

1-1-1999

The International Association Of Independent Tanker Owners (Intertanko) v. Lowry: The Lost Argument

John W. Bolanovich

Follow this and additional works at: <https://repository.law.miami.edu/umiclr>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

John W. Bolanovich, *The International Association Of Independent Tanker Owners (Intertanko) v. Lowry: The Lost Argument*, 7 U. Miami Int'l & Comp. L. Rev. 27 (1999)
Available at: <https://repository.law.miami.edu/umiclr/vol7/iss1/4>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

**THE INTERNATIONAL ASSOCIATION OF
INDEPENDENT TANKER OWNERS (INTERTANKO) v.
LOWRY: THE LOST ARGUMENT**

JOHN W. BOLANOVICH*

- I. INTRODUCTION
- II. PRELUDE TO *INTERTANKO V. LOWRY*
 - A. *History of Environmental Concerns of Washington State*
 - B. *Federal Response of the Oil Pollution Act of 1990*
 - C. *Washington State's Response to the Oil Pollution Act of 1990*
- III. *INTERTANKO V. LOWRY*
 - A. *Intertanko's Argument Below*
 - B. *The Court's Response and Reasoning*
- IV. THE ARGUMENT NOT MADE
 - A. *The Right of Innocent Passage*
- V. Conclusion

* Mr. Bolanovich is an Associate with Stokes & Murphy, Orlando, FL and has a B.A., Edinboro University, 1982; M.S., Florida International University, 1988; J.D., University of Miami, 1998.

I. INTRODUCTION

In an effort to maintain and preserve their thousand miles of coastline from the hazards of oil spills, the state of Washington has enacted a state statute imposing standards for oil tanker operations that exceed those required by federal law. Intertanko, the world's largest independent tanker organization, argued that the law, which requires oil tankers and onshore oil facilities to prepare and submit spill prevention and response plans, exceeds the state's authority. Intertanko sought an order in federal court declaring the state statute unconstitutional.

On November 18, 1996, U.S. District Court Judge John Coughenour ruled that Washington's oil spill prevention law does not violate the Constitution, does not conflict with international agreements, and is not preempted by federal law.¹ In its argument, Intertanko relied on a number of federal statutes, regulations, and international treaty obligations to assert that the state statute and regulations improperly intrude into a field controlled by federal government.² They also relied upon a handful of treaties to which the United States has acceded. However, the Court disagreed, holding that the law legitimately protects the state's "delicate and valuable marine resources through the exercise of the state's police powers."³

One argument not advanced by the plaintiffs was that the state statute also violates the Right of Innocent Passage contained in the United Nations Convention on the Law of the Sea. ("Convention").⁴

1 The International Association of Independent Tanker Owners (Intertanko) v. Lowry, 947 F.Supp. 1484 (W.D. Wash. 1996) [hereinafter *Intertanko v. Lowry*], *aff'd in part and rev'd in part*, Intertanko v. Locke, 148 F.3d 1053 (9th Cir. 1998).

2 *Id.*

3 *Id.* at 1500.

4 United Nations Convention on the Law of the Sea, December 10, 1982, Art. 17, Part II, Sec. 3, 10 U.N.T.S. 26 [hereinafter *Convention*].

I will be exploring this argument and the impact it may have had on the Court's reasoning. Part II examines the events leading up to the dispute between Intertanko and Washington State including a brief history of Washington's environmental concerns, a discussion of the federal response to these concerns, and an analysis of the actual statute that forms the basis for this dispute. Part III will provide an analysis of Intertanko's District Court argument opposing the Washington statute as well as the Court's holding and reasoning. Part IV will provide the alternative argument I am the U.N. Convention on the Law of the Sea. This will include a brief history of the Convention, its authority as international law, and an analysis of the applicable parts of the Convention. Finally, Part V concludes that had Intertanko advanced the argument that the Washington State statute violates foreign vessels' Right of Innocent Passage, it may have made a difference in the ruling made at the district court level.⁵

II. PRELUDE TO *INTERTANKO V. LOWRY*

A. *History of Environmental Concerns of Washington State*

It is a well conceded point that environmental damage caused by oil spills from oil tankers and barges can have a devastating effect on a state's natural resources. A well-known example in the United States is the wreck of the Exxon Valdez in Prince William Sound,

⁵ Since the drafting of this article, Intertanko's argument has become lost again, this time on appeal. *See* Intertanko v. Locke, 148 F.3d 1053 (9th Cir. 1998). The Ninth Circuit Court of Appeal refused to hear arguments on the right of innocent passage doctrine because Intertanko did not raise this issue in the lower court.

This is only further support for the contention that had this argument been asserted in the District Court level, Intertanko stood a possible chance of winning their case. However, the argument and courts' ears will remain like ships passing in the night.

Alaska, in March 1989.⁶ Another example is the 231,000 gallons of oil that spilled from the Nestucca oil barge in Washington near Gray Harbor in December 1988.⁷ Threats of potential environmental devastation lend special concern to states such as Washington, where their waters are especially unique and valuable.

The marine waters of Washington include a rocky ocean coastline, the "inland sea" of Puget Sound, and the Strait of Juan de Fuca.⁸ These irreplaceable waters contain a very rich and diverse ecosystem. Their fisheries, shellfish, and habitat resources, as well as their undeniable aesthetic value, allow these waters to play an important role in the state's economic and tourism base. The waters also provide a unique educational and resource opportunity for students, citizens, and marine environmental professionals.

Aside from this obvious desire to protect their valuable ecosystem, Washington has additional financial motivations for ensuring their coastlines remain protected from oil spill devastation. There are numerous recreational opportunities that their marine waters provide through the state park system. Activities such as picnicking, camping, beach combing, windsurfing, clam digging, bird watching, scuba diving, water skiing, and swimming attracted 55,917,511 visitors to state parks on or adjacent to Puget Sound in 1995.⁹ The Washington Department of Natural Resources also manages aquatic lands by the leasing of boat moorage, marine terminals, and bedlands for shellfish harvest. In 1995, the revenue

6 *Grounded Tanker Spills 270,000 Barrels of Oil off Alaska*, Associated Press, Mar. 24, 1989.

7 *Oil Slick Kills, Imperils Birds Along State Coast*, Seattle Times, Dec. 24, 1988, at A8.

8 *Intertanko v. Lowry*, 947 F.Supp. at 1488.

9 State Defendants' Memorandum in Support of Motion for Partial Summary Judgment at 4, *Intertanko v. Lowry*, 947 F.Supp. 1484 (W.D.Wash. 1996).

generated from the management of these state-owned aquatic lands totaled \$9,983,858.¹⁰ In addition, the assessed valuation of residential waterfront property in some areas of Puget Sound exceeds \$2 million per acre.¹¹ The property taxes generated by these property values flow directly to the local governments.

Many people have long identified clean waters, salmon fishing, and other seafood resources with Washington State. This has provided an incentive for businesses and families to move to the state. There is no doubt that future oil spills would result in economic disaster and community loss for Washington waters.

B. *Federal Response of the Oil Pollution Act of 1990*

In response to the states' rapidly emerging concerns of environmental damage caused by oil spills from oil tankers, and more specifically, in direct response to the Exxon Valdez oil spill in Prince William Sound, Congress passed the Oil Pollution Act of 1990 ("OPA 90").¹² The Act created a comprehensive prevention, removal, liability, and compensation regime for dealing with oil pollution caused by vessels.¹³

In various provisions of the Act, Congress tried to define how some of the new provisions would relate to existing law. One of these provisions is Section 1018(a) of OPA 90 (104 Stat. 505), found

10 *Id.*

11 *Id.*

12 Oil Pollution Act of 1990, Pub.L. No. 101-380, 1018 Stat. 575 (August 18, 1990). See *The International Association of Independent Tanker Owners (Intertanko) v. Lowry*, 947 F.Supp. 1484 (W.D. Wash. 1996), *aff'd in part and rev'd in part*, *Intertanko v. Locke*, 148 F.3d 1053 (9th Cir. 1998).

13 *Intertanko v. Lowry*, 947 F.Supp. at 1491.

in Title I of the statute (codified at 33 U.S.C. § 2718).¹⁴ That provision provides:

Nothing in this Act . . . shall . . . affect, or be construed or interpreted as preempting, the authority of any State or political sub-division 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.¹⁵

In addition, Section 1018(c) provides:

Nothing in this Act . . . shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof . . . (1) to impose additional liability or additional requirements; or (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law; relating to the discharge or substantial threat of a discharge, of oil.¹⁶

Washington claims that this non-preemption language recognizes the right of states to impose additional requirements to prevent oil spills.¹⁷ Intertanko, on the other hand, asserts that this rather broad language is limited to liability, compensation, and

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

removal, but not prevention.¹⁸ In addition, Intertanko argues that Congress said that it was not "in this Act" preventing the states from imposing some forms of requirements different from federal standards.¹⁹ Specifically, Congress' language does not necessarily mean that some other Act or recognized body of law might not provide a prohibition against such legislation.²⁰

C. Washington State's Response to OPA 90

Following its belief that OPA 90 authorized states to supplement this federal law and desiring to provide the ultimate protection possible to their marine waters, Washington State enacted a comprehensive law, addressing the issues of oil pollution at the state level.²¹ One part of the law establishes the Office of Marine Safety (OMS) and directs it to establish standards in rules for oil spill prevention plans that provide the "best achievable protection" ("BAP") from damages caused by the discharge of oil into the waters of the state.²² The law requires owners and operators of tank vessels to submit oil spill prevention plans that conform with these newly established rules to OMS.²³ It also requires vessels that merely transit Washington waters while sailing to other U.S. or Canadian ports to provide prior notice before the tanker can enter state waters. The law also requires that this notice report any conditions that pose a hazard

18 *Id.*

19 *Id.* at 1491-2.

20 *Id.* at 1496.

21 *See* Wash. Rev. Code §§ 88.46.010 *et seq.*; Wash. Admin. Code §§317-21-010 *et seq.*

22 *See* Wash. Rev. Code §88.46.040.

23 *Id.*

to the vessel or to the marine environment.²⁴ Failure to file acceptable plans, subjects violators to statutory penalties and a prohibition on calling at Washington ports.²⁵

Intertanko has challenged sixteen (16) of these regulations, claiming they are invalid.²⁶ These regulations lay out specific requirements that tanker vessel operators must satisfy in order to meet the BAP standards in their prevention plans.²⁷ They may be summarized as follows:

WAC 317-21-130, Event Reporting. 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 for tankers that operate in Puget Sound.

WAC 317-21-130, Operating Procedures--Watch Practices. 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.

WAC 317-21-205, Operating Procedures--Navigation. Requires tankers in navigation in state waters to report its positions every fifteen minutes, to write a comprehensive voyage plan before entering state

²⁴ *Id.*

²⁵ See Wash. Rev. Code §88.46.090; Wash. Admin. Code §317-21-020.

²⁶ *Intertanko v. Lowry*, 947 F.Supp. at 1488-89.

²⁷ *Id.*

waters, and to make frequent compass checks while under way.

WAC 317-21-210, Operating Procedures — Engineering. Requires tankers in state waters to follow specified engineering and monitoring practices.

WAC 317-21-215, Operating Procedures — Prearrival Tests and Inspections. 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.

WAC 317-21-220, Operating Procedures — Emergency Procedures. Requires tanker masters to post written crew assignments and procedures for a number of shipboard emergencies.

WAC 317-21-225, Operating Procedures — Events. 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

WAC 317-21-230, Personnel Policies — Training. Requires operators to provide a comprehensive training program for personnel that goes beyond that necessary to obtain a license or merchant marine document, and which includes instructions on a number of specific procedures.

WAC 317-21-235, Personnel Policies — Illicit Drugs

and Alcohol Use. Requires drug and alcohol testing and reporting.

WAC 317-21-240, Personnel Policies — Personnel Evaluation. 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 more than six months a year.

WAC 317-21-245, Personnel Policies — Work Hours. Sets limitations on the number of hours crew members may work.

WAC 317-21-250, Personnel Policies — Language. 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.

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

WAC 317-21-260, Management. 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.

WAC 317-21-265, Technology. Requires tankers to

be equipped with global positioning system receivers, two separate radar systems, and an emergency towing system.

WAC 317-21-540, Advance Notice of Entry and Safety Reports. 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.²⁸

III. INTERTANKO V. LOWRY

A. *Intertanko's Argument Below*

Intertanko sought an order declaring that these Washington statutes and regulations were unconstitutional.²⁹ Most of the federal law relied upon by Intertanko in its motion for summary judgment is derived from the Tank Vessel Act of 1936, the Ports and Waterways Safety Act of 1972 ("PWSA"), the Port and Tanker Safety Act of 1978 ("PTSA"), and OPA 90.³⁰ These acts either added to or amended prior law regarding the regulation of oil tankers.³¹ They either imposed specific requirements for tankers or delegated to the Coast Guard the responsibility for promulgating specific standards.³²

Intertanko also relied on a handful of treaties to which the United States has acceded including the International Convention for

28 *Id.*

29 *Id.* at 1488.

30 *Id.* at 1489.

31 *Id.*

32 *Id.*

the Safety of Life at Sea, 1974 ("SOLAS"), the International Convention for the Prevention of Pollution from Ships, 1973, and the Protocol of 1978 ("MARPOL"), the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, 1978 ("STCW"), and the International Regulation for Preventing Collisions at Sea, 1973 ("COLREGS").³³

Intertanko argued that the BAP rules were preempted by these federal statutes, regulations, and treaty obligations pursuant to the Supremacy Clause of the United States Constitution.³⁴ It also argued that the BAP rules violated the Foreign Affairs Clause and the Commerce Clause of the United States Constitution.³⁵ And finally, Intertanko argued that the BAP rules were invalid because they reached beyond the three-mile territorial limit of the navigable waters of Washington state.³⁶

B. *The Court's Response and Reasoning*

The Court reasoned that, pursuant to the broad language of § 1018 of OPA 90, none of the provisions of OPA 90 preempted the ability of the states to add to the federal requirements in the areas addressed by the Act.³⁷ The language reemphasized that the Act broadly reserved to states the ability to impose additional requirements with respect to oil pollution.³⁸ By conducting an overall review of the language, structure, and legislative history of the Act,

33 *Id.* at 1489-90.

34 *Id.* at 1490.

35 *Id.*

36 *Id.*

37 *Id.* at 1491.

38 *Id.* at 1492.

the Court concluded that OPA 90's express nonpreemption language, applied to the BAP regulations which govern tanker operations, personnel, management, technology, and information reporting.³⁹ These BAP regulations cover similar ground addressed by the prevention provisions of OPA 90, which set standards for tanker personnel qualifications, manning, operations, design, and construction.⁴⁰ In the Court's view, the Act made clear that Congress placed a high priority on reducing the threat of oil pollution and permitted states to impose additional requirements to meet these goals.⁴¹

As for the implied field preemption argument, the Court agreed that the areas addressed by the BAP regulations covering tanker operations, personnel, management, technology, and information reporting were also comprehensively regulated by federal statutes, regulations and treaty obligations.⁴² However, the Court did not state that comprehensive regulation of an area alone is enough to infer preemption. The Court held that there must be an additional showing that Congress intended the comprehensive nature of the regulation to foreclose state action.⁴³ Since the BAP standards are intended to protect the environment, they are an exercise of the state's police powers. An unavoidable overlap of state and federal regulations occurs when vessels are involved. However, when pollution is a concern, the Ninth Circuit has recognized the need for joint federal/state regulation of the ocean waters within three miles of

39 *Id.* at 1493.

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

shore.⁴⁴

As for the express preemption argument, the Court reasoned that Congress did not intend to give the Coast Guard authority to preempt state law with regard to the oil spills.⁴⁵ This reason was due to the nonpreemption language of OPA 90 § 1018.

Conflict preemption was not present in the Court's view because compliance with state and federal law would not be a physical impossibility.⁴⁶ In fact, the state regulations complimented the federal goal of reducing human error as a major cause of maritime casualties.⁴⁷ In response to Intertanko's argument that the BAP regulations unconstitutionally limited commerce, the Court disagreed and held that a state law does not directly regulate interstate commerce merely because it concretely affects a business engaged in interstate commerce.⁴⁸ The BAP regulations were not impermissibly aimed at regulating commerce, or impeding interstate trade to protect state business interests.⁴⁹ The statutes and regulations were instead merely intended to protect local waters from pollution.⁵⁰ The Court emphasized that Intertanko must show the burdens that the regulations impose on interstate commerce clearly outweigh the local benefits.⁵¹ Unfortunately, Intertanko had not presented sufficient facts to prove an inequitable balance such that a Commerce Clause

44 *Chevron v. Hammond*, 726 F.2d 483, 489 (9th Cir. 1984).

45 *Intertanko v. Lowry*, 947 F.Supp. at 1496

46 *Id.* at 1497.

47 *Id.*

48 *Id.* at 1498.

49 *Id.*

50 *Id.*

51 *Id.* at 1497.

violation would be present.

As for Intertanko's Foreign Affairs Clause argument, the Court claimed it was rare for a state statute to be invalidated due to its intrusion into the realm of foreign affairs.⁵² The Court reasoned that Washington State was not acting in the federal government's place vis-a-vis a foreign or international body, but instead was exercising its police power by regulating both foreign and domestic tankers to protect the environment.⁵³ Since the state's decisions in this area are not keyed to any judgment as to the worthiness of a foreign regime, the Foreign Affairs Clause challenge could not be sustained.⁵⁴

This Court also addressed Intertanko's argument that the BAP regulations affect tankers beyond the three-mile limit imposed by the Washington Constitution.⁵⁵ Further, the Supreme Court has upheld state police power regulations that incidentally and indirectly affect interstate or foreign commerce outside of state waters.⁵⁶ Also, the Court pointed out that the Washington Supreme Court has upheld the authority of the state to prohibit the possession or transportation of salmon taken from beyond the state's three-mile limit.⁵⁷ The bottom line is that the courts have allowed some incidental impact on extraterritorial activities if the goal is protection of state resources.

Overall, the Court held that the BAP regulations are

⁵² *Id.* at 1499.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ WASH. CONST. art. XXIV, § 1.

⁵⁶ *See Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 426, 56 S.Ct. 513, 515, 80 L.Ed. 772 (1936)(denying challenge to California law restricting the use of sardines caught outside of state waters).

⁵⁷ *See Frach v. Schoettler*, 46 Wash.2d 281, 290, 280 P.2d 1038, *cert. denied*, 350 U.S. 838, 76 S.Ct. 75, 100 L.Ed. 747 (1955).

constitutionally valid. They are not preempted by federal law, do not violate the Commerce Clause or the Foreign Affairs Clause, nor are they improper extraterritorial restrictions. Rather, the state laws act to legitimately protect Washington's delicate and valuable marine resources through the exercise of the state's police powers.

IV. THE ARGUMENT NOT MADE

A. *The Right of Innocent Passage*

The sea covers more than 70 percent of the surface of the globe. The United States has always had basic and enduring interests in the oceans and has consistently taken the view that the wide range of these interests is best protected through a widely accepted international framework governing the uses of the sea. The goal of the United States has always been to develop a comprehensive treaty on the law of the sea which will be respected by all countries, and to which they could become a party. With this in mind, the United Nations Convention on the Law of the Sea ("the Convention") was completed in Montego Bay on December 10, 1982.⁵⁸

The Convention sets forth a comprehensive framework governing the uses of the oceans. It was adopted by the Third United Nations Conference on the Law of the Sea which met between 1973 and 1982 to negotiate a comprehensive treaty relating to the law of the sea.⁵⁹ The Convention was signed by the United States on July 29, 1994 and forwarded to the Senate of the United States for advice as well as consent of the Senate to accession and ratification.⁶⁰

Although the Senate has not acted on the Convention as of yet, its intermediary authority can be derived from comments of then

58 Convention, *supra* note 5, Preface.

59 See Bernard H. Oxman, *The New Law of the Sea*, 69 A.B.A. J. 157 (1983).

60 Convention, *supra* note 5, Letter of Transmittal.

President Ronald Reagan when he declared that the Convention was declaratory and customary international law for almost all of its provisions except those on deep sea bed mining.⁶¹ For all intents and purposes, the substantive provisions dealing with pollution are currently accepted as customary international law.⁶² Within the Convention lies the important legal doctrine of the Right of Innocent Passage ("RIP").⁶³ This fundamental principle of the international law of the sea embodies the concept that all ships enjoy the right of innocent passage through another State's territorial sea.⁶⁴ The principle of RIP is expressed in Article 17 of Part II, Section 3 of the Convention. This article provides that, "Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea."⁶⁵ The territorial sea has been defined as the twelve nautical miles measured seaward from the coast or baselines delimiting internal waters.⁶⁶

The term "passage" is further defined in Article 18 of Part II, Section 3 of the Convention. This article provides:

1. Passage means navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such a roadstead

61 1 PUB. PAPERS OF PRESIDENT REAGAN at 378-79 (1983).

See LOUIS HENKIN ET AL., INTERNATIONAL LAW, 1387 (3d ed. 1993).

63 Convention, *supra* note 5, Art. 17, Part II, Sec. 3.

64 United States v. Alaska, 422 U.S. 184, 197, 95 S.Ct. 2240, 2250, 45 L.Ed. 2d 109 (1975). This right of innocent passage does not include a right of overflight or submerged passage.

65 Convention, *supra* note 5, 1982, Arts. 17, Part II, Sec. 3..

66 Oxman, *supra* note 59.

or port facility.

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary to force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.⁶⁷

The meaning of "innocent passage" is further explored in Article 19 of Part II, Section 3 of the Convention. This article provides:

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Such passage shall take place in conformity with this convention and with other rules of international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal state if in the territorial sea it engages in any of the following activities: (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; (b) any exercise or practice with weapons of any kind; (c) any act aimed at collecting information to the prejudice of the defense or security of the coastal State; (d) any act of propaganda aimed at affecting the defense or security of the coastal State; (e) the

launching, landing, or taking on board of any aircraft; (f) the launching, landing, or taking on board of any military device; (g) the loading or unloading of any commodity, currency, or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State; (h) any act of willful and serious pollution contrary to this Convention; (i) any fishing activities; (j) the carrying out of research or survey activities; (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; (l) any other activity not having a direct bearing on passage.⁶⁸

Applying the facts of *Intertanko v. Lowry* to Articles 17 through 19 we find that the RIP doctrine can, at least definitionally, apply to the dispute at hand. The definition of "passage" in Article 18 applies to the type of activity that *Intertanko* claims the BAP regulations are hindering. It is "navigation through the territorial sea for the purpose of traversing that sea without entering internal waters" ⁶⁹ Also, it is travel that is "continuous and expeditious" ⁷⁰

And this passage is "innocent" because it is "not prejudicial to the peace, good order or security of the coastal State."⁷¹ Understandably, Washington State might argue that, if the Court were inclined to adopt a broad definition of "good order . . . of the coastal State," that the potential threat of environmental damages would rise to this level and therefore take *Intertanko's* activity outside the definition of "innocent passage" as laid out in Article 19. However,

68 *Id.* at Art. 19, Part II, Sec. 3.

69 *Id.* at Art. 18, Part II, Sec. 3.

70 *Id.*

71 *Id.* at Art. 19, Part II, Sec. 3.

they would still have to overcome the hurdle of part 2(a)-(g) of Article 19 where the Convention explicitly explains what types of activities represent ones that would be prejudicial to the peace, good order or security of the coastal State. The only one that could possibly apply would be (h), which is "any act of willful and serious pollution contrary to this Convention."⁷² However, "willful" activity is not what we are talking about here. Intertanko is not undertaking any willful activity along these lines, therefore none of the exceptions which would have the effect of taking the activity outside of the definition of "innocent passage" apply.

Article 21 of the Convention recognizes the authority of the coastal State to implement their own laws and regulations regarding a variety of respects.⁷³ Article 21 provides, in part:

1. 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: (a) the safety of navigation and the regulation of maritime traffic; (b) the protection of navigational aids and facilities and other facilities or installations; (c) the protection of cables and pipelines; (d) the conservation of the living resources of the sea; (e) the prevention of infringement of the fisheries laws and regulations of the coastal State; (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof; (g) marine scientific research and hydrographic surveys; and (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the

⁷² *Id.*

⁷³ *Id.* at Art. 21, Part II, Sec. 3.

coastal State.

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.⁷⁴

Although sections 1(d) and 1(f) of this article purport to give Washington state broad authority for their BAP regulations, it is important to take a close reading of the language of this article. The Convention is careful to emphasize that the laws and regulations adopted by the coastal State must be "in conformity with the provisions of the Convention and other rules of international law."⁷⁵ As we will see with the following analysis of Article 24, the state regulations may not "impair this right of innocent passage" provided for within the Convention. The restrictions allowed by the state in Article 21 must be reasonable and necessary and not have the practical effect of denying or impairing the right of innocent passage.⁷⁶

In addition, section 2 of Article 21 states that the coastal State's laws may not apply to the manning or equipment of the foreign ships unless they are giving effect to generally accepted international rules or standards.⁷⁷ However, several of the Washington State BAP regulations deal with manning or equipment. Specifically, WAC 317-21-265, which requires tankers to be equipped with global positioning system receivers, two separate radar systems, and an emergency towing system certainly deal with "equipment." And WAC 317-21-230 through WAC 317-21-255

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at Art. 17, Part II, Sec. 3, Commentary p. 20.

⁷⁷ *Id.* at Art. 21, Part II, Sec. 2.

dealing with personnel policies of training, drug use, evaluations, work hours, language, and training records all obviously deal with "manning." Therefore, these regulations should be precluded unless Washington State can show that these regulations give effect to generally accepted international rules or standards.

Of special interest is Article 24 of Part II, Section 3. This article provides, in part:

1. The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this convention, the coastal State shall not: (a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage⁷⁸

The word "impair" is not defined in the Convention. However, Webster's Dictionary defines it as "to make worse; to diminish in quantity, value, excellence, or strength; to do harm to, damage, or lessen."⁷⁹ The cumbersome, overreaching BAP regulations impair Intertanko's right of innocent passage to the extent that they diminish or make worse their ability to travel the territorial seas without being hampered.

Similar to OPA 90's savings clause, the Convention addresses a state's right to establish their own laws for the prevention of pollution. Section 5 of Part XII of the Convention contains language on international rules and national legislation to prevent, reduce, and

78 *Id.* at Art. 21, Part II, Sec. 3.

79 WEBSTER'S NEW COLLEGIATE DICTIONARY 574 (1975).

control pollution of the marine environment.⁸⁰ Specifically, Article 211 addresses states' rights and duties for enacting laws to prevent pollution from vessels.⁸¹ Although this article appears to mirror OPA 90's non-preemption language in recognizing a state's right to enact such legislation, the drafters of the Convention were careful to point out the limitations such legislation may have on a vessels right of innocent passage.⁸² For example, paragraph three of Article 211 states: "This article is without prejudice to the continued exercise by a vessel of its right of innocent passage"⁸³ In addition, paragraph four, states: "Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels."⁸⁴ The BAP regulations in many ways impair and/or hamper foreign vessels' rights of innocent passage. First, the regulations dealing with operating procedures are overreaching and much more cumbersome than existing regulations. For example, WAC 317-21-205, requires tankers to record positions every fifteen minutes, to write a comprehensive voyage plan before entering state waters, and to make frequent compass checks while under way.⁸⁵ This regulation has limited appeal in its potential to prevent catastrophic marine pollution, especially when weighed against the undue burden it places on the staff of the vessel. Second, most of the personnel policies are obsessive and duplicative. They, likewise, have limited potential in impacting the frequency of pollution from vessels.

But most of all, the BAP regulations hamper foreign vessels'

80 Convention, *supra* note 5, Art. 211, Part XII, Sec. 5.

81 *Id.*

82 *Id.* at Art. 21, Part II, Sec. 3.

83 *Id.* at Art. 211, Part XII, Sec. 5.

84 *Id.*

85 Wash. Rev. Code § 88.46.205 (1995).

rights of innocent passage because they are almost impossible to achieve when reconciled with other coastal state's regulations. A foreign vessel cannot be expected to potentially adhere to a new set of regulations every time it enters a new territorial sea. This would be not only impractical and confusing, it would be next to impossible. Washington state cannot expect every ship traversing its territorial seas to rise to unnecessarily elevated standards of operation when the regulations far exceed any put forth by other coastal states, federal law, or international law.

In several statutory provisions, Congress has explicitly recognized and accepted the RIP doctrine which restricts our domestic regulatory regime and is central to U.S. Navy operations in foreign territorial seas.⁸⁶ Section 1223 of Title 33 codifies the Secretary's power to affect, alter or restrict the operating requirements of vessels in the navigable waters of the United States or in any area covered by an international agreement negotiated pursuant to section 1230 of Title 33.⁸⁷ In particular, it gives him power to construct, operate, maintain, improve, or expand vessel traffic services.⁸⁸ This includes taking measures for controlling or supervising vessel traffic or for protecting navigation and the marine environment and may include, but need not be limited to, reporting and operating requirements, surveillance and communications systems, routing services, and fairways.⁸⁹ Similar to the BAP regulations, these federally enacted powers have the potential to impair what could be recognized as a vessels right of innocent passage. However, explicit in this power is the exception noted in part (d) of section 1223 which provides:

86 See 33 U.S.C. § 1223(d) (1998); 46 U.S.C. § 3702(e)(1998).

87 See 33 U.S.C. §§ 1223, 1230.

88 See 33 U.S.C. § 1223.

89 See *id.*

(d) Except pursuant to international treaty, convention, or agreement, to which the United States is a party, this chapter shall not apply to any foreign vessel that is not destined for, or departing from, a port, a port or place subject to the jurisdiction of the United States and that is in (1) innocent passage through the territorial sea of the United States⁹⁰

Also, chapter 37 of Title 46, which consolidates the laws that are applicable to vessels that transport oil or hazardous material in bulk as cargo or cargo residue, contains a similar exception to vessels in innocent passage.⁹¹ Section 3702 provides: "This chapter does not apply to a foreign vessel on innocent passage on the navigable waters of the United States."⁹² Again, in enacting legislation for the purpose of ensuring safety at sea as well as environmental protection, Congress has recognized the need to uphold the rights of foreign vessels to innocent passage through the territorial sea. If federally enacted laws cannot reach into this recognizably protected area, then laws put forth by any particular state should contain the same limitation.

In addition, the RIP doctrine has been reviewed by the courts, admittedly with limited success. In *Barber v. Hawaii*, a citizens group acting on behalf of boaters affected by state regulations on mooring fees challenged the constitutionality of the state regulations and legislation affecting the rights of mariners to anchor and navigate in ocean waters surrounding the Hawaiian islands.⁹³ The citizens group argued that the regulations violated the right of innocent passage expressed in the Convention on the Territorial Sea and

90 33 U.S.C. § 1223(d).

91 See 46 U.S.C. § 3702 (1998).

92 *Id.*

93 *Barber v. Hawaii*, 42 F.3d 1185, 1185-1186 (9th Cir. 1994).

Contiguous Zone, a 1958 international treaty of which the United States is a signatory.⁹⁴ According to the citizens group, the Hawaiian regulations interfered with the right of innocent passage through the territorial sea that was guaranteed to foreign flag vessels under Article 14 of the 1958 Convention.⁹⁵ The United States District Court for the District of Hawaii entered judgment for the state.⁹⁶ The Court of Appeals agreed, but merely on the basis that the RIP doctrine did not apply to the dispute at hand because none of the vessels involved in the dispute were operated under a foreign flag and the passage involved was not continuous and expeditious.⁹⁷

Since Congress has explicitly recognized and accepted the RIP doctrine in the statutory provisions of 33 U.S.C. section 1223(d) and 46 U.S.C. section 3702(e), and the courts have allowed the argument to go forward in *Barber*, then the argument could have been advanced by Intertanko in the District Court. Although the doctrine has received limited exposure in the courts, the facts of the dispute at hand suggest that it might have made a difference in the decision of Judge Coughenour in ruling that the Washington regulations do not violate international agreements and is not preempted by federal law.

V. CONCLUSION

Intertanko should have argued in the District Court that the Washington State BAP regulations hamper their Right of Innocent Passage in the territorial seas. The doctrine is not only recognized as customary international law, but is mirrored in federal legislation and has been reviewed by the courts. The facts of *Intertanko v. Lowry*

94 Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205; *Barber*, 42 F.3d at 1195.

95 *Barber*, 42 F.3d at 1195.

96 *Id.* at 1199.

97 *Barber*, 42 F.3d at 1195.

suggest that if the doctrine were argued by Intertanko that Judge Coughenour might have ruled otherwise and struck down the BAP regulations because of its conflict with international agreements.