In the

Supreme Court of the United States

UNITED STATES OF AMERICA, PLAINTIFF, V. STATE OF CALIFORNIA, DEFENDANT.	No. 5 Original

Washington, D. C.
March 17, 1980

Pages 1 thru 46

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF CALIFORNIA, Defendant.	No. 5 Original

Washington, D. C.,

Monday, March 17, 1980.

The above-entitled matter came on for oral argument at 2:06 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOHN BRISCOE, ESQ., Deputy Attorney General of California, 6000 State Building, San Francisco, California 94102; on behalf of the Defendant

STEPHEN M. SHAPIRO, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Plaintiff

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in United States v. California.

Mr. Briscoe, I think you may proceed when you are ready.

ORAL ARGUMENT OF JOHN BRISCOE, ESQ.,

ON BEHALF OF THE DEFENDANT

MR. BRISCOE: Mr. Chief Justice, and may it please the Court:

This case is before the Court today on California's exception to the report of the Special Master. Two years ago the parties cross-petitioned this Court for a fourth supplemental decree with respect to three questions. The matter was referred to a Special Master, Alfred Arraj, whose report was ordered filed last October.

As to the Master's recommendation on the first two questions, neither party has excepted. California has excepted to the Master's recommendation on the third question which concerns the title to approximately 2,500 acres of submerged land off the coast of California, virtually all of which lies in areas of proven oil reserves.

The question in essence before the Court today is whether California's title to these lands depends, as the government urges, on whether certain man-made structures on the coast of California are built of rock rubble or of

pilings.

Before getting to the facts of this case, since this was filed in 1945, perhaps a brief synopsis of what has occurred would be in order. It was filed in 1945 by the United States against California in this Court's original jurisdiction, and the question then presented was the ownership of all of the lands within the three-mile belt of sea off the coast of California.

The first decision handed down in 1947 by this Court held that these lands were not owned by California and although the government was not expressly held to be the owner, was held to hold paramount rights in these lands.

The decision was overturned as it were in 1953 when Congress enacted the Submerged Lands Act which quit claimed or restored, in the words of one of this Court's decisions in this litigation, the submerged lands back to the coastal states.

In the case of California, this quit claim operated with respect to all submerged lands lying within three geographic miles of the coastline. That was the expression used. Now, insofar as relevance here, coastline was defined merely as the line of ordinary low water in direct contact with the open sea.

Now, at that time, in 1953, oil technology had

not reached the sophistication that it did shortly and there was no great need to ascertain the location of this three-mile boundary which separated the submerged lands owned by the state of California, that is those two or three miles out on the Continental Shelf lands owned by the United States, but by the early sixties technology had developed and the parties needed a more definite determination as to the location of this boundary and consequently the United States asked for a supplemental decree from this Court.

The second decision consequently was in 1965 and the most pertinent element of that decision was this Court's recognition that the expression "coastline" as defined in the act was vague and its adoption for the purpose of lending greater precision to this word of the provisions of a multilateral treaty which had recently gone into effect, that was the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. The Court recognized that this convention contained a number of very specific rules for measuring the three-mile belt of territorial waters and felt that it would be appropriate to adopt these definitions for purposes of the Submerged Lands Act. So this controversy which was originally domestic only in nature has now taken on an international law cast.

In applying the convention in 1965 and subsequently in the 1969 Louisiana case and subsequent to that in 1977, this Court has made clear that the coastline as defined in the Submerged Lands Act includes not only the natural features of the coast but also certain coastal facilities and among these are rock rubble breakwaters, jetties and what are known at least in California as beach erosion groins.

The question in the present case is whether 16 other structures on the California coast are likewise to be treated as parts of the coast for purposes of the Submerged Lands Act. These structures, unlike the forty or so others on the California coast which this Court has decreed be parts of the coast, are not built of rubble but are built instead on pilings.

The Special Master recommended that this Court decree that these structures do not constitute parts of California's coastline and it is to that recommendation that we except.

One of these piers is in northern California, near San Francisco. The other -- I think that is the most recently built also, in 1972. The other 15 piers are all located in southern California, and there is a particularly good reason for that. A combination of geographical factors which we have discussed at some

length in our opening brief contributed to this.

Southern California, the coastline being approximately 500 miles, in its natural condition contained only one fully enclosed natural harbor and that was at San Diego at the extreme southerly end of the state. On the other hand, because of the general alignment of the coast, it is almost east and west, if you ever noticed that on a chart. It is not a north-south coastline. The general alignment of the coast, a fringe of offshore islands which act as breakwaters to approaching waves, and a series of submarine canyons which also have the effect of dissipating wave energy. I don't pretend to be an expert in oceanography, but if you have never noticed swells coming in from the sea, they pile up, they reach greater heights than they were at sea, they reach these greater heights and then break.

The submarine canyons along the coastline of California and vestages of ancient rivers serve to dissipate that wave energy. So as a consequence, because there was only one natural harbor, piers were erected on the coast of southern California to serve as the ports of that area of the coastline as the state of California began to develop, after 1850, and it wasn't until after the turn of the century that artificial breakwaters were built to create more or less all-weather harbors and we

begin to find these other structures which this Court has already addressed, jetties and beach erosion groins which have been wmplaced largely to protect the beach or to restore an eroding shoreline.

QUESTION: The Santa Barbara Biltmore pier was never used for navigation, was it?

MR. BRISCOE: Yes, it was. In fact, Mr. Justice Rehnquist, it is not in very good condition right now and, as the testimony before the Special Master shows, we don't know what the future of that will be, but that was used and was designed for and in fact was used for pleasure craft, largely patrons of the Biltmore Hotel.

QUESTION: Well, to just dock at the pier, so to speak?

MR. BRISCOE: Yes. Now, to get into the significance of the difference between a port and harbor, I will in a second, but essentially the Special Mater found and the parties agree, both parties agree that a port is a place where vessels may load or unload their passengers or cargo, and a port may or may not be part of a habor which, on the other hand, is a protected area. You can have a port without necessarily having a habor.

The Special Master found that five of the piers that are presently in dispute in this matter are at the present time used for the loading and unloading of

passengers and cargo, and these are primarily used to service the offshore oil installations in the Santa Barbara Channel. The crews are taken to these installations, supplies, tools and so forth.

QUESTION: What are the dimensions of these five piers roughly?

MR. BRISCOE: I believe -- if any of you have noticed the blue binder, I believe that is Exhibit I, it has photographs and it has all the specifications and historic data, and so forth, on the piers. The longest -- the Special Master reported that the longest was the oceanside pier -- I believe the longest was the Rincon Pier which is 3,500 feet. There is a scale on one of the charts. The others range in length from approximately 1,000 feet to --

QUESTION: What did you refer to?

MR. BRISCOE: Exhibit I. I'm sorry. It is a large blue binder with a series of photographs. It has each of these piers photographed from above, from the ground and --

QUESTION: Is there one for each of us?

MR. BRISCOE: Pardon?

QUESTION: Is there one for each of us?

MR. BRISCOE: No, I'm sorry, there's not. This was part of the record at the trial.

QUESTION: It was just lodged with the record as part of the trial?

MR. BRISCOE: That's correct.

QUESTION: I see.

MR. BRISCOE: It is California's Exhibit I.

QUESTION: Well, do you accept the Special Master's maps in the --

MR. BRISCOE: Yes. In fact, we drew them.

QUESTION: And each one of those has a scale on them?

MR. BRISCOE: Yes. I was saying, this Exhibit I has very exact specifications. It has a specification drawing on each one of these. But I think you will note that the Rincon Pier, which is the largest of all of them, and one of the five presently used as a port, is approximately 3,500 feet in length.

QUESTION: Aren't most piers -- don't most piers have something to do with ships?

MR. BRISCOE: Well, certainly the piers on the California coast historically did. What we find today, the remaining eleven piers, those that are not predominantly used for the berthing of vessels --

QUESTION: They are just not used that way any more? They were built for that --

MR. BRISCOE: Some of them were, that's correct.

The Huntington and the Newport Pier, these were principal ports along those parts of the coast. Others, however, some of them were recently built, such as the one near San Francisco, Sharp, is a purely recreational pier. It is used for strolling and getting out beyond the serf zone to cast your line.

So, in summary, the older ones were built to serve as ports and have gradually become converted. I think a significant feature is that every one of these piers can be used as a commercial or a military port in virtually a matter of hours if the need arises. During World War II, as Mr. Herring testified before the Special Master, every single pier on the California coast was occupied by the Coast Guard, and some of these were put to use immediately as ports for the patrol vessels and others were simply held to prevent their use by enemy craft.

Now, we would like to emphasize three things. As we mentioned, this Court has adopted the Geneva Convention on the Territorial Sea --

QUESTION: You are talking about the Special Master, he found that some of these piers were ports --

MR. BRISCOE: That's correct.

QUESTION: -- but he found that none of them were part of a harbor?

MR. BRISCOE: That's correct.

QUESTION: And found that none of them was part of a beach protection --

MR. BRISCOE: That is also correct, yes.

As we mentioned, the Convention on the Territorial Waters has been adopted for purposes of the Submerged Lands Act, and our principal point is that the legislative history of that convention, which consists predominantly of two things. It consists of a record of the discussions of the commission that drafted it, and it consists of a commentary to the various articles, in particular Article 8. That legislative history demonstrates clearly that it was the intent of the drafters of the convention to include structures such as the 16 piers as part of the nation's coastline.

Secondly, a point that I think ought to be emphasized is that California cannot enlarge its submerged lands grant by the expedient of building a new pier or a new jetty or groin, for that matter. The Special Master recognizes this, but I think it is worth reiterating.

The United States, through its power over navigable waters, has the ability to prevent any such structure from being built. It can even order the removal of it or it can impose conditions, as it has in the case of California, if you want to build a structure you must

waive your claim to any additional submerged lands that you would otherwise be entitled to.

QUESTION: That would preclude California from going out and extending a whole lot of these things up and down the coast while the case is pending.

MR. BRISCOE: That's correct. We might be able to build piers --

QUESTION: But you wouldn't get any benefit out of them.

MR. BRISCOE: That's correct.

QUESTION: You couldn't build it just for this purpose.

MR. BRISCOE: That's exactly correct.

The third point we would like to emphasize at the outset is that this Court has set forth very clear principles to guide the determination of this controversy and we submit that this Special Master simply did not employ those. He looked instead to a test that was propounded by Professors McDougal and Burke which the Special Master calls the reasonableness test. And we would call this Court's attention to the fact that that test was not designed by the authors to be used in connection with structures built on the coastline, it was designed to be used for structures unconnected with the coast, that is, artificial islands.

Turning to the convention on Territorial Waters, Article VIII is the one provision that expressly deals with structures erected on the coast and jutting out to sea, and I submit that for that reason is the appropriate place to begin.

The text of Article 8, the English text -- and I emphasize that -- reads, "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour works shall be regarded as forming part of the coast."

Now, particularly with respect to Mr. Justice White's question, the expression harbor and harbor works leaps out, and indeed the United States seizes on those two words and points out that none of these piers are parts of a harbor, none of these piers create shelter, create a harbor and thus they cannot be harbor works.

But it is quite clear that Article 8 embraces much more than structures strictly associated with a harbor. We begin by noting that in the 1966 decree in this case, which implemented the '65 decision, this Court decreed that the California coastline includes the outermost permanent harbor works within the meaning of Article 8 and perhaps the single most important factor to identify at the outset in ascertaining the meaning of the article is that the convention was authenticated in

more than one language, French and English being the principal languages. Article 32 provides that each text is equally authentic.

When we look at the French text of Article 8, it is very interesting. We don't find the expression harbor works and we don't find the expression harbor. The French text speaks of the permanent installations of a port system and indeed, the International Law Commission, which drafted the convention, entitled even in the English version, entitled this article "Ports." So I think the bottom line clearly is that the technical distinction, which is correct, between a port and a harbor was completely immaterial to the International Law Commission, and indeed this Court has recognized in that decree, which is 382 U.S., p. 450 -- that is the page at which the port facilities are addressed -- that port facilities are to be treated as parts of the coast.

QUESTION: When you use the word "port" do you simply mean a place that a ship could pull up to and unload?

MR. BRISCOE: Yes.

QUESTION: It isn't necessarily a sheltered place from the tides or weather?

MR. BRISCOE: That is correct, although, as we pointed out, the southern California coast has these

natural features. The one pier in northern California is not protected in that fashion, but there are natural features that enable vessels to tie up at these piers on the southern California coast 330 days a year and not need the benefit of an artificial breakwater. So that accounts for the reason we have so many and why it was some time before artificial harbors were built. The commerce of southern California was progressing nicely without them.

QUESTION: San Pedro is an actual harbor.

MR. BRISCOE: That's correct, it is an artificial harbor and that is the biggest example. That breakwater was begun about 1910. There was a tremendous war over where that was going to be located. It was begun about 1910 and completed about 1948, after World War II. The principal commerce of southern California very naturally settles there and settles also in San Diego which has been improved over its natural condition.

QUESTION: Well, it is not uncommon in these conventions for the language of French, for example, not to be precisely the same as --

MR. BRISCOE: That's right.

QUESTION: Isn't it the general rule that when American courts are dealing with such a convention or treaty that we take the American expression of it and we are not bound by how someone else has translated the

the American into French.

QUESTION: It was the French expression of it, wasn't it, not the American? Great Britain was a party.

MR. BRISCOE: You are talking about a signatory to the convention, Mr. Justice --

QUESTION: Yes, the Convention on the Territorial Sea, and we are also.

MR. BRISCOE: The United States is also, that's correct.

QUESTION: There is some little difference between the English language and the American language.

MR. BRISCOE: Oh, yes, that is a different matter. I understood that --

QUESTION: For these purposes, however, do we not take English-American as against the French?

MR. BRISCOE: No, I believe not. I would cite the Court to the case of Reed v. Weiser, the closest case on point. That was a Second Circuit decision in 1977 about 550 2d. That case dealt with the Warsaw Convention on the Liability of Air Carriers and a very identical problem was presented there. The air carriers were limited in their liability and so the plaintiff sued agents of the air carriers and the question arose were these agents, employees and so forth to be within the umbrella of the protection of the convention, and the Court said we have

to look -- there is an ambiguity in the English language, we have to look to what the French text of the convention says.

QUESTION: Well, do you start with the proposition that there is an ambiguity here in the English version, the American English version?

MR. BRISCOE: No. I would suppose there is not an ambiguity to begin with, but I would suggest this: This Court has immediately, particularly in the Louisiana case, in addressing these particular problems of the meaning of various articles in the convention, low tide elevations, islands, bays, and so forth, without any hesitation this Court has immediately looked to the preparatory work, the discussions of the delegates and the official commentary, and so I would say that is the accepted -- that has been the traditional approach of this Court in the submerged lands litigation.

QUESTION: Don't I remember also in your brief, General Briscoe, that you make the point that the words "port" and "harbor" mean something different in England from what they do in the United States or --

MR. BRISCOE: I believe it was "jetty" and "pier."

QUESTION: That was it.

MR. BRISCOE: Yes, which at bottom is of little

consequence because we find the words interchanged. On that subject, that takes us to the question of the eleven piers which are not predominantly used as ports but are typical recreational piers. They have restaurants on them, people fish, and so forth.

Now, there are approximately 25 or so structures, artificial structures on the California coast which have been decreed to be a part of our coast, that have no connection whatever to a port or a harbor. Just for argument, we might assume that these eleven piers do not. The question is what is the principle that makes those structures parts of the coastline, and the answer to that is in the discussions of the International Law Commission and in the official commentary we find that, although when the commission began its work in 1952 -- the convention wasn't adopted until '58 -- we find that it initially addressed its problem in the context of ports, and indeed that is a question of far broader significance.

But on July 1, 1954, we see for the first time the discussion of a whole range of coastal structures that have nothing to do with a port or a harbor, jetties that were being used to harness tidal energy, coast protective works, other kinds of jetties. And as the testimony is clear, a jetty or may not have any connection with a port or harbor. And what the commission did

is append to the test of Article 8 a comment which became an official commentary when the convention was forwarded to the General Assembly in 1956, which read: "Permanent structures erected on the coast and jutting out to sea (such as jetties and protecting walls or dykes) are deemed to be harbour works."

Now, that paragraph is very significant. For one, this Court has cited it, holding Article 8 expressly covers artificial structures not closely linked to ports. But it is also very significant because of how it came about.

When this discussion first occurred in 1954, Mr. Francois, the delegate from France, suggested a separate article for it. The discussion went on and he said we will treat protecting walls and so forth in a separate article, but instead we find that it was appended as a comment and later as an official commentary to it.

Indeed, in 1955, after this discussion had gone on, there was some discussion -- the British government was concerned about an extraordinarily long pier, seven-mile-long pier being built in the Persian Gulf, and in the course of asking are we going to allow this kind of structure to be used, he referred to "the commission's rule that jetties and piers be treated as part

of the coastline."

Now, that is probably the single most telling point in the entire legislative history --

QUESTION: Could I just interrupt for a second. You are talking about 1955 history of the convention.

MR. BRISCOE: Yes.

QUESTION: To help us understand the meaning of a statute Congress enacted in 1953.

MR. BRISCOE: To help us understand the meaning of the convention which this Court in 1965 adopted wholesale. In 1965, this Court said this convention contains well developed specific rules for determining the base line from which you measure the territorial sea. We are going to adopt this convention wholesale for the purpose of defining coastline, which was the word used in the Submerged Lands Act, base line coastline becoming the same thing for that purpose.

So I am pointing to legislative deliberations, if you will, that took place in 1955 with respect to a convention that was adopted in 1958 and which later this Court adopted for purposes of the earlier Submerged Lands Act. So I don't think there is any anomaly in using post-legislative declarations --

QUESTION: If there is an anomaly, it was created by this Court, rather than --

MR. BRISCOE: That's correct. That's correct.

I would like to make two further points. We believe that the position we are taking is a reasonable position. We don't see that distinguishing between structures because one happens to be built or rubble and one happens to be built of pilings makes any difference. And indeed the poor mariner at sea who is looking at a chart and trying to determine whether he is within or without the three-mile belt can't tell whether the structure he sees is a pier or a jetty or some other thing. They all appear the same.

Indeed, the former geographer of the Department of State, Dr. G. Edsel Pearcy, in three publications, in 1959, 1965, and 1969, expressed the view, indicated the view that piers were to be regarded as forming parts of the coast.

Lastly, I would like to emphasize that this Court has on no fewer than seven occasions held that piers are extensions of the land for purposes of admiralty and harbor workers compensation cases. The most recent was the Nacirema case in 1969 which at page 215 cites approximately six earlier cases of this Court to the same effect.

QUESTION: The purpose there is somewhat different, is it not?

MR. BRISCOE: That is unquestionably true, Mr. Chief Justice.

QUESTION: Sometimes it is thought that all you have to do is be within sight of salt water in order to have coverage.

MR. BRISCOE: Well, yes, but the rule had been developed that extensions such as piers were clearly to be treated as parts of the land.

QUESTION: As you already told us, the Court rejected that test and adopted rather the convention test.

MR. BRISCOE: That's right, but I wanted to point out one thing. We concede that these cases are not controlling, but there is one point to be made which I neglected to make in the briefs, and that is this: In the 1969 Louisiana case -- and I am referring to page 64 -- this Court was dealing with the problem of islands at the mouths of bays and whether they should be treated as headlands. It examined the legislative history and it came up with what it called a common sense approach, and then it noted that other courts were of the same view, and in support it cited a British admiralty case, the Anna. Now, I submit that if it is appropriate to look to British admiralty cases to support the common sense approach, it is no less appropriate to look to our own domestic admiralty cases for support in looking for the

correct and for the common sense approach.

I would like to reserve the remainder of my time. Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Shapiro, you may proceed.

ORAL ARGUMENT OF STEPHEN M. SHAPIRO, ESQ.,

ON BEHALF OF THE PLAINTIFF

MR. SHAPIRO: Mr. Chief Justice, and may it please the Court:

The United States contends that California's open pile piers and the elevated Punta Gorda Causeway do not enlarge the state's coastline under the Submerged Lands Act.

In support of this contention, we rely on the text of the act, Articles 3 and 8 of the Geneva Convention and this Court's decisions establishing which structures do and which do not extend the coastline.

Before turning to the special rule which applies to harbor works, I would like to summarize the general rule. The generally applicable base point for measuring the territorial sea of a coastal state is the low tide line running along the shore. This is the rule which is prescribed in the act, which states that 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. The same standard appears in Article 3 of the Geneva Convention, as this Court recognized in its second decision in this litigation.

Applying that traditional rule to the California shoreline is not difficult. It is undisputed that the Pacific Ocean at low tide runs right under the legs of these piers and reaches the shore without interruption of any kind. It leaves the low tide line on the beach precisely where it would have been if these piers had never been erected. In short, the piers have no effect whatsoever on the natural low water line along the shore.

In the words of the Special Master, water flows freely underneath all of the piers. They have no visible effect on the shoreline. This is in sharp contrast to structures such as concrete jetties or landfills or gravel banks or groins which push back the sea by extending the land domain. This Court used those very terms in describing the structures which it included as proper base points in its second decisionin this litigation.

QUESTION: Well, some of those things you were just describing are put there for the very purpose of developing accretions to the land, are they not?

MR. SHAPIRO: Quite true, Your Honor.

QUESTION: That is, the sand that is carried and the silt carried on the waves.

MR. SHAPIRO: That is correct.

QUESTION: Now, you say there is no such function of the --

MR. SHAPIRO: These piers have no such function. They rest on open pilings that are between 16 and 60 feet apart and the water rushes right under these piers and right through the pilings without any interruption. There is no impact at all on hydrographic conditions, that is the waves or the undercurrents of the ocean. It leaves the ocean precisely as it would have been if they had never been erected.

California nonetheless argues that even though the tide rushes right under these piers to the beach, the low water line should be traced along the outer perimeter of the piers. Under that theory, the low water line skips from post to post until it reaches the end of the pier which may be as much as a half mile seaward, and the posts are between 16 and 60 feet apart. This we submit is not a low water line at all, it is just a series of posts that are completely surrounded by water.

If these posts standing in the water make up a low water line, then so too does any string of artificial islands, which is inconsistent with this Court's ruling in the Louisiana case, that an artificial structure completely surrounded by water does not extend the coastline.

And it makes no difference we submit under Article 3 that the posts in the water have a platform on top. That platform has no contact at all with the water. It is between 20 and 30 feet above the water at low tide. Clearly, the platform does not push back the ocean or have any conjunction with the ordinary line of low water along the coast. And under the express terms of the act, there is no way that the elevated platform can be that line along the coast which is in direct contact with the open sea.

QUESTION: What about a breakwater that extends out to sea, slants off the shore and creates some calm water behind it?

MR. SHAPIRO: That would be an Article 3 structure if it were attached to the shore and it were a solid structure extending into the water. This Court has treated that kind of a structure as an Article 3 structure.

QUESTION: The only thing is it isn't on posts.

MR. SHAPIRO: Correct.

QUESTION: But it goes out and if a pier went out in exactly the same direction, you would say it is not -- did not extend the waterline?

MR. SHAPIRO: That is correct, for the simple reason --

QUESTION: But a breakwater would even though all the ships did was come around the breakwater and

anchor just inside the breakwater and unload by boat?

MR. SHAPIRO: The pier could not extend the base line and I would like to --

QUESTION: But the breakwater could?

MR. SHAPIRO: The breakwater could, and this is the common sense of that distinction. The pier --

QUESTION: It is just like the Revenue Code, that is just because it is.

MR. SHAPIRO: The pier doesn't displace the low water mark. The lower water line is on the beach precisely where it would have been. It starts at one end of the beach and runs right under the pier and continues on on the other side of the pier. But when you have a solid structure, there is only one low water line.

QUESTION: Oh, no. Oh, no, you end up with exactly the same low water line on the shore.

MR. SHAPIRO: But you don't, Your Honor, behind a solid peninsula that extends into the ocean. There is only a low water line around the peninsular, not --

QUESTION: No, this is just a line. It is a line, it is not a complete circle. It just goes out in a slant from the coastline.

MR. SHAPIRO: Well, if it is perpendicular --

QUESTION: No, it isn't perfectly perpendicular. It is on a 45° angle with the coastline, say, and between

it is an expanding area of rather quiet water on the way out, behind it.

MR. SHAPIRO: Well, that structure could well be an Article 8 harbor structure, but it would also in our view be an Article 3 structure because it displaces the water for its whole extent, and the very tip of it would be -- you could trace low water line around the whole of this structure and that, after all, is the standard that is contained in Article 3 and in the statute, where is the low water line, does it follow the structure or does it flow under the structure, and in this case it goes right under the structure without hindrance.

QUESTION: What if you had a pier built of solid wood pilings, not pilings or posts every 20 feet but simply solid?

MR. SHAPIRO: A solid wooden structure, assuming it could be constructed and stay up --

QUESTION: Like a cement pier that went right out --

MR. SHAPIRO: That structure would be an Article 3 structure, there would be no question that that structure would displace the water with solid land and would displace the low water line at the tip of that structure. You could trace it continuously --

QUESTION: So if I built a wooden pier, I'm

out of business, but if I built a cement pier out there right beside it, it is a --

MR. SHAPIRO: It is an Article 3 structure.

QUESTION: It extends the coastline.

MR. SHAPIRO: It does indeed. It does indeed and the reason is that Article 3 asks the question where is the low water line. That is the base point for delimiting the territorial sea.

Before turning to Article 8 of the convention, I would like to respond briefly to two of California's arguments about Article 3. California says that the posts that support the pier form a substantially continuous surface similar to the example that was given of a wooden structure and that in fact they are similar to the rocks piled up in a jetty, they make up an almost continuous wall.

This we submit is a misstatement of the case because the pilings in the pier are between 16 and 60 feet apart. Between 90 and 98 percent of the underside of this pier is completely void, as the Special Master specifically found. There is no way to characterize the space as de minimis gaps between a substantially solid wall of rock or cement. These are open pile piers through which the ocean rushes, as the Special Master described.

California also says that the low water line

should extend to the tip of these piers because official charts show the low water line and the piers using the same black mark. But the maps don't suggest that the low water line runs around the piers. These maps that California is referring to depict the scene on such a small scale that there is inadequate space to distinguish between different features. The high water mark, the low water mark, piers, jetties, rivers, meridian lines are all delineated with the same symbols. But if one looks to large scale official national ocean survey maps, the distinctions are clear, and I would refer the Court to Plaintiff's Exhibit 20 and Defendant's Exhibits FF, PP, and EE which show that a green dotted line is used to show the low water line and it runs right under these piers, just as the low water line runs right under these piers in the real world, and there is no indication in these large-scale maps that Article 3 refers to that the low water line is traced around the perimeter of the piers.

I should add that no official government document has ever suggested that open pile piers extend the coastline. The Pearcy articles that are cited by California do state that some piers enlarge the coastline but the author was talking about solid structure of the kind described by Mr. Justice White, not about open

pile piers.

QUESTION: Do you say those are Article 3 structures?

MR. SHAPIRO: Those are Article 3 structures.

QUESTION: What are Article 3 structures?

MR. SHAPIRO: Article 3 structures are solid land masses that displace the low water line. They extend the land domain by pushing back the sea, in the words of this Court.

QUESTION: Well, would they be equivalent to the small peninsulas that are developed by the groins or the sand gradually builds up along side of them?

MR. SHAPIRO: That would be a perfect example of an Article 3 structure, any solid mass that begins on the land and continues into the water and pushes back the water, changes the location of the low water line, would be an Article 3 structure.

Because these piers do not fit comfortably with an Article 3, California of course places its principal reliance on Article 8 which states that the outermost permanent harbor works which form an integral part of the harbor system shall be regarded as forming part of the coast.

On its face, this provision offers no more support for California than Article 3. As this Court held

in the Louisiana case, harbor works are structures which in some sense enclose and shelter the waters within. It is undisputed that these open pile piers do not enclose or shelter any water. As the Special Master specifically found, none of the piers in question is part of the harbor or harbor system because none of the piers provides an anchorage sheltered from weather conditions on the open sea.

Now, even though these piers do not serve as harbor works, California claims that they should be treated the same way because there is little need for harbors in California and because piers have an equivalent function. These assertions, however, are factually unfounded.

California has many real harbors which fall within the scope of Article 8. The great natural harbors of San Francisco and Monterey and San Diego are examples, and I would also refer the Court to the Special Master's report, pages 44, 47, and 48, which clearly depict artificial harbors within just a few miles distance of some of these very same piers that are on the southern California coast. Those harbors serve an important protective function during winter months when California's coast is buffeted by storms. Nor is the state in our view justified in applying the term "port" to these piers.

The literal meaning of the word "port" is a sheltered haven, it comes from the Latin word portas which means a sheltered harbor. It doesn't mean just a place where boats tie up and discharge cargo.

And as the first comment to Article 8 makes perfectly clear, the port --

QUESTION: You don't deny that at least some of these piers are used regularly by ships?

MR. SHAPIRO: Five of them are used and tied up regularly for exchanging passengers and cargo.

QUESTION: And if you define port like your colleague, they are ports?

MR. SHAPIRO: That's true, Your Honor, but the dictionary defines the word differently and it --

QUESTION: Is the word "port" used in the convention?

MR. SHAPIRO: The word "harbor" is used in the English version and "port" appears in the French version. But if this word is looked up in the French dictionary, the same word is used for harbor and port in French. There is one word. And as the first comment to this article makes perfectly clear, the kind of structures that Article 8 is concerned with are structures that enclose or shelter the waters, that create inland waters, not simply platforms that jut from the land into the sea.

So our interpretation of the word harbor and port not only is consistent with this Court's Louisiana decision but also with the very first comment to Article 8 which talks about the kind of structures that Article 8 deals with.

QUESTION: I suppose if these piers would be ports and hence extend the coastline, one of these deep water ports would be a --

MR. SHAPIRO: Precisely. Precisely, or any peipeline that ran into the water. One of these piers is nothing but a system of two pipes.

QUESTION: Or any anchored buoy to which a ship could tie out in the --

MR. SHAPIRO: Precisely. California's view that the word "port" can be defined under Article 8 as a place where boats load and anchor and unload is inconsistent with the Geneva Convention in a number of respects. Under Article 9, roadsteads, which are defined as places normally used for loading and unloading ships and for anchoring ships, are not ports and they are not base points, even though they meet this definition of port that California has provided. Roadsteads, of course, are just places in the open sea where boats lay down their anchors and transfer their cargoes to vessels heading shoreward, and the same is true of artificial islands. Artificial islands are often used for anchoring

and for exchanging passengers and cargoes, but they are not base points, they are not ports and they do not enlarge the territorial sea.

California, of course --

QUESTION: Is that in part because they are not connected with the mainland?

MR. SHAPIRO: That is correct, but California's view of a port is any place where boats anchor and load and unload, in our view is over-broad because it would embrace many structures totally unconnected with land or structures that are nothing but pipes that run from the land undersea out to a deep water anchorage where boats can pump petroleum. Under California's view, that would extend the coastline.

The state nonetheless argues, of course, that its pier should be assimilated to harbor works because they are similar to coast protective works or jetties as referred to in the second comment to Article 8. But they are clearly not coast protective works, as the Special Master specifically found, and they are not jetties within the meaning of comment two.

The primary dictionary meaning of the word "jetty" is a solid structure that opposes itself to the force of the waves. That is also the meaning of the French word "jetee" which appears in the French version

of comment two. The French word for an open pile pier is appontement, and that word does not appear in any of the discussions of Article 8 or comment two.

California's interpretation of this comment to include any permanent structure jutting into the sea would strip it, we submit, of any logical relationship to Article 8. As I mentioned, Article 8 is concerned with structures that enclose or subdue the water; these structures appropriate part of the sea and make it an adjunct to the land. But under California's theory, any structure jutting into the sea would be assimilated to a harbor. Examples would be a long intake pipe resting on stilts or a sewage discharge pipe that runs out a half mile before it sinks into the water, or a catwalk between the shore and an artificial island, and these aren't just hypothetical examples because one of the piers in this case, as the Court will see when it examines the pictures, is nothing but an elevated pipeline. California states that it carries millions of tons of cargo. What in fact is happening is that petroleum is being pumped continuously through these pipes to vessels at sea, and that in California's view would extend the coastline and give the state potential claims to new mineral rights worth millions of dollars of value just because a pipeline has been erected on stilts into the ocean.

We believe that this Court's decisions support our more measured interpretation of the second comment to Article 8. In Louisiana, this Court held that solid jetties which had a true coast protective function and which indirectly sheltered the inlet to a harbor were covered by comment two. That we submit is an application of Article 8 which is true to its purpose and quite different from California's proposed application. Its piers have virtually no impact on hydrographic conditions. That is, they do not provide any shelter against the waves or the undercurrents of the ocean. Indeed, they were specifically designed to elevate a platform above the turbulence of the ocean without resisting the waves in any manner.

No decision of this Court or any other court suggests that structures such as these should be assimilated to harbor works within the meaning of Article 8. Our view that these piers are not part of the coast is supported by principles of international law recognized before the adoption of the Geneva Convention.

QUESTION: Mr. Shapiro, I just missed it. Could you give me again the French word for a pier that is open underneath?

MR. SHAPIRO: It is appontement.

QUESTION: A bridge. I see.

MR. SHAPIRO: Right. That's correct.

No court or commentator stated before 1958 that open pile piers unconnected to a harbor were entitled to the exceptional status of harbor works or that they extended the territorial sea. I would refer the Court to the thorough examination of the historical materials that was prepared by Professor Lauterpacht and which is part of the record in this case.

Although California's expert expressed a different opinion on the ultimate issues in this case, he was candid to acknowledge that open pile piers unconnected to harbors receive no specific mention in any authority before the International Law Commission began its codification work, and this is significant because Article 8 was intended to be consistent with the positive law now in force. That was stated in the sixth report of the ILC and that thought was again repeated by the report of the Geneva Convention in 1958.

California has, of course, found references to jetties and piers in summaries of discussions of the International Law Commission in 1956, and from this it argues that the ILC must have believed that open pile piers unconnected to a harbor were coast extending structures. But these references simply do not support California's theory.

In the first place, the references that California relies on were by English delegates and the primary meaning of pier and jetty in British usage, as the Oxford English Dictionary teaches us, is a solid stone structure that changes hydrographic conditions that protects against the forces of the waves. Moreover, all of these comments were made in the context of discussing true harbor works. There were no references to isolated piers unconnected with a harbor, because this, of course, is the focus of Article 8, harbor works, and ports or harbors are define as structures that enclose the ocean and provide protection.

We note in this connection that long jetties are often solid stone structures which protect the inlets to harbors or inland waters as they are found off the coast of this country. In Louisiana and in Texas, solid stone jetties of over three miles in length are found right off the coastline. Under these circumstances, the delegates' references to jetties and piers can't logically be relied on by California to support its theory. If the delegates were in fact contemplating solid stone structures or structures that were connected with harbors, which we submit is the most likely inference, then these discussions support our interpretation, not that of California.

I would like to make one point in conclusion that I think is important when this case is viewed from a policy point of view, as California would have it in its opening reply brief. The United States does not question the value of these piers to California. They serve a socially significant purpose. Likewise, the coastal states have an interest in elevated causeways and offshore oil rigs and in artificial islands, but none of these are coast extending structures.

California's open pile piers are different from every other structure which this Court has held to be part of the coast, and they can only be compared we submit with the elevated causeways that were considered by the Court in the Florida case that we discuss in our briefs. Accordingly, even though California has a perfect right to use and enjoy these piers, they do not enlarge the three-mile zone extending seaward from the low water line on the shore.

I need only add one additional point, and that is that if California's theory were accepted by this Court, it would result in an extension of the territorial sea of the United States and its contiguous zone off the shores of all of the United States' coastal domain. Contrary to the position that this country has taken in its international relations with other nations, the record

in this case describes the position that we have taken in negotiations with nations such as Mexico where we have refused to use piers of this kind even though it would be to our economic interest to use those piers.

The Imperial Beach Pier could have been used by this country to extend the contiguous zone and the territorial sea in its 1970 negotiations with Mexico, but we didn't use it because we think it is wrongin principle. This is not an Article 3 structure and it is not an Article 8 structure and we have not therefore used it as a coast extending device in our own international dealings. We are of the view --

QUESTION: Do you suggest California would be bound by the American position in those treaty negotiations?

MR. SHAPIRO: We don't suggest that, Your Honor. This is a question of international law that is determined by the convention itself.

QUESTION: It is a bargaining process, is it not, not a judicial --

MR. SHAPIRO: A bargaining process?

QUESTION: The American position, the U.S. position was a bargaining position.

MR. SHAPIRO: We took a bargaining position that was disadvantageous to ourselves because we believed that it was wrong to use structures of this kind as a matter of

international law. I don't suggest that this is controlling of the outcome in this case, but it is a useful datum I believe to bear in mind.

As this Court pointed out in the second decision in this litigation, an interpretation under the Submerged Lands Act of Article 8 would also extend the coastline in our international dealings because the one standard is applicable, and that is the standard of Article 8.

We are of the view that the burden of persuasion rests with those persons who seek to enlarge the territorial sea and to cut back on the freedom of the high seas by extending the three-mile zone off the coast. That burden should be particularly weighty when the proposed base point is artificial, when it does not push back the sea by extending the land domain and when it has no relationship to harbor works or coast protective structures that traditionally have been accorded exceptional status under international law.

For these reasons, we respectfully request that all of the recommendations of the Special Master be adopted by the Court.

Thank you.

MR. CHIEF JUSTICE BURGER: You have about three minutes remaining.

ORAL ARGUMENT OF JOHN BRISCOE, ESQ.,

ON BEHALF OF THE DEFENDANT -- REBUTTAL

MR. BRISCOE: Thank you, Mr. Chief Justice.

The first point I want to rebut very emphatically is the suggestion that what this Court decides in this case can somehow compel the United States to do something in the conduct of foreign affairs. That is absolutely not the case.

QUESTION: I didn't read his suggestion that way. I thought he said it was just a straw in the wind.

MR. BRISCOE: Well, I would characterize it that way, too. This whole idea that this Court is somehow to give deference to the position of the State Department or the position of the Department of the Interior was very thoroughly analyzed by the former Chief of the Marine Resources Section of the Justice Department, Jonathan Charney, in an article in Volume 7 of the Vanderbilt Journal of Transnational Law, and his conclusion is that deference to the position of the executive should play no role.

This Court may hold that piers are parts of the coastline for purposes of the Submerged Lands Act, and if the government chooses not to employ them as base points in its claim of territorial sea, it is perfectly free to do so.

QUESTION: But we have in our cases turned to the convention, haven't we?

MR. BRISCOE: Oh, yes.

QUESTION: And the question arises what do some of the words mean in the convention to which we have turned for guidance.

MR. BRISCOE: That's correct.

QUESTION: And the people who negotiated and signed that convention and used those words perhaps have some notion about what they meant.

MR. BRISCOE: Well, we would suggest that also the British government, which takes the opposite view, that piers ought to be treated as parts of the coast, whether they are port piers or recreational piers --

QUESTION: I agree. I agree. But nevertheless you can't say that the parties who negotiated those words, that their views are entitled to no weight at all.

MR. BRISCOE: Well, the parties that negotiated the treaty with Mexico, which Mr. Shapiro referred to, were not the parties who negotiated the Geneva Convention. These events were twenty years apart. In fact, if we look to contemporaneous American practice at the time, Dr. Pearcy's articles are probably the best touchstone of what American practice on this very question was.

Mr. Shapiro remarked that all the discussion

concerned structures in the context of harbor works, and yet in the government's briefs, on page 23, it concedes that the Persian Gulf pier, the 7-mile long pier was apparently unconnected with the harbor, and that is exactly the case. The concession has already been made.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 3:04 o'clock p.m., the case in the above-entitled matter was submitted.)

- - -