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When Good Courts Go Wrong: A Critique of the Supreme Court's Domestic Maritime Boundary Jurisprudence

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WHEN GOOD COURTS GO WRONG: A CRITIQUE OF THE SUPREME COURT'S DOMESTIC MARITIME BOUNDARY JURISPRUDENCE[1]

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I. INTRODUCTION

Alaska v. United States[3] in 2005 is the latest in a series of federal/state maritime boundary cases that began with *United States v. California* in 1965.[4] That case held that the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone[5] would henceforth constitute the applicable law in all disputes between the United States and the individual states in regard to establishing the boundaries along their joint coastlines.[6] Because the United States has yet to ratify the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1958 Convention is the law currently in force and will be used throughout the article as the applicable statute in any maritime

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3. Alaska v. United States, 545 U.S. 75 (2005).

4. United States v. California, 381 U.S. 139 (1965).

5. Geneva Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205, referred to hereafter as the 1958 Convention.

6. *See* United States v. California, *supra* note 4, at 165.

boundary dispute between the United States and its individual states.

The most interesting issues in this unique area of the law only arise in federal states such as the United States, Germany, Mexico, Canada, Australia, New Zealand, Venezuela, Brazil and a handful of others[7] where there are in essence two sovereigns at every point along the coast. In each case, the competition for resources has resulted in a unique "constitutional settlement" that has taken several forms within the individual federal states, i.e., awarding all resource control to the states themselves (Germany), or to the federal government (Mexico), or to both sovereigns in a pro-rata resource sharing scheme (Canada) or, as in the case of the United States, a regime that offers a certain distance off-shore to the individual states with the remainder left to the federal government.[8]

In the United States, the Submerged Lands Act[9] and the Outer Continental Shelf Lands Act[10] (both enacted in 1953) gave control over the water and submerged land resources within three miles of the baseline to each individual coastal state, except those states whose coasts front the Gulf of Mexico. These states came into the union with a six-mile off-shore area of control and therefore, under the equal footing doctrine, retain that control under the Acts. The federal government retains all rights to the resources in the remainder of the continental shelf.

This so-called constitutional settlement was hard won. In 1945, the Truman Proclamation on the Continental Shelf[11] touched off what has become a sixty-year struggle between the federal government and its maritime states for jurisdiction over off-shore resources.[12] Prior to 1945, the states assumed that, under the common law view expressed in cases such as *Pollard's Lessee v. Hagan*[13] and *Martin v. Waddell,*[14] title to off-shore lands beneath

7. *See, generally,* GAYL WESTERMAN, THE JURIDICAL BAY, Oxford University Press 188-223 (1987).

8. *See id.* at 188-209.

9. Submerged Lands Act, Pub. L., No. 83-31, 67 Stat. 29 (1953).

10. Outer Continental Shelf Lands Act, Pub. L. No. 83-212, 67 Stat. 462 (1953).

11. Proclamation No. 2667, 10 Fed. Reg. 12, 303 (Oct.2, 1945); Proclamation No. 2668, 10 Fed. Reg. 12, 304 (Oct. 2, 1945).

12. *See* WESTERMAN, *supra* note 7, at 201.

13. 44 U.S. (1 How.) 212, 228-229 (1845).

14. 41 U.S. (1 Pet.) 367, 410 (1842).

navigable waters had passed from the King to the thirteen original colonies and to states admitted to the Union thereafter under the equal footing doctrine.

The federal government raised few objections to this view until new twentieth century technologies revealed that the submerged lands off-shore several coastal states contained oil reserves and other potentially lucrative natural resources. At this point, the federal government asserted national sovereignty over the same submerged lands.[15] In 1945, the United States brought an original action against the State of California asking the Supreme Court to determine whether title to these lands belonged to California or to the United States. In 1947, the Supreme Court answered the question definitively, holding that the United States, as the national sovereign, possessed "paramount rights" in these offshore areas.[16] In 1950, the federal government brought identical actions against Louisiana[17] and Texas,[18] with identical results, leaving to the states only tidelands and those lands beneath inland waters of the states.

These three cases touched off "one of the most hotly contested political issues of the post-war decade."[19] Eventually, the coastal states appealed to Congress to restore the submerged lands that they had believed they owned before the first California case was decided. This effort bore fruit in 1953 when the Congress passed the Submerged Lands Act and, somewhat later in the same year, the Outer Continental Shelf Act which, as noted, gave control over the water and submerged land resources within three miles of their coastlines to the maritime states with control over the remainder of the Continental Shelf to the federal government. Both Acts defined the coastline as the low-water mark located where the mainland was in direct contact with the open sea as well as the constructive coastlines located at the seaward limit of "inland waters," a term left undefined. Concluding in the second California case that the "baseline" established for international purposes and the "coastline" established in the Submerged Lands

15. WESTERMAN, *supra* note 7, at 202.

16. United States v. California, 332 U.S. 19, 36-37 (1947).

17. United States v. Louisiana, 339 U.S. 699 (1950).

18. United States v. Texas, 339 U.S. 707 (1950).

19. *See* United States v. California, 381 U.S. 139, 185 (1965) (Black, J., dissenting).

Act must be one and the same, the Supreme Court held:

> It is our opinion that we best fill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available. The Convention on the Territorial Sea and the Contiguous Zone. . .provides such definitions. This establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations. . .[20]

When the two statutes were enacted in 1953, the United States claimed a three mile territorial sea and the rights of coastal states thereafter became paramount in and under those waters. When the territorial limit increased to twelve miles under the 1982 Law of the Sea Convention,[21] the coastal states retained control over the three-mile limit and federal control extended a further nine miles from the baseline to the limit of the new territorial sea claim. Although President Reagan declined to formally enter into the 1982 Convention, he notified third parties through executive order and policy statements that the United States intended to adhere to the basic provisions of the 1982 Convention which "generally confirm existing maritime law and practice and fairly balance the interests of all states."[22]

At the time, the emerging regime appeared to be a forward-looking and effective way of allocating offshore resources between the federal government and its coastal states. Unfortunately, this has not proven to be the case, and conflicts between federal and state interests in off-shore waters only intensified in subsequent years.

The U.S. constitutional settlement above rests on two key tasks: the establishment of "the baseline" from which all seaward zones are measured and the location of "the coast." The rules for determining the location of the baseline are clearly delineated in

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20. United States v. California, 381 U.S. at 163 (1965).

21. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1245, referred to hereafter as UNCLOS or "1982 Convention." *See* Proclamation No. 5928, 54 Fed. Reg. 777 (Jan. 9, 1989) extending U.S. territorial sea to twelve miles.

22. President's Statement on United States Oceans Policy, 1 PUB. PAPERS, 378-379 (Mar. 10, 1983).

the 1958 Convention and remain unchanged in UNCLOS.[23] These rules only become controversial in the case of the various water-crossing baselines that states are allowed to establish when inland waters, such as rivers and bays, meet the open sea.[24] This author has written extensively on the establishment of such baselines[25] and will not discuss the basic topic in detail here. Rather, the almost 50 years of federal/state litigation based on the establishment of baselines along the coasts of the United States, concluding with the Alaska case in 2005, is both the motivation for and the focus of this article.

As can be the case in a common law jurisdiction in which courts establish precedents on a case-by-case basis, the law in this area has moved beyond the clarity of the 1958 Convention to include a convoluted series of "tests" or "factors," which have grown exponentially with each subsequent case and have moved U.S. jurisprudence in this area far beyond the simplicity of the international rules envisioned by the drafters and, indeed, by the Supreme Court itself. These "tests" can be termed "non-conventional" in the sense that they are not a part of the 1958 or the 1982 Conventions. Rather they were drawn from the writings of various scholars, many of which pre-date the 1958 Convention itself by decades or, in some cases, hundreds of years. Special Masters and the Court alike have adopted these tests, as if the careful consensus reached in the 1958 Convention, and continued unchanged in UNCLOS in 1982, had never occurred.

Many have criticized the growing complexity of this methodology and warned that it would lead to the need for both parties in federal/state litigation to craft arguments and provide evidence based on these so-called tests, further embroidering the fabric of misconception and down-right error that occurs in many

23. 1958 Convention, art. 3: Baselines; art. 4, Straight Baselines; UNCLOS, art. 5: Normal Baselines; art. 7: Straight Baselines.

24. 1958 Convention art. 5: Internal Waters; art. 13: Mouths of Rivers; art. 7: Bays. UNCLOS art. 8: Internal Waters; art. 9: Mouths of Rivers; art. 10: Bays.

25. GAYL WESTERMAN, *The Juridical Status of the Gulf of Taranto: A Brief Reply*, 11 SYRACUSE J. INT'L L. & COM. 297 (1985); GAYL WESTERMAN, THE JURIDICAL BAY (Oxford University Press 1987); W. MICHAEL REISMAN & GAYL S. WESTERMAN, STRAIGHT BASELINES IN INTERNATIONAL MARITIME BOUNDARY DELIMITATION (St. Martin's Press 1992); REISMAN, ARSANJANI, WEISSNER & WESTERMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE (Foundation Press 2004).

of the decisions themselves.[26] The Court's 2005 decision in *Alaska v. United States* is merely the latest case in point, but the trend has been clear for many years.

In addressing the concerns presented in the introduction, Part II of this article will argue that the Supreme Court and its Special Masters have misapplied the rules embodied in the 1958 Convention and UNCLOS in regard to the establishment of juridical bays, in every domestic maritime boundary case since 1965. Part III will criticize the approach taken by the Special Master and thereafter by the Court in the Alaska case, and will suggest the correct methodology to be applied in cases with complex coastlines, such as the Alexander Archipelago. Part IV will briefly suggest that U.S. policy on the use of the Straight Baseline methodology, i.e., forbidding its use along its own coasts while approving it for third states, is out of date and is in urgent need of reconsideration.

The article will conclude in Part V with two important points:

One, that the U.S. Supreme Court's approach to the establishment of juridical bays along U.S. coasts has become seriously flawed and overly complicated and must be taken back, perhaps in the next federal/state conflict, to its roots in the 1958 Convention.

Two, that the U.S. State Department and other relevant executive agencies must reconsider U.S. policy on the establishment of straight baselines along its coasts. This is important because, if conservatively applied, a new policy may obviate the need to spend several years and hundreds of thousands of dollars on each maritime boundary delimitation case as it comes before the U.S. Supreme Court. Conservative use of straight baselines by the United States and its coastal states will better serve our national security and commercial interests while not unduly interfering with freedom of the seas.

II. JURIDICAL BAY JURISPRUDENCE

A. BACKGROUND

A brief summary of the development of the law related to

coastal indentations may be helpful here. The international law of the sea has developed over many centuries as part of the on-going effort to fairly balance the exclusive interests of coastal states in maximizing the water areas over which they can claim maritime sovereignty and the inclusive interests of the community of states in maximizing freedom of the seas for navigation, fishing, transport, and other common uses.[27]

Within this equation, the exclusive interests of coastal states have been seen as attaching most firmly to their "inland" or "internal waters," i.e., lakes, rivers, and, most particularly, to bays which lie within the coastal littoral but are also linked directly to the open sea. These intriguing water areas were once termed *inter fauces terrae,* literally "within the jaws of the land." From ancient times forward, coastal peoples have settled near these protected indentations because they offered an efficient transportation system for people and goods when land roads were unsafe or non-existent; they offered a cheap and readily accessible food supply that could be accessed with more safety than by venturing into the open sea or the hinterlands; and the inhabitants were able to defend these waters from predators more easily due to their relatively narrow openings to the sea. In fact, until relatively recent times, these sheltered water areas contributed much more than the land surrounding them to coastal inhabitants' basic requirements for food, security, services, and goods.[28]

Throughout centuries of fluctuating international norms that at one time favored a policy of open seas (*mare liberum*) and at another time, closed (*mare clausum*),[29] these indentations lying within the land mass of a single state and variously termed bays, gulfs, sounds, fjords, locks, firths, estuaries and the like, were generally seen by the international community as so vitally connected to the economic and security interests of the coastal state as to be considered more like the land than the open sea. Therefore, they were subject to the same absolute sovereignty that a coastal state exercises over its land territory.

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27. *See* WESTERMAN, *supra* note 7, at 14-31, 181-186; and J.R.V. PRESCOTT, THE MARITIME POLITICAL BOUNDARIES OF THE WORLD 37, 39-45 (Brill Academic Publishers 1985); *See also, generally,* JONATHAN CHARNEY, INTERNATIONAL MARITIME BOUNDARIES (Kluwer Law International 1998).

28. *See* WESTERMAN, *supra* note 7, at 32-74.

29. *Id.*

Historically, coastal states have exercised wide latitude in determining which coastal indentations could be designated as part of their inland waters. Despite community-wide consensus, however, every era produced opposition to what were seen as "excessive" bay claims; and various rules were developed[30] that purported to limit the extent and/or the size and/or the configuration of bays to which the exclusive sovereignty of a given coastal state could reasonably attach. This dialogue continued into the twentieth century, until a historic consensus on bay claims was reached in Article 7 of the 1958 Convention and was continued unchanged in Article 10 of UNCLOS in 1982.[31]

Disputes between nation states over excessive bay claims have virtually ceased since that time due to the wholesale incorporation into both treaties of the language of the International Court of Justice (I.C.J.) majority decision in the *Anglo-Norwegian Fisheries* case[32] which gave states with deeply indented coasts, or those fringed with islands in the immediate vicinity, the right to draw straight baselines connecting the outermost points of their exceptional coastlines and to claim all waters landward of those baselines as internal waters. This radical legal innovation is now used legitimately by the target states of the provision, i.e., Norway, Sweden, and perhaps a handful of others; but it is also used widely and, it has been argued, promiscuously and pathologically,[33] by states possessing neither deeply indented coastlines nor anything remotely like fringing islands in the immediate vicinity.[34] Since the "baseline" is the "coast" by definition, and thus the point from which all further sea zones are measured, these states hope to move their baselines as

30. *Id.* at 46-47. Narrow limit rules have included the cannon shot rule, the line of sight doctrine, and others; *Id.* at 51-61. These were then superseded by rules establishing nautical mile limits on the extent of the opening to the sea, as weapons technology made each of the prior rules obsolete.

31. *See* 1958 Convention, art. 7 and UNCLOS, art. 10.

32. Anglo-Norwegian Fisheries (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 1951). *See also* 1958 Convention, art. 4, and UNCLOS, art. 7.

33. *See* WESTERMAN, *supra* note 7, at 186-187 and notes 17 and 18 [promiscuous baselines]; *see also* RIESMAN & WESTERMAN, STRAIGHT BASELINES, *supra* note 25, at 118-120 [pathological baselines].

34. *See* maps in REISMAN & WESTERMAN, STRAIGHT BASELINES, *supra* note 25, at 108-189. These excessive claims are but another example of the effort by coastal states, obvious since the beginning of the last century, to extend control over their coastal waters by enclosing the largest area of internal waters possible within their baselines.

far out to sea as possible, thus further extending the limits of their territorial seas and contiguous zones. This effort became even more widespread after 1982 when coastal states used the same technique to claim exclusive state control over vastly expanded areas of continental shelf and the newly-established exclusive economic zone (EEZ).[35]

Because a straight baseline claim by a given nation state subsumes the more modest indentations along the coast which the state might previously have enclosed as bays, disputes before the I.C.J. and other relevant international fora no longer deal with bay determinations in the main. Rather, the I.C.J. has been required to consider the straight baseline claims of states and the effect of such claims on the delimitation of the continental shelf and/or the exclusive economic zone between or among competing states.[36]

Within the United States, however, the bay dialogue has continued unabated into the twenty-first century in the context of federal/state maritime boundary conflicts, for two major reasons. First, an inherent conflict between state and federal interests was created by the nature of the constitutional settlement chosen by the United States. Second, the United States policy which proscribes the use of straight baselines by either the federal government or its individual states has severely limited the bases upon which a state can successfully claim sovereignty over its coastal indentations.

B. U.S. JURISPRUDENCE SINCE 1958

1. THE INHERENT FEDERAL STATE CONFLICT

The implications of the coupling of the Submerged Lands Act

35. UNCLOS, art. 55-75

36. *See, inter alia, Continental Shelf (Libyan Arab Jamahirya/Malta)* Judgment, 1985 I.C.J. 13*; Delimitation of Maritime Areas Between Canada and the French Republic (St. Pierre and Miquelon)* (Can./Fr.) 95 I.L.R. 645 (1994); (*Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*, 1993 I.C.J. 38*; Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* 2001 I.C.J. 87 (Judgment of Mar. 16); *Territorial and Maritime Dispute (Nicaragua. v. Colombia), Judgment*, 2007 I.C.J. 124; *Gulf of Maine (Canada v. U.S.)*, 1984 I.C.J. 246; *Channel Continental Shelf (U.K. v. France)*, 18 R. Int'l Arb. Award 3 (1977), 54 I.L.R. 6 (1977); *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment 2009 I.C.J. 132; *Maritime Dispute, Peru v. Chile*, Judgment Pending.

with the new rules for bays established by the 1958 Convention were recognized immediately by the federal government. In 1970, shortly after the second *California* decision which adopted the Convention as the law applicable to all federal/state maritime boundary controversies, an Interagency Baseline Committee was established within the executive branch. This federal Committee was charged with re-evaluating the baselines then existing in light of the new Convention and then producing a series of nautical charts establishing the "correct" baselines for each portion of the coast, regardless of the length of time the previous baselines had been used and with what amount of acquiescence by the federal government and third states. There is no doubt that the Committee was also created to formulate the federal government's position that would be used in federal/state maritime boundary litigation, both existing and pending.[37] When these charts were completed, the federal government engaged in a cynical campaign of litigation designed to strip the states of all of the coastal indentations considered vulnerable to attack under the newly drawn federal baselines. Literally, every coastal state has been involved in these challenges.[38]

In each litigation, the federal government has felt free to use the baselines established by the federal Interagency Baseline

37. *See, e.g.,* United States v. Alaska, 422 U.S. 184, Supp. Materials, Vol. 1: Appendix, No. 73-1888, Testimony of Dr. Robert D. Hodgson, Geographer, Dept. of State, at 298, 300, 301, 307, 310, 312, 313, and 325 (October Term, 1973), confirming that the Committee was aware of pending cases when discussions on particular baselines relevant to these cases began. The purpose of this Committee is made clear in Appendix F of the Coastline Committee Charter, distributed by the Department of State on August 7, 1970. This memorandum to Members of the LOS Task Force from the acting legal advisor to the State Department on the subject of the "Establishment of Ad Hoc Committee on Delimitation of the U.S. Coastline," reads in part: "This committee will review the lines recently drawn by the Geographer of the Department of State . . . and will determine the location of the limits of the United States territorial sea and the contiguous zone as accurately as possible . . . . It is anticipated that the committee will arrive at a provisional United States position . . . [that] can be used in the international and the **domestic** sphere" (emphasis added). *Id.* at 415. For a more detailed discussion of the knowledge by Committee members of on-going and pending cases against the states, *see infra* Part III. *See also* WESTERMAN, *supra* note 7, at 224-225, notes 178 and 197.

38. Including, *inter alia,* Alaska: [*Cook Inlet]* (1975); [*Norton Sound*] (1992); [*Arctic Coast*] (1997); [*Alexander Archipelago*] (2004). California, (1965 & 1966); Florida (1975 & 1976); Louisiana: [*Alabama and Mississippi Boundary Case*] (1985); [*Louisiana Boundary Case*] (1969 & 1975); Maine: [*Rhode Island & New York Boundary Case*] (1986); [*Nantucket Sound*] (1987).

Committee as benchmarks, citing to them as if these determinations had been made by a group of objective scholars and experts rather than a committee appointed by the federal government itself – that is to say, one of the parties to each of the disputes. This questionable practice has been widely adopted by Special Masters and the Court alike, and continues unabated until this day.

This conflict of interest between the United States and its own states might seem to be one of form rather than of substance. After all, we acknowledge federal supremacy in many areas of our national life. But the context here is quite different. When two nation states, e.g., the United States and Canada or Great Britain and Norway, are competing for water resources in a given sea area, each will be assumed to be acting in the best interests of its own citizens in any litigation which may transpire. But who decides what is in the best interest of the citizens when there are two sovereigns along each coast, and each claims a duty to protect the interests of the same people?

Recall that in other forms of constitutional settlement, either there is no competition inherent in the scheme (i.e., all the rights adhere either to the states or to the federal government), or the federal and state governments act in common with pro-rata shares of resources awarded to each. In the United States, however, baseline decisions are made by the federal government, and any opposition by the individual states must be resolved within the context of costly federal/state litigation and ultimately decided by the highest federal court.

2. THE U.S. POLICY ON THE USE OF STRAIGHT BASELINES

The second major reason that bay determinations remain highly relevant in U.S. federal/state litigation today is that the federal government has refused, as a policy matter, to utilize straight baseline claims in establishing the coastline of the United States. This has made it likewise impossible for individual states to utilize straight baseline claims, regardless of how legitimate such claims might be under the geographical guidelines established in the *Anglo-Norwegian Fisheries* case and adopted in international treaty form in 1958.[39]

39. 1951 I.C.J. 116, *supra* note 31. The most juridically important language of

This policy was given Court sanction in *United States v. California,*[40] the first major federal/state maritime boundary dispute to come before the Supreme Court after the coming into force of the 1958 Convention: "We conclude that the choice under the Convention to use the straight base-line method for the determining inland waters. . . is one that rests with the Federal Government, and not with the individual states."[41]

Unfortunately, beyond federal primacy, the *California* Court offers no rationale for this part of its decision, and we are left to piece one together from two sources. First, we know that U.S. policy has always favored narrow limits in the seas for national security purposes, e.g., to facilitate the movement of U.S. naval vessels as they conduct legitimate surveillance and rescue activities or as they attempt to contest and minimize the maritime claims of third states which are seen to interfere with U.S. military and commercial interests. Second, we also know from documents referenced in the immediately preceding section that the Interagency Baseline Committee was tasked with setting new baselines that favored federal interests. In refusing to make claims to straight baselines under Article 4 of the 1958 Convention themselves, the government was well aware that this would eliminate a possible extension of state claims, as well as one legitimate basis upon which states could establish a claim to their traditional water areas in pending litigation between the federal government and the states.

Part IV of this article will set forth several reasons, beyond fundamental fairness, that U.S. policy in this area should be reconsidered. For now, suffice it to say that regardless of rationale, the effect of this policy has been that in the United States, the legitimacy of every claim by an individual state to sovereignty over

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Article 4 of the 1958 Convention reads as follows: 1) In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured. 2)The drawing of such baselines must not depart to any appreciable extent from the general
direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the
land domain to be subject to the regime of internal waters.

40. 381 U.S. 139, *supra* note 4.

41. United States v. California, 381 U.S. at 168.

the waters of a coastal indentation must rise or fall as either a juridical bay within Article 7 of the 1958 Convention (UNCLOS, Article10), or as historic inland waters under no conventional guidelines whatsoever.

Ironically, the U.S. policy on straight baselines in and of itself might not have created too serious a problem for states had Article 7 been applied as intended by the Convention drafters. Recall that in 1965, the *California* Court held that in any federal/state maritime boundary dispute over the nature of coastal indentations, the applicable law in the U.S. was to be identical to the latest statement of international law on this issue, then Article 7 of the 1958 Convention.[42] This provision had been praised as a clear statement of the law which could provide excellent guidance in the making of bay determinations. But as more and more federal/state cases have come before the Court since 1965, both the purposes and the text of Article 7 have been systematically misapplied. The arguments of the parties and the decisions themselves have been corrupted by the creation and subsequent use of several subsidiary "tests" which have no basis in the 1958 Convention and, in fact, may have been rejected by the original drafters themselves. Litigation has become increasingly complex, requiring more time and more money spent on both sides than is warranted, as if the historic consensus achieved in 1958 and preserved in 1982 had never been reached.

The time has come to take a look at these various so-called subsidiary tests and determine whether or not they are facilitating efficient and just results in these cases. If not, it is long past time to discard them and return to first principles as the drafters intended. These determinations can only be made through a detailed re-examination of the text of Article 7 (UNCLOS, Article10) and it's drafting history.

3. THE SUBSIDIARY TESTS

a. THE ASSIMILATION OF ISLANDS TO THE MAINLAND TEST

The first conceptual misstep in the Supreme Court's Juridical Bay jurisprudence occurred very early on in federal/state maritime boundary litigation when the federal Baseline Committee, special

42. *See supra*, note 20.

experts, Special Masters and the Supreme Court, faced with complex coastlines that are more the rule than the exception, inexplicably began to consider a question not presented by the language of Article 7 of the 1958 Convention, i.e., "Can an island be considered a part of, or an extension of, the mainland for juridical bay determination purposes?" If answered in the affirmative, this only begged a further question: "If so, When?" The answer, "[W]hen the island can be assimilated to the mainland," merely added a further layer of uncertainty, because surely the next question must be, "When CAN an island be assimilated to the mainland?" And thus the *Assimilation of Islands to the Mainland* test was born, leading to a host of further conceptual errors along the way as each successive federal/state controversy elaborated a more unwieldy set of "factors" that must now be argued by all parties to a controversy and therefore seriously considered by each Special Master and the Court in turn.

The issue was first considered in *United States v. Louisiana*,[43] where the Court stated, "the general understanding has been – and under the Convention certainly remains – that bays are indentations in the *mainland*, and that islands off the shore are not headlands but at the most create multiple mouths to bays." [44] The Court continues: "We have concluded that Article 7 [of the 1958 Convention] does not encompass bays formed in part by islands, which cannot realistically be considered part of the mainland. Article 7 defines bays as indentations in the 'coast,' a term which is used in contrast with 'islands' throughout the Convention."[45]

This language from the Louisiana case has been relied upon in every subsequent federal/state maritime boundary case. Therefore, it seems important to review the language of Article 7 upon which the *Louisiana* Court purports to rely. Article 7(2) [now 10(2)] reads:

> For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast.

43. 394 U.S. 1 (1969).
44. *Id.* at 62 *(Emphasis in original).*
45. *Id.* at 67.

> An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of a semi-circle whose diameter is a line drawn across the mouth of that indentation.[46]

It should be immediately clear to the reader that the words and phrases below, taken from the *Louisiana* decision, do not appear in Article 7(2) above or any other section of Article 7:

- Mainland
- A part of the mainland
- Bays formed in part by islands
- Indentations in the mainland
- Indentations in the coast
- Headlands
- Islands off the "shore"

Therefore, the *Louisiana* Court's allegation of "general understanding" aside, these concepts could not possibly have "remained" as part of the drafters' understanding. In fact, the 1958 Convention's drafting history makes it quite clear that many of the terms used by the *Louisiana* Court above were eschewed by the International Law Commission in both its 1955[47] and its 1956 drafts.[48] For example, the older terms *headlands* and *inter fauces terrae* were specifically rejected[49] in favor of the more flexible term, *natural entrance points* which was adopted by the full Conference in 1958.[50]

Even though the drafters specifically rejected the use of

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46. *Supra* note 5.

47. [1955] 2 Y.B. Int'l L. Comm'n 251.

48. Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9) at 15-16, U.N. Doc. A/3159 (1956), referred hereafter as Report of the I.L.C. (1956).

49. In phrases such as "a semi-circle drawn on the mouth of that indentation" and "the semi-circle drawn at the entrance of that indentation," the draft language indicates that the Commission intended to favor a more functional, descriptive approach in identifying the entrance of an indentation. It is also clear the drafters considered "entrance" and "mouth" as synonyms. *See* WESTERMAN, *supra* note 7, at 113, ns. 95 and 98.

50. *See* U.N. Doc.A/CONF.13/C.1/l.62, in 3 United Nations Conference on the Law of the Sea at 227-28 (1958).

headlands, the term is frequently used by commentators[51] and by Courts to this day, often as a synonym for *natural entrance points*. This continued use has led to more troubling conceptual missteps because the term *natural entrance points* was intended by the drafters to refer to a much wider, more functional concept which may include traditional headlands as a subcategory but which also includes any number of other features, such as harbor works and other artificial structures which, under Article 8 of the 1958 Convention, are regarded as forming natural entrance points for bays. The I.L.C. *Commentary* goes further to say that permanent structures erected on the coast (e.g., jettisons, protecting walls, and dykes) are considered a part of harbor works for delimitation purposes. As long as these features clearly mark an entrance into the indentation, they create natural entrance points under Article 7.[52]

Much more important for our analytical purposes here, there is also no doubt whatsoever that the drafters envisioned islands as serving as natural entrance points and, in fact, as sometimes creating the indentations themselves. The first part of the drafters' intention is made clear in Article 7(3), which sets forth the general measurement rule for bays in its first sentence, "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 a line joining the low-water marks of its natural entrance points."[53]

Referring back to the semi-circle test established in Article 7(2), the second sentence of Article 7(3) clarifies the methodology to be used when islands create separate mouths or entrances[54] into a bay:

> Where, **because of the presence of islands**, an indentation has more than one mouth, the semi-circle

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51. *See for example* A. SHALOWITZ, SHORE AND SEA BOUNDARIES, Coast and Geodetic Survey, U.S. Government Printing Office (1962) at 63-64.

52. *See* Report of the International Law Commission to the General Assembly, 9 U.N. GAOR Supp. (No. 9) at 15, U.N. Doc. A/2693 (1954). *See also* [1954] 1 Y. B. Int'l. L. Comm'n at 88-89; [1955] 1 Y.B. Int'l. L. Comm'n at 74; [1956] 1 Y.B. Int'l. L. Comm'n at 193; 3 United Nations Conference on the Law of the Sea (1958) at 142.

53. Article 7(3), sentence one, 1958 Convention (*emphasis added*).

54. Recall that the terms "mouths" and "entrances" are used interchangeably by the 1958 Convention drafters in describing the location of natural entrance points.

> **shall be drawn** on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation **shall be included** as if they were part of the water area of the indentation.[55]

It is important to note that in measuring the water area of a single-mouthed indentation for comparison with that of the semi-circle, as required by Article 7(2), one simply draws a line between the natural entrance points of the indentation and uses the length of that line as the diameter of a semi-circle, whose area must then be compared with the water area of the indentation itself. When islands create more than one mouth, however, the rule is clarified in sentence two. Here, when computing the length of the line to be used as the diameter of the semi-circle, only the combined length of the lines **between** the islands **shall** be used. Further, when one understands that any islands within the indentation (i.e., landward of the closing lines) **shall** be included as part of the water area measurement, it is clear that Article 7 was intended to offer a decided advantage to states whose coastlines include indentations which, because of the presence of islands, have more than one entrance and, therefore, more than two natural entrance points.[56]

This was an advantage expressly intended by the drafters, as the legislative history of these special rules makes clear. All I.L.C. drafts of Article 7 from 1953 forward include these measurement rules for multi-mouthed indentations, and all versions are stated in mandatory terms, exactly as does the final version in the 1958 Convention.[57]

The *Commentary* which accompanied both the 1955 and the 1956 drafts went even further, indicating that the drafters not only sought to create a special regime for islands that create multiple mouths into an indentation, but much more radically, they recognized that these islands could actually create the indentations themselves. The 1955 *Commentary* to Article 7(3) reads:

> If, as a result of the presence of islands, an indentation

55. Article 7(3), sentence two, 1958 Convention (*emphasis added*).
56. *See* WESTERMAN, *supra* note 7, at 94, 129.
57. *Id.* at 121-126.

> which has to be established as a bay has more than one entrance, the sum total of the length of the different entrances **will be** regarded as the length of the bay. **Here, the Commission's intention was to indicate that the presence of islands at the entrance to an indentation links it** [the indentation] **more closely with the territory, which may justify some alteration of the proportion between the length and depth of the indentation. In such a case, an indentation, which without islands at its entrance would not fulfill the necessary conditions, is to be recognized as a bay.**[58]

The 1956 *Commentary* changes very little of substance. If anything, the drafters' intentions are made even more explicit:

> [H]ere, the Commission's intention was to indicate that the presence of islands... tends to link it [the indentation] more closely to the mainland, and this consideration may justify some alteration in the ratio between the width and the penetration of the indentation. **In such cases an indentation which, if it had no islands at its mouth, would not fulfill the necessary conditions, is to be recognized as a bay.**[59]

Several intentions are clarified by the legislative history above:

1. It is obvious that the International Law Commission considered islands to be one of many coastal features that may form *natural entrance points* into an indentation under Article 7 (UNCLOS, Article10), making any consideration of whether or not islands can be seen as creating the *headlands* of a bay or as being *a part of the mainland* or as *assimilated to the mainland,* as has been done from the Louisiana case forward, completely absurd.
2. The Commission also made clear that the presence of islands which form separate entrances into an indentation

58. [1955] 2 Y.B. Int'l. L. Comm'n at 37 (*emphasis added*). Note again the use of mouth and entrance as interchangeable terms.

59. [1956] 2 Y.B. Int'l. L. Comm'n at 269 (*emphasis added*).

renders the indentation even more landlocked and well-marked than one whose axis is completely open to the sea. This geographic fact justifies a move away from the strict application of the semi-circle test imposed in Article 7(2), and towards that required by the second sentence of Article 7(3). By design, this alteration offers distinct advantages to a coastal state rather than creating merely *special circumstances* that can only diminish the state's chances of succeeding in a juridical bay claim.

3. Perhaps most importantly, the Commission's use of the imperative in both their 1955 and 1956 *Commentaries*, as well as in the resulting text of the Convention, is an indication of their clear intention to create a special regime for these islands, so much so that, an indentation, which without the presence of islands would not meet the necessary conditions, nonetheless is to be recognized as a bay. This of course renders the oft-heard arguments that: 1) a juridical bay can only exist if there is a recognizable indentation into the mainland or into the coast, or 2) that an indention can only gain bay status if the island can be assimilated to the mainland, likewise absurd.

Far from ignoring islands as some commentators have suggested,[60] the Committee of Experts, the International Law Commission, and the First Committee of the full Conference each expressly adopted rules which grant special standing to these bay-related islands. The mandatory language of Article 7 itself (UNCLOS, Article10) requires us to consider indentations created in whole or part by islands as even more closely tied to the land regime and therefore as triggering a special relaxation in the aerial and geographical requirements for a bay. The drafters had no problem whatsoever in seeing that in certain situations, such as New York's Long Island Sound, an island may have the legal effect of creating the juridical bay itself.

One might think that upon careful reading of the drafts and commentaries, it would be difficult to ignore a geographical feature that has been given such profound juridical significance. Many,

60. *See* D. BOWETT, THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW at 30 (Oceania Publications 1979), in which Bowett, citing to the same 1955 and 1956 Commentaries as well as the language of Article 7, concludes that "[i]n effect, islands are ignored for the purposes of Article 7."

however, have done just that. The Special Master's Report in the Rhode Island/New York Boundary case points to the same ILC *Commentaries* detailed above and reaches a conclusion at odds with the clear language of those Commentaries:

> New York argues that the clear indication of such language is that islands may be used to form part of a bay. A review of the Summary Records of the ILC for 1955 and 1956 indicates that this language addresses the problem created by the presence of islands in the mouth of a bay... Except for the indication that the drafters of the Convention took islands into account in one situation, the language is inapposite to the question of whether islands can be treated as part of the mainland to form an indentation.[61]

The three major misconceptions in this one excerpt alone reveal that the Special Master has become a captive of the special tests and factors created by his predecessors.

First, he reads the same Commentaries as referring to the *problem* created by islands, whereas such islands are among the most common geologic features to be found along a natural coastline, especially near coastal indentations.

Second, he misconstrues these islands as lying *in the mouth* of a bay. This is a basic error made consistently by many commentators,[62] who apparently believe that Article 7(3) only refers to islands that line up precisely between mainland headlands. These commentators often provide diagrams which then are repeated by others over the years. Not only does this misconstruction not reflect reality in nature, it is not at all indicated in the text, which refers only to islands that create more than one mouth into an indentation.

Third, and perhaps unnecessarily at this point, it must be stressed that this *part of the mainland* language was never a part of the drafters' "understandings" nor did it become a part of the Convention text. Perhaps the Special Master believed that when the International Law Commission used the imperative to state

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61. October Term 1983 Report of Special Master No. 35 Original at 34, n. 23.

62. *See* WESTERMAN, *supra* note 7, at 137-149; *See also infra* the text and illustration accompanying notes 154-159.

that when an indentation is created by one or several islands, even if without the islands there would be no such designation, the indentation is to be recognized as a bay, the drafters intended such treatment to be optional. More likely, however, the Special Master had become so convinced that the assimilation of islands to the mainland test was the applicable rule of law, he no longer felt it necessary to return to the Convention itself.

Fortunately for New York, the Supreme Court ultimately concluded that even though Long Island Sound was created by the off-shore presence of Long Island, the Sound could nonetheless be considered a juridical bay. The victory is pyrrhic, however, because in reaching this conclusion, the *Rhode Island/New York* Court based its conclusion not on the actual language of the provision nor on its drafting history, but rather on the heavily labored analysis of subsidiary factors that allowed Long Island to be seen as a part of the mainland and, therefore, assimilated to it.[63]

b OTHER SPECIAL FACTORS FLOWING FROM THE ASSIMILATION TEST

If the drafters made all of this is so clear, one might ask why the case law in federal/state maritime boundary cases, almost all of which have involved islands, has gone so far off the analytical path that the drafters, the text of the 1958 Convention, and in fact the Court in the second California case, intended? It would appear that once the Supreme Court in the Louisiana case adopted many of the tests created by the federal Baseline Committee, our common law system took it from there, doing what in most cases it does best, i.e., taking each case and elaborating the reasons for a decision based on the line of reasoning in the last case.

63. The decision was not as positive for Rhode Island because the Supreme Court accepted the Federal Baseline Committee's recommendation that the closing line of the bay should run from Montauk Point on Long Island to Watch Hill Point in Rhode Island rather than obey the mandatory language of Article 7(3) of the Geneva Convention, second sentence, which requires that in the case of islands which create more than one mouth into an indentation, a closing line **shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths.** If that mandatory language had been followed, the closing line between Montauk Point and Block Island and continued between Block Island and Pt. Judith, Rhode Island, would have enclosed a bay that met the semi-circle test as well as the closing line limit of 24 miles stipulated in Article 7(4). It would also have enclosed the waters of Block Island Sound in its entirety.

Acknowledging first that, "no language in Article 7 or elsewhere positively excludes all islands from the meaning of the 'natural entrance points to a bay,"[64] the *Louisiana* Court nonetheless elaborates a "special circumstances" analysis to serve as a guide for all further litigations:

> [W]hile there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, and the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast. We leave to the Special Master the task of determining in the first instance – in the light of these and any other relevant criteria and any evidence he finds it helpful to consider – whether the islands which Louisiana has designated as headlands of bays are so integrally related to the mainland that they are realistically parts of the "coast" . . .[65]

In another part of the opinion, the Court indicates that an island's origin and its resultant connection with the shore is another factor to consider.[66]

Following the *Louisiana* Court's direction, Special Master Armstrong[67] considered the Court's so-called "factors" in his analysis and concluded:

> Applying the tests outlined by the Court. . ., neither the size, distance from the mainland, depth and utility of the intervening waters, shape of the low-water elevations, or their relationship to the configuration or curvature of

64. 394 U.S. at 61.

65. *Id.* at 66. Even though the Court appears to understand the implications of the Convention's natural entrance points language, in developing their special circumstance approach they return to the old terms that had been specifically rejected by the Convention drafters, e.g. headlands and mainlands, that are now going to find their permanent place in all subsequent U.S. juridical bay jurisprudence.

66. *Id.* at 65 n.84.

67. Report of the Special Master of July 31, 1974, at 20-21, in No. 9, Orig., United States v. Louisiana, approved, 420 U.S. 529 (1975).

> the coast indicate that they should be assimilated to and treated as a part of the mainland. While it is true that the Court leaves open the possibility of considering other relevant criteria and states that the list given is intended to be illustrative rather than exhaustive, this appears to be intended to leave open the question of whether islands or low-water elevations which meet the five suggested specific criteria may nevertheless be so assimilated. . .[68]

Subsequent cases have rigorously applied the same "factors" and, due to the "special circumstances" of each case, have added more of their own, which will be elaborated in the discussion of the Alaska case below. By the time *Alaska v. United States* was filed, the attorneys for the United States and those representing Alaska were compelled to cover each and every one of these cumulative factors in detail. The highly regarded Special Master in the Alaska case, Gregory E. Maggs, was perforce required to analyze each of the arguments of the parties based on these factors. His juridical bay analysis alone accounts for almost one hundred pages of his Special Master's Report.[69]

PART III. THE ALEXANDER ARCHIPELAGO

A. THE FLAWED ANALYSIS IN *ALASKA V. UNITED STATES*

On June 12, 2000, the Supreme Court granted the State of Alaska leave to file a bill of complaint to quiet title relating to certain submerged lands in Southeast Alaska. The first issue concerned the submerged lands underlying the waters of the Alexander Archipelago and the second, the submerged lands underlying the waters of Glacier Bay. Only the dispute concerning the Alexander Archipelago will be treated here.

Alaska claimed title to these submerged lands under two theories:

1. The waters therein constitute historic inland waters of the United States; or in the alternative,

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68. *Id.* at 35-37.

69. The Alaska case was filed in 1999 and the Special Master was appointed in 2000. The Report of the Special Master Gregory E. Maggs was received and ordered filed with the Court April 26, 2004. *See* juridical bay analysis at 140-226.

2. The waters constitute two juridical bays.

The two lines of analysis often intersect due to misapplication of one theory or another by the parties and/or the Special Master. Under either theory, however, the enclosed waters would constitute internal waters and, therefore, be subject to the exclusive jurisdiction of the State of Alaska. This section will focus exclusively on the juridical bay analysis of Special Master Maggs because the Master's Report constitutes the latest compilation of the non-conventional tests and factors that, he believes, must be applied in order to resolve juridical bay issues.

It is understood from the way in which the Special Master frames the issues that the *assimilation of islands test* has become a threshold issue that must be resolved in order to reach the real issue – whether or not Alaska's juridical bay claims conform to Article 7. According to the Special Master's Report:

> The parties agree that Alaska must prevail on two general issues to establish the alleged juridical bays. The **first** issue is whether numerous islands in the Alexander Archipelago can be "assimilated" to each other or to the mainland to form the sides of the alleged juridical bays. The **second** issue is whether the alleged juridical bays, if formed by the assimilation of islands, meet the requirements stated in Article 7 of the Convention.[70]

Perhaps reflecting on the complex task put before him, Special Master Maggs continues:

> The United States and Alaska have based their competing arguments on information contained in surveys, charts, publications, affidavits, and other documents. They do not dispute the authenticity of these documents or what they say. Almost all the parties' disagreements concern legal standards or the application of the law to facts. . . In these circumstances, a trial would not aid resolution of this matter. As one counsel put it at oral argument, "The Master has a phenomenal amount of evidence in front of him that the

70. *Id.* at 140.

> parties have been able to collect . . . I'm afraid that if you had a trial you would hear more. . . "[71]

1. FACTORS CONSIDERED IN PRIOR CASES

The Special Master began his assimilation analysis by reviewing "Factors Considered in Prior Cases."[72] Citing the language of the Louisiana case discussed in detail above, the Master stated that the question of whether a particular island is to be treated as a part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast, as well as the island's origin and resulting connection with the shore.[73]

The Special Master then turned to the precedents found in the Louisiana case,[74] the Rhode Island and New York Boundary case,[75] and the United States v. Florida case.[76] In his discussion of the New York case, it appears that a further set of factors may have been added to the *Louisiana* list through a series of exceptions filed by the United States and a list of "points" cited as being important to the *Rhode Island/New York* Court's finding that Long Island could be assimilated to the mainland. The Special Master stated:

> The United States filed exceptions to Special Master Hoffman's Report. . . [arguing] that islands should be treated as headlands only. . . when the island is separated from the mainland by a genuine "river"; when the island is connected to the mainland by a low-tide elevation; or when, as in the *Louisiana Boundary* Case, the shoreline is deltaic in nature.[77]

Special Master Maggs noted that the *Rhode Island/New York* Court nominally rejected the federal government's factors, saying that each case must be considered individually in terms of the

71. *Id.* at 141.
72. *Id.* at 148.
73. *Id.* at 149.
74. *Id.* at 149-150.
75. *Id.* at 150-151.
76. *Id.* at 152.
77. *See* 469 U.S. at 517 and 2003 Alaska Spec. Master's Report at 151.

assimilation test.[78] But he noted further that the Court, in its own case-by-case analysis of Long Island, emphasized the following points in reaching its conclusion. Whether these points constitute merely an expansion of the *Louisiana* factors or constitute additional tests, the language below has undoubtedly made its way into subsequent cases:

> (1) Long Island and the mainland almost completely surround the water in Long Island Sound, creating a "pocket of water;"
>
> (2) The western end of Long Island, closest to New York City, "helps form an integral part of the familiar outline of New York Harbor;"
>
> (3) The East River, which separates Long Island from Manhattan, "before dredging" had a shallow depth of 15 to 18 feet and a dangerous current;
>
> (4) The size of the East River in terms of width and depth was very small in comparison with the 118-mile length of Long Island Sound;
>
> (5) Long Island and the adjacent shore shared a common "geological history," formed by deposits and sediments brought by sheets of ice 25,000 years ago;
>
> (6) Long Island Sound is not a route of international passage. . . ships traveling between points north and south of Long Island Sound typically pass Long Island on its seaward side.[79]

Special Master Maggs also pointed to *United States v. Florida* in which Special Master Maris reasoned[80] that the Florida Keys below the Moser Channel should not be assimilated to the Florida Keys above the Moser Channel, based on the non-navigability of the Channel itself. Special Master Maris went on to say that the upper Florida Keys were eligible for assimilation in an area of "very shallow water which is not readily navigable and nearly all of which is dotted with small islands and low-tide elevations."[81]

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78. Special Master's Report at 151.

79. 469 U.S. at 518 and 2003 Spec. Master's Report at 151.

80. United States v. Florida, 425 U.S. 791 (1976); *see also* 2003 Alaska Spec. Master's Report at 152.

81. Florida, 425 U.S. at 791.

The Court in the Florida case did not rule on this issue, but the navigability of the so-called intervening waters was added to the list of special factors that Special Master Maggs felt compelled to take into consideration in his analysis of Alaska's claims.

1. THE ANALYSIS OF SPECIAL FACTORS IN THE ALEXANDER ARCHIPELAGO

Alaska claimed four indentations as Juridical Bays: North Bay, South Bay, Sitka Sound, and Cordova Bay.[82] The Special Master began his factual summary by focusing on the size of four indentations themselves. [83] Prior cases have looked at the size of the islands as relevant to the assimilation issue, but the absolute size of the water area has appeared as a factor only in the series of exceptions filed by the United States in the Rhode Island/New York Case.[84] These were not accepted by the Special Master or the Court in that case, but it would seem that any factor mentioned in passing became part of a juridical bay analysis, regardless of its relevance to Article 7 which only treats the size of the water area when applying the semi-circle test in Article 7(2).

A reader's impression of the sheer size of these indentations and some of the comparisons made with land areas in the United States have little to do with the issues. To illustrate but a few of these comparative measurements:

> North Bay and South Bay are extremely large. North Bay has an area of 5,593 square nautical miles and its mouth. . . is 154 nautical miles wide. South Bay has an area of 4,949 square nautical miles, and its mouth. . . is 120 nautical miles wide. . . [85] To give some sense of the scale of these immense bodies of water, the entire State of Connecticut has an area of only 5,544 square miles or 4,186 square nautical miles; Connecticut is thus smaller than either North Bay or South Bay. . . [86] [W]ith an area of 2,231 square miles, [Cordova Bay] exceeds both

82. *See* maps, Appendices D and E, October Term 2003 Spec. Master's Report.
83. *Id.* at 142.
84. *See supra* note 80, at 27-28.
85. *Id.* at 143.
86. *Id.* at 143. The confusion is made further apparent by the claim that the State of Connecticut has a land area that can be expressed in "nautical miles."

Delaware and Rhode Island in size.[87]

The same curious comparisons are made again when the Master moves on to the size of the islands themselves: Kuiu Island is long and narrow... [and] has an area of 745 square miles, making it the 15th largest island in the United States and roughly a dozen times the size of the District of Columbia... Kupreanof Island... has an area of 1,089 square miles, making it the 12th largest island in the United States and giving it roughly the same land area as the state of Rhode Island.[88]

Although it has been the practice of each Special Master to elucidate one or more new tests for bay determination, one can only hope that comparing the size of claimed indentations and/or islands to the size of various smallish U.S. states will not catch on.

The Special Master repeats several other misconceptions in his summary, one of the most egregious being that inherited from *Louisiana:* "[B]ays typically are indentations of water into unbroken land masses. North and South Bay do not fit this usual pattern."[89] Presumably, these waters fail to "fit" because they are made up, in part, by islands. As discussed at great length above,[90] the drafters expressly acknowledged that even along coasts without an obvious indentation, a bay can be formed by the presence of islands themselves; that islands can obviously serve as entrance points into an indentation; and most importantly, that indentations that without the presence of islands might not be considered as bays, are to be so considered under Article 7(3).

By stating a non-rule at the outset and then treating the indentations at issue as special circumstances needing special rules, the Master once again sets in motion the flawed analysis that has plagued all the previous federal-state boundary cases, starting of course with the question of whether a given island can be assimilated to the mainland. Before he engaged in his own assimilation analysis of the Alexander Archipelago, the Special Master cited prior case law[91] as the source for the ever-growing list of special factors that have become embedded in bay jurisprudence

87. *Id.* at 146.
88. *Id.* at 143-44.
89. *Id.* at 143.
90. *See supra* text accompanying notes 43-60.
91. Master's Report at 148-53.

in the United States. The first factor, the identity of the intervening waters, should be discussed in some detail because it appears that Master Maggs understood the factor to be a threshold test which must be satisfied before proceeding to an analysis of the assimilation to the mainland test.

a. THE IDENTITY OF THE INTERVENING WATERS

Alaska and the United States could not agree as to the meaning of the term *intervening waters*. Alaska put forward the argument that intervening waters between two land forms should include only the waters that are *pinched*, where the opposing land forms in fact come together creating an *assimilation zone*. The government argued that intervening waters should include "the entire area across which the two land forms of interest face one another."[92]

Both definitions require extensive geographic and hydrographic measurement. In a geographical setting as complex as the Alexander Archipelago with over a thousand islands facing off against both island and mainland land masses, such an endeavor would appear to be impossible, even if relevant. Nevertheless, some measurement was in fact gamely attempted here. There is mention of the length and width of some of the water areas measured in nautical miles, or yards, or even more confusingly, in some places in meters, without any discussion of the relevance of these measurements in the larger analysis under Article 7. [93] What is the merit in knowing these measurements? If the water area under study is very wide and/or long or perhaps narrow and/or short, or if it lies between one land mass directly facing another or is somewhat skewed, or if it lies between the closest points of intersection of the land, what insight can we derive as to whether or not the water areas can be enclosed as internal waters?

The Special Master himself appeared to be unconvinced as to the utility of this kind of analysis, noting that neither the *Rhode Island/New York* Court nor the *Louisiana* Court offered "any definition of intervening waters."[94] The Special Master complained

92. *Id.*
93. *Id.* at 153-55.
94. *Id.* at 154.

that the *New York* Court held that "assimilation depend[ed] on the 'intervening waters' [yet the Court] did not qualify these words in any way."[95] He later suggested that "uncertainty of this kind surely will burden the Court in further coastal litigation."[96]

Despite these misgivings as to whether or not a valid determination of intervening waters can be made in current or subsequent cases, Master Maggs felt compelled to make a determination in order to move forward in his analysis. As he pointed out: "The question here is only how to define the intervening waters to permit individual consideration of the numerous factors identified in the Court's precedents."[97] Noting that "Alaska offers no principles for deciding what to consider and what not to consider,"[98] Master Maggs adopted the U.S. position for three stated reasons:

a. The United States' position has greater certainty because it offers an objective method for delimiting intervening waters;

b. The uncertainty inherent in Alaska's approach could make identification of the "intervening waters" highly manipulable; and,

c. Alaska's approach would make assimilation

95. *Id.* at 160.

96. *Id.* To this observation, one can only reply, "It already has." This uncertainty is well-illustrated in the Master's Report at 177-78, when he attempts to apply the tests proposed by the United States to identify the "intervening waters" in the Alexander Archipelago. Using the Hodgson and Alexander 45-degree test discussed *infra* to establish the precise area of Keku Strait that can be defined as "intervening waters," along with the 3-to-1 ratio test that Hodgson and Alexander proposed for determining its "average width," the Master observes that the documents submitted by the parties, despite all the supposed "certainty" that can be provided by the use of such extra-conventional tests, still do not establish either the relevant area of Keku Strait nor its average width "with precision." *Id.* at 178. The U.S. and Alaska used different tidal levels for their areal measurements; and even though, as Alaska correctly argued, low water is the correct basis for measurement, it appears that "neither the United States nor Alaska has measured the low tide area of Keku Strait." *Id.* Seemingly frustrated by this failure of the parties to produce reliable information upon which he can make a decision, the Special Master appears to say, oh well, "[E]ven without a precise measurement, the average distance between the two islands clearly exceeds the distances between opposing land forms where the Court has previously recognized assimilation." *Id.* at 179.

97. *Id.* at 159.

98. *Id.* at 155.

substantially easier.[99]

Not one of these points is valid, but point b. is the most easily and briefly refuted. The Special Master stated that the new terms advanced by Alaska would not be particularly helpful in identifying intervening waters. The two reasons given for rejecting these terms, however, have little to do with the "uncertainty" of Alaska's approach. The first reason, that adopting Alaska's arguments might alter the assimilation analysis under the factors identified in the Louisiana and Rhode Island/New York cases, is unsupported; but it is also unwarranted because, as the *New York* Court itself held, each case must be analyzed individually for assimilation purposes.[100]

The second reason stated, that the "United States rightly may worry that foreign nations could exploit the uncertainty in arguing for assimilation of islands that are not 'realistically' parts of other land forms,"[101] is simply out of date in the twenty-first century. Citing as authority the Louisiana case decided 40 years ago,[102] Master Maggs continued to invoke the argument made in many of the early cases by Special Masters and the Court alike, that what is done in U.S. federal/state bay litigation will influence our relations with other nation states. The Master alludes to the same misconception earlier when he says, ". . .given that assimilation of islands may affect international borders, a vague standard may invite undesirable international controversies."[103]

However true these statements may have been in 1958, they are no longer so. In the rest of the world, juridical bay delimitation is basically a thing of the past due to the widespread usage of straight baselines to delimit coasts under Article 4 of the 1958 Convention (UNCLOS, Article7). Straight baselines subsume smaller coastal indentations, thereby fossilizing "bay" determinations almost entirely at the international level, where I.C.J. maritime boundary decisions now deal exclusively with establishing single maritime boundary lines delimiting the continental shelf and exclusive economic zone between and among

99. *Id.* at 154-55.
100. 469 U.S. at 517.
101. *Id.* at 158.
102. United States v. Louisiana (Louisiana Boundary Case), 394 U.S. 1 (1969).
103. Master's Report at 155.

states.[104] By not adopting the straight baseline regime for the United States, the federal government has guaranteed continued bay delimitation work for lawyers and experts in federal/state conflicts for the foreseeable future, but we should have no fear that what we do here will influence international law of the sea jurisprudence as to juridical bays. Even shortly after the 1958 Geneva Convention came into force, when U.S. baseline policy might have stirred "international controversy," the U.S. "assimilation of islands" test was never used internationally or by other nation states.

As to the Master's first rationale for adopting the U.S. approach at point a, the government had proposed using an objective test, i.e., the "45-degree test," to identify intervening waters, thus supposedly providing more certainty than the approach proposed by Alaska. The Special Master summarizes the test briefly: "[T]he open sea ends and an inlet begins, when the shores of the two land forms bend more than 45 degrees away from the sea and toward each other."[105] The Master credits this test to the English geographer P. Beazley[106] and to two U.S. State Department geographers, Robert Hodgson and Lewis Alexander.[107]

There are two major problems associated with the Master's reliance on this extra-conventional test as a methodology for locating intervening waters in the Alexander Archipelago. First, the test was never intended to be used to replace or even to supplement the clear guidelines established under Article 7 which require locating the natural entrance points of an indentation. As the term implies, most natural entrance points are *natural,* as in easily identifiable, and thus easily established without the aid of additional tests in all but the most special circumstances. Two of these special circumstances arise when an indentation with one easily identifiable entrance point on one side of an entrance faces a gently sloping coastline on the other and when one easily

104. For the I.C.J.'s most recent decision in this area, *see Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, I.C.J. Judgment 3 February 2009.

105. Master's Report at 155.

106. P. Beazley, *Maritime Limits and Baselines: A Guide to their Delineation* (The Hydrographic Society, Special Publication No. 2, pp. 16-17 (1977).

107. Robert D. Hodgson and Lewis M. Alexander, *Towards an Objective Analysis of Special Circumstances: Bays, Rivers, Coastal and Oceanic Archipelagos and Atolls* (Law of the Sea Institute Occasional Paper No. 13, pp. 10-12, Apr. 1972).

identifiable entrance point faces a completely featureless coastline on the other.[108]

The Supreme Court has recognized that where there is no readily identifiable natural entrance point, an objective test *may* be employed to locate one. In 1966, in its Supplemental Decree in the California case, the Court approved the use of one of these objective tests, the so-called "bisector of the angle test"[109] for locating an entrance point on a gently sloping coastline.

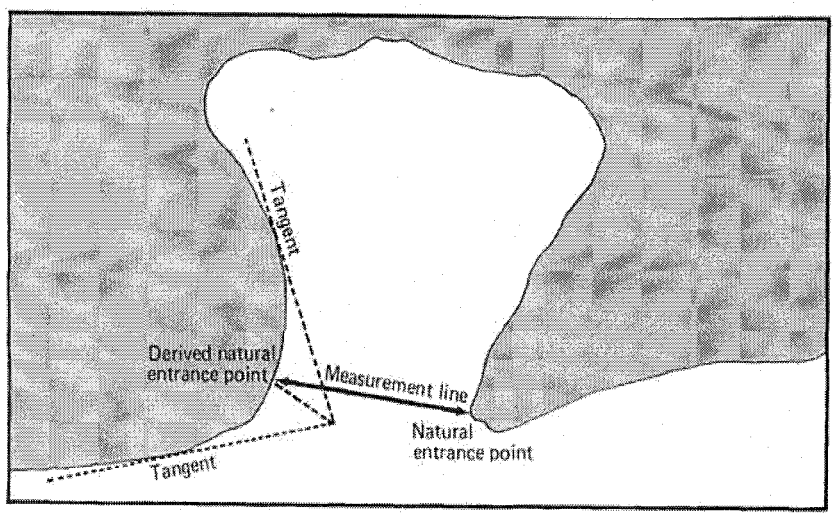

Figure 1. Bisector method for deriving a natural entrance point on a gently sloping coastline.

In so doing, the Court makes clear that extraneous tests are **not** to be used when the natural entrance points of an indentation can be identified:

> In drawing a closing line across the entrance of any body of inland water having **pronounced headlands** [sic], the line shall be drawn between the points where the

108. Illustrations for these configurations, i.e. figures 2 and 3 below can be found in both Beazley's (*see supra* note 105, at 17) and Hodgson and Alexander's cited works (*see supra* note 106, at 10-12). *See also* WESTERMAN, supra note 7, at 115-17.

109. Several commentators proposed the bisector of the angle test for special circumstances. *See, e.g.,* Hodgson and Alexander, *supra* note 106, at 10-12.

> plane of mean lower low water meets the outermost extension of the headlands. **Where there is no pronounced headland,** the line shall be drawn to the point where the line of mean lower low water on the shore is intersected by the bisector of the angle formed where a line projecting the general trend of the line of mean lower low water along the open coast meets a line projecting the general trend of the line of mean lower low water along the tributary waterway. [110]

In the second special circumstance noted above, where a definable entrance point on one side of an indentation faces a featureless coastline on the other side, the "45-degree test" proposed by Hodgson and Alexander, Beazley, and others has been sometimes used as a way to locate a natural entrance point where, as the Supreme Court says above, no pronounced entrance point can be found on the other side of the indentation.

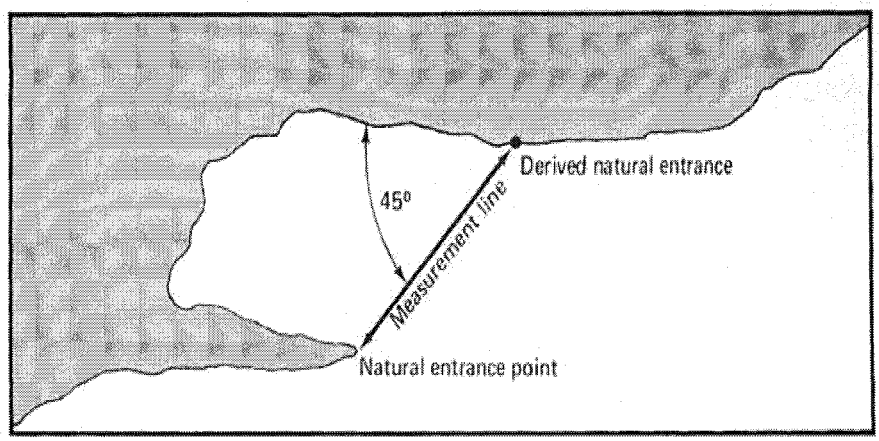

Figure 2. 45° method for deriving a natural entrance point on featureless coastline.

Although Hodgson and Alexander had long argued that the 45-degree test would provide a more objective method for determining **all** headlands for bays, it was not the intent of the drafters of Article 7 to put the burden of additional geometric measurement on coastal states beyond the semi-circle test, except

110. United States v. California, 382 U.S. 448, 518-519 (1966).

in extraordinary circumstances. Unfortunately, both the clear intention of the drafters and the clear statement of the Court, set forth immediately above, have been eroded by subsequent decisions that may - or may not - have approved the use of the 45-degree test in more general circumstances.

In one of the more troubling sections of his Report, Special Master Maggs addresses the claim of the federal government that the 45-degree test was used by the *Rhode Island/New York* Court for some purposes, but the section of the case quoted immediately thereafter includes only a brief description of the test and is cited directly to Beazley rather than the Court.[111] Continuing, the Master states that although the Court has applied the 45-degree test to delimit bays, it has not used the test for identifying intervening waters, again without a citation to the Rhode Island/New York case itself. Pointing out, however, that Hodgson and Alexander "specifically advocate using the test for this purpose,"[112] the Master then cites directly to these geographers for the proposition that the closing lines on each end of intervening waters "would of course be determined by the application of the 45-degree test as in the bay situation."[113] At no point does Master Maggs cite language of the *Rhode Island/New York* Court itself to support the contention that the Court has specifically approved the use of the 45-degree test generally for either bay delimitation or for the identification of intervening waters. Rather, Master Maggs states that Hodgson and Alexander's recommendation deserves weight "because the Court **relied generally on their paper** to define the headlands [sic] of a bay." [114]

This is circular reasoning of the first order. The Special Master appears to acknowledge that the *Rhode Island/New York* Court did not specifically approve the use of the 45-degree test to define intervening waters, but they did define the test quoting from the work of Beazley and Hodgson and Alexander; and because Hodgson and Alexander recommend the use of the test in all instances, the Court must have agreed because they "relied generally" on Hodgson and Alexander's paper at trial.

111. Master's Report at 156.
112. *Id.* at 157.
113. *Id.* (citing to Hodgson and Alexander, *supra* note 106, at 17).
114. Master's Report at 157 (*emphasis added*).

Naturally, this flawed reasoning is opposed by Alaska which contends that the *Rhode Island/New York* Court did not attempt to use the 45-degree test to define intervening waters. The Special Master himself appears to agree later in the Report when he states that, at bottom, he does not believe that the *Rhode Island/New York* Court meant to establish a test for this purpose, having said merely that assimilation depends on the "intervening waters," without qualifying these words in any way.[115]

What is perhaps most curious is that the Special Master chose the U.S. approach originally on the basis of certainty, saying, "the United States' position has greater certainty because it offers an objective method for delimiting intervening waters," namely, the 45-degree test. After first hypothesizing that "Alaska's definition. . . generally will produce uncertainty and the United States' definition generally will not,"[116] the Master appears to conclude after several pages of analysis that he does not believe that this test has been established for use in this circumstance. What the Special Master does not say, but surely it is implicit, is that the "objective" 45-degree test proposed by the U.S. appears not to provide the degree of certainty that he had hoped for.

Even though the Special Master returns to the 45-degree test later in his Report when he appears to approve its use it for identifying intervening waters between specific islands,[117] his comments above concerning the lack of precedential guidance provided by prior Courts, coupled with the utter inability of the parties to produce reliable identifications using this test,[118] reflect perhaps the Master's deep misgivings about establishing the 45-degree test as part of an intervening waters analysis specifically or as part of bay delimitation generally.

Since the Supreme Court does not cover this point in its judgment in the Alaska case (nor in fact does the Court discuss any of the so-called assimilation "factors" analyzed in the Master's Report), it cannot be said that the 45-degree test or any other extraneous test has been adopted by the Supreme Court as a general rule for juridical bay delimitation. To date, the clearest

115. *Id.* at 160 (citing to U.S. v. Maine (Rhode Island and New York Boundary Case) 469 U.S. 504, 519 (1985).

116. Master's Report at 154, 155.

117. *Id.* at 177.

118. *Id.* at 177-79.

indication of the Supreme Court's attitude toward the use of objective standards beyond those provided in Article 7 is that revealed in the California Supplemental Decree cited above,[119] i.e., that in the special circumstance where there is no pronounced natural entrance point to an indentation, an objective test *may* be used to create one.

This approach is most in keeping with the intent of the drafters and the text of Article 7 of the 1958 Convention, which was meant to simplify the rules on bays by the use of readily understandable geographic terms, limited by the geometric standard provided by the semi-circle test and the 24-mile closing line rule. If correctly applied, no other so-called objective test is needed to identify the waters of an indentation.

The Special Master articulates his third reason for adopting the U.S. approach to defining intervening waters at point c. above, i.e., that "Alaska's approach would make assimilation substantially easier."[120] In this one statement, the Master reveals, perhaps unconsciously, the federal bias that underlies the whole of federal/state maritime boundary litigation to date. When Master Maggs worries that Alaska's approach might make assimilation easier, the question that must be asked is, "Easier for whom?" The answer, of course, is, "For Alaska." The larger question might be, How did we get to the point that a Special Master in federal/state maritime boundary litigation can make a supposedly neutral choice between the arguments of the parties by openly stating that he is choosing the one that will have the most negative effect on one of those parties, in this case the coastal state? The answer arguably lies embedded in the process alluded to briefly, *supra*, by which the federal government established "official" U.S. baselines which were then used as "objective" evidence in all of the government's cases against the states.

Recall that shortly after the Court in the second California case held that Article 7 of the 1958 Convention was to be the applicable law in all federal/state cases establishing maritime boundaries under the Submerged Lands Act,[121] a federal Interagency Baseline Committee was established to reset the

119. *See supra* note 109.
120. *Id.* at 158.
121. United States v. California, 381 U.S. 139, 165 (1965).

baselines around the coasts of the United States in light of the new Convention. Dr. Hodgson and Dr. Alexander were then U.S. State Department geographers. Both served on the Interagency Baseline Committee with representatives from the Justice Department and other executive agencies. After the new baselines had been drawn, Dr. Hodgson was engaged as an expert by the United States in many of the government's cases against the states.

Dr. Hodgson was well aware that the federal government had existing and pending cases against the states and that his expert opinion would be used in these cases. As noted earlier,[122] in his deposition in the Alaska Cook Inlet case,[123] Dr. Hodgson was asked whether the work of the Baseline Committee had been undertaken because, as reflected in an intergovernmental memo, the federal government "has its lawsuits against most of the coastal states?" Dr. Hodgson eventually replied, "I would say that it was in part because of the litigation existing and pending."[124] In the same deposition, Dr. Hodgson acknowledged that the Committee had knowledge, when determining the baselines for Cook Inlet, Alaska, of the pending litigation between the state and the federal government relative to the status of Cook Inlet as inland waters, and that he himself did know of the litigation by the time the Committee's discussion of Cook Inlet began.[125]

In further questioning, Dr. Hodgson was asked if he agreed with a memorandum written by Dr. Chapman of the Fish and Wildlife Department, to Dr. Boggs (Dr. Hodgson's predecessor as U.S. Geographer), which expressed this concern: "There may be some question of propriety for a Federal Agency to publish such an overprinted line with a case turning upon the position of this line now in litigation with the Government as a party to this suit."[126]

Dr. Hodgson replied that he did not know if there was a question of legal impropriety involved, but he believed there would be no bureaucratic impropriety in the "production of the charts and their ultimate use by the Justice Department in this suit," adding

122. *See supra* text accompanying note 36.

123. United States v. Alaska, 422 U.S. 184 (1975); supp. materials vol. 1: appendix, no. 73-1888, Testimony of Dr. Robert Hodgson, Geographer, Department of State (October Term, 1973).

124. *Id.* at 301.

125. *Id.* at 310.

126. *Id.* at 311-12.

the caveat that "[I]f we were to produce a series of charts specifically for that purpose, then there might be a question of impropriety."[127] Having already acknowledged that the purpose for producing the charts was in part to create evidence for use in existing and pending litigation against the states, one has to assume that the word "specifically" is the key word in this passage from Dr. Hodgson's testimony.

My purpose in setting forth a portion of the record in some detail here is not to impugn the integrity of Dr. Hodgson or any other of the several geographic experts involved in the work of the Baseline Committee. They were doing the job they had been asked to do based on their considerable geographic expertise. Having explored baseline delimitation in their prior work, it probably seemed quite appropriate to suggest theories developed therein, such as the 45-degree test, as an aid to interpreting Article 7 of the 1958 Convention. Of course, these should never have been recommended for general use in bay determinations in which natural entrance points are readily definable; but I assume the good faith of these geographic experts, even though they were well aware of the federal litigation against the states in which many of their suggested baselines would come to be seen as "official" and their various testimonies considered those of "objective" experts.

Rather, it is my intention to make clear that official baselines affecting state interests were drawn by federal officials with an eye toward pending federal-state maritime boundary cases. These federal officials, including the federal prosecutors in every case against the states, felt free to import a host of extra-conventional theories and tests to create baselines that to say the least took the federal position in pending cases very much to heart. Many of the later missteps in statutory interpretation had their genesis in this intense federal workshop because the use of outdated terms embedded in the writings and the conceptual constructs of Committee members created the erroneous impression that continued usage of those terms and concepts was appropriate in interpreting the new language of Article 7.

One example may suffice to illustrate the enormity of the mischief caused by an ad hoc group supposedly tasked with

127. *Id.* at 313. *See also* WESTERMAN, *supra* note 7, at 223-25 and notes 176-79, for a more complete rendering of portions of these proceedings.

interpreting the new Convention which in reality overrode that language while creating baselines for use in federal/state maritime cases. By utilizing the outdated terms "headlands" and "mainland" as acceptable surrogates for "natural entrance points" and "coasts," the much more flexible and inclusive terms chosen by the drafters, the work of the Baseline Committee led directly to the language in the Louisiana case and others which speaks of bays being indentations "into the mainland" whose "headlands" are located on mainland points on either side. Once this error was "written in" to the language of Article 7, then any feature not matching this paradigm must present a special circumstance NOT contemplated by the drafters, thus necessitating special rules.

Coastal features such as islands (which by definition cannot be "mainland" nor serve as "mainland headlands" but can serve as "natural entrance points" which create more than one mouth into a coastal indentation) must therefore be seen as "exceptional," even though the drafters had specifically acknowledged the importance of such naturally- and frequently-occurring coastal configurations in the actual text of Article 7(3) and included them within the measurement rules in the text of Article 7(4). By ignoring the text and the commentaries, the Baseline Committee's work led to the "special circumstances" approach now firmly embedded in domestic juridical bay precedents and to the development of a host of special tests and factors which must be analyzed in order to resolve each supposedly "exceptional" case. The most harmful of these special tests must surely be the "assimilation of islands to the mainland test" which purports to resolve the key issue of when islands can be considered a "part of the mainland," a question which could never be posed under the clear language of Article 7 in which the term "mainland" never appears.

In one of the most telling sections of the U.S. Brief on Count II (juridical bays) in the Alaska case, the government acknowledges that "[T]he Convention makes no express provision for assimilating islands to the mainland."[128] This gap might have been seen as an indication that no such inquiry was ever intended or required. But by the time of the Alaska case, the non-test had become a fixture of the Court's special circumstances approach.

128. Motion of the United States for Partial Summary Judgment and Memorandum in support of Motion on Count II of the Amended Complaint, at 5, July 24, 2002.

The government's brief continues: "[T]he Supreme Court has ruled that assimilation is permissible in exceptional circumstances. The Court first recognized that possibility in the Louisiana case,"[129] and the brief leaves no doubt as to how this extra-conventional test came into being nor as to the basis upon which past Special Masters and Courts have relied for their decisions:

> In past original actions raising similar issues, the Supreme Court's special masters... have heard testimony from international law experts and geographers on the highly specialized principles that govern the application of Article 7 of the Convention.[130]

The government's brief also makes clear that the non-test of assimilation has now become a threshold requirement that must be satisfied before moving forward in a juridical bay analysis:

> [T]he United States urges that the islands do not qualify, as a matter of law, for assimilation to the mainland because they lack even the threshold requirement of the necessary relationship to the mainland... Accordingly... there would be no occasion to reach the further inquiry of whether the resulting configurations of the islands and the mainland satisfy the other requirements for creating juridical bays by assimilation.[131]

The Special Master later acknowledges the threshold nature of the test when he notes that the government has asked him not to undertake an Article 7 analysis "if Alaska's assimilation theory fails." Nonetheless, he proceeds to address the Article 7 issues, which should have been the very heart of his analysis, for the "convenience of the [Supreme] Court," which "may disagree with some or all of the Special Master's recommendations with respect to assimilation or may find the requirements of Article 7 easier to address."[132]

In sum, the creation of the assimilation of islands to the

129. 394 U.S. at 60-66.
130. *Id.* at 3 (*emphasis added*).
131. *Id.*
132. Master's Report at 198.

mainland test has caused the regime for bay-related islands specifically designed by the drafters to benefit coastal states worldwide to be "ignored" in U.S. federal/state conflicts. The clear text of Article 7(3) and (4) has been overridden by tests proposed by attorneys and geographic experts, many of whom worked for the government on these cases, vitiating the drafters' intent. Sadly, one cannot assume the same good faith on the part of Justice Department officials as has been assumed for State Department geographers above. As noted previously by this author:

> When one reflects on the fact that the federal prosecutor on all the major federal-state cases. . . sat regularly on the Baseline Committee, having major input in baseline decisions, the question of propriety cannot easily be brushed aside. When one reflects further on the probable impact of "official baseline charts" as evidence in these cases, one fears for the concept of the Federal Government as a state trustee.[133]

Whether the process described above was tainted with bias or impropriety, or has simply led to a cascade of unfairness over the years, it cannot be denied that in every case Special Masters and the Court have relied on baseline charts drawn by a federal committee well aware of pending cases against the States, and introduced as evidence by the federal government as presumptively official. The frequent reference to the "very influential" and "highly regarded" work of Hodgson, Alexander and other objective experts are further illustrations of a federal advantage that has run through federal/state maritime boundary litigation to this day. Nor is this advantage disproved by the fact that some cases have eventually been decided in favor of the states, because the special circumstances approach adopted by the Court, with its baggage of special "tests" and related "factors" and high costs in tow, has made it increasingly difficult for coastal states to prevail in their inland waters claims. That the Special Master can state openly that he is choosing the approach of the federal government because to choose otherwise would make it easier for Alaska to prevail on their assimilation claim simply reinforces the charge.

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133. WESTERMAN, *supra* note 7, at 225.

b. OTHER ASSIMILATION FACTORS

Other factors deemed essential to the "assimilation of islands" analysis by the Special Master can be roughly categorized as those pertaining to the waters of the indentation (the depth, width, and utility of the intervening waters; the effect of tides and of dredging and improvements on defining intervening waters; and the distance between shores) and those pertaining to the land [the configuration of the coast; the size, shape and population of the island(s); the social and economic conditions of the island(s); and the geologic origin of the island(s)]. A brief critique of the Master's analysis in each category will suffice to illustrate some of the key misconceptions in play.

The Waters: Moving on to his assimilation analysis per se, the Special Master uses by-now familiar case precedent[134] to establish that "assimilation depends on the depth, width, and utility of the intervening waters." Only the **utility** of the waters has any relevance to juridical bay delimitation, and this element is proven, not by measurements of any kind, but by the **actual usage** of the waters. There is no need for width and depth calculations, either in and of themselves or as surrogates for utility if that is their purpose.

From earliest times, there has been general agreement that bays could be internalized by coastal states because doing so did not interfere with normal shipping lanes that typically by-pass bay entrances entirely. Unless a ship had some business within the indentation, e.g., entering the indentation for the purpose of making and/or taking deliveries of goods, or plying the waters for local travel and trade between internal locations, or making an authorized military visit to an inland port, there was no reason for a ship to enter these protected waters without the permission of the coastal state.

Even though Courts have sometimes spoken about the shallow depth of the water of a given indentation as indicating that the waters will most likely not be used for any but local purposes, that does not make the depth of an indentation relevant on its own. For example, you may have waters that are very shallow, as in Mississippi/Alabama Sound or in parts of the

134. *Louisiana Boundary Case*, 394 U.S. at 66; *Rhode Island and New York Boundary Case*, 469 U.S. at 516.

Florida Keys, and therefore not likely to be used for interstate/international navigation. But you may also have very deep waters, such as those in parts of the Alexander Archipelago, which are also unlikely to be used except for reaching inland ports due to the fact that the closely interconnected nature of the islands makes travel difficult and slow and unattractive to any but those leaving or entering those ports. Both of these kinds of waters pass the utility test, regardless of their depth, because their factual use is consistent with principles which allow the enclosure of internal waters.

Under current bay jurisprudence, however, the measurement of the depth and width of an indentation is thought to be required even if no one is clear about how to use the numbers to make their respective cases. In the Alaska case, there is a good deal of confusion among the parties and the Master himself concerning the difference between assessing the navigability of the waters in question (which is irrelevant, because local traffic and interstate traffic both ply "navigable" waters by definition) and their utility. The analysis is greatly complicated by the addition of yet two more factors, the effect of the tides and the effect of dredging and improvements, which are likewise irrelevant because their stated effects are also on the navigability of the waters, rather than their utility.[135]

Observing that as the tide rises, the waters become deeper, wider and more useful for navigation (with the not-surprisingly opposite effect when it falls), neither the Special Master nor the parties are able to explain how these differences matter, even in the case of Southeast Alaska which has "large tidal ranges."[136] A lively if bizarre discussion ensues about the appropriate tidal datum to use for measuring the width and the depth of the waters; but again, this appears to be related to navigability rather than use. Even though the Master states that tides are important in assessing utility, he does not explain why. Finally, Master Maggs appears to agree that only the utility of the waters is relevant and, moreover, attempting to "take [all three factors] into account. . . would make the assimilation inquiry almost unmanageable."[137]

135. Master's Report at 165-66.
136. *Id.* at 166.
137. *Id.* at 167.

The same critique can be made of the Master's analysis of the effect of dredging and improvements, which also confuses navigability with utility. In looking at specific waterways later in the Report, the Special Master "concludes that the depth and utility of the very deep and easily navigable portions of Keku Strait weigh more heavily against assimilation than the shallow and less navigable portions of Rocky Pass."[138] But the question to be asked in each case is, "Navigable by whom and for what purpose?" While it is certainly the case that dredging and other improvements, such as those made in Rocky Pass, can deepen and improve the navigability of the waters, that is not the correct test. Rocky Pass, even if not improved and made more navigable, would be enclosable as internal waters. The deeply navigable Keku Strait would also be enclosable as internal waters because the use of the waters is in keeping with international principles favoring their enclosure. This analysis has been taken far off course, possibly because the assimilation test causes each Special Master to take a diversion in favor of federal interests or perhaps because there is widespread confusion about the proper assessment of the utility of the waters of an indentation. Assuming it to be the latter, a short review of fundamentals may prove helpful.

The utility of the waters, as noted, is highly relevant to bay delimitation, but it is to be assessed factually, based on the actual usage of the waters in question. Utility is synonymous with use. A quick investigation into the actual uses by ships of the waters of a claimed indentation will reveal their utility without onerous measurement requirements. Usage to and from points within an indentation, regardless of the width, navigability, or depth of the waters or their improved or unimproved state, or even the size and draft of the users' ships, will point toward a use compatible with the fundamental policies underlying bay enclosure. Normal shipping lanes used by ships engaged in point-to-point interstate/ international trade and other types of "innocent passage" would not be enclosable because those uses are compatible with the policies favoring freedom of the seas rather than exclusive use by coastal states.

This principle is widely acknowledged, but the application of principle to fact often reveals confusion as to how the various uses

138. *Id.* at 181.

are to be categorized. In several sections of his report, the Master points towards uses that he appears to see as interstate or international when in fact they are internal in nature because they involve the passage of ships to and from inland ports of the Archipelago. For example, he states that Wrangell Narrows is part of "the regular route taken by vessels running to all southeastern Alaska points from the ports on the Pacific coast of the United States and Canada."[139] But it doesn't matter where the vessels have come from. It matters where they are going (e.g., to points in Southeastern Alaska in general or to points within the Archipelago) and for what purpose.

The Master tells us that the waters are used by ships carrying cargo (more likely than not involving points within the Archipelago), and by the Alaska Steamship Company and the Pacific Steamship Company carrying passengers (also, more likely than not involving internal points). Moreover, the traffic is said to include "cruise ships, state ferries, barges, and freight boats carrying lumber products, petroleum products, fish and fish products, provisions and general cargo,"[140] all uses which the Master appears to see as inconsistent with internalization but which in fact have the high likelihood of involving shipping between inland points themselves or shipping to or from points within the Archipelago and the sea.

Of course, these factual determinations will need to be made in each case, but they must be based on actual usage, not the type of cargo or size of ship or the width and depth of an indentation. There is no need for making guesses based on surrogate measurements when the facts are so easily determined. It could not be clearer that a ship leaving Seattle carrying cargo bound for a Canadian or Russian port, or even one bound for an Alaskan port not within the Alexander Archipelago, will not be entering the waters of the Archipelago but rather will be "passing by" on its voyage.

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139. Master's Report at 183.

140. *Id.* It should be noted that the same confusion between the use and navigability of inland waters is to be found in the Master's analysis of the historic bay issue, where waters are consistently described as heavily trafficked even though the uses of the waters cut in favor of consistent internal use by ships of the coastal state and others, and treaty-authorized vessels from other nations.

The Land: The Master's analysis of special factors related to the land forms themselves, i.e., the configuration of the coast, the size of an island, the social and economic conditions on the islands and the geographic origin of the island(s), suffers from the same conceptual maladies discussed above. It is almost as if a virus, let's call it the "assimilation virus," infected the body of juridical bay jurisprudence early on and, never having been detected and treated properly, has metastasized so widely throughout the system that it is now almost surely incurable. We no longer question the necessity of pursuing diagnostic tests designed to assess the various special factors because they have become accepted parts of the differential diagnosis, the best practices if you will for all those wanting to establish credible careers. Not to over-use the metaphor, but as in well-known medical contexts where the cause of cholera or plague outbreaks is sought in factors as widely diverse as the socio-economic status of the victims, the ethers arising from a nearby river, or the will of God, many of the best practitioners spend years testing irrelevancies before the cause is detected in human effluent or rodent feces, and correct analytical procedures are established.

In the case of bay determination, we are similarly befuddled. To take the first of the land-related factors above, in assessing an island's relationship to the configuration of the coast we no longer ask why this is important to our bay diagnosis. It must be, because so many good practitioners agree that it is, and it has been included in so much of our "medical" literature, i.e., federal/state cases decided under the original jurisdiction of the Court.

By the time of the Alaska case, neither Alaska nor the U.S. would dare to question the appropriateness of the assimilation of islands to the mainland test itself, nor the relevance of considering the configuration of the coast in relation to the island(s) as central to resolving the assimilation issue. Remarkably, even the parties themselves agree that an island's relationship to the configuration or curvature of the coast is most conducive to assimilation when the "island is separated from the mainland or another island by a 'riverine' channel of water."[141] Perhaps most remarkable, the parties also agree that, having established yet another extra-conventional term, another extra-conventional test should be used

141. *Id.* at 161 (*emphasis added*).

for determining when a channel has this so-called riverine character, i.e., that "for assimilation to occur, a channel of intervening waters should have a length-to-width ratio of three-to-one."[142]

Clearly, the virus has now spread to the point that in trying to locate the intervening waters between the mainland [sic] and the islands, in order to define the island's relationship to the configuration of the coast, in order to satisfy the assimilation to the mainland requirement, neither party questions the need to define a feature as non-essential as a "riverine channel." Instead, the parties enthusiastically adopt the new so-called test and only disagree at the margins where the application of tests to facts is in dispute. It is no longer surprising to find that, as the virus goes undetected in case after case, both parties, even the moving state, run the risk of adopting analyses that may cut against their own interests.

As more cases involving islands come before the Court over time (and almost all bay cases do involve islands), other assimilation queries are developed in order access the geographical relationship between the specific land forms involved in each case: Does the island alter the "natural configuration of the mainland coast" too much? Does the island lie in general conformity with the configuration of the coast or does it "jut out" from the mainland in an unseemly way? Is the distance between the island and the mainland too great? Is the "size of the island" so large that it "dwarfs" the size of the "mainland" indentation? Or is the island more or less able to be assimilated if it is too small?

Still more questions are posed based on principles used to assess islands in other Convention contexts, such as straight baseline claims (Are there many or few "social and economic connections"[143] between the inhabitants of the islands and the mainland and which condition matters more? Can the islands be seen as "fringing" the coast?) or claims to the continental shelf (Do the islands and the mainland share a common geological history?

142. *Id. See also* Hodgson and Alexander *supra* note 107, at 20.

143. Article 4(7) of the 1958 Convention reads as follows: Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage. *See* "Fringing Islands" language, *supra* note 39, Article 4 (1).

Is the continental shelf a continuation of the mainland?) Such tests were never meant to be applied in a juridical bay context. However due to the inability to settle on a Article 7-based standard for bay determinations, they often are. Before long, it is hard to see a way back to Article 7 and the simplified process for bay determination that the drafters intended.

Needless to say, the language of Article 7 does not require the laborious processes described above. Islands are natural features of coasts and create natural entrance points into coastal indentations, sometimes even creating the indentations themselves. The rules established under Article 7, in particular the geographic limitations imposed by the semi-circle test and the twenty-four mile closing line rules, were designed to address all of the historic concerns about excessive bay claims in a much more simplified, efficient, and neutral way. In fact, that was the very purpose of the codification exercise that resulted in both the 1958 and the 1982 Conventions - to eliminate to the extent possible the differences between states in delimiting their coastal indentations. Sadly, even when Special Masters and the Court purport to apply the Article 7 rules, they are too overburdened by past misconceptions to appreciate the benefits that might flow from applying Article 7 as the Convention drafters intended.

2. THE MASTER'S JURIDICAL BAY ANALYSIS UNDER ARTICLE 7

Even when Special Master Maggs begins his structural analysis of the actual text of the Convention,[144] his continued use of outdated terms leads to the implication that there is uncertainty concerning the proper relationship between the geographic and geometic criteria set forth in Article 7(2) and the measurement rules set forth in Article 7(3), in particular those related to islands. This has a deleterious effect on all parts of the Master's analysis in which the mouth of an indentation must be measured for various purposes. The first sentence of Article 7(2) requires that the width of the mouth be compared with the depth of the indentation's penetration inland in order to assess the **landlocked** character of the indentation. The second sentence of Article 7(2) requires that the width of the mouth be measured in order to determine the length of the line that will be used as the diameter of the semi-

144. Master's Report at 198-226.

circle, the area of which must then be compared with the area of the indentation itself in applying the semi-circle test.

The legislative history of the development of these sections, based on the consistent historical treatment of these bay-related islands over hundreds of years, is very illuminating but cannot be covered in detail here due to space restrictions.[145] In brief, however, Article 7(2) represents an uneasy marriage between states that wanted to retain traditional geographic criteria, i.e., "landlocked" and "well-marked," and those who, since the time of the 1930 Hague Codification Conference, had demanded more easily applied geometric criteria, such as that imposed by the semi-circle test. In their 1953 and 1954 drafts of Article 7(2), the drafters took a purely geometric approach, establishing only the semi-circle test for bay determination. The replies of governments, however, indicated a strong desire on the part of a few states to retain the more familiar geographic terms. The 1955 and 1956 drafts and the final language of 7(2) reflect a compromise. The first sentence of Article 7(2) retains the geographic criteria but the second sentence makes clear that no indentation, however landlocked (or well-marked), can be considered a juridical bay unless it also passes the semi-circle test.

Disagreement has persisted since 1958 as to whether the two sentences of Article 7(2) impose two separate empirical tests or whether an indentation that passes the semi-circle test is by definition landlocked, the latter being the view of the majority of commentators today, primarily because it is difficult to find a bay worldwide that passes the semi-circle test and yet fails to be landlocked as well.[146] The *Louisiana* Court, however, held in favor of the minority view, i.e., that Article 7(2) establishes in its two sentences, two separate empirical tests.[147]

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145. *See* WESTERMAN, *supra* note 7, at 199-259 for a detailed discussion of this history.

146. Although this author adopted the former view when The Juridical Bay was published in 1987, I have changed my opinion due to better charting by all states, more advanced navigation aids, and, most importantly, the lack of real-life examples in which a given bay, having passed the semi-circle test, fails to pass the geographic criteria as well. Nonetheless, the first sentence remains; and until the Court agrees with the majority that the first sentence of Article 7(2) is made redundant by the semi-circle test, the landlocked (and well-marked) requirements will have to be resolved in each federal/state case.

147. 394 U.S. at 54.

The *Louisiana* Court's approach has complicated the analysis in subsequent juridical bay cases, of course, because so many more criteria must perforce be met to establish a bay. But one of the major disagreements in this case did not center on the relationship between the two sentences of Article 7(2). Rather, Alaska and the federal government strongly disagreed about how to measure the width of the mouth of the indentation under the measurement rules for islands established in Article 7(3).

Alaska argued that the general and mandatory measurement rule contained in the first sentence of 7(3), "[F]or the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of an indentation and a line joining the low-water marks of its natural entrance points," applied equally to both sentences of 7(2), whether the indentation in question is a single-mouthed or a multi-mouthed bay. This is an appropriate interpretation of the statute, in that the section begins with a general statement, "[f]or the purpose of measurement. . ." indicating that the first sentence is to be applied when determining both the landlocked (and well-marked) character of the indentation and when applying the semi-circle test. The first sentence of 7(3) also ends with language of general application, indicating that when measuring the extent of the opening for any "purpose," one must deal with a line "joining the low-water marks of its natural entrance points." We know from our detailed analysis of the legislative history[148] that the drafters considered islands to be normal coastline features and that islands that create more than one mouth into an indentation also create multiple natural entrance points. Thus, the whole of the first sentence of 7(3) applies with equal force when undertaking the measurement tasks set forth in 7(2).

The United States argued that the second sentence of Article 7(3) cannot be applied in any situation except when establishing a diameter line for purposes of the semi-circle test and, thus, only applies to the second sentence of 7(2). The problem with this inappropriate statutory construction is that we are then left with no standard whatsoever for measuring the opening for the purpose of applying the landlocked and well-marked requirements. The drafters could not have intended such a gap because, as they

148. *See, in general, supra* PART II.

observed in every draft of Article 7, islands which create separate mouths into an indentation tend to lock that indentation even more firmly to the interests of the coastal state and the presence of islands creates an indentation that is both more landlocked and well-marked than one whose entrance faces the open sea.[149]

The second sentence of Article 7(3) does not establish a rule that can only be used when applying the semi-circle test. Rather, it was meant to clarify the general rule, establishing a mandatory methodology for measuring the width of a multi-mouthed indentation, i.e., the sum total of the lengths of the lines across the different mouths, (rather than the length of a line extending from mainland headland [sic] to mainland headland), is to be used.[150] The language in the 1956 draft reads almost identically: "If a bay has more than one mouth, this semi-circle **shall be drawn** on a line as long as the sum total of the lengths of the different mouths," language that is consistent with the final Convention text.[151]

Despite this mandatory language, the Special Master rejected Alaska's argument that both the general rule and the more specific clarification of that rule must be applied equally to both sentences of 7(2) and, instead, adopts the position taken by the United States, that the clarification can only be used when applying the semi-circle test. In other words, despite the clear intent of the drafters as to the landlocked and well-marked character of multi-mouthed bays, the government argues that when we are applying the landlocked and well-marked requirements in the first sentence of 7(2), we need an all new rule.

It is hard to read Article 7(3) as not applying to the semi-circle test since the term is specifically referenced therein.[152] That does not mean, however, that the same rule cannot be applied

149. *See supra* text accompanying notes 55-57.

150. [1955] 2 Y.B. Int'l L. Comm'n at 36.

151. [1956] 2 Y.B. Int'l L. Comm'n at 268-69 (*emphasis added*). The final text of Article 7(3) reads as follows: 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 a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the **semicircle shall be drawn** on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation **shall be included** as if they were part of the water area of the indentation.

152. *See id.*

when comparing the width of the indentation with the depth of its penetration inland under the first sentence of 7(2). For that sole purpose, the Master adopts the U.S. approach, which requires measuring the total distance from mainland headland to mainland headland without subtracting the length of the various islands because "the text of Article 7 better supports the United States' view."[153]

The text of Article 7, however, contains no language whatsoever that would support the United States' view, nor does the legislative history which makes clear that only one methodology for measuring the opening(s) of an indentation was ever expressly mentioned by the drafters. The Master suggests at several points that "nothing in Article 7 expressly says how to make this width/depth comparison when islands lie in the mouth"[154] of an indentation, a statement that seems at odds with all rules of treaty interpretation. Even if one truly believed that the measurement rule for multi-mouthed bays only applies when performing the semi-circle test established in the second sentence of 7(2), you would surely reason that the methodology that is expressly mentioned could and should be used first for other purposes before moving off-text and designing an entirely new rule based on out-dated terminology expressly rejected by the drafters, i.e., that the mouth of the indentation should be measured from mainland headland to mainland headland ignoring, for purposes of applying the landlocked requirement, all islands lying "in the mouth."

It may well be that the use of the modifying phrase "in the mouth" to describe bay-related islands led the Special Master to accept, without convincing analysis, the measurement test advocated by the federal government. Certainly the same phrase is repeated frequently in the Report. [155] As discussed above, this language concept error, originally made by geographic experts (some of whom later served on the Baseline Committee) has come into wide use, often accompanied by a visual illustration which shows islands lying neatly "in the mouth" of a bay along a straight line drawn between two "mainland" entrance points. This visual misrepresentation has of course embedded the language concept

153. Master's Report at 202.
154. *Id.* at 203.
155. *Id.* at 203 and 204.

error even more firmly into later works and cases that speak of a bay as having "**a**" mouth and islands as lying "in **the** mouth" of the bay. The Special Master utilizes the same erroneous language in adopting a new rule for measuring the mouth of an indentation under the first sentence of 7(2).

> When measuring the penetration of an indentation using the **longest straight line method,** the longest straight line must begin on the **headland to headland** line across the mouth of the bay. Although a bay may have entrance points that lie seaward of this line when islands lie **in the mouth** of the bay, the Special Master previously has concluded that islands should be ignored when measuring the indentation's physical characteristics for the purposes of article 7(2)'s first sentence.[156]

The original illustration is usually credited to Hodgson and Alexander,[157] but it has been replicated in the work of many commentators, including Beazley.[158] Westerman also uses the chart,[159] but only to observe that neither geographic reality nor the language of Article 7 supports such a reading.

156. *Id.* at 207 (*emphasis added*).

157. *Supra* note 107, at 16.

158. *Supra* note 106, at 24.

159. WESTERMAN, *supra* note 7, at 129, figure 11, which is reproduced *supra* at text accompanying note 112.

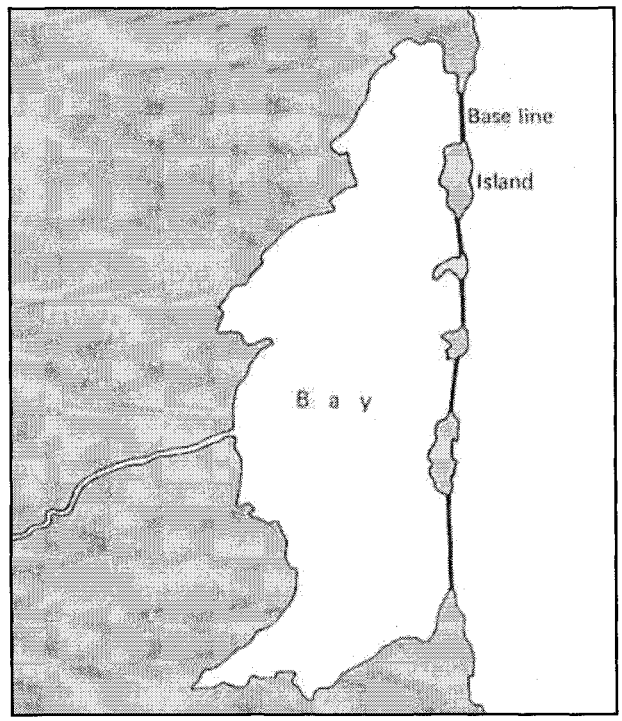

Figure 3. Islands misconceived as "in the mouth of the bay."

Nature has not seen fit to place islands in a straight line in the "mouth" of bays, and Article 7 sets forth no location requirements whatsoever for islands which create multiple mouths into bays.[160] In that circumstance, it is obvious that an indentation will have at least two mouths, and perhaps more, with "mouths" being defined factually as openings or entrances into the indentation which are used by vessels to enter the enclosed waters. Each of these multiple entrances must be measured using the general and mandatory measurement rule contained in Article 7(3), i.e., lines must be drawn between the natural entrance points of the indentation. Unfortunately, the original conceptual error has become so engrained in the jurisprudence of bay delimitation

160. *Id.* at 128. The drafters rely on the semi-circle test and the 24-mile closing line rule to ensure that islands creating separate entrances to an indentation do not stray too far from the shore.

that Special Master Maggs can even overlook the mandatory language from the *Louisiana* Court, that "lines across the **various mouths** are to be the baselines for all purposes,"[161] as only referring to the drawing of closing lines after already determining that a bay exists.[162] Here, the Master ignores the fact that the landlocked and semi-circle tests are two of the ways in which we make that determination. Article 7(3) measurement rules must be applied first before the bay determination can be made. The Master's questionable treaty interpretation can perhaps be best understood from his observation that the difference between the measurement methodologies advocated by the two parties "substantially affects the juridical bay analysis. . . [making it] easier to satisfy the requirements of article 7(2)'s first sentence."[163] Once again: Easier for whom?

The second basic error in the Special Master's textual analysis of Article 7 is his continued over-use of special tests when none are needed. To use but one example here, in measuring the bay's "penetration" in order to analyze the "proportion" and "landlocked" language in Article 7(2),[164] the Master adopts the "longest straight line method" (to which, remarkably, both Alaska and the government agree) in calculating the width-depth ratio. As with the special 45-degree test, the 3-to-1 ratio test, the bisector of the angle test, and others discussed above, the longest straight line test was recommended in Hodgson and Alexander's "influential" paper.[165] Despite their agreement on which test to use, the parties dispute where the longest straight line may start and where it may end,[166] Alaska arguing that it may start at the most distant entrance point leading into the bay and the United States countering that the line must begin on a line drawn from "headland to headland across the bay's mouth." After substantial briefing by both parties, supported by some of the most complex mapping of alternative lines this author has ever seen,[167] the Special Master chooses the United States approach, acknowledging however that neither side has cited authority for its

161. Louisiana Boundary Case, 394 U.S. at 55.
162. Master's Report at 204.
163. *Id.* at 202.
164. *Id.* at 205-14.
165. Hodgson, *supra* note 107, at 8-9 and fig. 3.
166. Master's Report at 206-08.
167. *See* Master's Report, Appendices E through L.

position.

In assessing the proportion of width to penetration inland to apply the landlocked requirement, even more special tests are proposed. Hodgson and Alexander recommended that "true-landlocked conditions should require that the opening (of the bay) be narrower than a principal lateral axis of the bay."[168] Another expert, Mitchell Strohl, suggested that a model bay would have a penetration equal to its width.[169] These and other suggested proportions are reminiscent of those proposed and rejected during the drafting process, the history of which the Master appears to be familiar. Ignoring the measurement rules set forth in Article 7(3) completely, he notes that Article 7(2) could have required more definite measurement rules, but does not. He concludes, along the lines of the Hodgson and Alexander test above, that the proportion of penetration to width is a factor to consider, "the greater the proportion, the more the waterway resembles a bay, and vice versa."[170]

The tests put forward by the geographic experts above and those adopted by Master Maggs contradict the precedent set in the second California case where the Court held that Monterey Bay, with a width of 19.24 miles and a penetration inland of only 9.2 miles, constituted a juridical bay. The Master rejects this very clear precedent as a benchmark for future cases, saying that if the Court had used the longest straight line method instead of the maximum perpendicular line method (even though neither are required nor preferred), the penetration of Monterey Bay would exceed the width of its mouth.

The correct analysis of Article 7 does not require this kind of complexity. The landlocked quality of a given indentation, with or without islands that create different mouths into it, will usually be obvious to the eye and require no special rules. Once proposed and used, however, supposedly helpful mathematical tests tend to proliferate and gain legitimacy to the point that not using a particular measurement method can, as the Special Master suggests above, arguably deprive a prior decision on Monterey Bay of its present legitimacy. Would any of us seriously argue that

168. *Supra* note 107, at 8.

169. MITCHELL STROHL, THE INTERNATIONAL LAW OF BAYS 57 (Martinus Nijhoff 1963).

170. Master's Report at 211.

Monterey Bay no longer should serve as a benchmark for future bay cases?

We are in danger now of allowing such tests to overwhelm good sense. Because they produce widely disparate results depending on the interests of the parties, we may easily lose track of the fundamental question being asked: Are the waters of this indentation so closely related to coastal state interests that a conclusion can be reached favoring those interests? Every mathematical test or geographical factor currently being taken into account in reaching the conclusion that an indentation is in fact a bay is directly related to this basic inquiry. The presence of islands that create separate mouths into an indentation ties that indentation even more closely to coastal state interests, as the drafters made clear.[171]

B. A CORRECTED JURIDICAL BAY ANALYSIS UNDER ARTICLE 7

I conclude in advance that the Alexander Archipelago qualifies as a juridical bay under Article 7 of the 1958 Convention on the Territorial Sea and Contiguous Zone (UNCLOS, Article10). I do not reach this conclusion using the same theory as that employed by the State of Alaska, however, because the straight jacket imposed on coastal states by prior federal/state litigation forced Alaska to adopt the same skewed analytical framework that is now required of both parties and finders of fact in these cases. I would not re-configure the Archipelago into two primary juridical bays, North Bay and South Bay, and two smaller juridical bays, Cordova Bay and Sitka Sound. Even though the Special Master recommended juridical bay status for the latter two indentations, that designation was based on the use of the "assimilation of islands to the mainland" test rather than on the language of the Convention. I would also reject the method adopted by Alaska to create North Bay and South Bay, i.e., visually removing all the islands of the Archipelago save for a few that are said to create a peninsula jutting out perpendicularly from the coast and forming one so-called hypothetical bay on each side of the peninsula.

171. *See* [1955] 2 Y.B. Int'l. L. Comm'n, at 37: "Here, the Commission's intention was to indicate that the presence of islands at the entrance to an indentation links it more closely with the territory, which may justify some alteration of the proportion between the length and the depth of the indentation."

Alaska made a legitimate case for enclosing both bays but was forced to tailor their arguments to the so-called assimilation theory, which I fundamentally oppose as being irrelevant under the policies, principles and text of Article 7 and as having been used to undermine the interests of coastal states in federal/state maritime litigation.

Instead, I propose the following corrected analysis of the Alexander Archipelago as one unified water area based exclusively on the text and legislative history of Article 7.

Under Article 7(1), all of the coasts and all of the waters of the Alexander Archipelago lie within the boundaries of the United States. Nothing in the past alleged relationship of a part of the coast to Canada, or changes related to glacial melting, are relevant to this conclusion.

Under Article 7(2), sentence one, the Archipelago can be deemed a well-marked indentation because the history of use of the waters therein indicates that they have been and are presently used by vessels either moving between points within the Archipelago, or moving to internal points from regular shipping lanes outside the Archipelago, or returning from internal points to regular shipping lanes within the territorial sea. Vessels using the regular lanes for interstate/international shipping or other innocent passage-type purposes normally pass by the various entrances to the Archipelago without entry, unless specifically authorized. The internal nature of the waters is proven by their actual use by vessels approaching the Archipelago from the sea or moving among inland ports.

Ironically the Supreme Court quotes this author's own work[172] to determine that the Alexander Archipelago does not satisfy the well-marked requirement of Article 7(2). In paragraph 13 of the majority opinion, the Court states:

> To qualify as a well-marked indention, a body of water must possess physical features that would allow a mariner looking at navigational charts that do not depict bay closing lines nonetheless to perceive the bay's limits [sic]and hence to avoid illegal encroachment into inland waters. . . We have been referred to no authority which

172. WESTERMAN, THE JURIDICAL BAY, *supra* note 7, at 82-85.

> indicates that a mariner looking at an unadorned map of the southeast Alaskan coast has ever discerned the limits of Alaska's hypothetical bays. . . [These bays] would not be discernible to the eye of the mariner.[173]

In their attempt to satisfy the non-test of assimilation of islands to the mainland, Alaska may have assisted the Court in making this determination. The Court speaks of "Alaska's hypothetical bays," referring not to the waters of the Archipelago itself but rather to the two bays that were created by removing most of the islands within the Archipelago visually from maps and creating two "hypothetical" bays (North Bay and South Bay) on either side of a peninsula (also made up of islands) that, as described above, jutted out perpendicularly from the shore:[174]

173. Alaska v. United States of America, 545 U.S. 75, 96 (2005).
174. *See id.*, Appendix B.

The Court says that these bays would not be discernible to the eye of a mariner, and one would have to agree. This visual representation removed the very characteristics that make the Alexander Archipelago so clearly discernible from the open sea on navigational charts, i.e., a complex water area made up of thousands of interlocking, puzzle-shaped islands that seem to form an almost impenetrable barrier between the waters of the Archipelago and the territorial sea.

Respectfully the eye of the mariner is precisely the authority that should have been consulted by the Court in establishing the well-marked character of these waters. It is the use of these waters by mariners engaged in local commerce between and among the various islands (e.g., ferrying passengers and carrying cargo between internal points, engaging in fishing and other resource exploitation activities, conducting rescue and other fish and game department tasks) or those arriving from the sea delivering goods to internal points or bringing goods from those same points back into the interstate/international shipping lanes, or ships in distress seeking safe harbor, or military vessels visiting internal ports with authorization, that have historically proven beyond doubt that mariners approaching from the sea with only their navigational charts can and have discerned the difference between the waters of the Archipelago and those of the territorial sea. I would venture to say that no mariner engaged in international/interstate point-to-point trade or other kinds of innocent passage has ever preferred to enter these waters, to pass through the maze of thousands of interconnected islands and passages, many impassable except in the summer months, instead of proceeding along the regular shipping lane on the seaward side, just as the Court concedes is the case with mariners passing by Long Island Sound unless they have a need to visit points within.

The Court misquotes this author as saying that the mariner must perceive "the limits" of the bay, but that is not the test. In the absence of official charts or external navigational aids such as buoys or a lighthouse, a mariner must often rely on the two-dimensional configuration of the indentation on his chart; and it must be geographically obvious to the mariner that internal waters are likely to be enclosed, even if no official boundary line

has been recorded by the coastal state.[175] No one who has ever seen the configuration of the Alexander Archipelago, even on ordinary maps, as illustrated below on Map 2, could fail to see that this is a unique part of the coast that almost certainly will contain internal waters. It is obvious even to the most inexperienced mariner that this is not a strait through which a vessel can take a shortcut between areas of high seas. The geographical obviousness of the Alexander Archipelago as a well-marked indentation under Article 7(2) has been confirmed by the uses of its waters over time.

The Archipelago also contains "landlocked" waters. The geography of the Archipelago is made up of thousands of closely interconnected islands in a puzzle-like configuration separated by narrow waters which in all but a few areas do not exceed six miles. The landlocked character of these waters is obvious from the maps alone without resort to extra-textual mathematical tests. If additional confirmation is needed, this conclusion is also supported by the use of the waters, as noted above. In addition, the Archipelago is sparsely-inhabited and virtually devoid of roads, bridges and other connections. Travel to, from, or between points within the Archipelago for commerce or pleasure depends almost entirely upon traversing these waters by boat or coastal air service. The landlocked character of this immense water area is further enhanced by the presence of islands which create separate entrances into the Archipelago, and in a real sense block the waters of the indentation from the open sea.

The same facts that confirm the well-marked and landlocked character of the Archipelago also qualify it as more than a mere curvature of the coast. Under Article 7(2), sentence two, the waters of the Archipelago pass the semi-circle test because the area of the waters of the indentation equals or exceeds the area of a semi-circle drawn on a diameter line measured between the natural entrance points of the indentation. In the case of multi-mouthed indentations, this diameter line "shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths." Although a hydrographic measurement will be helpful in close cases, there is no doubt in this case that the water area of the indentation far exceeds the area of a semi-circle drawn on a line as long as the sum total of the lines drawn between the islands and

175. WESTERMAN, *supra* note 7, at 85.

not including the length of the islands themselves. Although the Master appears to think that the massive size of the water area within the Archipelago cuts against its enclosure as a bay, a close reading of Article 7(2) suggests the opposite. As long as the area of the waters exceeds the area of the semi-circle, the most important juridical threshold of Article 7 has been cleared, regardless of the absolute size of the water area. This favorable areal comparison is enhanced by last sentence of Article 7(3) which requires that we treat the area of the islands within the indentation, i.e., landward of the closing lines between the most seaward islands, as if they were part of the water area itself.

Under Article 7(4) and Article 7(5), the entrance into the Archipelago cannot be said to pass the 24-mile closing line rule per se, due to the fact that the total distance between the islands that create entrances into the indentation in fact exceeds 24 miles. Rather than moving automatically to apply the rule in Article 7(5),[176] it can be argued on the basis of the legislative history that the presence of islands that create more than one mouth into an indentation tends to link that indentation even more closely to the interests of the coastal state, so that a certain leeway in measurement rules may be permitted.

Supporting this reading, a longer closing line for multi-mouthed bays was expressly envisaged by the drafters in an early stage of their deliberations in 1953. The Committee of Experts, having proposed that the "closing line across a (juridical) bay should not exceed 10 miles in width," noted that "if the entrance of a (juridical) bay is split up into a number of smaller openings by various islands, closing lines may be drawn provided that none of these lines exceed 5 miles in length – except one which may extend up to 10 miles in length."[177] Clearly then, a longer closing line was contemplated for multi-mouthed bays than the 10-mile limit proposed for bays with a single mouth. In addition, the drafters set no limit on the number of entrances between islands that can be

176. Article 7(5) reads as follows: "Where the distance between the low-water marks of the natural entrance points of a bay exceeds 24 nautical miles, a straight baseline of 24 nautical 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."

177. *See* U.N. Doc. A/CN.4/90, at 25; U.N. Doc. A/CN.4/77, at 10. The closing line limit for single mouthed bays was increased to 24 miles in subsequent drafts and now appears in the official text.

measured. For example, assume that the presence of several islands has created ten separate entrances into the indentation. Assume further that nine of these entrances are five miles in length and one is ten miles in length, which would meet the rule proposed by the drafters. The sum total of the closing lines, measuring only the distances between islands, would then be fifty-five miles, a result apparently within the drafters' contemplation at that time. Although this language did not become part of Article 7 per se, the drafters' idea that the presence of islands justified some leeway in the closing line limit in Article 7(4) did survive in subsequent drafts.

Based on this reading of the legislative history, my approach would be that as long as the waters enclosed retain their landlocked and well-marked character and pass the semi-circle test, thus legitimizing our conclusion in favor of exclusive use, there is no reason to disqualify the Archipelago as a juridical bay on the basis of a somewhat larger than 24-mile sum total of distances between the islands.

Finally, under Article 7(6), the Alexander Archipelago qualifies as a juridical bay because the foregoing provisions of Article 7 have not been applied to historic bays or in any case where the straight baseline system provided for in Article 4 (UNCLOS, Article7) has been applied.

IV. THE NEED FOR RECONSIDERATION OF A U.S. POLICY ON THE USE OF STRAIGHT BASELINES UNDER ARTICLE 4 OF THE 1958 CONVENTION.

As noted in detail in Part II above,[178] Article 4 of the 1958 Geneva Convention was based on the I.C.J. Decision in the Anglo-Norwegian Fisheries Case in 1951 which established the right of states with deeply indented coastlines or those with fringing islands in the immediate vicinity to establish so-called straight baselines at the outermost side of their coastal islands. The skjaergaard or rocky rampart along the Norwegian coast was seen as too complex to be delimited under the normal rule which requires a baseline to be established at the low water line at every point along the coast. The I.C.J. opinion was used almost verbatim by the drafters of Article 4 in 1958 and was continued unchanged

178. *See supra* at text accompanying notes 38-41.

in 1982 (UNCLOS, Article7), thereby concluding an almost 30 year effort by coastal states to expand control over increasingly broad areas of their contiguous high seas.[179]

The United States has approved the use of the straight baseline regime for third states as long as the guidelines of Article 4 are met but has elected not to exercise those same rights along U.S. coasts, even though the coastline in many areas fits those guidelines precisely. The second California case in 1965 approved the federal policy, holding that coastal states such as California could not internalize coastal waters under Article 4 unless or until the federal policy changed. The government's possible motivations for this decision are discussed in detail above.[180] Whatever might have been the perceived wisdom of these decisions in the mid-twentieth century, however, this policy is in urgent need of reconsideration through a twenty-first century lens.

This author has attempted to utilize such a lens to critique the Supreme Court's increasingly flawed jurisprudence under Article 7 of the 1958 Convention (UNCLOS, Article10). A second article that will appear next year will use the same lens to criticize the misguided executive branch policy on straight baselines under Article 4 (UNCLOS, Article7), in detail. For now, various bases for what is hoped will be the beginning of a more modern approach to U.S. policy in this area can be briefly previewed here.

First, to put aside one of the government's historic concerns regarding the use of Article 4, the claims of third states to straight baselines have now become so ubiquitous that the possibility of discouraging such claims by U.S. example and thereby preventing their widespread and possibly unlawful use abroad, no longer exists in any but the most academic context. U.S. policy can best be effectuated in the international arena by insisting that claims by third states be conservatively drawn under the clear language of Article 4 and, as always, by engaging in a policy of "non-acquiescence" in areas of the seas in which such claims are most egregious.[181]

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179. *See* REISMAN & WESTERMAN, *supra* note 25, at 19-37. The authors suggest that the final victory in that struggle, i.e., the approval in 1982 of a 200-mile exclusive economic zone for all coasts, rendered the piecemeal struggle of coastal states to increase their exclusive control over their off-shore resources moot.

180. *See supra* Part II, Section B(2).

181. *See* REISMAN & WESTERMAN, *supra* note 25, at 105-190 for original

Second, denying coastal states the opportunity of enclosing internal waters in situations where the geographic standards of Article 4 are undeniably met has not only unfairly foreclosed a legitimate option to states involved in federal/state litigation but has unwisely foreclosed all the benefits that might have come to the federal government from exercising their own rights under Article 4. An undeniable benefit in terms of extended control over ocean resources is enjoyed by states utilizing such claims, because any seaward expansion of the baseline extends all other sea zones as they move outward into the high seas. Even if the United States were to conservatively enclose every part of the coastline which meets the "deeply indented and cut into" or "fringed with islands in the immediate vicinity" criteria, there would be, in addition to a vastly more rational baseline, a small but not insignificant increase in the amount of resources on and under the continental shelf and in the exclusive economic zone that would automatically become available for exploitation by U.S. entities. This possibly modest benefit grows in comparison to the arguably non-existent gain that the federal government earns from creating federal "donut holes" in areas such as the Alexander Archipelago, where small interstices among islands open up irregularly when the distance between islands exceeds six miles. Complex mapping is beyond the scope of the present article, but even a sketch map of the Archipelago may quickly establish to the naked eye the very limited benefit gained by the federal government by applying the U.S. policy on straight baselines in this area.

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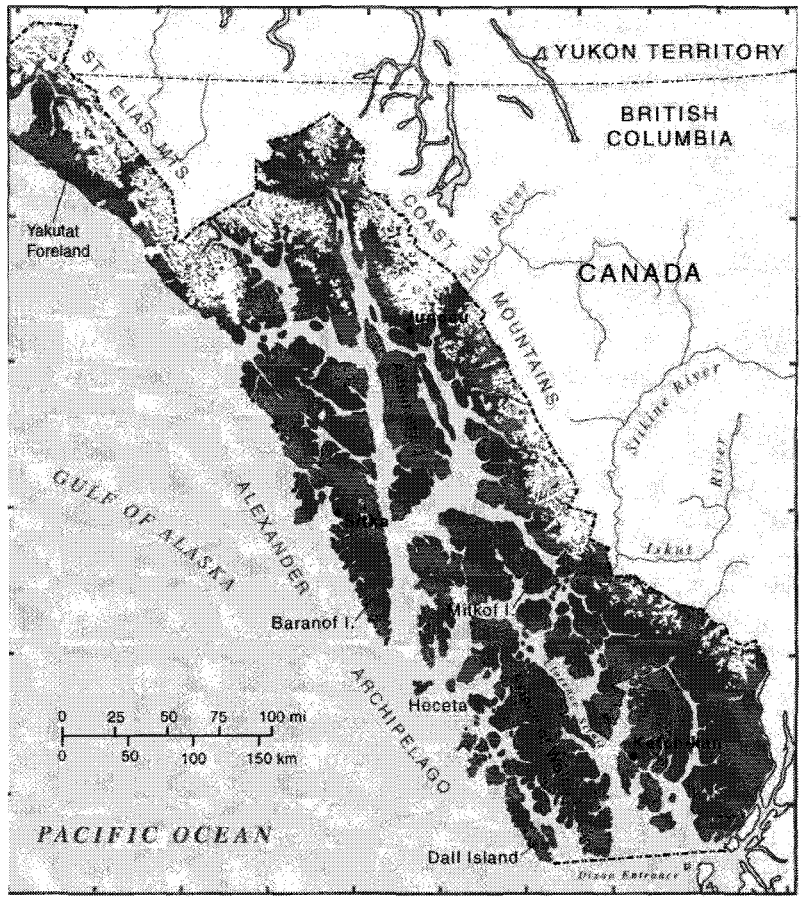
hydrographic charts representing straight baseline claims by states in substantial conformity with Article 4 (UNCLOS, Article7), such as Norway, Sweden, Finland, Ireland, The Netherlands and parts of the Canadian Pacific Coast; and those that violate Article 4, either because their non-conforming coasts fails to meet even the threshold geographic criteria of Article 4, including Canada on the Atlantic Coast, Australia, Cuba, Iceland, France, Vietnam, and numerous others whose coasts are conforming in part but whose straight baselines claims are too excessive, such as Myanmar, Kampuchea, Chili, South Korea, and others who claims pathologically extend far beyond the parts of their coasts that could be legitimately enclosed.



1. Looking at the informal map, the unremarkable line of the western Alaskan coast of the United States proceeds southward to the Canadian border as illustrated, until it reaches one notable area where the coast appears to have become "fractured" into small pieces that fit puzzle-like into a narrow rectangle seemingly "carved out" of the Canadian landmass on the eastern side of the Archipelago. Except for this unusual configuration, however, it is obvious that the line and direction of the coastline facing the open sea has not changed.

2. A map reader's sense that geological changes may have produced this extraordinary shift in the character of the coastline is verified by various sources summarized in the Special Master's Report. These sources indicate that, in fact, the unusual topography was formed by erosion of the complex fault patterns

and contacts between different rock types, caused by both glacier action and a later partial inundation, all of which has resulted in the encroachment into the original land mass by a series of narrow fiords, which provide the only substantial means of surface transport throughout the Archipelago.[182] No one familiar with the Article 4 geographical and geological criteria could deny that the Archipelago is a paradigmatic Article 4 coastline, perhaps even "super-paradigmatic" since there is no skaergaard extending beyond the regular coast out into the open sea as in Norway and states whose coasts meet the Article 4 standards.

3. If an unbroken baseline is drawn on the map above along the seaward side of the islands, that line would reflect the location of several historic renderings of the U.S. coastline, including those drawn by U.S. geographers for the 1903 Alaska Boundary Tribunal, an arbitration between the United States and Great Britain, and those drawn by G. Etzel Pearcy, geographer of the U.S. State Department, drawn in 1963.[183] Inexplicably shifting from a consistent historic rendering of this section of the Alaskan coast, the Interagency Baseline Committee created new "official" baselines in 1971[184] which move inside the archipelago to encircle each and every island and to mark every section of the coast. In almost every case, the waters between the land points do not exceed 6 nm in width, so that Alaskan internal waters in essence overlap with each other in calculating the three mile limit from each baseline granted to coastal states under the Submerged Lands Act. In a few cases, however, the waters do exceed 6 nm in width, creating almost insignificant "donut holes" representing enclaves under so-called federal control but lying completely within Alaskan waters. When one considers the map drawn by the federal government (inserted as Appendix C of the decision as noted), one is tempted to laugh at the absurdity of such a solution

182. *See* Master's Report, *supra* note 68, at 93-96. This section of the Report concerns Alaska's claim to the archipelago as historic inland waters, a claim which the Special Master dismisses, on arguably specious grounds. The purpose of including this description of the geological changes in the geography of the land mass is not to disprove that part of the Master's Report, but to demonstrate that the archipelago is an example of a U.S. coastline that meets Article 4 requirements precisely.

183. *See id.* at 10. Another map showing the same lines can be found in Appendix C of the Special Master's Report and in submissions by the State of Alaska.

184. *See id.* at Appendix C.

(e.g., How will these "U.S." waters be marked, with colored die perhaps or with a fence? Will the Alaskan pilotage rules for tug boats expire at each donut hole, necessitating the creation of an all new breed of federal tug boats which will ply only across these diminutive spaces?) were it not for the fact that the Alaska case has adopted these baselines, donut holes and all, as official.

4. No special hydrographic assistance is needed to see that the federal policy in this area has resulted in very little benefit to the federal government. In addition, it has in several instances led to extremely negative, even absurd, results. For one, the jurisdiction of the federal (and state) government under various important federal environmental and conservation statutes, e.g., the Clean Water Act, ends at the three-mile limit of coastal state control, leaving the federal government as proud owner of various isolated federal enclaves which were quickly discovered by the owners of large Glacier Bay cruise ships and others to be the perfect location for dumping ship waste of all kinds. The problem was later addressed by special act of Congress, but nothing could be better proof of the old adage, "Be careful what you wish for."

It should also be noted on the benefits side that the federal government could make excellent use of expanded control over areas of internal, territorial and contiguous waters in the current climate of increased security concerns. While we cannot halt innocent passage through the territorial sea, we can nonetheless develop more protective procedures within our internal waters and close expanded areas of territorial sea and contiguous zone for limited time periods and for limited purposes related to national security, national public health and drug trafficking prevention.

Finally, while federal policy on straight baselines has produced few measurable benefits for the government and has instead produced in some instances very negative and non-sensical outcomes, it also has unnecessarily inflated the costs in time and money and human resources that the federal government must incur in resolving any federal/state maritime dispute. The latest Alaska case took years to prepare and resolve, utilizing the time and talents of valuable public servants in both the federal and state governments as well as numerous experts and special witnesses hired by both sides, all to produce the hundreds of pages of documents and develop the arguments necessary to the oral phase of the case. All federal/state cases have become much more

time-consuming and expensive than warranted. In a time of limited resources on all sides, surely it is much more judicially efficient to allow disputes to be resolved under those sections of the Convention that most clearly fit the geographical facts presented in each case. No one involved can deny that competing claims to the Alexander Archipelago could much more easily have been resolved if the parties and the fact finders were allowed to see it from the beginning as an Article 4 (UNCLOS, Article 7) claim. If the federal government could see its way clear to claim coastal indentations that fit the Article 4 paradigm, those coastlines would rarely if ever be subject to dispute. Yes, coastal states would probably retain slightly larger areas of control behind the Article 4 baselines, if conservatively drawn. But the federal government stands to benefit far more.

V. CONCLUSION

The U.S. Supreme Court approach to the establishment of juridical bays along its coasts has become seriously flawed and overly complicated and must be taken back, perhaps in the next federal/state maritime boundary delimitation case, to its roots in Article 7 of the 1958 Convention on the Territorial Sea and the Contiguous Zone. Several key conceptual and interpretative missteps in the early cases have been exacerbated by the establishment over time of special tests and analytical factors that now place burdens of excessive time and cost on the federal government and the states alike in bringing these cases before the Court. Not only are these extra-conventional tests irrelevant to the delimitation of bays, but their use has created a process that fails to conform with the modernized and simplified approach envisioned by the Convention drafters under Article 7. In addition, the Court's special circumstances approach may conceal a serious federal bias embedded in the litigation process which now increasingly may affect the outcome of each case. Even the possibility of such a bias is too important not to be addressed by the Court.

The U.S. State Department and other relevant executive agencies must reconsider the United States' policy on the establishment of straight baselines along its coasts, most importantly because, if conservatively applied, a new policy permitting the use of Article 4 straight baselines may obviate the

need to spend several years and hundreds of thousands of dollars on each maritime boundary delimitation case as it comes before the Court. This would be especially beneficial in cases involving coastlines as complex as those of the Alexander Archipelago. Current federal policy established in the 1960's may no longer be reasonable nor in the best commercial, financial, and national security interests of the United States.