No. 5, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

ON THE REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES IN OPPOSITION TO CALIFORNIA'S EXCEPTION

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STATEMENT

1. The case is here on cross-motions for a fourth supplemental decree.[1] At the suggestion of the par-

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[1] The Court entered its original opinion and decree in this case in 1947. *United States* v. *California*, 332 U.S. 19 (opinion); 332 U.S. 804 (decree). The first supplemental decree was entered in 1966. 381 U.S. 139 (opinion); 382 U.S. 448 (decree). The second supplemental decree was entered in 1977, 432 U.S. 40, and the third supplemental decree in 1978, 436 U.S. 32 (opinion); 439 U.S. 30 (decree).

ties, the Court appointed a Special Master, who took evidence,[2] held hearings and filed his final Report. The United States has not excepted to the Master's recommendations.[3] California, however, has filed an

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[2] In November, 1978, the Special Master, accompanied by counsel, inspected the areas in dispute along the California coast. Hearings were held in New York City on April 17-18, 1979, and in Denver, Colorado on May 7-9, 1979. See Special Master's report (hereinafter "Rep.") at 3.

[3] The United States has not excepted to the Special Master's recommendations that the closing lines proposed by California be drawn across the Port of San Pedro (see Rep. at 6-13) and San Diego Bay (see Rep. at 13-19). We acquiesce in those recommendations, limited as they are to their special facts. In doing so, however, we do not wish to be understood as agreeing with every statement that the Special Master made in reaching his ultimate ruling as to these closing lines.

Specifically, we disagree with the Special Master's conclusion that the "shortest distance test," upon which the United States relied in contending that the closing line at San Pedro from the western terminus of the Long Beach breakwater ought to be drawn to the Alamitos jetties (see Rep. at 32, 33), "has not been sanctioned in earlier Supreme Court decisions" (Rep. at 8). Although the Court has not referred to that test by name, that test has in fact been the basis upon which many closing lines sanctioned by this Court have been drawn. See *United States* v. *Louisiana*, 420 U.S. 529 (1975); 422 U.S. 13 (1975).

We likewise disagree with the Special Master's assumption that prior decisions of this Court, and the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639 (1958) (Convention), recognize an "[i]mplicit * * * principle that closing lines * * * shall be straight" (Rep. at 9). Where, as at San Pedro, there are several mouths, the closing lines run between the natural entrance points which form the various mouths. See *Louisiana Boundary Case*, 394 U.S. 11, 54-60 (1966); Convention Art. 7(3). Nowhere does the Convention suggest that the closing lines

exception with a supporting brief, to which we now reply.

The single disputed question before the Court is whether open-pile piers constructed on shore and extending out to sea are extensions of the coast and thus proper base points for measuring the three-mile grant to coastal States under the Submerged Lands Act, 43 U.S.C. 1301 *et seq.* The Special Master has recommended that this Court enter a decree in favor of the United States, rejecting the claim that the California piers constitute extensions of the coast (Rep. 19-30). For the reasons stated in the Report,

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across the various mouths must run on the same bearing, nor has this Court ever enunciated such a rule. Indeed, as the Special Master recognized here (Rep. at 10), the closing line "will not be straight whichever way the line is drawn."

Finally, we believe the Special Master was mistaken in suggesting that the lines delineating inland waters for navigation purposes have any relevance to the determination of closing lines for purposes of the Convention. This Court squarely rejected such a contention in the *Louisiana Boundary Case, supra,* 394 U.S. at 17-35. Recognizing that his consideration of the navigation lines "may appear to be a departure" (Rep. at 10) from the holding in *Louisiana,* the Special Master set forth two reasons for considering the lines (Rep. at 10-12), neither of which we find persuasive. Because the Special Master explicitly reached his findings as to San Pedro "without regard to [the navigation] lines" (Rep. at 12), his use of those lines, even as "supplemental evidence" to support his findings (*ibid.*), was unnecessary. And only because he reached his findings for independent reasons to which we do not except do we acquiesce in those findings now. We believe that this Court's decision in *Louisiana, supra,* conclusively establishes that the navigation lines are irrelevant to the solution of questions arising under the Convention and the Submerged Lands Act.

and others, we urge the Court to adopt the Master's recommendations and to overrule California's exceptions.

2. The underlying facts are simple and undisputed. Along the coast of southern California are 15 piers (Rep. at 35-40, 42-50), and one artificial island that is connected to the mainland by a causeway very like a pier (Rep. at 41). Each of these piers is so situated that a three-mile arc swung from its tip would envelop a certain area of water that is not within three miles of any other part of the coast. The areas thus enveloped range from six acres in the case of the Venice pier (Rep. at 42) to 978 acres in the case of the Rincon Island-Punta Gorda Causeway complex (Rep. at 41).[4]

The piers themselves, as the Special Master found (Rep. at 20-21), range in length from 500 feet to 3,500 feet. They are set on permanent piles of concrete, steel or wood, with decks of asphalt, concrete or wood. Water flows freely underneath the piers, which have no visible effect on the surrounding shore line. Unlike jetties, groins or breakwaters, the piers were not designed to protect the shore or the surrounding waters. Most of the piers are open to the public, and may be used for strolling or rod fishing; one pier (Biltmore Hotel Pier, Rep. at 39) is owned

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[4] The diagrams appended to the Report (*id.* at 32-49) are those submitted by California in its petition for a decree (Cal. Pet. 11-49), except that El Segundo Pier (Cal. Pet. 33) has been demolished and is no longer an issue in this litigation (Rep. at 2 n.2). As we noted in our motion for entry of a decree (U.S. Mtn. 5 n.2), we have not verified the acreage figures. See Rep. at 1 n.1.

by a hotel across the street and was closed to all persons, apparently because of concern as to its stability, when the Special Master and counsel visited it in November 1978. Three piers (Ellwood, Morro Strand, and Carpinteria, Rep. at 36, 38, 40) are owned by oil companies, which use them to tie up vessels that supply offshore oil rigs.

The Rincon Island-Punta Gorda Causeway complex [5] (Rep. at 41) consists of an artificial island built by an oil company to service oil wells; it is connected to the mainland by a causeway some 2,700 feet long, over which motor vehicles travel to and from the island. The causeway is, in structure and design, indistinguishable from a conventional open-pile pier (Rep. at 20-21).

While there are any number of other piers along the California coast, the piers identified in this proceeding are, to the parties' knowledge, the only ones that can affect the State's three-mile offshore boundary; other piers, which are not at issue in this case, are situated so that an arc swung three miles from their tips would, at all points, be landward of a three-mile line defined by nearby points of the coast. The Court's decision in this case, however, will presumably apply to similar piers off the coast of other states that potentially extend the state's three-mile grant.[6]

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[5] Unless otherwise noted, references in this reply to "piers" include the Rincon Island-Punta Gorda Causeway complex.

[6] California's brief in support of its exception contains an extended discussion (Cal. Br. 6-12) of the history and use of these piers and other piers which are not involved in this

ARGUMENT

I. INTRODUCTION AND SUMMARY

A. The basic legal principles that govern the determination of federal-state boundaries at sea have been discussed at length by this Court in earlier stages of the present case and in other cases. See, *e.g.*, *United States* v. *California*, *supra*, 332 U.S. 19; *United States* v. *California*, *supra*, 381 U.S. 139; *Louisiana Boundary Case*, 394 U.S. 11 (1969). For present purposes, however, it is enough to remember that, after Congress passed the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, which granted to California and other states ownership of lands within three miles of the state's "coast line," 43 U.S.C. 1311 (b)(1), 1301(b), 1301(c), this Court concluded that it would look to the provisions of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639 (1958) (Convention), for a more precise definition of the term "coastline." See *United States* v. *California*, *supra*, 381 U.S. at 165; *Louisiana Boundary Case*, *supra*, 394 U.S. at 33-34.

Thus, as the Special Master stated (Rep. at 3-6, 22-24), this case must be decided primarily in the light of the Convention and this Court's decisions

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litigation and which may no longer even exist. Nearly all of this historical information appears for the first time in California's brief and is, for that reason alone, entitled to little or no weight. In any event, its relevance is not obvious and indeed California makes little use of it in the argument.

construing it. Yet, as the Master also recognized (Rep. at 23-24), quoting the United States' expert witness, Elihu Lauterpacht, Q.C., "Nothing [on this issue] is inserted in the Convention on the Territorial Sea. * * * [I]n the present case we are dealing with a highly exceptional problem * * *."[7] That succint statement goes to the heart of the present inquiry. The testimony produced in this case[8] by experts for both parties is, we have no doubt, the most methodical and comprehensive analysis to be found in the law on the question whether piers such as these are extensions of the coast line. While both parties have found in this material support for their respective positions, we concede only the obvious by stating that the evidence is not compelling on either side.

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[7] A typographical error in the Report places this quotation at page 17 of Plaintiff's Exhibit 12. The correct citation is page 7.

[8] By agreement of the parties and the Special Master (see Rep. 3 n.3), the expert witness on international law for each party (Mr. Lauterpacht for the United States; Judge Philip Jessup for California) submitted, as direct testimony, lengthy written opinions that surely refer to every commentator, treatise and judicial opinion to have dealt even marginally with the question of artificial extensions of the coast. Both witnesses also analyzed thoroughly the *travaux preparatories* of the Convention, as well as prior attempts by international bodies to define the nature of the territorial sea.

Mr. Lauterpacht's direct testimony (Plaintiff's Exhibit 12) is 57 pages in length; Judge Jessup's (Defendant's Exhibit C) is 73 pages, plus addenda. These documents were exchanged in advance of cross-examination, which itself consumed two full days and produced a transcript of 280 pages.

B. Our submission is essentially in two parts: first, an affirmative case, demonstrating that the relevant provisions of the Convention effectively foreclose California's pier claim, and, second, a rebuttal of the several arguments advanced by the State to overcome those textual provisions.

1. We begin by invoking Article 3 of the Convention which establishes the usual rule: that the baseline for measuring the territorial sea is the low-water line along the coast. Plainly, an open pier, suspended over the water—unlike a solid artificial structure, such as a groin or jetty—does not satisfy this standard, lacking as it does the essential ingredient of a low-water line. The question, then, is whether piers qualify as part of the coast under any of the exceptional rules recognized by the Convention.

2. The only special provision of the Convention arguably relevant to the case of piers is Article 8, dealing with harbor works. But the solitary California piers, jutting straight out to sea, do not remotely qualify under this Article. A single pier like those in suit simply does not constitute, or help to create, a "harbor"—universally understood to be a partly enclosed and sheltered place of anchorage. Much less can an isolated pier be deemed part of a "harbor system." And, finally, a single pier does not fit the rule of Article 8 because the objective of that provision is to define as inland the waters enclosed by the arms of a harbor—and, obviously, the piers in suit produce no such bay-like area.

3. We turn, then, to the "Commentary" to Article 8, which speaks of certain "permanent structures * * * jutting out to sea" as "assimilated to harbor works." Rep. at 27. That comment, we suggest, ought not be read expansively to contradict the limiting language of the text. The actual examples given are structures that are both *solid*—"jetties and coast protective works"—and that perform a *function* akin to harbor works—deflecting the force of waves or seas and sheltering the area in their lee. If such works, even when detached from a port system, may qualify as part of the coast, there is good reason not to stretch the Commentary further. Its "legislative history" does not justify making too much of the words, and certainly does not warrant applying it to embrace open-work structures. Nor has this or any other Court invoked the Commentary to Article 8 to reach more than solid, coast-protective works.

4. Indeed, we find in this Court's judgment in the *Florida* case an indirect, but compelling, rejection of the proposition that open-work structures can be deemed extensions of the mainland. There the Special Master had found that one arm of "Florida Bay" was formed by the Florida Keys, which he treated as part of the mainland because of the causeway that made a continuous connection. But this Court disallowed the claim to "Florida Bay," on the objection that the Keys could not qualify as a headland. While that holding was premised on Article 7 of the Convention, rather than Article 8, this Court has elsewhere stated that the same standard applies.

Since the causeway there involved was similar in construction to the piers now before the Court—except only that the causeway was a more substantial structure—it must follow that the California piers also fail to qualify as part of the coast.

5. We next address the contention that the piers are part of the coast because they are indicated on official large-scale charts with the same thin black line used to denote the low-water line. This, in our view, is a frivolous point. The reason for showing the piers on the charts is simply to alert mariners of the obstruction. But the single projecting lines representing piers, groins, jetties or breakwaters are obviously not low-water lines and no one could reasonably so construe the charts.

6. The Special Master placed special reliance on the approach advocated by two commentators, McDougal and Burke, who suggest that a structure ought to be counted as part of the coast only if it "create[s] in the coastal state any particular interest in the surrounding waters that otherwise would not exist." Applying this standard, the Master concluded that the piers in suit do not have that effect. Although California itself urged the particular passage on the Master, it now complains that the criterion is too "vague." For our part, we believe the Master was justified in looking to McDougal and Burke for guidance and correctly applied the test they proffer.

7. Finally, we deal briefly with California's invocation of domestic law—specifically the Longshoremen's and Harbor Workers' Compensation Act—as

fixing the demarcation line between land and sea. The short answer is that this argument comes too late. The Court has long since determined to look to international law, and particularly the Convention on the Territorial Sea and the Contiguous Zone, for a definition of the coastline. To change the standard now would produce intolerably inconsistent results.

II. ARTICLE 3 OF THE CONVENTION EXCLUDES PIERS FROM THE "COAST LINE."

Article 3 of the Convention on the Territorial Sea and the Contiguous Zone provides the primary rule for determining the baseline from which the territorial sea (and, therefore, the grant to California) is measured:

> Except as otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast * * *.

At least in this Court, it is settled that the term "coast" as used here includes some artificial extensions of the natural shore. That was expressly held in this very case in 1965, 381 U.S. 139, 176-177, and incorporated in the decree implementing that decision. 382 U.S. 448, 449 (1966). The principle was applied in the *Louisiana Boundary Case, supra*, 394 U.S. at 40-41 n.48, in recognizing an artificially created spoil bank jutting out from shore as part of the coast,[9] and was presumably the premise of a

[9] We discuss below at pages 25 to 26 the Court's treatment in the same case of beach erosion jetties at Grande Isle. See 394 U.S. at 49 n.64.

more recent decree in this case specifying the low-water line along some 22 jetties, groins and breakwaters as part of the California coastline. 432 U.S. 40, 41-42.[10]

Accordingly, one might expect California to place primary reliance on Article 3 in support of its claim that piers constitute extensions of the mainland. But California now relegates Article 3 to a distinctly secondary role (Cal. Br. 29-33) and relies chiefly on Article 8. The reason is obvious: piers on pilings lack the low-water line that is the essential ingredient of the "normal baseline" defined in Article 3. However open piers may otherwise resemble solid jetties, groins and breakwaters, the absence of a low-water line critically distinguishes piers and irrevocably excludes them from consideration under Article 3.[11]

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[10] So, also, in the *United States* v. *Louisiana*, 389 U.S. 155, 158 (1967), it was assumed that jetties off the coast would affect the modern coastline, and, in *Texas* v. *Louisiana*, 426 U.S. 465, 469 and n.3 (1976), the Court held that jetties must be taken into consideration.

[11] We recognize, of course, that the Special Master found this line of reasoning unpersuasive (Rep. at 24), and concluded that "[t]he continuity or discontinuity of the water line is an engineering characteristic which affects only whether or not the structure is a coast protective work" (*ibid.*). We respectfully disagree with this conclusion. Whatever might be the engineering characteristics of a structure with no continuous low-water line, one cannot disregard its legal characteristics. Because Article 3 establishes that, unless otherwise provided, the coast line is "the low-water line along the coast," a structure that has no low-water line cannot be "part of the coast" unless it fits within one of the exceptions to Article 3, a proposition we discuss in Section III.

In any event, we believe that the Special Master's conclusion implicitly recognizes this result. Although he was unim-

Of course, as Article 3 expressly recognizes, there are other, exceptional, ways of fixing the baseline. These include straight baselines (Art. 4), bay-closing lines (Art. 7) and lines drawn across the mouths of rivers (Art. 11). Plainly, none of these is relevant to the pier claims. And so, California invokes Article 8, which announces a special rule for harbors. It is to that Article that we now turn.

III. THE EXCEPTION IN ARTICLE 8 OF THE CONVENTION DOES NOT APPLY TO THESE PIERS.

Article 8 is the provision of the Convention upon which California places primary reliance.[12] It provides:

> For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.

It is immediately apparent that this provision does not easily fit our case. By its very language, Article 8 establishes a two-part test to determine what

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pressed with our argument as to Article 3, he nonetheless found that the piers did not come within the exception that Article 8 provides (Rep. at 25-29) and he concluded that "the California coast line follows the natural coast in the vicinity of these structures * * *" (Rep. at 29). If that is so (and we believe it is), it must be so by virtue of Article 3; in other words, because the exception does not apply, one reverts to the general rule.

[12] California professes to find support for its position in Article 3 of the Convention as well. Cal. Br. 29-33. We address that contention at pages 30-33, *infra*.

is a "part of the coast" under that Article. To qualify, a particular structure must be part of "the outermost permanent harbour works," and must, in addition, "form an integral part of the harbour system." As we shall see, the piers in suit fail on both counts. What is more, the whole object of Article 8 was to make clear that waters within a harbor are "inland waters" and that the territorial sea begins at the line connecting the outermost permanent structures of the harbor. That purpose has no application to solitary piers such as these.

A. The piers are not "harbor works."

In the *Louisiana Boundary Case, supra,* 394 U.S. at 36-40, this Court considered and rejected Louisiana's argument that dredged channels were "harbor works" within the meaning of Article 8. In doing so, the Court set certain standards for determining what "harbor works" are (*id.* at 36-37; emphasis added):

> Article 8 applies only to raised structures. The discussions of the Article by the 1958 Geneva Conference and the International Law Commission reveal that the term "harbor works" connoted 'structures' and 'installations' which were 'part of the land' *and which in some sense enclosed and sheltered the waters within.*

The Court went on to note that "this view comports with generally accepted definitions of the term 'harbour' and 'harbour' works,' " citing the leading definition of "harbour works" as "[s]tructures erected along the seacoast at inlets or rivers *for protective*

purposes, or for enclosing sea area adjacent to the coast *to provide anchorage and shelter.*" 394 U.S. at 37 n.42, citing 1 Shalowitz, *Shore and Sea Boundaries* 292 (1962) (emphasis added).

The evidence is undisputed that none of the piers involved in this litigation provides shelter to surrounding waters or protection to the coast (Rep. at 20, 21, 28-29; D. Tr. 340).[13] In fact, California's expert on coastal engineering testified that, unlike jetties and groins, which are designed to break up wave action, piers are designed to have no effect on the movement of the sea (D. Tr. 354-355). Piers therefore neither "enclose" nor "shelter" nor "protect" and are thus beyond the definition of "harbor-works" that this Court adopted in the *Louisiana Boundary Case* for purposes of the Submerged Lands Act.

B. The piers are not "harbors."

At this point, it is perhaps appropriate to make what should be an obvious point—that no pier at issue here is a "harbor" in its own right. The *Louisiana Boundary Case* approved (394 U.S. at 37 n.42) Shalowitz' definition of a harbor appearing at 1 Shalowitz, *supra*, at 60 n.65. That footnote states:

> According to Coast Survey terminology for purposes of standardizing its use in surveying and charting, a harbor is "a natural or artificially improved body of water providing protection for

[13] "D. Tr." refers to the transcript of the hearing held before The Special Master in Denver on May 7-9, 1979. "N.Y. Tr." refers to the transcript of the hearings held before the Special Master in New York on April 17-18, 1979.

vessels, and generally anchorage and docking facilities," ADAMS, HYDROGRAPHIC MANUAL 54, SPECIAL PUBLICATION NO. 143, U.S. COAST AND GEODETIC SURVEY (1942). According to U.S. Navy usage, it is "any protected water area affording a place of safety for vessels." NAVIGATION DICTIONARY 98, H.O. PUBLICATION NO. 220 (1956). In legal terminology, it has been defined as "a haven, or a space of deep water so sheltered by the adjacent land as to afford a safe anchorage for ships." BLACK, LAW DICTIONARY (4th ed.) 847 (1951), citing *Rowe* v. *Smith*, 50 Am. Repts. 16 (1883) (Conn.); *The Aurania*, 29 Fed. 98, 103 (1886); and *People* v. *Kirsch*, 35 N.W. 157 (1887) (Mich.). "Port," according to Black, is a word of larger import than "harbor," since it implies the presence of wharves, or at least the facilities for receiving and discharging cargo. I Farnham, *The Law Of Waters And Water Rights* 507 (1904), gives the following definition for a harbor: "A harbor is a body of water so far surrounded by land as to provide safe anchorage for vessels, and provided with such natural or artificial advantages as to afford easy means for interchange of traffic between the shore and land. An indenture of the shore does not constitute a natural harbor, when, in its natural state, it merely furnishes vessels protection by the shelter of the upland."

Each of the various formulations has two elements in common: a harbor is a body of water, and it provides protection or shelter.[14] Obviously, a pier is not a body of water; and, as we have just shown, it does

[14] California's expert witness agreed with this definition. D. Tr. 253, 338.

not provide shelter. As California's expert acknowledged, these piers "are not harbors." D. Tr. 367.

Nor is there merit to California's contention (Cal. Br. 28) that the piers are "works within a 'harbor' " because they are built in "area[s] of substantial protection from the elements * * *." The Special Master made no finding that any of the piers is in protected areas. The testimony on which California relies for the point (D. Tr. 304-306, 375-376; see Cal. Br. 12) proves too much; it suggests that all of Southern California is substantially protected from the elements. As the graphic depictions of the piers that California provided the Special Master (Rep. 35-50) demonstrate, the piers are along flat stretches of the coast, as indeed they would have to be in order to affect the state's grant under the Submerged Lands Act. In any event, even if one assumes that the piers are in areas of "substantial protection from the elements," that does not make them works within a "harbor." The accepted definition of a harbor (see pages 15-16, *supra*) excludes "[a]n indenture of the shore * * * when, in its natural state, it merely furnishes vessels protection by the shelter of the upland." I Farnham, *Law of Waters and Water Rights* 507 (1904), approved in 1 Shalowitz, *supra*, at 60 n.65. See *Louisiana Boundary Case*, *supra*, 394 U.S. at 37 n.42.

C. The piers are not part of a "harbor system."

If the Court should find, contrary to our argument, that the piers at issue here are "harbor works," it

must then address the second part of Article 8's test: do they "form an integral part of [a] harbour system"? The evidence shows that they do not.

The question can conceptually be split into two parts for each pier. First, does the pier form part of its own harbor system, that is, is it a harbor system in itself? Second, does it form an integral part of a harbor system that includes other components?

The first question must obviously be answered in the negative, for if a pier is not of itself a "harbor" (as we have just shown), then it cannot be of itself, a harbor "system." A "system" is "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose; an aggregation or assemblage of objects joined in regular interaction or interdependence * * *." *Webster's Third International Dictionary* (1976 ed.) A single structure, such as a pier, thus cannot be a "system."

A pier can, as a conceptual matter, be *part of* a harbor system. But that is plainly not the case with the piers at issue here. It is undisputed (see Calif. Exh. I; Rep. at 20-21, 35-50) that these piers are isolated structures, naked against the beach and divorced from any other coastal feature, much less a harbor.

D. Piers do not enclose inland waters.

As Judge Jessup himself testified on behalf of California (see note 8, *supra*), "The concern [in drafting Article 8] was definitely with closing lines

in ports, rather than with the question of base points" (N.Y. Tr. 68). This is made clear when we refer to the initial proposal of 1930, when the League of Nations Codification Conference proposed the following formula (L. Dir. 20; J. Dir. 35; emphasis added):[15]

> In determining the breadth of the territorial sea, *in front of ports* the outermost permanent harbour works shall be regarded as forming part of the coast.

As Judge Jessup testified (N.Y. Tr. 62), the League of Nations proposals were the starting point for the deliberations of the International Law Commission (ILC), which drafted the treaty that became the Convention on the Territorial Sea and Contiguous Zone. Indeed, the first text considered by the Commission was that just quoted (L. Dir. 24; J. Dir. 38), and the reasons for changing it had nothing to do with our present concern (L. Dir. 25; J. Dir. 39-41).

The upshot is that Article 8, like Article 7 dealing with bays, was designed to define the boundary of inland waters in the case of a harbor: the waters enclosed by the artificial arms of the port and a line connecting them would be deemed "inland." Ob-

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[15] "L. Dir." and "J. Dir." refer to the prepared direct testimony of Mr. Lauterpacht (U.S. Exh. 12) and Judge Jessup (Calif. Exh. C), respectively, submitted to the Special Master at the hearings in New York on April 17, 1979.

viously, that concept does not fit the isolated pier structures involved here.

The Special Master was thus quite correct in stating (Rep. at 28), as to Article 8, "[w]hen all is said and done it seems clear that the drafters of the Geneva Convention and the commentators simply did not think of or consider the question of artificial piers erected on the open coast and not directly connected with any conventional harbor."

California argues, however, that the Article means much more than its language, or its history, suggests. And, in support, California invokes part of the "Commentary" appended to Article 8 by the International Law Commission. We turn to that Comment.

IV. THE PIERS CANNOT BE "ASSIMILATED" TO HARBOR WORKS UNDER THE COMMENTARY TO ARTICLE 8 OF THE CONVENTION

The International Law Commission's Commentary to the final draft of Article 8 (see L. Dir. 30; J. Dir. 50-51) included the following as Comment 2:

> Permanent structures erected on the coast and jutting out to sea (such as jetties and protecting walls or dikes) are assimilated to harbour works.

The bulk of California's Article 8 case (Cal. Br. 18-29) rests on these words.

On its face, the Comment is ambiguous. It can be read to say, as California insists, that jetties and like structures, even when not an integral part of a harbor system, nevertheless qualify as "part of the

coast." But that would expressly contradict the text of Article 8—which requires of "true" harbor works that they form "an integral part of the harbour system." One would hardly expect such an inconsistent rule to be announced in a mere comment.[16] Yet, the Comment seems superfluous if it merely tells us that jetties, when part of a harbor system, should be viewed as "harbor works." That might be thought to go without saying. To resolve our dilemma, we turn to the "legislative history" and the application of Comment 2.

A. The "legislative history" of Comment 2.

1. It is agreed (see Cal. Br. 22-23; L. Dir. 24; J. Dir. 33-35) that Article 8 of the 1958 Convention did not break new ground, but merely codified, in almost the same words, a proposal adopted in

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[16] While Professor Briggs (Cal. Br. 21), a member of the International Law Commission, has stated that, in his opinion, the commentary of the ILC "interpret[s]" and "qualif[ies]" the text of the article to which it refers, he has also acknowledged that other members of the Commission, including its chairman, hold different views on the subject. H. Briggs, *The International Law Commission* 188-189 (1965). These other members have pointed out, in the course of official debate, the distinction between commentary and text: the commentary constitutes an "interpretation," but the text sets forth "the rules of law." International Law Commission, *Yearbook*, Thirteenth Session 59 (1961); see H. Briggs, *supra*, at 189. As one member stated, "[C]ommentaries [are] not on the same footing as the articles themselves." International Law Commision, *Yearbook*, *supra*, at 39. And, as the Chairman of the Commission noted, "because of the pressure of time, the commentaries could not receive the same thorough consideration as the text of the articles themselves." *Ibid.*

1930 by the League of Nations Conference. Then, as now, it was accepted that the outermost fixed harbor works in front of ports should be deemed part of the coast, primarily for the purpose of defining the harbor waters so enclosed as "inland" (see L. Dir. 18-20; J. Dir. 35). But neither in 1930 nor in the preliminary proceedings did anyone suggest that artificial structures jutting out to sea—whatever their construction—should be regarded as extensions of the mainland when not associated with a port or harbor.[17]

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[17] Nor is any such view reflected in the academic literature of the period. Judge Jessup, testifying for California, invoked three French writers whose published works presumably reflect the international understanding before the present Convention was drafted. First in time is Romee de Villeneuve (J. Dir. App. A6), who simply recites the accepted view (as of 1914) that "the waters of a port belong to the coastal state," without any reference to piers, much less to piers unconnected with a harbor. Next is Louis-Marie Renaud, whose treatise was published in 1933 (J. Dir. App. A1). From the testimony of Judge Jessup, one might suppose Renaud had written that open piers, although no part of a harbor system, extend the coast (J. Dir. 10). But the actual text invoked, and Judge Jessup's translation (J. Dir. App. A2-3), make clear the author has done no more than include piers as "an integral part of the ports" when they physically form part of a harbor system. Renaud does not remotely suggest that isolated piers extend the coastline.

Finally, much reliance is placed on the work of Professor Gidel, said to be "the greatest living authority on the law of the sea" (J. Dir. 10-11). Again, however, Judge Jessup initially gives us a misleading summary of the views expressed by Gidel in his 1932 treatise (*id.* at 11). The actual text (J. Dir. Ann. A8-10) nowhere mentions piers, and, more important, Gidel is at all times discussing harbor works "in front of ports," not lone structures unrelated to any harbor.

2. Article 8 and the portion of the Commentary that California relies upon were written in 1954. Yet there is nothing in the Commission discussions of that year that endorses treatment of artificial projections into the sea as extensions of the mainland, except when part of a harbor system. The late Professor Lauterpacht, not one expert witness for the Government, did raise a question about jetties that *were* part of a harbor system and, with apparent agreement from the other members, he *opposed* the inclusion of dykes (L. Dir. 24-25; J. Dir. 38-39). Thus, when Comment 2 emerged at the end of the 1954 session (L. Dir. 27; J. Dir. 43), it would naturally be read as simply clarifying that jetties could qualify as harbor works when associated with a port. And, no one having mentioned anything other than solid structures, there is equally no basis for construing the Comment as embracing piers.

In the ensuing session of the Law Commission, the text of Article 8 survived unchanged (L. Dir. 31; J. Dir. 46, 47, 49, 51-52), and the only alteration of the Commentary was a narrowing amendment (by deleting the reference to "dykes") and the addition of a caveat with respect to overlong jetties (L. Dir. 30; J. Dir. 50-51). This hardly suggests a radical change of view by the Commission. Yet, it is true that in 1955 and 1956, one finds some discussion of a very long "pier" or "jetty" in the Persian Gulf, apparently not part of a harbor, which at least some delegates believed covered by Article 8 (L. Dir. 27-29; J. Dir. 44-49). Understandably, California seizes on those references (Cal. Br. 24-27).

Without knowing more about the structure under discussion, it is dangerous to build on these passages. For our part, we think it questionable whether, without any change in the text of Article 8, or even any broadening of the Commentary, the Commission properly can be deemed to have announced a wholly new rule. The references invoked are too equivocal to support such a conclusion.

But, if we should now read Comment 2 as reaching some structures—such as solid jetties—even when not associated with a harbor system, it would be wholly unjustified to construe it as "assimilating" isolated open piers which serve no function akin to that of harbor works. The occasional appearance of the word "pier" in the English text of the *travaux preparatoires* is far too ambiguous. As Judge Jessup has noted, in British terminology (as opposed to American), the primary definition of "pier" is a solid stone structure—what Americans term a "jetty" (J. Dir. 4-7)—and it may well be that the construction discussed by Sir Gerald Fitzmaurice (Cal. Br. 25) was such a solid structure.[18]

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[18] In any event, California here relies on legislative deliberations that followed, rather than preceded, publication of the comment to which they refer. As this Court has noted when faced with similar arguments, "Legislative observations [following] passage of the Act are in no sense part of the legislative history." *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 200 n.7 (1977); see *Oscar Mayer & Co.* v. *Evans*, No. 78-275 (May 21, 1979), slip op. 6. See also *TVA* v. *Hill*, 437 U.S. 153, 189-191 (1978).

B. Application of Comment 2.

In the *Louisiana Boundary Case*, *supra*, 394 U.S. at 49-50 n.64, the Court construed Comment 2 as embracing beach erosion jetties even if not "closely linked to ports," but the Court went on to stress that the structures in question performed a function of "harbor works" in that they indirectly sheltered the waters of a harbor. While we do not believe Comment 2 need be read so generously, that resolution of the question may be accepted here.

Indeed, this is perhaps the only way to give the Comment real meaning without, at the same time, doing violence to its status as a note to Article 8. The location of the Comment under Article 8 can be explained as indicating the Commission's view that the coastline is affected by artificial structures jutting out to sea (as opposed to artificial land-fill) only when they perform a function comparable to harbor works—such as protecting or sheltering the shore.

This reading is suggested not only by the fact that Comment 2 appears under the "harbor works" Article, but by the terms used. It is, indeed, difficult to "assimilate" to harbor works structures which bear no relation to harbor works. The examples of the Comment, moreover, point in the same direction. Jetties and "coast protective works" both shelter the coast and often provide a somewhat protected place of anchorage. As we have already noted (see pages 16-17, *supra*), open piers do not. To expand the Comment to include open piers would be to sever its ties to any Article of the Convention and to give it the

status of an additional, wholly independent, provision. That is, of course, not the proper role of a mere "comment,"[19] and we ought to resist that result unless the clearest evidence compels it. As we have seen, the proceedings leading to the formulation of Comment 2 require no such surprising conclusion.

Although California suggests (Cal. Br. 28) that the Master concluded that five of the piers "constitute port facilities," and that such a conclusion brings those piers within "the express terms of the text of Article 8" (*ibid.*), this contention misreads the Master's report. He found that three of the piers (Carpenteria, Ellwood and Morro Strand) are used by oil companies "for access to vessels which are used to supply offshore oil rigs" (Rep. at 21) and that Port Orford is a "port facility"—at least to the extent it has a coin-operated davit suitable for lowering small boats into the water (D. Tr. 334-355). However, the Master also quite properly concluded that the amount of shipping handled by these facilities does not justify deeming them "ports" (Rep. at 29).

This is a practical, common-sense conclusion well supported by the evidence. Merely because a port is a place for the transfer of passengers of cargo between ship and shore (see Rep. at 7 n.7) does not mean that any pier is transformed into a "port" when a roughneck hops aboard a service vessel or an angler uses a davit to launch his Boston Whaler beyond the surf. California's attempt to press the

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[19] See note 16, *supra* (Briggs).

Special Master's report to the limits of its literalnes must founder on the Master's own findings that any transfer of cargo or passengers at these four points is *de minimis* (Rep. at 29). Otherwise, California could thwart the purposes of the Convention by the relatively inexpensive expedient of installing a coin-operated davit on each pier that does not already have one. Plainly, the law should not turn on such trivia.[20]

In all, California's contention that these piers are included within Article 8 lacks support in the Article itself, its history and application, and even its commentary. Were that not enough to foreclose California's claim, a prior decision of this Court suffices.

V. TREATING THE PIERS AS PART OF THE COAST IS INCONSISTENT WITH THIS COURT'S DECREE IN *UNITED STATES* v. *FLORIDA*.

California's contention (Cal. Br. 20) that any "permanent structures erected on the coast and jutting out [to] sea" are part of the coast under Article 8 is inconsistent with *United States* v. *Florida*, 425 U.S. 791, 793 (1976) (see also *United States* v. *Florida*, 420 U.S. 531, 533 (1975)).

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[20] The Special Master did find that at Rincon Island there was a "large dock * * * with substantial hardware * * * for the berthing of vessels." Rep. at 20. And he did not include Rincon Island in the category of *de minimis* ports. Rep. at 29. However, he properly excluded Rincon Island for another reason—it is an artificial island and thus cannot serve as a basepoint for delimiting the territorial sea. See Rep. at 29; Convention, Article 10. And, he quite properly concluded, "the fact that the island is connected to the mainland by a pier" should not change that result. Rep. at 29.

In *Florida*, the Special Master concluded that there existed a "Florida Bay," defined by drawing a closing line from Knight Key to East Cape on the Florida mainland (see App. A, *infra*). This Court rejected that conclusion. 425 U.S. at 793. Although it did not spell out its reasons for doing so, the only apparent justification for the result is that the Court did not consider the Florida Keys to be a part of the mainland coast; if the keys were a part of the mainland coast, "Florida Bay" would be a striking—indeed, almost perfect—example of a bay (see App. A, *infra*) within the meaning of Article 7 of the Convention.[21] Since the Florida Keys are connected by a causeway (see, App. A, *infra* and U.S. Ex. 14 in this case), the result of the Florida case is that an island and causeway system, although connected to the mainland, is not "part of the coast" of the mainland.

In recommending that "Florida Bay" be adjudged inland waters, the Special Master stated (Report in No. 52, Orig. at 39):

> This area [i.e., eastward of the closing line drawn from Knight Key to East Cape] comprises for the most part very shallow water which is not readily navigable and nearly all of

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[21] Article 7 defines a bay as a "well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." A bay must also meet the semicircle test (Article 7(2)) and the 24-mile test (Article 7(4)). The Special Master drew "Florida Bay" to meet both these criteria. The chart appended to this brief is taken from the Master's Report in the *Florida* case.

> which is dotted with small islands and low-tide elevations. I find that this area is sufficiently enclosed by the mainland and the upper Florida Keys, which constitute realistically an extension of the mainland, to be regarded as a bay which constitutes inland waters of the State * * *.

He concluded (*id.* at 57):

> The waters between the mainland and the upper Florida Keys which lie east of a straight line drawn between the East Cape of Cape Sable and Knight Key comprise Florida Bay and constitute inland waters of the State of Florida and the closing lines between the several upper Florida Keys and the said line between the East Cape of Cape Sable and Knight Key mark the seaward limit of those inland waters.

The United States excepted to this conclusion, arguing that Florida Bay could not be a bay within the meaning of Article 7 "unless the islands are 'so closely aligned with the mainland as to be deemed a part of it.' [*Louisiana Boundary Case, supra,*] 394 U.S. at 67 n.88." *United States* v. *Florida*, No. 52, Orig., Exceptions of the United States to the Report of the Special Master at 10. The United States then urged that Florida Bay did not meet the test of the *Louisiana Boundary Case* because the upper Florida Keys cannot realistically be considered part of the mainland; specifically, the channels and water gaps west of Teatable Key precluded any finding that the keys further west are so closely aligned with the mainland as to be deemed a part of it.

Thus, the conclusion of the Court that "[t]here are no inland waters within Florida Bay" (425 U.S. at 793) necessarily means that the keys east of Knight Key (App. A, *infra*) do not form part of the coast of Florida, even though they are linked to each other and the mainland by the causeway.

That ruling is dispositive here. The causeways connecting the Florida Keys and California's piers are of very similar construction, albeit the former are more substantial, supporting constant vehicular traffic. Furthermore, if the piers here are "part of the coast" under Article 8, they must be "part of the coast" under Article 7 as well. See, *e.g.*, *Louisiana Boundary Case*, *supra*, 394 U.S. at 38 n.44 ("[I]f dredged channels were really 'part of the coast' within Article 8, their seawardmost extensions could also serve as headlands from which lines closing indentations could be drawn.") But since *Florida* establishes that an island-causeway system (and, *a fortiori*, a causeway or pier itself) cannot be "part of the coast" under Article 7, any theory that maintains that it is a part of the coast under Article 8 is invalid.

VI. THE PIERS ARE NOT "PART OF THE LOW-WATER LINE" ON THE GOVERNMENT'S OFFICIAL CHARTS

California's next contention (Cal. Br. 29-33) relies on Article 3 of the Convention insofar as it specifies that the "normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast *as marked on large-scale charts officially recog-*

nized by the coastal State" (emphasis added). The claim is that the United States has marked the piers as part of the low-water line on its official charts and that, therefore, under that Article, the piers are already part of the low-water line. This argument is wholly without merit.

If California's factual premise were true, this latest chapter of the litigation would have been unnecessary. California's purpose in seeking entry of a decree is in fact to compel the United States to recognize the piers as part of the coast line (see Cal. Pet. 3-4). Its Article 3 argument appears to be that the United States has already done so. We have not.

What the United States has done, as a matter of cartography, is to use a thin black line on its charts to denote the place where land and water meet. See Def. Ex. U-1 (Deposition of Dr. Hodgson); Def. Ex. AA (chart of the California coast). This line is placed, as nearly as the limitations of mapmaking permit, along the low-water line, and so may be said to represent the low-water line on the coast. The United States also uses, as a matter of cartography, a thin black line to represent jetties, groins, breakwaters, piers and similar structures that protrude into the sea (D. Tr. 152-153). California seeks to exploit this coincidence. But there is no basis for confusing the two lines.

Any mapmaker is obviously limited to some extent in his use of symbols, and a thin black line is a reasonable practical representation of a thin, straight

structure such as a pier or jetty. One purpose of the charts, after all, is to aid the mariner, and the cartographer should not be required to resort to circles or squares or some other inappropriate symbol to represent a pier merely because he has used a thin black line to represent the low-water mark. The chart reader is not misled: the single straight line jutting out to sea does not *look* like a low-water line, normally curved and obviously defining the boundary of land.

The evidence on which California relies provides no support for its form-over-fact proposition. It claims (Cal. Br. 30) that the late Dr. Hodgson, the Geographer of the Department of State and the United States' expert witness in this area, testified in his deposition that "structures such as groins are treated as parts of the coast by virtue of Article 3, that is, since [sic] they are represented by the same solid black line that represents other segments of the low-water line along the coast" (Cal. Br. 30-31; footnote omitted). Dr. Hodgson said no such thing. He testified that breakwaters and groins are part of the coast line; he said nothing about the fact that they, like piers, are depicted by black lines. Def. Ex. U-1 at 131; see Cal. Br. 31 n.49. Similarly, Mr. Lauterpacht, the United States' expert witness on international law, did not testify, as California contends, that "breakwaters also are considered parts of the coast by virtue of Article 3, because they are marked as parts of the low-water line on the official Government charts" (Cal. Br. 31; footnote omitted).

Mr. Lauterpacht testified that breakwaters are part of the coast; like Dr. Hodgson, he did not even mention black lines or any other cartographic symbol. His testimony was that a breakwater is part of the coast "by virtue of the direction of its alignment, by virtue of its proximity to the coast, by virtue of its function as being there to protect the coast, by virtue of its being solid to the ground, all those things accumulate together in effect to make it a part of the coast" wtihin the meaning of Article 3. N.Y. Tr. 186-187; see Cal. Br. 31 n.50.

Thus, the fact that piers are represented on the charts by black lines similar to those representing jetties, breakwaters and other parts of the coast (Cal. Br. 31-32) is immaterial to resolving the question whether piers ought to be considered part of the coast or not.[22]

VII. THE ACADEMIC COMMENTARY INVOKED BY THE SPECIAL MASTER SUPPORTS HIS CONCLUSION

After concluding that "the drafters of the Geneva Convention and the commentators simply did not think of or consider the question of artificial piers * * *," and finding that this Court's prior decisions did not answer the question (Rep. at 28), the Special

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[22] We agree with California (Cal. Br. 32-33 & n.53) that it is irrelevant that the three-mile line offshore, as depicted on some charts, appears to be drawn from the tips of some piers. As Dr. Hodgson testified, these minute discrepancies are attributable to imprecision in drafting and slight misalignment in the color plates used to produce the charts. D. Tr. 381-386.

Master turned to the so-called "reasonableness test" articulated by the commentators McDougal and Burke in their treatise THE PUBLIC ORDER OF THE OCEANS, published in 1962 (Rep. at 26-27, 28). According to those writers (Rep. at 26-27):

> When the construction of an area of land serves consequential coastal purposes, it would seem to be in the common interest to permit the object to be used for delimitation purposes * * *. The principal policy issue in determining whether any effect for delimitation purposes ought to be attributed to other formations and structures is whether they create in the coastal state any particular interest in the surrounding waters that would otherwise not exist, requiring that the total area of the territorial sea be increased * * *.

Applying this "practical approach" (Rep. at 26) to the facts before him, the Special Master concluded that the piers did not create "an 'interest in the surrounding waters that would not otherwise exist.'" Rep. at 28.

California now advances the curious argument that this test is inconsistent with the Convention (Cal. Br. 34), is inapplicable in any event to structures such as piers (*id.* at 35), and is a "vague criterion" that will invite further litigation (*id.* at 36). The contention is curious because Judge Jessup, California's expert witness, relied on the McDougal-Burke treatise—in fact, on precisely the language quoted by the Special Master—to support California's position that the piers are indeed part of the coast (J.

Dir. 63-64). Moreover, in its brief to the Special Master, California urged the adoption of the McDougal-Burke test, quoting it at length, and told the Special Master that "[c]ertainly the California piers meet the suggested criterion." Cal. Br. to Special Master 15-16.

Now that the Special Master has adopted the standard California urged upon him, but has reached under it a result adverse to California, the State attacks the standard itself as inappropriate, unapproved, and vague. California, we suggest, cannot have it both ways. Its prior advocacy of that standard justifiably produces some skepticism about its present objections.

In any event, there is no merit to California's contention that consideration of the factors that McDougal and Burke describe is a departure from the Convention or the prior decisions of this Court. The Master quite plainly did not use the McDougal-Burke test to displace prior law on the subject. He carefully considered every appropriate aspect of the Convention and all applicable prior decisions of this Court before coming to the conclusion that they did not provide a clear answer to the pier question (Rep. at 5-6, 21-28). By looking to learned commentators to ascertain what the law is or should be in this area, the Special Master did nothing more than what this Court has done in this and other cases. See, *e.g.*, *United States* v. *California*, *supra*, 332 U.S. at 31 & n.10, 32 & nn.11-12, 33 & n.17; *Louisiana Boundary Case*, *supra*, 394 U.S. at 23 n.26, 24 n.29, 29 n.35,

47 n.63, 51 n.67, 57 n.78, 62 n.82, 65 & n.85, 68 n.90, 71 n.95, 76 n.103; *United States* v. *Alaska*, 422 U.S. 184, 200 (1975). Indeed, this Court has used the McDougal-Burke treatise to aid it in deciding questions concerning delimitation of the territorial sea. *Louisiana Boundary Case*, *supra*, 394 U.S. at 23 n.26, 47 n.63, 68 n.90, 69 n.92, 76 n.103.[23]

Thus, contrary to California's belated assertions, the Special Master was hardly departing from the principles laid out by this Court when he referred to what Mr. Lauterpacht called "the most substantial exposition of the law of the sea to have appeared since the Geneva Conference of 1958" (L. Dir. 35).

Moreover, the Special Master was correct in concluding, under the reasonableness test, that the piers at issue here do not create an interest in the surrounding waters that would not otherwise exist (Rep. at 28-29). Unlike breakwaters, harbors, jetties and similar structures designed to facilitate use of the surrounding waters or to protect the shoreline in the vicinity, the piers at issue here are designed precisely to have *no* effect on the surrounding waters or shoreline, as California's own expert witness on engineering testified (D. Tr. 340; see page 15, *supra*). Rather, the piers are primarily recreational in nature, allowing pedestrians to stroll from the beach and fishermen to cast their lines.

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[23] Other courts have also found the treatise helpful. See, *e.g.*, *Trailer Marine Transport Corp.* v. *FMC*, 602 F.2d 379, 387 n.36 (D.C. Cir. 1979); *United States* v. *Postal*, 589 F.2d 862, 871, 878-879 (5th Cir.), cert. denied, No. 78-1714 (Oct. 1, 1979).

The fact that the piers "support human activity" (Cal. Br. 37) does not mean that they create an interest in the surrounding waters sufficient to accord the piers status as part of the coastline.[24] And as to the three piers that are used to tie up vessels used in oil operations, the Special Master found on the basis of all the evidence (including his personal visit to the piers, see Rep. at 3), that the volume of shipping was not so significant as to justify different treatment for them. This conclusion is supported by

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[24] This argument of "human activity" is apparently all that remains of the test that California once advanced as determinative of the question here.

Judge Jessup's testimony was that the "distinguishing characteristic" (N.Y. Tr. 128) between coastal structures that are basepoints and those that are not is whether the structure has "a definite passageway which is utilized so that there is a really human traffic, as it were, between the shore and the end of [the] artificial structures[]." *Ibid.* Thus, for example, he would not draw a basepoint from the seawardmost extension of airport runway approach lights extending into the sea (id. at 121-123), but if one assumed that there were a roadway leading from the shore to the outermost light, the resulting structure would "come within the definition of the assimilated structures" (id. at 124). Similarly, a sewage outfall pipe would not form part of the coast unless there were a means of human traffic on it; with such a means, it becomes, in Judge Jessup's view, indistinguishable from a pier, and its end would be a base point (*id.* at 127-128).

Consistent with this reasoning, Judge Jessup would use an open-work causeway to delimit the territorial sea. In his view, a causeway to an island is essentially "a pier going out to meet it" (N.Y. Tr. 99). He thus agreed that if the island were removed, the territorial sea would be measured from the tip of the causeway (*id.* at 111). Judge Jessup applied this principle to conclude that a causeway that traversed high seas between two territorial seas would generate a terri-

the evidence, and California has suggested no basis for ignoring the Master's recommendation in this respect.

VIII. THE CONTROLLING PRINCIPLES ARE THOSE ESTABLISHED BY THE INTERNATIONAL LAW OF THE SEA, ESPECIALLY THE CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE, NOT DOMESTIC LAW RULES ADOPTED FOR WHOLLY DIFFERENT PURPOSES

California contends (Cal. Br. 38-42) that it was the intent of Congress that domestic law govern questions of construction of the Submerged Lands Act. It then cites a number of decisions in which the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, rather than admiralty law, was applied to accidents occurring on piers. From this California concludes that piers are part of the land rather than of the sea.

The argument comes too late. A decade and a half ago, in this very case, the Court reached a different conclusion. It was found that, in enacting the Submerged Lands Act, Congress had left the definition of the coastline to the courts. And the Court determined that the provisions of the Convention, not

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torial sea of its own, at least on the assumption that the causeway was so low to the water that ships could not pass underneath (Jessup Cross 106-107). The Florida case implicitly rejects such a theory. See pages 27 to 30, *supra*.

Nowhere does the Convention or its history provide a basis for making coastline determinations turn on a structure's use as a human passageway, and California appears now to have abandoned Judge Jessup's rationale.

domestic law, should govern in applying the Act. *United States* v. *California, supra,* 381 U.S. at 150-154. That ruling was reaffirmed when Louisiana argued that inland waters should be delimited for purposes of the Submerged Lands Act as they had been under an 1895 statute that referred to the "harbors, rivers and inland water of the United States." This Court found no indication that Congress intended to tie the meaning of inland waters in the later Act to that in the former. *Louisiana Boundary Case, supra,* 394 U.S. at 19; see note 3, *supra.*

Accordingly it is irrelevant that admiralty law has not been applied to accidents that occur on piers. As we have noted (see pages 27 to 30, *supra*), substantial bridges joining the Florida Keys are not part of the coast for purposes of the Submerged Lands Act. Yet no one would suggest that admiralty law should govern traffic accidents on those bridges. We are here concerned with construing the Submerged Lands Act and the Convention, not the Longshoremen's and Harbor Workers' Compensation Act.

In addition, Congress has specifically provided that the Longshoremen's and Harbor Workers' Compensation Act, rather than admiralty law, is to be applied to activities on oil rigs on the outer continental shelf. Outer Continental Shelf Lands Act, 43 U.S.C. 1331, 1333(c).[25] Following California's logic, this fact

[25] The Outer Continental Shelf Lands Act provides for Federal administration of the seabed resources seaward of the area granted to the States under the Submerged Lands Act. The two Acts were considered together by Congress and enacted within 80 days of each other.

would make the rigs part of the "coast" and base-points for measuring Submerged Lands Act grants. Yet Article 10 of the Convention provides that artificial islands are not part of the land. The fact that activities on them are not governed by admiralty law is of no international consequence. As Mr. Lauterpacht testified, a domestic claim is not necessarily valid under international law, and where there is a conflict, the restrictions of domestic law must yield. N.Y. Tr. 248-249. Judge Jessup agreed. N.Y. Tr. 264.

CONCLUSION

The exception of the State of California to the Special Master's Report should be overruled and the Court should enter a decree as proposed by the United States in paragraph 3 of its Proposed Fourth Supplemental Decree (regarding the piers).

The United States has no objection to entry of a decree as proposed by the State of California in paragraphs 1 and 2 of California's Proposed Fourth Supplemental Decree (regarding the closing lines at San Diego and San Pedro). See note 3, *supra*.

Respectfully submitted.

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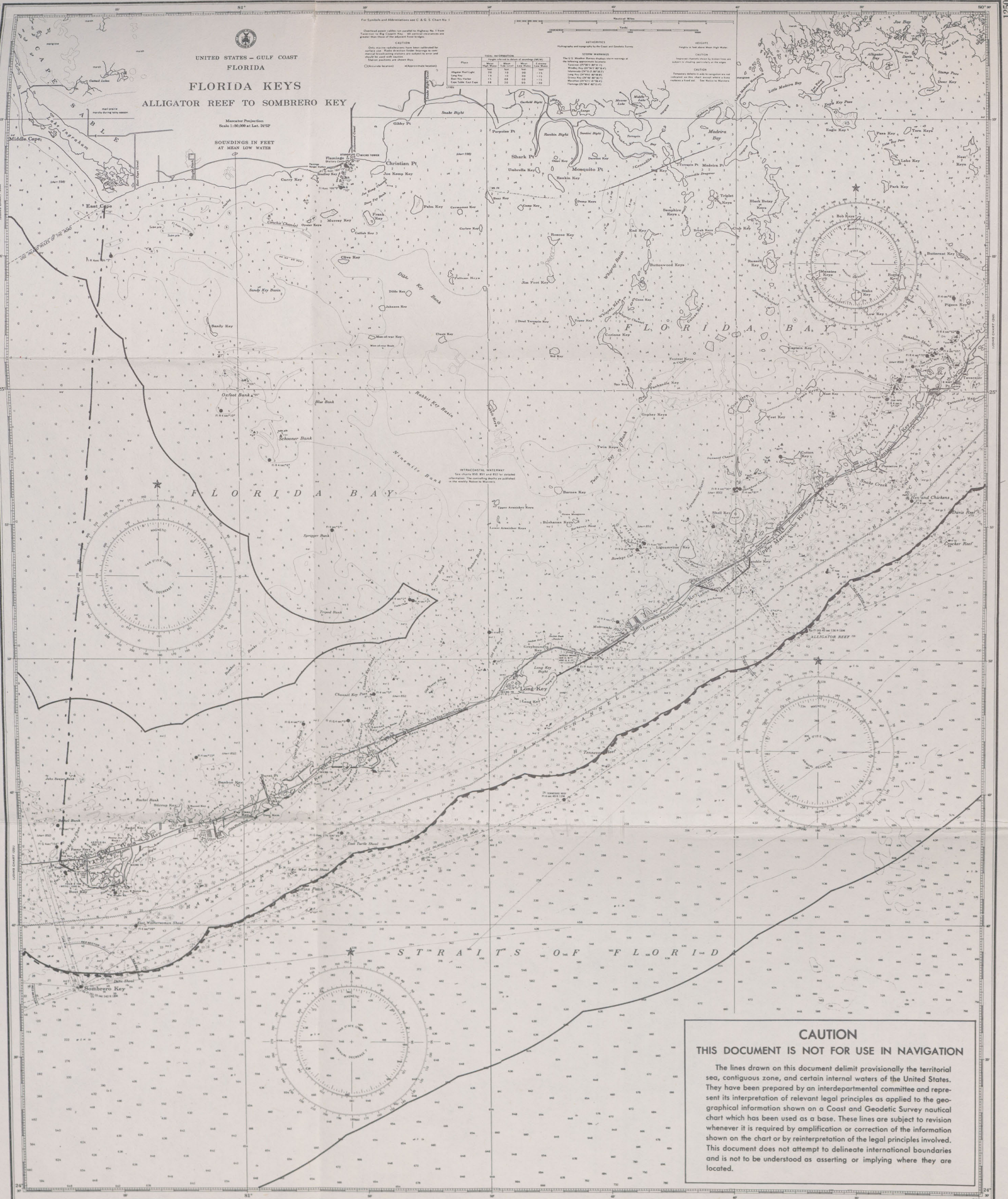

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