In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 5, Original

UNITED STATES OF AMERICA,
Plaintiff,

VS.

STATE OF CALIFORNIA,
Defendant.

On the Report of the Special Master

EXCEPTION OF THE STATE OF CALIFORNIA AND SUPPORTING BRIEF

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EXCEPTION OF THE STATE OF CALIFORNIA

The State of California excepts to the Special Master's recommendation that this Court decree that none of the sixteen piers on the California coast, including the Rincon Island-Punta Gorda "Causeway" complex, constitutes an artificial modification of the coast, and that the California coast line follows the natural coast in the vicinity of these structures for purposes of fixing the federal-state boundary under the Submerged Lands Act. The Special Master's discussion of this question is contained at pages 19 through 29 of his Report. His recommendation is given at page 30.

November 14, 1979

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BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF ITS EXCEPTION TO THE REPORT OF THE SPECIAL MASTER

JURISDICTION

The United States initiated this action against the State of California in 1945, invoking the original jurisdiction of this Court conferred by Article III, Section 2, Clause 2 of the United States Constitution. In its first decree herein, 332 U.S. 804, 805 (1947) this Court reserved jurisdiction, ". . . to enter such further orders and to issue such writs as may from time to time be deemed advisable or necessary to give full force and effect to this decree." *Id.*

Since that time, three supplemental decrees have been entered. *United States v. California,* 382 U.S. 448, 453 (1966); *United States v. California,* 432 U.S. 40, 42 (1977); and *United States v. California,* ..... U.S. ....., 99 S. Ct. 556,

557 (1978). Each of these decrees has contained a paragraph making explicit the Court's retention of jurisdiction to entertain further proceedings, enter orders, and issue writs either to give proper force and effect to its decree or to effectuate the rights of the parties in the premises. *Id.*

In these Cross-Motions for Entry of a Fourth Supplemental Decree, the parties invoke the jurisdiction retained by this Court in its decrees of 1947, 1966, 1977 and 1978, particularly with reference to the following statement from its 1966 decree:

> ". . . As to any portion of such boundary line or of any areas claimed to have been reserved under section 5 of the Submerged Lands Act as to which the parties may have been unable to agree, either party may apply to the Court at any time for the entry of a further supplemental decree." *United States v. California, supra* at 453, paragraph 13.

QUESTION PRESENTED

Do sixteen piers on the California coast, including the Rincon Island-Punta Gorda "Causeway" complex, constitute parts of California's "coast line" as that expression is used in the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. § 1301 (c)? More precisely, do these sixteen structures constitute "artificial modifications" or "artificial extensions" of California's coast line according to the principles established in this Court's prior decisions and decrees herein?

TREATY AND STATUTE INVOLVED

Convention on the Territorial Sea and the Contiguous Zone, T.I.A.S. No. 5639, 15 U.S.T. (Pt. 2) 1606, Articles 3 and 8.

Article 3 provides:

> "Except where otherwise provided in these articles, 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 recognized by the coastal State."

Article 8 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."

Submerged Lands Act, 67 Stat. 29, 43 U.S.C. § 1301 (c). This section provides:

> "(c) The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."

STATEMENT OF THE CASE

These cross-motions for a Fourth Supplemental Decree present three of the last remaining questions respecting the location of the seaward boundary of the land "confirmed" to California by operation of the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §§ 1301 *et seq.*[1] California excepts

[1]The parties anticipate that the remaining questions can be resolved by agreement.

to the recommendations of the Special Master as to one question only: Whether sixteen piers on the California coast constitute artificial "modifications" or "extensions" of the "coast line" within the meaning of this Court's prior decrees in this case. If they do, the seaward boundary of the lands confirmed to California by the Submerged Lands Act is to be measured from the ends of those piers.[2] The Special Master recommended a decree that they do not. The lands in dispute are approximately 2,500 acres, most of which lie within areas of present oil development.

The United States filed this action in 1945 to determine ownership of the lands underlying the "three-mile belt" off California's coast. In the first decision herein, this Court held that while the United States had not established its own title to the submerged lands, it nonetheless held "paramount rights" in them. *United States v. California,* 332 U.S. 19 (1947); *id.* at 43 (Frankfurter, J., dissenting); *United States v. Texas* 339 U.S. 707, 723-24 (1950) (opinion of Frankfurter, J.). Six years later, passage of the Submerged Lands Act "restored" to the seaboard States the rights to their offshore submerged lands, rights Congress felt had been divested by the first decision in this case. *United States v. Louisiana,* 363 U.S. 1, 28 (1960). In the case of certain Gulf Coast States the Act operated to restore title to the submerged lands lying within nine nautical miles of the "coast line." In the case of California it restored title to those lands within three nautical miles of the "coast line." 43 U.S.C. § 1301 (b), (c).

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[2]For illustrations of the effect on the offshore boundary of treating the piers as parts of the coast, see Appendix A of the Report of the Special Master, pp. 35-50.

The expression "coast line" is defined in the Submerged Lands Act as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters . . . ." 43 U.S.C. § 1301 (c). This case has been before the Court several times since passage of the Submerged Lands Act, principally for determinations of the location of the "coast line" along specific areas of California's coast.[3]

The present cross-motions for a fourth supplemental decree, filed during the October Term, 1977, seek determinations of the location of California's "coast line" in three respects. The parties seek a determination of the line enclosing the inland waters of San Pedro Bay, and also of the line enclosing the inland waters of San Diego Bay. The third question is whether sixteen piers on the California coast are "artificial modifications" or "artificial extensions" of California's coast line within the meaning of prior decrees herein. The Hon. Alfred A. Arraj was appointed Special Master on August 10, 1978, for the purpose of taking evidence and making recommendations based on that evidence. His Report dated August 20, 1979, was ordered filed on October 1, 1979, at which time the Court directed the filing of any exceptions within 45 days.

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[3]The Court has retained jurisdiction throughout this litigation, primarily for this purpose. *United States v. California*, 381 U.S. 139 (1965); *United States v. California*, 382 U.S. 448 (1966) (First Supplemental Decree, implementing the 1965 decision); *United States v. California*, 432 U.S. 40 (1977) (Second Supplemental Decree); *United States v. California*, 436 U.S. 32 (1978); and *United States v. California*, ... U.S. ...., 99 S.Ct. 556 (1978) (Third Supplemental Decree, implementing the 1978 decision).

The State of California accepts all of the Special Master's recommendations except that with respect to the sixteen piers. In this memorandum we address only that recommendation, deferring argument in support of the remainder of the Master's Report until our response to the Government's exceptions, if any.

* * *

To a far greater extent than on the Atlantic seaboard,[4] shoreline piers serving as military and commercial ports and for recreation have been fixtures on the coast of California virtually since its annexation from Mexico. Their existence is due to a lack of fully enclosed natural harbors on California's one thousand-mile coast line, a characteristic first recorded by Richard Henry Dana in 1841:

> "This wind (the south-easter) is the bane of the coast of California. Between the months of November and April, (including a part of each,) which is the rainy season in this latitude, you are never safe from it, and accordingly, in the ports which are open to it, vessels are obliged, during these months, to lie at anchor at a distance of three miles from the shore, with slip-ropes on their cables, ready to slip and go to sea at a moment's warning. The only ports which are

[4]There are many piers on the California coast other than the sixteen which are the subject of this petition; because of a nearby cape or coastal structure these other piers would have no effect on the Submerged Lands Act boundary if treated as part of the coast. The Port San Luis, Stearns Wharf and Santa Monica Piers are examples. *See* Defendant's Exhibit GG, Tr. Denver Hearings, p. 232.

> safe from this wind are San Francisco and Monterey in the north, and San Diego in the south."[5]

(All but one of the sixteen piers that are the subject of the Special Master's Report lie south of Monterey.) Until the building and dredging of artificial harbors, not begun for nearly one hundred years after Dana wrote, coastal piers extending beyond the surf zone into deep water served as the principal ports of Southern California. And as the Special Master found, a number of these piers still serve as ports.[6]

During the 1860's, piers on San Pedro Bay were the shipping ports for Los Angeles, San Bernardino and Arizona. These piers included Timms Landing, wharves at Wilmington, and Anaheim Landing on the eastern side of the Bay.[7] The 1870's saw major pier construction at other points on the Southern California coast to handle an increasing volume of shipping and particularly to facilitate the transfer of cargo and passengers from ship to rail, and vice-versa. The Port San Luis Pier was built in 1872, as was the Stearns Wharf in Santa Barbara, both of which are still in existence and use today. The Port Hueneme Pier was built just prior to 1872.[8]

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[5]Dana, Two Years Before the Mast 57 (B. F. Collier & Son 1969). This observation was also made by the first Special Master in this case. *See* Report of Special Master William H. Davis, *United States v. California*, (then) No. 6 Original, October 14, 1952, p. 47. *See also* House of Representatives Report No. 2515, 82d Congress, 2d Sess., p. 19 (1952).

[6]Report of the Special Master, p. 7 n. 7, p. 21.

[7]Bancroft's Works, Vol. XXIII, History of California, Vol. VI, at 522 (1888); Davidson, Coast Pilot of California, Oregon and Washington 36-37 (4th ed. 1889); Newmark, Sixty Years in Southern California 366 (N.Y. 1926); Marquez, Port Los Angeles: A Phenomenon of the Railroad Era 1 (San Marino 1975).

[8]Tr. Denver Hearings, pp. 261-263, 296-297.

By acquiring the Wilmington piers and the Los Angeles and San Pedro Railroad, the Southern Pacific Railroad in 1872 obtained a virtual monopoly over all shipping to and from Los Angeles that was not first challenged until 1875. In that year, United States Senator John P. Jones of Nevada built a pier 1,740 feet long on the shore of Santa Monica Bay, at a site four miles closer to Los Angeles than the Southern Pacific's terminal piers at Wilmington on San Pedro Bay. Jones' Los Angeles & Independence Railroad made its maiden run between Santa Monica and Los Angeles in October, 1875, and was planned to extend to Salt Lake City. The depression of 1876, however, and rate-cutting competition by the Southern Pacific forced Jones to sell the pier and railroad to the Southern Pacific in June, 1877. But the episode began a long dispute over the appropriate site for the Port of Los Angeles. The maneuvers of protagonists seeking to establish a particular site as the Port of Los Angeles began several decades of bustling pier construction on the Southern California coast.[9]

In 1887, Port Ballona, a pier about two-thirds downcoast from Point Dume on Santa Monica Bay, was opened as the ocean terminus of the California Central Railroad.[10] The following year McFadden's Wharf was built just south of San Pedro Bay; now known as the Newport Beach Pier, it is one of the sixteen that are the subjects of the present proceeding. In 1890 the Redondo Railway Co. built the first

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[9]Ingersoll, Century History of Santa Monica Bay Cities 144-45 (Los Angeles, 1908); Willard, The Free Harbor Contest at Los Angeles 63 (Los Angeles, 1899); Marquez, *supra*, n. 7, pp. 3-24.

[10]Newmark, *supra*, n. 7, p. 581.

pier at Redondo Beach on Santa Monica Bay, and connected it by rail to Los Angeles. The Santa Fe Railroad immediately followed suit with a railroad pier of its own at Redondo.[11] By 1892, it was estimated that more than sixty per cent of all water traffic in and out of Los Angeles, if coal and lumber were excluded, was passing across the Redondo piers.[12]

By 1890, the Southern Pacific and its new president, Collis Huntington, were losing control of San Pedro Bay. Lands there were being acquired by persons thought to be agents for the Union Pacific, and the Southern Pacific turned its attention to Santa Monica Bay. While Southern Pacific's existing wharves in San Pedro Bay were kept in repair, and a few new ones built, the Railroad began construction of the massive Long Wharf at Santa Monica in January 1892. When completed in 1893, this pier extended 4720 feet into the Bay and supported two railroad tracks that fanned into seven at pier-head. The pier-head in addition supported 380 frontage feet of depot buildings. Aside from its rail and vessel traffic, the pier attracted tourists who could walk its entire length, dine in its restaurant, and fish for yellowtail tuna and halibut.[13]

Shortly thereafter, three of the sixteen piers that are the subjects of these cross-motions were constructed. Ocean-

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[11]Tr. Denver Hearings, p. 305-306; Marquez, *supra*, n. 7, p. 32.

[12]Willard, *supra*, n. 9, p. 64; Mayo, Los Angeles 113 (N.Y., 1933).

[13]Ingersoll, *supra*, n. 9, pp. 187, 203; Willard, *supra*, n. 9, pp. 61, 66-69; Newmark, *supra*, n. 7, p. 468; Bartlett, "The Battle for Southern Pacific Ports," Westways 26-29 (August, 1935); Warren, History of the Santa Monica Bay Region 54, 61 (Santa Monica, 1934); Marquez, *supra*, n. 7, pp. 36-63.

side Pier was built in 1896, Huntington in 1904, and Balboa approximately 1907.[14]

The preeminence of these piers as the major shipping ports of Southern California declined in the early part of the twentieth century. By 1900 the "Free Harbor" forces had persuaded Congress that San Pedro Bay, and not Santa Monica Bay, was the better site for the Port of Los Angeles. With the construction of the outer breakwater in San Pedro Bay, major commercial shipping tended to concentrate there. The piers at other points on the Southern California coast became subsidiary ports for fishing vessels and those engaged in minor coasting trade, such as lumber.[15]

Oil production off the Southern California coast, however, created a new use for piers beginning in the 1930's. Today the Ellwood, Carpinteria, Morro Strand, Punta Gorda-Rincon, and Port Orford piers are used as ports by vessels engaged in offshore oil production.[16]

During World War II, the Coast Guard occupied all the piers on the open California coast. Some were used as landing places for offshore patrol vessels; others were placed under guard to prevent their use by enemy ships.[17]

With the construction of small-craft harbors in the last several decades,[18] the need for piers as landing places has

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[14]Tr. Denver Hearings, p. 262.

[15]Tr. Denver Hearings, p. 298; Marquez, *supra,* n. 7, pp. 82-89.

[16]Report of the Special Master, pp. 20-21; Tr. Denver Hearings, pp. 223-224, 299-302, 373-374. Defendant's Exhibit I, Tr. Denver Hearings, p. 8.

[17]Tr. Denver Hearings, pp. 303-304.

[18]*See,* e.g., the projects listed in Defendant's Exhibit Z, pp. 4-6, Tr. Denver Hearings, p. 199.

diminished and their use for recreation has increased. The example of the Santa Monica Long Wharf, which was immensely popular in the nineteenth century as a fishing and promenade pier, has been followed by several of the piers that are the subject of the present petitions. These include piers at Imperial Beach, Ocean Beach, Oceanside, Newport (McFadden's Wharf), Huntington, Balboa, Hermosa, Venice and Manhattan Beach. While several of these piers are still used as landing points for vessels, they are primarily recreational piers.[19] One reason piers on the California coast have remained so popular as recreational facilities is a national policy, begun in the 1930's, of encouraging the use of our coasts for recreation.[20] Yet as the uses of these piers have changed in the past, changing social or economic conditions may require different uses in the future. In March, 1979, for example, a massive landslide buried the Pacific Coast Highway near Malibu on Santa Monica Bay. Two recreational piers, the Malibu and the Santa Monica, were pressed into service as ferry ports, saving ferry passengers a twenty-five mile highway detour. Conversion of a strictly recreational pier to a ferry port, or to a military port in a period of emergency, can be effected in a matter of days.[21]

The Special Master found that "[n]one of the piers in question is part of a harbor or harbor system . . . because none of the piers provides an anchorage sheltered from

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[19]Report of the Special Master, p. 21. Tr. Denver Hearings, pp. 316-318.

[20]Tr. Denver Hearings, p. 317; *see*, e.g., Coastal Zone Management Act of 1972, as amended, 16 U.S.C. § 1451.

[21]Tr. Denver Hearings, pp. 301-302.

weather conditions on the open sea." Report of the Special Master, p. 28. He defines a port as ". . . . any place where passengers or cargo may be transferred between ship and shore. A port may or may not be part of a harbor, which is a haven providing safe anchorage and sheltering for boats from weather conditions prevailing on the open sea." Reports of the Special Master, p. 7, n. 7. It is true that none of the piers lies in an area of fully enclosed protection from the elements. But all are built in areas of partial protection. While a fully enclosed harbor such as San Diego or San Francisco provides the optimum haven from the elements, the Southern California coast nonetheless provides a substantial protection to vessels lying alongside piers on the open coast. This protection is afforded by several features. The general alignment of the coast south of Pt. Conception serves as a shield against the prevailing northwest winds. The Channel Islands offshore act as massive breakwaters and submarine canyons along the coast dissipate the energy of approaching waves. These features are sufficient to afford safe berthing at the piers approximately 330 days a year. The alignment of the offshore islands, however, leaves the coast generally unprotected during the "southeasters" described by Dana.[22]

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[22]Tr. Denver Hearings, pp. 304-306, 375-376; Ingersoll, *supra*, n. 9, p. 121 (Santa Monica Bay); Davidson, Directory for the Pacific Coast of the United States, Report to the Superintendent of the U.S. Coast Survey 15-16 (1862) (Santa Barbara-Ventura coast). "The islands break the force of the large westerly swell of the Pacific along the coastline, and in winter afford good lee from the full force of the southeast gales." Davidson, Coast Pilot of California, Oregon and Washington 53-54 (4th ed., 1889). "San Pedro Bay is well protected in every direction, except against the winter gales from the southeast round to the southwest. During the spring, summer and autumn months, it is an excellent roadstead. It is

SUMMARY OF ARGUMENT

This Court has established unequivocal principles for determing what coastal installations shall be regarded as "artificial extensions" of the coast line for purposes of the Submerged Lands Act. These principles provide, for example, that such structures as jetties, breakwaters and groins are to be so regarded. *United States v. California,* 432 U.S. 40, 41-42 (1977). And when they are applied to the facts of the present case, these principles confirm that the sixteen piers are likewise artificial extensions of California's coast line.

The Special Master, however, did not apply the plain principles this Court has established. In his recommendation to this Court he relies instead explicitly on a test which this Court has not considered, much less adopted. Report of the Special Master, p. 26. Ironically, earlier in his Report he rejects a principle urged by the United States, precisely because it "ignores the framework" of this Court's prior decisions. Report of the Special Master, p. 8.

When the sixteen piers are considered in the light of the principles established by this Court, it is clear they are to be regarded as parts of California's "coast line" for purposes of the Submerged Lands Act. This Court has decreed that the "coast line" is to be taken as "modified" or "extended" by artificial structures, as well as by natural changes. *United States v. California,* 382 U.S. 448, 449,

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nearly free from dangers, and there is nothing to be feared outside of a quarter of a mile from the shoreline in the bay or approaches." *Id.* at 38. The waters of Santa Monica Bay are sufficiently calm that a gambling ship, "The Rex," having no motor power, lay anchored within the bay more than four miles from nearest land, for five or six years. *People v. Stralla,* 14 Cal. 2d 617, 625; 96 P. 2d 941, 944 (1939).

451 (1966); *United States v. California, supra,* 432 U.S. at 41-42. Furthermore, it has directed that the principles contained in the Convention on the Territorial Sea and the Contiguous Zone be employed in ascertaining the meaning of the expression "coast line" as used in the Submerged Lands Act. T.I.A.S. No. 5639; 15 U.S.T. (Pt. 2) 1606 ("the Convention"). *United States v. California,* 381 U.S. 139, 165 (1965). Specifically, the Court has decreed that "artificial modifications" of the coast line include "outermost permanent harbor works" within the meaning of Article 8 of the Convention. *United States v. California, supra,* 382 U.S. at 449. Article 8 provides that port facilities are to be regarded as parts of the coast, and five of the California piers, as the Special Master found, are port facilities. Moreover, as this Court has recognized, Article 8 "expressly covers artificial structures which are not closely linked to ports," providing certain criteria are met. All of the piers meet these criteria: They are permanent structures, connected to the coast, and not of excessive length. (A seven-mile-long pier in the Persian Gulf is the most frequently cited example of an excessively long coastal structure; the longest pier in issue, Ocean Beach, is 3500 feet. Report of the Special Master, p. 21.)

Significantly, this Court has decreed a variety of coastal structures to constitute artificial extensions of the coast. *United States v. California, supra,* 432 U.S. at 41-42. Some of these structures are port facilities, some are "coast protective works," and others serve purposes unrelated to navigation or coastal maintenance. As do the sixteen piers, however, all of these structures possess the attributes required by the prior decisions of this Court.

Article 3 of the Convention corroborates the result obtained by employing the principles of Article 8 and the Court's decrees. It establishes that the sixteen piers are parts of the "normal baseline" from which the extent of the territorial sea, and hence of the operation of the Submerged Lands Act, is to be measured.

The Special Master chose not to rely on the foregoing principles, but instead on a test suggested by two writers in 1965. That test, however, was designed not for structures erected *on* the coast, but specifically for offshore installations. Adoption of such a new test would seem clearly to invite additional litigation in the submerged-lands cases, but in this case it is clear that the sixteen piers meet the authors' suggested criterion.

Had there been a need to look beyond the principles established by this Court and the Convention, it would have been far more appropriate to consult our domestic jurisprudence, which has consistently treated piers as parts of the coast for admiralty purposes. For the drafters of the Submerged Lands Act clearly contemplated that questions of interpretation would be governed by domestic and not international law. Moreover, the Special Master could have consulted three publications of the State Department, expressing the view that piers are to be regarded as parts of the coast.

ARGUMENT

I

THIS COURT HAS ESTABLISHED THAT PORT FACILITIES AS WELL AS "STRUCTURES NOT CLOSELY LINKED TO PORTS," IF PERMANENT AND CONNECTED WITH THE MAINLAND, ARE TO BE REGARDED AS PARTS OF THE COAST. UNDER THESE PRINCIPLES, THE SIXTEEN PIERS CONSTITUTE PARTS OF CALIFORNIA'S COAST.

A. The Principles Established by This Court for Determining the Status of Coastal Installations Derive Primarily from Two Provisions of the Convention on the Territorial Sea and the Contiguous Zone, Article 3 and Article 8.

In past decisions this Court has made clear that port facilities are to be treated as parts of the coast line for purposes of the Submerged Lands Act. *See*, e.g., *United States v. California*, 382 U.S. 448, 449, 450, paras. 2, 4(b); *cf. United States v. Louisiana*, 394 U.S. 11, 49-50 fn. 64 (1969).

In addition, this Court has held that "structures not closely linked to ports" are to be regarded as parts of the coast if they are "permanent" and connected with the mainland. *United States v. Louisiana*, 394 U.S. 11, 49-50 fn. 64, 36-37. (A possible third requirement, a prohibition against excessive length, is discussed below but is not of concern here, since none of the structures has such a length. *See infra,* pp. 26, 29.) In accordance with these criteria, this Court has held a number of coastal installations not related to ports to constitute artificial "modifications" or "extensions" of the coast line, including structures denominated

"jetties" and "groins." *See,* e.g., *United States v. Louisiana, supra,* 394 U.S. at 49-50 fn. 64; *United States v. California,* 432 U.S. 40, 41-42 (1977); Tr. Denver Hearings, pp. 220, 234, 292.

Each of the sixteen piers on the California coast meets one or both criteria. Five are port facilities, as the Special Master found. These are the Ellwood, Carpinteria, Morro Strand, Port Orford, and Rincon Island-Punta Gorda facilities. Report of the Special Master, pp. 7 n. 7, 20-21. And all are permanent structures connected with the mainland, serving as extensions of the coast into the sea for port, recreation and other purposes. Report of the Special Master, pp. 21, 27 n. 21.

The Special Master apparently felt this Court's criteria inadequate for determining whether the piers are artificial extensions of the coast line, for in his recommendation he relied instead on another test, one which has not been recognized by this Court. Report of the Special Master, p. 26. For this reason this Court's past decisions, and particularly the bases for them, bear examination.

The principles which this Court has established governing what coastal installations shall be regarded as parts of the coast line have been taken primarily from the Convention on the Territorial Sea and the Contiguous Zone. In discussing the meaning of "coast line" as used in the Submerged Lands Act, this Court held in 1965:

> "Had Congress wished us simply to rubber-stamp the statements of the State Department . . . it could readily have done so itself. 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. We adopt them for purposes of the Submerged Lands Act." *United States v. California*, 381 U.S. 139, 165 (1965) (footnotes omitted).

Two provisions of the Convention, Article 8 and Article 3, establish that the sixteen piers, just as the jetties, groins and breakwaters, are parts of California's coast line for purposes of the Submerged Lands Act.

B. Article 8 Establishes That Port Facilities as Well as Installations Not Related to a Port or Harbor, if They Are "Permanent Structures Erected on the Coast and Jutting out to Sea," Are to Be Regarded as Forming Parts of the Coast.

Implementing its 1965 decision that the definitions contained in the Convention on the Territorial Sea and the Contiguous Zone are adopted for purposes of the Submerged Lands Act, this Court decreed in 1966:

> "[t]he coast line is to be taken as heretofore or hereafter modified by natural or artificial means, *and includes* the outermost permanent harbor works that form an integral part of the harbor system *within the meaning* of Article 8 of the Convention on the Territorial Sea and the Contiguous Zone. . . ." *United States v. California*, 382 U.S. 448, 449 (1966). (Emphasis added.)

Article 8 is the primary provision of the Convention addressing the status of installations built into the sea from the mainland: Are they to be regarded as structures

within the territorial sea, or as parts of the coast such that the territorial sea is measured from the seaward ends of the structures?

The principal focus of the article, as one would expect, is ports. The initial concern of its drafters, the members of the International Law Commission, was to assure that port and harbor facilities were regarded as parts of a nation's coast. Entitled "Ports" by the ILC, the text of Article 8 provides:

> ". . . [T]he outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast."

But as discussions leading to the adoption of the Article progressed, the subject of coastal installations not related to a port or harbor was raised. The Commission decided that these also should be treated as parts of the coast. This question of non-port-related structures was not of the utmost importance to the Commission, which was addressing such historic matters as the breadth of the territorial sea and rights in the continental shelf. But the subject was sufficiently important that the Commission's rule was incorporated into its official Commentary to Article 8. The second paragraph of that Commentary provides:

> "Permanent structures erected on the coast and jutting out to sea (*such as* jetties and coast protective works) are *assimilated* to harbour works."[23] (Emphasis added.)

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[23]Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9), U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 270, U.N. Doc. A/CN. 4/SER. A/1956/Add. 1.

This Court has recognized that in ascertaining the "meaning" of Article 8, as the 1966 decree herein requires, the official Commentary is a principal aid. In fact the Court has made specific reference to the paragraph of the Commentary quoted above, holding that the Article "expressly covers artificial structures which are not closely linked to ports." *United States v. Louisiana, supra,* 394 U.S. at 50 n. 64. Accordingly, this Court has held a number of "permanent structures erected on the coast and jutting out sea" to constitute artificial modifications or "extensions" of the coast line. In *United States v. California, supra,* 432 U.S. at 41-42, for example, a number of coastal installations were decreed to be "artificial extensions" of California's coast line. Some are port facilities, some are coast protectiye works, and others fall in neither category"[24]

As we demonstrate below, the five piers that are port facilities constitute parts of the coast within the express meaning of Article 8. And all of the piers are "permanent structures erected on the coast and jutting out to sea." Thus even those of the sixteen piers "not closely linked to ports" are "assimilated" to "harbour works" and are to be regarded as forming part of the coast.

The International Law Commission, which drafted the Convention on the Territorial Sea and the Contiguous Zone, was formed pursuant to Article 13 of the United Nations Charter, which mandates the General Assembly to "initiate studies and make recommendations for the purpose of encouraging the progressive development of

[24]*See* Tr. Denver Hearings, pp. 210-211, 220, 233-234, 292; and see photographs in Defendant's Exhibit GG.

international law and its codification." The Commission was created by General Assembly Resolution 174 (II) on November 21, 1947, to fulfill this mandate, and was charged specifically with the codification and development of international law. At its first session in 1949, the Commission selected the regime of the territorial sea as a topic for consideration, and work on this subject was begun in 1952. *See* 1 Shalowitz, Shore and Sea Boundaries, 203 *et seq.* (1962).

The significance of the official Commentary to Article 8, and of the Article's "preparatory work" in general, should be emphasized. Professor Briggs, noting that the statute creating the International Law Commission requires it to prepare and submit Commentaries together with the text of articles, writes: "[T]he commentaries, as well as the black-letter texts, set forth the Commission's views. In fact, the commentaries not only interpret, but sometimes qualify the text of articles to which they are appended, and both text and commentary are adopted by the Commission prior to their reference to the General Assembly."[25] The preparatory work or "legislative history" of Article 8 is also significant in ascertaining the "meaning" of the article. This Court has made frequent use of the preparatory work of treaties, including that of the Convention on the Territorial Sea and Contiguous Zone.[26]

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[25]Briggs, The International Law Commission 189 (1965). *See* Jessup Memorandum, Defendant's Exhibit C, pp. 23-24, Tr. N.Y. Hearings, pp. 8-9.

[26]*United States v. Louisiana, supra,* 394 U.S. at 43 n. 53, 45 n. 58, 55, 56. *See also Kinkhead v. United States,* 150 U.S. 483, 486 (1893); *United States v. Texas,* 162 U.S. 1, 23-28, 36-38 (1896); *Oklahoma v. Texas,* 260 U.S. 606, 632 (1923); cases collected in 2 Hyde, International Law Chiefly as Interpreted and Applied by the United States § 533 D., at 1482-83 (2d rev. ed. 1945).

Judge Philip C. Jessup provided testimony for the Special Master during the New York hearings in the form of a memorandum which dealt at length with the Commentary and the preparatory work pertaining to Article 8. This memorandum should be consulted for a full exposition of those subjects.[27] Certain highlights however are presented here. They demonstrate that the drafters of the Convention clearly contemplated that such structures as the sixteen California piers were to be regarded as forming parts of the coast.

Early efforts toward codification of the law of the sea, though unsuccessful, provided a basis for the later work of the International Law Commission. The League of Nations Preparatory Committee in 1929 considered the status of ports, and drafted Basis of Discussion No. 10, which was adopted the following year by the Second Committee of the 1930 League of Nations Codification Conference. It reads:

> "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."[28]

The Report of the Second Committee referred to "outermost permanent harbor works" as "outermost fixed works," showing that the Conference meant the word "permanent"

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[27]Jessup Memorandum, Defendant's Exhibit C, pp. 38-52. Judge Jessup's distinguished career in international law need not be recounted here. A summary is contained in Defendant's Exhibit A, Tr. N.Y. Hearings, p. 5. *See also* the bibliography and testimonials in Volume 62 of the Columbia Law Review, Defendant's Exhibit B, Tr. N.Y. Hearings, pp. 6-7.

[28]League of Nations, Report of the Second Committee, Conference for the Codification of International Law, The Hague, 1930, C.230.M.117.1930.V., p. 12.

to connote fixed, immoveable structures as opposed to floating structures.[29] Professor Gidel, the delegate from France who conceived the term "fixed works," wrote four years later that the expression included such structures as "breakwaters, jetties, *piers*, etc."[30] (Emphasis added.)

Such early efforts at codification, insofar as they addressed the question of coastal structures, addressed them largely in the context of ports. The question of coastal structures not strictly associated with ports appears not to have been given extensive consideration. But this situation began to change when the International Law Commission in 1952 commenced its work on the subject of ports, which led to the drafting of what became Article 8. Its discussions, and ultimately its official Commentary show that the Commission gave the question thoughtful consideration.

The Commission took the League of Nations proposal with respect to ports as its starting point, and its first two years of discussions were largely confined to port facilities as such. On July 1, 1954, however, the Commission discussed the status of jetties (which are frequently unconnected with a port or harbor[31]), dykes used to harness tidal energy, and other structures not related to ports or

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[29] *Id.*

[30] 3 Gidel, Le Droit International Public de la Mer 524-25 (1935) (*"môles, jetées, encrochements,* etc." The French *jetée* means pier, just as "jetty" in British usage means pier. Report of the Special Master, p. 27; Jessup Memorandum, Defendant's Exhibit C, pp. 3-11.

[31] A number of jetties which have been decreed parts of California's coast line, for example, have no connection with a port or harbor, nor are they "coast protective works." *United States v. California, supra,* 432 U.S. at 41-42; Tr. Denver Hearings, pp. 220, 234, 292.

harbors.[32] While some members of the Commission favored treating such coastal installations in a separate article, the subject instead was treated in the form of this "comment" to Article 8 in the report covering the work of the ILC's 6th Session, June 3-July 29, 1954:

> "Permanent structures erected on the coast and jutting out to sea (such as jetties and protecting walls or dykes) are assimilated to harbour works."[33]

This view that permanent structures erected on the coast be assimilated to "harbour works," even if not connected with a port or harbor, did not thereafter change, and became embodied in the Commission's official "Commentary" to Article 8 in 1956.

As the work of the International Law Commission continued over the next two years, discussions of coastal structures recurred on several occasions, largely in the context of concern over excessively long structures. The example of a seven-mile long *pier* in the Persian Gulf was most frequently used. The United Kingdom raised the point respecting this pier in 1955.[34] Mr. Francois, the Special Rapporteur, again raised the matter of the seven-mile pier later in 1955, but reported, "The case seemed too special

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[32]Summary Records of the 6th Session, [1954] 1 Y.B. Int'l L. Comm'n 88, U.N. Doc. A/CN.4/SER. A/1954.

[33]Report of the International Law Commission to the General Assembly, 9 U.N. GAOR, Supp. (No. 9), U.N. Doc. A/2693 (1954), reprinted in [1954] 2 Y.B. Int'l L. Comm'n 155, U.N. Doc. A/CN.4/SER. A/1954/Add. 1.

[34]Report of the International Law Commission to the General Assembly, 10 U.N. GAOR, Supp. (No. 9), Annex (Item 16), U.N. Doc. A/2934 (1955), reprinted in [1955] 2 Y.B. Int'l L. Comm'n 58, U.N. Doc. A/CN.4/SER. A/1955/Add. 1.

to warrant the Commission's amending the general principle it had adopted."[35] The United Kingdom representative then remarked:

> ". . . *The Commission's rule that jetties and piers be treated as part of the coastline had been based on the assumption that those installations would be of such a type as to constitute a physical part of such coastline;* it would indeed have been inconvenient to treat that kind of installation otherwise than in the manner advocated by the Commission. But huge piers of the type being constructed in the Persian Gulf [*i.e.,* the seven-mile pier, ought to be treated differently]."[36] (Emphasis added.)

The subject was mentioned several times during the Commission's work in 1956.[37] Sir Gerald Fitzmaurice of the United Kingdom again remarked:

> "Piers projecting from the land up to a certain point might reasonably be regarded as part of the land, but if they extended several miles into the high seas, their situation would be similar to that of artificial constructions in the sea, and it was arguable that they should not be regarded as part of the coast, but as erections in the high seas."[38]

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[35]Summary Records of the 7th Session, [1955] 1 Y.B. Int'l L. Comm'n 73, U.N. Doc. A/CN.4/SER.A/1955.

[36]*Id.* at 74. The italicized portion of this passage was quoted in *United States v. Louisiana, supra,* 394 U.S. at 37 n. 42.

[37]Regime of the High Seas and Regime of the Territorial Sea, Comments by Governments, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. A/CN.4/99/Add. 1 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 26, 85, U.N. Doc. A/CN.4/SER.A/1956/Add. 1.

[38]Summary Records of the 8th Session, [1956] 1 Y.B. Int'l L. Comm'n 193, U.N. Doc. A/CN.4/SER.A/1956.

The Commission then agreed that a reference to Sir Gerald's remarks would be included in the report.[39] That reference took the form of the third paragraph of the Commission's official Commentary to Article 8 as the article was reported to the General Assembly. The full Commentary reads as follows:

"Ports"

* * *

"(1) The waters of a port up to a line drawn between the outermost installations form part of the internal waters of the coastal State. No rules for [the internal waters of] ports have been included in this draft, which is exclusively concerned with the territorial sea and the high seas.

"(2) *Permanent structures erected on the coast and jutting out to sea (such as jetties and coast protective works) are assimilated to harbour works.*

"(3) Where such structures are of excessive length (for instance, a jetty extending several kilometres into the sea), it may be asked whether this article could still be applied or whether it would not be necessary, in such cases, to adopt the system of safety zones provided for in article 71 for installations on the continental shelf. As such cases are very rare, the Commission, while wishing to draw attention to the matter, did not deem it necessary to state an opinion."[40] (Emphasis added.)

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[39] *Id.*

[40] Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9), U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 270, U.N. Doc. A/CN.4/SER.A/1956/Add. 1.

(As Judge Jessup observed, in British usage the word "jetty" includes "pier."[41] That British and not American usage was employed in the Commentary is apparent from the spelling of "harbour" and "kilometres" and from the fact that the third paragraph, which uses as an example a "jetty," was the product of discussion concerning a seven-mile-long *pier*.)

The ILC text was taken up by the United Nations Conference on the Law of the Sea at Geneva in 1958. Prior to the final vote Mr. Francois, the Special Rapporteur, stated that "the Commission had deliberately drawn the provision [of Article 8] in mandatory terms in order to eliminate every shadow of doubt."[42] Article 8 as drafted by the International Law Commission was adopted April 29, 1958, by a vote of seventy to none, with one abstention.[43] It was signed by the President of the United States on March 24, 1961, and was entered into force on September 10, 1964.[44]

One additional point concerning the "meaning" of Article 8 ought to be made. The distinction between a port and a harbor made by the Special Master (Report, p. 7 n. 7), while correct from an engineering viewpoint, is immaterial to the meaning of Article 8. The International Law Commission's deliberations leading to the adoption of

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[41]Jessup Memorandum, Defendant's Exhibit C, pp. 4-8.

[42]III Official Records, U.N. Conference on the Law of the Sea, First Committee (Territorial Sea and Contiguous Zone), 142, U.N. Doc. A/CONF. 13/39 (1958).

[43]*Id.* at 141-42; 4 Whiteman, Digest of International Law 263 (1965).

[44][1964] 15 U.S.T. (Pt. 2) 1606.

Article 8 were undertaken initially in the context of "ports." While the English text of Article 8 speaks of "harbour works" and "harbour system," the Commission titled the article "Ports." The first paragraph of the Commentary refers to the "installations" of a "port." Moreover, the French text of the article, which is equally authoritative with the English,[45] speaks of the "permanent installations" (*"installations permanentes"*) of a "port system" (*"systeme portuaire"*).[46] Thus "harbour works," as used in its primary (*i.e.,* not "assimilated") sense, denotes harbor as well as port facilities. (Nevertheless, it might be noted, each of the piers is built in an area of substantial protection from the elements, thus constituting works within a "harbor." *See supra,* pp. 11-12.)

The five piers that constitute port facilities, then, are to be "regarded as forming part of the coast" by the express terms of the text of Article 8. Moreover, the preparatory work and the official Commentary to Article 8 make clear that those piers "not closely linked to ports," in the words of this Court, are to be "assimilated" to harbor works and similarly regarded as forming part of the coast. For each of the piers meets this Court's and the Convention's criteria:

(1) Each is connected with the mainland ("[p]ermanent structures erected *on* the coast and jutting out to sea . . ."). This requirement was recognized by the Court in *United States v. Louisiana, supra,* 394 U.S. at 37 (1969). In con-

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[45]Article 32 of the Convention. *See* Jessup Memorandum, Defendant's Exhibit C, pp. 30-32.

[46]Jessup Memorandum, Defendant's Exhibit C, pp. 30-32; [1964] 15 U.S.T. (Pt. 2) 1617.

trast, an artificial island detached from the coast may not be used as a point from which to measure the territorial sea by the terms of Article 10 of the Convention.

(2) Each is "permanent," as found by the Special Master. Report of the Special Master, p. 27 n. 21.

(3) None is of excessive length, a characteristic which would probably disqualify a structure from being treated as part of the coast. The caution expressed in paragraph 3 of the Commentary to Article 8 refers to a structure several kilometers long. The length of the longest pier in issue is 3,500 feet.

C. Article 3 Confirms the Result Obtained by Employing Article 8: The Piers, Being Parts of the Low-Water Line on the Government's Official Charts, Are Thus Parts of the "Normal Baseline" from Which the Breadth of the Territorial Sea is Measured.

Article 3 of the Convention leaves no question that the sixteen piers are to be regarded as parts of California's coast. It provides:

> ". . . [T]he 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 recognized by the coastal State.*" (Emphasis added.)

On every chart of the California coast "officially recognized" by the United States, in accordance with one hundred years of standard American charting practice, the sixteen piers are marked as parts of the low-water line. Article 3 thus provides that they are parts of the "normal baseline" (in terms of the Submerged Lands Act, the "coast line") from which the extent of the territorial sea,

and hence of the operation of the Submerged Lands Act, is to be measured.[47]

The charts of the American coast officially recognized by the United States are those published by the National Ocean Survey ("NOS"). *See,* e.g., Defendant's Exhibits AA through FF, HH and LL; Tr. Denver Hearings, pp. 232, 253. As Dr. Hodgson, The Geographer of the Department of State, testified for the United States, the low-water line referred to in Article 3 is represented on these charts by a solid black line.[48] The piers are included within this line, a fact that can be observed from the Government's charts, on which witnesses have identified them. *See* Exhibits AA through DD.

Significantly, the low-water line on the Government's charts follows the configuration of piers just as it does other structures, such as groins and breakwaters, that extend the coast line into the sea. And these latter structures are *conceded* by the United States to be parts of the coast line precisely because of Article 3. Dr. Hodgson testified for the Government that structures such as groins are treated as parts of the coast by virtue of Article 3, that is, since they are represented by the same solid black line that represents other segments of the low-water line along

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[47]The word "normal" is used to distinguish this standard baseline from the "straight baseline," which by Article 4 is permitted where for example a fringe of islands parallels the coast. *See generally,* 4 Whiteman, *supra* at 181-86. The United States has refused to adopt a system of straight baselines for American coasts. *See United States v. California, supra,* 381 U.S. at 166-69.

[48]Defendant's Exhibit U-1, p. 33, lines 20-21; Tr. Denver Hearings, p. 23.

the coast.[49] Another Government witness testified 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.[50] On the Government's charts, Exhibits AA through DD, witnesses have identified, in addition to the piers, a number of such groins and breakwaters which this Court has decreed to constitute parts of California's coast line under the Submerged Lands Act. *United States v. California, supra,* 432 U.S. at 41-42 (Second Supplemental Decree). One can observe that just as these structures are shown as parts of the low-water line along the coast, so are the piers. Article 3 clearly mandates that the piers be treated as parts of the coast line.

Significantly, American charting practice has consistently treated piers as well as other coastal structures as parts of the coast line. Mr. Shalowitz provides illustrations of the historical treatment of coastal structures in Volume 2 of his work, Shore and Sea Boundaries, *supra.* On page 198, piers are shown as extensions of the coast line in the third diagram from the top on the left of the page. The diagrams are captioned "Conventional symbols used in 1860." The 1865 chart reproduced on page 200 shows wharves within what is labeled "Inner Harbor," and also a structure labeled "Fox's Wharf" on the right side of the

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[49]Defendant's Exhibit U-1, p. 131, lines 1-4. If the scale of the chart is sufficiently large, the structure will be shown with a double solid line. *See, e.g.,* the groin shown on the far left side of NOS Chart 18754, Exhibit QQ, Tr. Denver Hearings, p. 420. At a smaller scale the structure will be depicted by a single solid black line. *See, e.g.,* the groins and jetties circled on Exhibit DD.

[50]Testimony of Elihu Lauterpacht, Tr. N. Y. Hearings, pp. 186-187.

chart. Each is depicted as an extension of the coast line. On page 248 Mr. Shalowitz speaks of the "present requirement (in 1963)," and refers to Figure 62 on the opposite page. There, under "Piers and waterfront areas," the coast line is shown as extending into the sea, by either a double or single black line, to depict a pier. (The reference in the text to the use of orange for the low-water line is applicable only to the hydrographic-survey sheets, which Dr. Hodgson explained are those from which the actual nautical charts, such as Exhibits AA through FF, are compiled.[51])

The rule of Article 3 is a sound one. It enables the mariner at sea to determine with certainty whether he is within or without the territorial waters of the coastal nation. He can compute his position with respect to a coastal installation shown on his charts without being expected to divine whether the facility is considered a "pier," a "jetty" or a "groin" by the coastal state. The point of view of the mariner has historically been a fundamental concern in issues of delimiting the territorial sea. S. Whittemore Boggs, formerly The Geographer of the State Department, wrote: "If the territorial sea is to be limited in a manner to occasion the least possible interference with navigation, it will be necessary *to assume the viewpoint of one who is on the sea* and who wishes to know where territorial waters begin." (Emphasis in the original.)[52]

The Special Master notes that the United States on certain of its charts (Exhibits AA through DD) has under-

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[51]Tr. Denver Hearings, pp. 183-184.

[52]Boggs, Delimitation of the Territorial Sea, 29 Am. J. Int. L. 541, 543 (1930). *See also* 1 Shalowitz, *supra* at 273.

taken to show the "three-mile line" offshore and that in instances it has measured this line from the seaward ends of piers. Report of the Special Masters, p. 25. This fact is entirely irrelevant in employing Article 3.[53] How the three-mile line may or may not be shown on a chart is not what Article 3 addresses. Rather it addresses how the *low-water* line along the coast is shown. And on every official Government chart of the California coast produced during the hearings before the Special Master, each of the sixteen piers is marked as part of the low-water line along the coast.

The sixteen piers then are parts of the "normal baseline" within the meaning of Article 3. From this baseline, the boundaries of the territorial sea, and those of the submerged lands quitclaimed to California, are to be measured.

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[53]California had called the Special Master's attention to these four charts, simply to demonstrate the soundness of the rule of Article 3. The "poor drafing" the Special Master speaks of (referring to the drawing of the three-mile line, not the coast line) was explained by the United States to be due at least in one instance to the fact that one cannot distinguish a breakwater from a pier on the charts. Tr. Denver Hearings, pp. 391-395. Certainly this Court cannot expect more of the mariner at sea than of the Government's cartographers.

It should be noted too that the United States is one of very few nations that have depicted on charts the boundaries of territorial waters. Deposition of Robert D. Hodgson, The Geographer, Department of State, Defendant's Exhibit U-1, p. 85, lines 9-16. For the California coast it has done so only on a series of small-scale charts. These are Exhibits AA through DD, all at scales smaller than 1:200,000. The mariner of course must rely on the large-scale charts to which Article 3 refers, such as Exhibit LL, whose scale is 1:12,000.

II

THE SPECIAL MASTER NEED NOT HAVE LOOKED BEYOND THE PRINCIPLES ESTABLISHED BY THIS COURT FOR DETERMINING WHAT COASTAL INSTALLATIONS ARE REGARDED AS PARTS OF THE COAST LINE FOR PURPOSES OF THE SUBMERGED LANDS ACT.

A. The Test Employed by the Special Master Was Designed by Its Authors to Apply Not to Coastal Structures, but to Artificial Islands.

The Special Master makes the observation at page 26 of his Report that "[s]ome artificial structures may . . . modify the coast line (within the meaning of the Submerged Lands Act), but others may not." Instead of looking to this Court's criteria for resolving the question of the piers, however, he looks elsewhere: "There must be a balancing of the competing considerations involved, and I now turn to that process. In balancing the considerations I shall be guided by the practical approach of commentators McDougal and Burke, *The Public Order of the Oceans* at 387-88 (1962). . . ." The approach of the two commentators used by the Special Master is then quoted:

> ". . . 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. . . ." (Emphasis added.)

As this Court has noted in a similar context, "It suffices to say that the Convention contains no such criteria." *United*

States v. Louisiana, supra, 394 U.S. at 41 fn. 48. That the Special Master chose not to employ the criteria established by this Court, and to use instead the test suggested by the two writers, is particularly surprising in light of the fact that earlier in his Report he had rejected a test urged by the Government, for precisely the reason that its use had not received the sanction of this Court. Report of the Special Master, p. 8.

Several comments on the McDougal and Burke criterion, however, are appropriate. First, the test was not suggested by the writers as applicable to structures "erected on the coast and jutting out to sea." It is presented in the portion of their book dealing with offshore installations *unconnected* with the coast. The authors give their frame of reference on page 387: "The main problems *regarding islands* concern whether the territorial sea may be measured from man-made islands, always above water, and whether a temporarily submerged area may be given a belt of territorial sea." The "other formations and structures" to which the authors refer in the passage used by the Special Master are explained on page 388 as "temporarily submerged areas, structures erected on the ocean floor, and floating objects." These are all offshore "formations and structures" and not "permanent structures erected *on* the coast and jutting out to sea" as described in paragraph 2 of the Commentary to Article 8 of the Convention. The authors do not discuss this latter type of structure until page 419. (The authors' view that some artificial structures *unconnected* with the coast are to be used for delimitation purposes, it should be noted, appears contrary to Article 10 of the Convention.)

McDougal and Burke, it should be noted, do not specify the nature of the "particular interest" of which they write. To adopt such a vague criterion after the many decisions in the submerged-lands cases would, it seems, invite further litigation on questions which had presumably been laid to rest. As noted above, the test was designed for offshore artificial installations which, it had seemed clear, were not to be used for delimitation purposes.

In any event, the Special Master's summary conclusion that the piers do not create " 'an interest in the surrounding waters that would not otherwise exist.' " cannot be maintained. Report of the Special Master, p. 28. They serve as ports, recreation facilities, and depending on need a variety of other purposes. In this sense they create a far greater interest in their surrounding waters than do beach erosion jetties and groins, for example, which have been ruled parts of the coast. These structures are the work of the Beach Erosion Board of the Corps of Engineers, which administers the national policy of "restoration and protection against erosion" of our shores. 33 U.S.C. § 426e. Such structures are designed to restore a former status or maintain the present status; piers on the other hand, extending the land into the sea for recreation, rail or other purposes, when built create an interest that did not exist before. Navigation patterns are changed to allow orderly vessel traffic to and from the piers and to provide safe clearance during periods of poor visibility. The piers are equipped with navigation lights, foghorns and radar reflectors, and these items are entered on coast

charts, the Coast Pilot, and other coastal literature.[54] Certainly the five piers that are used as ports for servicing offshore oil installations attain greater importance as the United States seeks energy self-sufficiency.[55] And the national policy of encouraging recreational use of our shorelines enhances the interest in waters adjacent to a pleasure pier that would not otherwise exist.[56]

Perhaps the essential characteristic of the piers, in regard to the McDougal and Burke test, is the fact that they support human activity. None of the other structures which have been decreed to constitute artificial extensions of the coast line do this. The groins which the Special Master alludes to on page 29 of his Report are simply lines of rubble placed perpendicular to a beach. (A number of the structures which were decreed by this Court in 1977 as artificial extensions of the coast line are depicted in Defendant's Exhibit GG. *United States v. California*, *supra*, 432 U.S. at 41-42.) In view of the human activity conducted on the piers alone, it would seem they create a far greater "interest in the surrounding waters" than do the other structures which have been treated as extensions of the coast line.

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[54]*See, e.g.*, United States Coast Pilot 7 (13th ed. 1977), Plaintiff's Exhibit 17, pp. 117, 121, 122, 124, 125, 136, 137, 141 and 155, Tr. Denver Hearings, p. 26.

[55]These are the Ellwood, Carpenteria, Rincon-Punta Gorda, Morro Strand and Port Orford piers. Tr. Denver Hearings, pp. 223-24, 299-300, 373-74.

[56]*See, e.g.*, Coastal Zone Management Act of 1972, as amended, 16 U.S.C. § 1451.

B. Domestic Law, Which Has Consistently Treated Piers as Parts of the Land, Could Have Been Consulted by the Special Master Instead. For the Drafters of the Submerged Lands Act Contemplated That Domestic and Not International Law Would Govern Questions of Interpretation.

We have seen that this Court has established precise criteria for determining what structures constitute artificial modifications of the coast line. Had there been a need to look for guidance elsewhere, it would have been far more appropriate to consult domestic jurisprudence before resorting to the suggestions of writers. For the drafters of the Submerged Lands Act clearly contemplated that questions of interpretation would be governed by domestic law.

Extensive hearings were conducted in the Senate Committee on Interior and Insular Affairs on Senate Joint Resolution 13, which became the Submerged Lands Act and which had been introduced by Senator Holland. 99 Cong. Rec., p. 257. Not surprisingly, much of the hearings concerned section 2 (c) of the Act (43 U.S.C. § 1301 (c)), the section in question in this proceeding:

> "The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters . . . ."

During debate on section 2(c) the following exchange took place between Senator Long of Louisiana and Senator Cordon, the committee chairman:

> "Senator Long. In view of the fact that this amendment did not carry, I think the bill should either state

> that we are bound by the Boggs formula [a State Department position on bays] or that we are not bound by it. Since it is, the chairman's view that we are not bound by such formula, I would like——
>
> "Senator Cordon. *There is no question in the chairman's mind as that we are not bound by any opinion, expert or otherwise, that is not comprehended in the statutes of the United States or in the decisions of its courts.*" Hearings before the Committee on Interior and Insular Affairs, United States Senate, 83rd Congress, 1st Session, on S.J. Res. 13, etc. (hereinafter "1953 Senate Hearings") 1385 (1953). (Emphasis added.)

This Court has noted that the passage of the Submerged Lands Act transformed what had been perceived as a question of the limits of American territorial waters into a purely domestic controversy over the division of the continental shelf, which may extend many miles beyond the limits of territorial waters. *United States v. Louisiana,* 363 U.S. 1, 30-36 (1960). (To illustrate that the Submerged Lands Act so transformed the controversy, one may observe that the grants to Texas and Florida under the Act extended nine nautical miles into the Gulf of Mexico, six more than the limit of territorial waters.) The Court in *Louisiana* laid heavy emphasis upon the legislative history of the Act in reaching its conclusion, and especially upon the testimony before the Committee on Interior and Insular Affairs of Jack B. Tate, deputy legal advisor to the Department of State. *Id.* at 31.

Mr. Tate, accompanied by Assistant Legal Advisor Raymund T. Yingling, testified at length before the Senate

Committee concerning the effect of the Submerged Lands Act upon the conduct of foreign affairs by the federal government. 1953 Senate Hearings, 1051-1086. Mr. Tate prefaced his testimony with this statement:

> "I should like to make it clear at the outset that the Department [of State] is not charged with responsibility concerning the issue of Federal versus State ownership or control." 1953 Senate Hearings, p. 1051.

Under questioning, Mr. Tate said that pursuant to the 1945 Presidential Proclamation (Proclamation No. 2667, 59 Stat. 884), the United States claimed the right of exploration and control of the sea bed and subsoil of the Continental Shelf. 1953 Senate Hearings, p. 1955.[57] The significance of the 1945 Proclamation, as his testimony showed, was to make the division of the Continental Shelf strictly a matter between the federal government and the States. Congress could divide the claimed area in any manner it desired, strictly as a domestic matter.

Reiterating his theme that the State Department had no interest in federal-state problems, Mr. Tate commented:

> "As far as concerns the matter of the States versus the Federal Government, and the Federal Government against the States, I do not think that is a matter the State Department could pass on." 1953 Senate Hearings, p. 1956.

He then adopted the prior statement of the State Department in a letter to Senate Connally:

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[57]This assertion by the United States received international "ratification" in Article 2 of the Convention on the Continental Shelf. T.I.A.S. No. 5578, 15 U.S.T. (Pt. 1) 471.

> " 'Generally speaking, so far as concerns the right of a Nation to control its own citizens at sea, the line between territorial waters and high seas is of no consequence, since the Nation has the same right of control both within *and beyond* that line. The division of that control between the Federal Government and the several States of the Union *is a question of domestic law . . .*' " (Emphasis supplied.)

Congress then plainly contemplated that questions of interpretation would be governed by domestic law. Significantly, American admiralty Courts have uniformly held that piers, like other coastal installations, are extensions of the land. What one federal court observed in 1965 is equally true today: "[N]ot one case has been cited . . . holding, or even suggesting, that a pier or similar structure could be considered not as being an extension of land but rather as being upon navigable waters." *Johnson v. Traynor,* 243 F. Supp. 184, 187-88 (D. Md. 1965). The Court of Appeals of Maryland in 1907 quoted from the early American case of *The Haxby,* 94 Fed. 1016 (1899):

> " 'The Century Dictionary defines a pier to be "a projecting quay, wharf or other landing place"; and, without some qualifying adjective, this is the ordinary meaning of the word. It may be a solid stone structure, or an outer shell of stone or wood filled in with earth; or it may be a framework formed by fastening a platform of planks upon piles driven into the soil at the bottom of the water. In either event, it is a projection of the land, and for purposes of jurisdiction it should be so treated' . . . . The mere fact that these piers are built upon piles, instead of on solid ground, ought not to make any difference. They are permanent structures, and as effectively monopolize the use of the

> land under them as if they were built in one of the other ways mentioned in *The Haxby*." *Western Maryland T.R. Co. v. Mayor, etc. of Baltimore*, 68 Atl. 6, 10 (Md. 1907).

See also Nacirema Co. v. Johnson, 396 U.S. 212, 214 (1969); *Hastings v. Mann*, 340 F. 2d 910, 911 (4th Cir. 1965), *cert. den.* 380 U.S. 963 (1965); *Travelers Insurance Company v. Shea*, 382 F. 2d 344, 346-347 (5th Cir. 1967); *Michigan Mutual Liability Co. v. Arrien*, 344 F. 2d 640, 644 (2d Cir. 1965); *East v. Oosting*, 245 F. Supp. 51, 54 (E. D. Va. 1965).

C. State Department Bulletins Published Between 1959 and 1969 Expressed the View That Piers Were to Be Regarded as Parts of the Coast.

While the Special Master consulted commentators McDougal and Burke, it is noteworthy that he ignored three Department of State documents published between 1959 and 1969 which deal with the question whether piers form parts of the coast line. In a Department of State Bulletin published in 1959, the author, then The Geographer of the Department, expressed the view that piers are to be regarded as forming parts of the coast.[58] In 1965 another Department of State document dealing with the law of the sea was published.[59] It includes a diagram showing how the territorial sea is measured. A pier, unconnected with any port or harbor, is used as part of the coast. (This article was cited by this Court in *United States v.*

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[58]Pearcy, Measurement of the U.S. Territorial Sea, XL United States Department of State Bulletin, No. 1044 at 963-68 (June 29, 1959). The relevant passage is quoted in 4 Whiteman, *supra* at 263.

[59]Sovereignty of the Sea, United States State Department Geographic Bulletin No. 3, at 29 (1965).

Louisiana, supra, 394 U.S. at 51 n. 66.) The identical diagram was included in a revised edition of the same document published four years later.[60] While these writings contain disclaimers that they necessarily reflect policies of the Department of State, it is noteworthy that the views remained unchanged during this period.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court not follow the recommendations of the Special Master with respect to the sixteen piers on the California coast and instead enter in this cause a supplemental decree in the form proposed by Defendant State of California in its Proposed Fourth Supplemental Decree filed herein.[61]

November 14, 1979

Respectfully submitted,

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[60]Sovereignty of the Sea, United States State Department Geographic Bulletin No. 3 at 31 (1969).

[61]Paragraph 3(i) of the proposed decree has been deleted by stipulation. See Report of the Special Master, p. 21 n. 17.