry of supplemental decree No. 2 as to the State of Louisiana have been properly served on the_____day of September, by mail-copies, sufficient postage prepaid, to the offices of the Attorney General and of the Solicitor General of the United States, respectively, in the Department of Justice Building, Washington 25, D.C. Copies have also been mailed to the offices of the respective Attorneys General of the States of Alabama, Florida, Texas, and Mississippi.