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THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO) V. LOCKE: DO OIL AND STATE TANKER REGULATION MIX?

Peter J. Carney[*]

I. INTRODUCTION

In *The International Association of Independent Tanker Owners (Intertanko) v. Locke*,[1] the Ninth Circuit Court of Appeals upheld a number of Washington State's Best Achievable Protection (BAP)[2] Regulations governing oil tankers operating in Washington State waters. The court upheld the State's regulations against a tanker operator's organization challenge that federal law, Coast Guard regulations, and international treaties preempted the state regulations.[3] The precedent-setting decision establishes that the federal regulation of oil tankers, and tanker regulations set forth in international treaties, in most instances, merely establish minimum standards that states may surpass in the interest of protecting their marine and shoreline resources. The holding of the Ninth Circuit is critical to the nature of future state environmental legislation as it provides insight into the power that states may find in savings clauses of federal statutes when fashioning environmental regulations.

This Note briefly surveys past and present tanker regulation, and analyzes the court's rationale in upholding the Washington tanker regulations. The influence of the savings clause in the Oil Pollution Act of 1990 will be established, and the power derived from it identified for future use by state governments. The court's characterization of the issue before it will

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1. The International Association of Independent Tanker Owners (Intertanko) v. Locke, 148 F.3d 1053 (9th Cir. 1998), *cert. granted*, 120 S. Ct. 33 (1999).

2. *See* WASH. REV. CODE ANN. § 88.46.010(2) (West 1996). "Best Achievable Protection" implies utilization of the state of the art in the industry. Washington's statute defines "Best Available Protection" as: "the highest level of protection that can be achieved through the use of the best achievable technology . . . training procedures, and operational methods which provide the greatest degree of protection available."

3. *See* Intertanko v. Locke, 148 F.3d at 1060.

be examined, and its significance in upholding Washington's regulations will be demonstrated. Finally, this Note considers the effect of the court's decision establishing that international environmental regulations merely set minimum standards that may be surpassed by state legislation.

II. EXISTING OIL TANKER REGULATION UNDER INTERNATIONAL AND FEDERAL LAW

Oil tanker regulations arise at various levels of political association because of varying needs ranging from industry-wide uniformity to protection of local resources. Both federal and international tanker regulations seek uniformity in an industry where the crossing of international borders is a regular occurrence, there exists a complexity of interactions between national jurisdictions, and communication difficulties arise because several different languages are often spoken among the members of a ship's crew.[4] Vessel registration practices compound these problems because tanker vessels may be flagged in one of many countries, despite the geographic location in which they predominantly operate, leaving regulation and enforcement to jurisdictions uneven in ability and motive.[5] In light of these difficulties, a lack of uniformity in operational procedures from varied jurisdictional regulations may have disastrous consequences.

A. Uniformity is Sought by Tanker Regulation in International Law to Further Maritime Safety and International Trade

Tanker regulation is governed by several international treaties[6] that seek to provide uniform tanker regulations critical to the safety and efficiency of tankers operating in the waters of multiple jurisdictions,[7] and that are

4. *See* Stephen R. Swanson, *Federalism, The Admiralty, and Oil Spills*, 27 J. MAR. L. & COM. 379, 409 (1996).

5. *See id.*

6. *See* International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47; the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 17 I.L.M. 546; the Multilateral International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459; the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region, Dec. 19, 1979, 32 U.S.T. 377; and the United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261.

7. *See* Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 493 (9th Cir. 1984); *see also* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979) ("Foreign Commerce is preeminently a matter of national concern. In international relations and with respect to foreign intercourse and trade, the people of the United States [must] act through a single government with unified and adequate national power.").

logically related to the types of environmental harm caused by oil spills. One can imagine many situations where safety would be seriously compromised due to irregular operational procedures because of the inability to quickly react by reason of limited or ineffective communication. From the perspective of efficiency in international trade, a lack of uniformity in maritime regulation can create confusion resulting in inefficiency within the industry.[8] Uniform international tanker regulation is encouraged for environmental reasons because such a scheme is logical in light of the nature of oil spills which often cause damage across international borders.[9] Proponents of strict uniformity at the international level further argue that a lack of uniform international regulations may encourage tanker operators to actively seek destinations with less stringent regulations and liabilities, ultimately resulting in less protection for the environment.[10] It is also theorized that vessels may opt for longer or more treacherous routes in avoiding jurisdictions with more stringent safety regulations, resulting in an increased potential for accidents.[11]

B. The Evolution of Federal Oil Tanker Regulation Culminating in the Oil Pollution Act of 1990

In Congress's most recent venture into the field of tanker regulation, the Oil Pollution Act of 1990 ("OPA 90"),[12] Congress sought to prevent the reoccurrence of natural disasters associated with oil spills such as the *Exxon Valdez* in Prince William Sound. Because the tanker industry is often able to externalize the environmental costs associated with oil spills, and is therefore not sufficiently encouraged to prevent spills, Congress deemed the Act necessary to compensate for the failure of the tanker industry to undertake spill prevention measures on its own. In light of the irreversible ecological damage resulting from oil spills, Congress enacted OPA 90 primarily as a preventative measure to avert spills before they happen, as opposed to establishing an "end-of-pipe" scheme designed to facilitate the

8. *See* Swanson, *supra* note 4, at 380–81.

9. *See* Ray v. Atlantic Richfield Co., 435 U.S. 151, 166 (1977) (quoting the Senate report to the Tank Vessel Act stating that "[t]he Senate report recognizes . . . that international solutions in this area are preferable since the problem of marine pollution is worldwide.").

10. *See* Swanson, *supra* note 4, at 410.

11. *See id.*

12. *See* 33 U.S.C.A. §§ 2701–2761 (West Supp. 1999).

expedient cleanup of unintended oil discharges.[13] However, the Act also addresses oil pollution removal, liability, and compensation.

Although past congressional acts have often addressed the field of oil tanker regulation in a piecemeal fashion, the aggregate result is a fairly comprehensive body of legislation. The Tank Vessel Act of 1936[14] was Congress's first foray into the field of tanker regulation and "sought to effect a 'reasonable and uniform set of rules and regulations regarding ship *construction*.'"[15] The Tank Vessel Act was subsequently modified by the Ports and Waterways Safety Act (PWSA)[16] in 1972. The PWSA specifically addressed the "*design and operating characteristics* of oil tankers."[17] In 1978, both the Tank Vessel Act and the PWSA were modified by the Port and Tanker Safety Act (PTSA).[18] The PTSA required the Secretary of Transportation to regulate vessel management, working environment, and pilotage, and to establish language requirements.[19]

C. Existing Case Law on Oil Tanker Pollution Clearly Demarcates Where States Are Welcome to Regulate and Where Federal Preemption Begins

Case law generally holds that states have the authority to regulate where pollution or environmental protection is the primary goal, but that this authority does not extend to regulating ship design or construction.[20] Before

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13. *See* S. REP. NO. 101-94, at 4 (1990), *reprinted in* 1990 U.S.C.A.A.N. 722, 724:
[A]ny oil spill, no matter how quickly we respond to it or how well we contain it, is going to harm the environment. Consequently, preventing oil spills is more important than containing and cleaning them up quickly . . . . At the present time, the costs of spilling and paying for its clean-up and damage is not high enough to encourage greater industry efforts to prevent spills and develop effective techniques to contain them.

14. *See* Tank Vessel Act of 1936, Pub. L. No. 74-765, 49 Stat. 1889 (1936).

15. Ray v. Atlantic Richfield Co., 435 U.S. 151, 166 (1978) (quoting H.R. REP. NO. 74-2962, at 2 (1926)) (emphasis added).

16. *See* Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424 (1972).

17. Ray v. Atlantic Richfield Co., 435 U.S. at 154 (emphasis added).

18. *See* Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471 (1978).

19. *See* 46 U.S.C.A. §§ 9101, 9102 (West Supp. 1999).

20. *See* Charles L. Coleman III, *Federal Preemption of State "BAP" Laws: Repelling State Boarders in the Interest of Uniformity*, 9 U.S.F. MAR. L.J. 305, 327 (1997):
A brief review of the leading maritime oil pollution cases confirms the existence of a clear dividing line between those areas in which a state or local entity remains free to regulate, and those areas where such regulations are preempted. [T]his line corresponds, for most purposes, to the gunwale of the vessel. The state has a free hand once the oil hits its waters, but it is not permitted to bring its regulations on board the vessel . . . for the purposes of regulating the equipment, crew training, manning, or other

Intertanko, Ray v. Atlantic Richfield Co.[21] was the most significant case on state-issued BAP regulations. As in *Intertanko*, *Ray* involved oil tanker regulations promulgated by the State of Washington.[22] The *Ray* Court held that the State's regulations calling for requirements such as minimum shaft horsepower, twin screws, double hull construction, two radars, and certain navigational equipment were invalid.[23] The Court further held that the State's regulations governed design and construction characteristics, impermissibly interfering in a realm of regulation implicitly preempted by the Port and Waterways Safety Act (PWSA) that prescribed these duties exclusively to the Secretary of Transportation.[24]

The Court in *Ray*, however, limited its holding solely to design characteristics,[25] leading the Court to uphold one of the State's regulations. The validated regulation required oil tankers of at least 50,000 deadweight tons to carry a Washington licensed pilot while navigating Puget Sound. The pilot regulation was upheld because the Court found that the regulation was not a "design requirement," and therefore was not preempted under the PWSA. The Court held that although the Secretary of Transportation was empowered with the authority to establish an escort regulation, he had not done so; thus, there was no conflict with any federal regulation and the State was free to act on its own.[26] The Court instead found the pilot requirement to be an operating rule "arising from the peculiarities of local waters that call[ed] for special precautionary measures."[27] This is a significant statement because it establishes a precedent distinguishing the need for uniformity mandating federal preemption from the need to regulate for special conditions of local waters permitting state action.

Another significant case, *Chevron U.S.A., Inc. v. Hammond*,[28] challenged a State of Alaska regulation prohibiting oil tankers from discharging into

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operational issues.

21. Ray v. Atlantic Richfield Co., 435 U.S. 151 (1977).

22. *See id.* at 154.

23. *See id.* at 161.

24. *See id.* at 164.

25. *See* Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 487 (9th Cir. 1984) (quoting the court in *Ray v. Atlantic Richfield Co.*, 435 U.S. at 168–169) ("As a matter of fact, the court specifically explained that tankers must meet 'otherwise valid state or federal rules or regulations that do not constitute design or construction specifications.'").

26. *See* Ray v. Atlantic Richfield Co., 435 U.S. at 180.

27. *Id.* at 171.

28. Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483 (9th Cir. 1984).

state waters ballast water stored in a vessel's oil tanks.[29] The court upheld Alaska's regulation on the grounds that it did not conflict with Coast Guard regulations,[30] and that the purpose of the state regulation was grounded in the regulation of water pollution, a legitimate exercise of state police power.[31] The *Chevron* court applied the analysis used by the *Ray* Court in determining whether Congress intended to implicitly occupy the field of regulating oil tankers in state waters.[32] The court found that, in the absence of express preemption language and conflicting federal regulation, Congress did not intend to solely occupy the field of tanker regulation, and that concurrent state legislation in the field was permissible. The *Chevron* court, agreeing with the Court in *Ray*, acknowledged that the state legislation would fail should it directly conflict with federal legislation.[33]

III. THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO) V. LOCKE

A. Facts

In legislative response to the *Exxon Valdez* spill, The State of Washington implemented several regulatory measures to protect its marine resources.[34] These regulations supplement federal regulations established by OPA 90 affecting the operational procedures of oil tankers, and impose other requirements on oil tankers that operate in Washington's state waters.

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29. ALASKA STAT. § 46.03.750(e) (Michie 1976) (amended 1998). The statute states:

> Cargo in tank vessels . . . engaged in the marine transportation of crude oil, refined petroleum products or their by-products may not be placed in segregated ballast tanks, nor may ballast be placed in cargo tanks of those tank vessels having segregated ballast systems. However, the department may by regulation permit the placing of ballast in the cargo tanks of those vessels in emergency situations. All ballast placed in cargo tanks shall be processed by or in an onshore ballast water treatment facility and may not be discharged in to the waters of the state.

30. *See* 33 C.F.R. § 157.29, 157.37(a)(1) (1998) (Coast guard regulations prohibit deballasting from oil cargo tanks within fifty miles of shore.).

31. *See* Chevron U.S.A., Inc. v. Hammond, 726 F.2d at 488.

32. *See id.* at 486:

> In determining congressional intent, relevant subjects include the Supreme Court's decision *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S. Ct. 988, 55 L. Ed. 2d (1978); comprehensiveness of federal regulations; consideration of state police power; congressional intent that there be collaborative federal/state efforts to protect the marine environment; need for uniform regulation; history of regulation on the subject matter; and available legislative history.

33. *See id.*

34. *See* WASH. REV. CODE ANN. § 88.46.010 (West 1996); WASH. ADMIN. CODE § 317-21-010 (1997).

Specifically, the Washington regulations challenged in this instance require that tanker operators file oil spill prevention plans with the State, and comply with the State's Best Achievable Protection Regulations.[35]

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35. Intertanko v. Lowry, 947 F. Supp. 1484, 1488–89 (W.D. Wash. 1996). The district court summarized the challenged regulations as follows:

> **Event Reporting** — WAC 317-21-130. Requires operators to report all events such as collisions, allisions and near-miss incidents for the five years preceding filing of a prevention plan, and all events that occur thereafter for tankers that operate in Puget Sound.
>
> **Operating Procedures — Watch Practices** — WAC 317-21-200. Requires tankers to employ specific watch and lookout practices while navigating and when at anchor, and requires a bridge resource management system that is the "standard practice throughout the owner's or operator's fleet," and which organizes responsibilities and coordinates communication between members of the bridge.
>
> **Operating Procedures — Navigation** — WAC 317-21-205. Requires tankers in navigation in state to record position every fifteen minutes, to write a comprehensive voyage plan before entering state waters, and to make frequent compass checks while under way.
>
> **Operating Procedures — Engineering** — WAC 317-21-210. Requires tankers in state waters to follow specified engineering and monitoring practices.
>
> **Operating Procedures — Prearrival Tests and Inspections** — WAC 317-21-215. Requires tankers to undergo a number of tests and inspections of engineering, navigation and propulsion systems twelve hours or less before entering or getting underway in state waters.
>
> **Operating Procedures — Emergency Procedures** — WAC 317-21-220. Requires tanker master to post written crew assignments and procedures for a number of shipboard emergencies.
>
> **Operating Procedure — Events** — WAC 317-21-225. Requires that when an event transpires in state waters, such as a collision, allision or near-miss incident, the operator is prohibited from erasing, discarding or altering the position plotting records and the comprehensive written voyage plan.
>
> **Personnel Policies — Training** — WAC 317-21-230. Requires operators to provide a comprehensive training program for personnel that goes beyond the necessary to obtain a license or merchant marine document, and which includes instructions on a number of specific procedures.
>
> **Personnel Policies — Illicit Drug and Alcohol Use** — WAC 317-21-235. Requires drug and alcohol testing and reporting.
>
> **Personnel Policies — Personnel Evaluation** — WAC 317-21-240. Requires operators to monitor the fitness for duty of crew members, and requires operators to at least annually provide a job performance and safety evaluation for all crew members on vessels covered by a prevention plan who serve for more than six months in a year.
>
> **Personnel Policies — Work Hours** — WAC 317-21-245. Sets limitations on the number of hours crew members may work.
>
> **Personnel Policies — Language** — WAC 317-21-250. Requires all licensed deck officers and the vessel master to be proficient in English and to speak a language understood by subordinate officers and unlicensed crew. Also requires all written instruction to be printed in a language understood by the licensed officers and unlicensed crew.

Because the court's decision relied partly on the necessity for state regulation due to the peculiarities of local waters, it is important to note some of the geographical and ecological features, and use characteristics of the Washington Coast and Puget Sound. The district court cited several characteristics of Puget Sound as being important facts in upholding the State's regulations: the rich biological diversity found in the waters; the Sound's susceptibility to damage from oil pollution because it is relatively confined and shallow;[36] and challenges to navigation due to vessel traffic, fog, and natural obstructions.[37]

Plaintiff, Intertanko, is a trade association representing members that own or operate oil tankers.[38] Intertanko members call at oil facilities in Puget Sound.[39] Intertanko initially filed suit in federal district court challenging several of the State's regulations on a federal preemption theory grounded in the Supremacy Clause and in the Commerce Clause of the United States Constitution, and various international treaties.[40] Intertanko also claimed that Washington's regulations infringed upon the foreign affairs power of the federal government.[41] The district court granted the State's motion for summary judgment and upheld every one of the challenged regulations.[42] Subsequently, Intertanko appealed to the Ninth Circuit, whose opinion is the subject matter of this Casenote.[43]

Personnel Policies — Record Keeping — WAC 317-21-255. Requires operators to maintain training records for crew members assigned to vessels covered by a prevention plan.

Management — WAC 317-21-260. Requires operators to implement management practices that demonstrate active monitoring of vessel operations and maintenance, personnel training, development, and fitness, and technological improvements in navigation.

Technology — WAC 317-21-265. Requires tankers to be equipped with global positioning system receivers, two separate radar systems, and an emergency towing system.

Advance Notice of Entry and Safety Reports — WAC 317-21-540. Requires at least twenty-four hours notice prior to entry of a tanker into state waters, and requires that the notice report any conditions that pose a hazard to the vessel or the marine environment.

36. *See* Intertanko v. Lowry, 947 F. Supp. 1484, 1488–89 (W.D. Wash. 1996).
37. *See id.*
38. *See id.*
39. *See id.*
40. *See id.* at 1489.
41. *See id.* at 1490.
42. *See id.* at 1500.
43. *See* Intertanko v. Locke, 148 F.3d 1053 (9th Cir. 1998), *cert. granted*, 120 S. Ct. 33 (1999).

B. The Significance of OPA 90's Savings Clause

The Ninth Circuit focused primarily on the federal preemption issue in its opinion. The savings clause, in section 1018 of OPA 90,[44] played a key role in the court's decision to uphold Washington's regulations. The court used the savings clause in two important ways: (1) to find that OPA 90 expressly permits additional state legislation; and (2) as indicative of Congress's overall intent in the field of tanker regulation to permit supplemental state regulation. The court, relying on a plain reading of the savings clause, found that OPA 90 did not preempt Washington's BAP regulations.[45] The court determined, however, that although OPA 90 amended the PWSA and PTSA, the savings clause did not apply to those earlier Acts, as argued by the State.[46] The court thus found that it was necessary to undertake an analysis of other federal legislation in the field to determine if Washington's regulations were otherwise preempted.[47]

C. The Court's Characterization of Washington's Regulations Forestalled a Finding of Implicit Federal Preemption

Intertanko contended that federal and international law must reign over state tanker regulation in the name of maritime safety, and fostering worldwide commerce on the seas. Intertanko argued that allowing an additional layer of regulation would result in "a lack of uniformity [impairing] federal superintendence of federal tanker manning, operational and safety standards, and present a threat to international maritime safety."[48] In support of its argument, Intertanko pointed to the Admiralty Clause[49] of the United States Constitution as expressly and exclusively conferring admiralty

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44. *See* Oil Pollution Act of 1990 § 1018, 33 U.S.C.A. § 2718(a)(1)(A) (West Supp. 1999).
The savings clause states:

> Nothing in this chapter or the Act of March 3, 1851 shall —
>
> (1) affect, or be construed or interpreted as preempting, the authority of any State of political subdivision thereof from imposing any additional liability or requirements with respect to —
>
> (A) the discharge of oil or other pollution by oil within such state; or
>
> (B) any removal activities in connection with such a discharge. . . .

45. *See* Intertanko v. Locke, 148 F.3d at 1060.
46. *See id.*
47. *See id.*
48. Intertanko v. Locke, Complaint No. C95-1096 (filed July 17, 1995) .
49. *See* U.S. CONST. art. III, § 2, cl. 1.

jurisdiction on federal courts to provide a uniform application of the law important to the development of worldwide maritime trade.[50]

1. Preemption under the Supremacy Clause

Intertanko claimed that the Washington regulations were invalid under the Supremacy Clause[51] because they "[stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[52] Intertanko set forth various categorical regulations found in the individual federal Acts regulating tankers as indicia of Congress's intent to preempt state regulation in the field.[53] Although the court chose to look comprehensively at the federal regulation in the field, it did not find preemption. The court stated that congressional intent was the most important factor in determining implicit federal preemption, despite apparently comprehensive legislation in a given field.[54] The court found that the savings clause in OPA 90, Congress's most recent legislation in the tanker field, indicated overarching congressional intent to leave states free to enact their own regulations in the field of oil tanker regulation.[55]

States would well serve their interests by promoting savings clauses in future federal legislation,[56] because such a clause will clearly demonstrate to a court the congressional intent to permit concurrent state legislation. Savings clauses will only benefit future environmental legislation because states can only use such a clause to enact environmental standards more strict than the minimum standards established by federal legislation.

The court also rejected Intertanko's argument that the federal regulation of oil tankers under the several existing federal acts so comprehensively regulated the field as to implicitly preempt supplemental state regulation. The Ninth Circuit found that the holding in *Ray* established federal preemption only where state regulations affected the design and construction of tankers. Thus, Washington's regulations affecting tanker operation and

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50. *See, e.g.*, Southern Pacific Co. v. Jensen, 244 U.S. 205, 206 (1917) ("The fashioning of maritime law was not left to the states because of the need for uniformity.").

51. *See* U.S. CONST. art. VI, cl. 2.

52. Intertanko v. Locke, 148 F.3d 1053, 1061 (9th Cir. 1998), *cert. granted*, 120 S. Ct. 33 (1999).

53. *See id.* at 1061–1062.

54. *See* M. Casey Jarman & Richard McLaughlin, *Commentary on Professor Tarlock's Paper: The Influence of International Environmental Law on United States Pollution Control Law*, 21 VT. L. REV. 793, 797 (1997).

55. *See* Intertanko v. Locke, 148 F.3d at 1060.

56. *See* Jarman & McLaughlin, *supra* note 54, at 797.

procedure were valid.[57] Opponents of such a narrow interpretation of *Ray* argue that although only regulations regarding design and construction characteristics were before the court in *Ray*, the scope of the holding should extend to the regulations under review in *Intertanko*.[58] Section 3703(a) of the PWSA states that the Secretary shall prescribe regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels.[59] It was argued by opponents that "the matters covered by Washington's current BAP regulations are separated only by a few statutory commas from the same federal design and construction regulations found preemptive in *Ray*."[60]

Accepting a broad reading of *Ray*, it may seem that the Ninth Circuit's conclusion, upholding Washington's BAP regulations, is in conflict with the PWSA. The conflict can be reconciled, however, by the court's characterization of the nature of the field being regulated. The court viewed Washington's rules as "environmental regulation" legitimately regulating water pollution, and as "navigational regulation" necessitated by the particular characteristics of the local geography and ecosystem.[61] The court found that state regulations in both categories were legitimate exercises of the State's police power, as opposed to design and construction regulation which would have been preempted under the Court's holding in *Ray*. The court in *Chevron* also relied on this characterization of the issue. The *Chevron* court stated: "there are significant differences between the subject matter regulated in *Ray* — vessel design features — and that regulated here — ocean pollutant discharges."[62]

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57. *See* Intertanko v. Locke, 148 F.3d at 1066.

58. *See* Charles L. Coleman, *Federal Preemption of State "BAP" Laws: Repelling State Borders in the Interest of Uniformity*, 9 U.S.F. MAR. L.J. 305, 329 (1997).

59. *See* 46 U.S.C.A. § 3703(a) (West Supp. 1999).

60. Coleman, *supra* note 58, at 329.

61. *See* Ray v. Atlantic Richfield Co., 435 U.S. 151, 164 (1978). *See also* Jarman & McLaughlin, *supra* note 54, at 793.

62. Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 488 (9th Cir. 1984). The court also stated " [I]n fact, the local community is more likely competent than the federal government to tailor environmental regulation to the ecological sensitivities of a particular area." *Id.* at 493. *See also* Askew v. American Waterways Operators, Inc., 411 U.S. 325, 328–29 (1973) (overruling a district court decision that a Florida statute imposing strict liability for damage resulting from oil spills was an unconstitutional intrusion into the federal maritime domain). The court stated:

> To rule as the district has done is to allow federal admiralty jurisdiction to swallow most of the police power of the states over oil spillage — an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of coastal people are greatly dependent.

2. Preemption under the Commerce Clause

Intertanko also argued that the Washington regulations imposed new standards on tankers that already meet existing federal and international standards, and, therefore, place an undue burden on interstate and international commerce.[63] The Supreme Court has identified two instances where state regulations will be held violative of the Commerce Clause:[64] (1) an otherwise valid regulation that furthers a legitimate state interest while incidentally burdening interstate commerce will be invalidated if the burden is clearly excessive in relation to local benefits; and (2) a regulation that clearly interferes with interstate commerce is unconstitutional unless the state makes a showing that a legitimate state interest other than economic protection necessitates the regulation.[65] Again the characterization of the issue by the court was paramount in deciding that the ends sought by Washington's regulations were a local benefit that outweighed an incidental burden on interstate commerce. By dismissing Intertanko's argument that the regulations placed too great a burden on commerce, the court expressly recognized the desire and authority of states to establish regulations protecting important natural resources in their territorial waters.[66]

D. International Law Regulating Oil Tankers Merely Establishes Minimum Standards Which the State Can Exceed in its Interest of Protecting Territorial Marine Resources from Oil Pollution

Intertanko made the claim that the state regulations interfered with the purposes and objectives of Congress because they conflicted with various international treaties. When addressing this issue in *Chevron*, the court noted the importance of adhering to a uniform regime of international maritime regulation.[67] The *Chevron* court, however, did not find reason why international regulation should exclusively govern a field when nonconflictory local regulation provided significant local benefits without disrupting international uniformity.[68]

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63. *See* Intertanko v. Locke, 148 F.3d 1053, 1068 (9th Cir. 1998), *cert. granted*, 120 S. Ct. 33 (1999).

64. *See* U.S. CONST. art. I, § 8, cl. 3.

65. *See* Intertanko v. Locke, 148 F.3d at 1068.

66. *See id.* at 1069.

67. *See* Chevron U.S.A., Inc. v. Hammond, 726 F.2d at 492.

68. *See id.* at 493:

The PWSA/PTSA does not mandate strict international uniformity. Although the legislative history of the PWSA/PTSA refers to congressional intent to abide by

In rejecting the same argument, the *Intertanko* court made an analogy to domestic federal regulation, where both the PWSA and PWTA give the Coast Guard authority to establish standards stricter than those found in international regulations.[69] The notion that international standards merely establish minimum requirements is also supported by the very international agreements cited by Intertanko as being interfered with by Washington's regulations. The relationship between international standards and federal domestic standards is analogous to the relationship between federal domestic standards and state standards. International agreements, whose primary goal is worldwide uniformity, often permit entity states to implement their own rules and regulations regarding environmental protection and marine pollution in general.[70] Also, the authority of signatories to international agreements regulating shipping does not extend to conferring unilateral authority to impose irregular design or construction requirements.[71] Based on prior court decisions and the nature of the standards set forth in international agreements, the court has established that like federal law, international treaties establish only minimum standards that may be surpassed by the states.[72]

> international agreements regarding the regulation of tankers, ... the statute nonetheless gives the Coast Guard specific authority to establish stricter requirements than those set by international agreements. This indicates Congress' view that the international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction.

69. *See* Intertanko v. Locke, 148 F.3d at 1063.

70. *See* U.N. Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261, 1274. Article 21 "Laws and regulations of the coastal State relating to innocent passage" states:

> The coastal state may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:
>
> . . .
>
> (f) the preservation of the environment of the coastal state and the prevention, reduction and control of pollution thereof. . . .

Id. at 1261.

71. *See id.* Article 21 "Laws and regulations of the coastal State relating to innocent passage" states: "2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards." *Id.*

72. *See* Intertanko v. Locke, 148 F.3d at 1063 (quoting the court's opinion in *Chevron U.S.A. Inc., v. Hammond*, 726 F.2d 483 (9th Cir. 1984)) ("[P]assage of OPA 90 by Congress only reinforces this Court's conclusion in Chevron that 'strict international uniformity' with respect to the regulation of tankers is not 'mandated' by federal law an that 'international agreements set only minimum standards.'"). *Id.* at 493–494.

IV. CONCLUSION

Despite disagreements by various parties on what constitutes an appropriate scheme of tanker regulation, the Ninth Circuit has established powerful precedent for allowing states to establish environmental regulation exceeding the stringency of federal and international regulation in the field. The court has implied that a strict quest for uniformity fails to address the need for regulation arising from the unique geographical characteristics and operational necessities of local waters, and does not sufficiently recognize state interests in protecting their marine resources. The court has also taken care to craft its decision in a manner that acknowledges the need for uniformity in regulations for safe operation, given the tanker industry's complexity and the nature of international navigation. The court has established limitations to ensure that state regulation will not conflict with international or federal regulation. Federal and international regulation will continue to provide uniform safety and operational rules that are simply complemented by more stringent state regulations where the need arises from the unique geographical, ecological, and use characteristics of local waters.