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Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)*

CRAIG H. ALLEN**

IV
INTERNATIONAL AGREEMENTS ON MERCHANT VESSEL ACCESS AND SAFETY STANDARDS

The modern legal regime governing merchant vessel safety and pollution prevention is now dominated by international agreements. Exercising its foreign affairs powers, the United States has entered into a multitude of international conventions, treaties, and agreements which together establish the terms of foreign merchant vessel access to United States ports and waters and the construction, design, equipment, manning, and operational rules and standards with which those vessels must comply as a condition of entry. In most cases the international conventions also establish the safety and pollution prevention standards with which United States flag vessels must comply under domestic law and as a condition of entry into the ports or waters of other nations. The 1982 United Nations Convention on the Law of the Sea (LOS Convention), examined below, provides the overall framework for this international marine safety and pollution prevention regime.

*Editor's Note: This is the second part of a multi-part article. Part III will appear in the January 1999 issue of the Journal. Part I appeared in the July 1998 issue of the Journal and examined the constitutional allocation of federal and state powers relevant to the regulation of merchant vessel safety and vessel-source pollution prevention and described the constitutional limitations on the states' exercise of their police powers.

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The LOS Convention, which entered into force in 1994, has been acclaimed by many as the most comprehensive international law project ever completed. Although President Reagan declared in 1983 that most of the Convention’s provisions codified customary international law, which the United States would follow, the United States refused to sign the Convention, citing objections to its deep seabed mining regime. In 1994, after the United Nations General Assembly approved an agreement amending the seabed mining provisions of the Convention, President Clinton presented the Convention to the Senate for its advice and consent.

The LOS Convention imposes an obligation on all States to protect and preserve the marine environment. The Convention provides a flexible international framework within which existing or subsequently-enacted treaties governing vessel safety and marine environmental protection may be implemented globally. It expressly requires all States to cooperate on a

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388 See LOS Convention art. 237. Similarly, the principal international conventions on marine safety and pollution prevention include provisions “saving” the legal effect of the LOS Convention. See, e.g., International Convention for the Prevention of Pollution from Ships, T.I.A.S. No. 10561; 1978 Tanker Safety and Pollution Prevention Protocol (MARPOL), reprinted in 17 I.L.M. 546 (1978), entered into
regional and global basis, directly or through competent international organizations, to formulate international rules and standards to prevent, reduce, and control pollution from vessels. By establishing general guidelines within which the community of nations may prescribe more detailed rules and standards, and requiring all States to work toward development of international standards, the LOS Convention permits the international legal regime for merchant vessel safety and protection of the marine environment to evolve, as it must if it is to meet changing environmental needs and take advantage of new technologies.

In addressing the problem of vessel-source pollution the Convention allocates jurisdiction and responsibility for prescribing and enforcing vessel safety and pollution prevention rules and standards among flag States, coastal States, and port States. The Convention devotes substantial attention to vessel-source pollution and the various roles of respective States in prescribing and enforcing rules to prevent such pollution. How that responsibility is allocated has become a subject of lively debate, both in the context of the LOS Convention, and under contemporary State practice. As the following sections will describe more fully, the principal responsibility for enforcing vessel-source pollution regulations lies with the flag State. Coastal States are granted jurisdiction to prescribe laws consistent with international rules and standards and to enforce those laws against foreign vessels in order to protect their adjacent marine environment. Coastal State jurisdiction over foreign flag vessels is most extensive when the vessel voluntarily enters a port or an offshore terminal in the coastal State. Under these circumstances, the "port State" may even regulate a foreign vessel's design and construction standards, subject to any applicable port State

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389 LOS Convention art. 211(1).
390 As used in the Convention, the "flag State" is the State which grants to a vessel her nationality, registration, or the right to fly the State's flag.
391 A "coastal State" is the State adjacent to an area of water over which it exercises some level of jurisdiction or control with respect to the waters and vessels within those waters.
392 With respect to regulating vessels, "port States" are distinguished from coastal States by the fact that the vessel involved has voluntarily entered a port or offshore terminal or the internal waters of the State.
393 The 1982 LOS Convention does little to address standards for prescribing or enforcing pollution liability measures, such as requirements for certificates of financial liability. See art. 229 ("Nothing in this Convention affects the institution of civil proceedings in respect of any claim for loss or damage resulting from pollution of the marine environment."); art. 235 (States shall cooperate in implementation and development of international law relating to compensation and compulsory insurance.).
394 Id. art. 217.
395 Id. art. 220.
396 Id. art. 211(3) & (4).
control provisions in governing safety and pollution prevention conventions or in port access treaties to which the port State is a party.

1. Flag State Role in Vessel Safety and Pollution Prevention

The LOS Convention reaffirms the long-established principle that primary responsibility for regulating vessel safety and pollution prevention lies with the vessel’s flag State. Along with the right to grant national registry to ships comes the correlative international duty to take adequate measures to ensure that those vessels meet standards that are at least as strict as the generally accepted international standards designed to promote marine safety and prevent pollution. Article 94 of the Convention requires flag States to take measures to ensure safety at sea with regard to: 1) the construction, equipment, and seaworthiness of ships; 2) the manning of ships, labor conditions, and training of crews, taking into account the international instruments; and, 3) the use of signals, the maintenance of communications, and the prevention of collisions.

Flag States must adopt national laws and regulations to prevent or control vessel-source pollution which are at least as strict as internationally accepted standards, and they must enforce both the international standards and their own laws and regulations. Flag States must verify compliance with relevant marine safety standards both before granting a vessel her registration and periodically thereafter. Verification is to be performed through inspections by qualified surveyors. Certificates attesting to compliance must be issued to the vessel. Flag States must also ensure that their vessels carry adequate charts, publications, and navigational equipment, and that each vessel is in the charge of a competent master and officers who are fully conversant in applicable international regulations concerning the safety of life at sea, collision prevention, and pollution reduction, prevention, and control. These “framework” requirements are extensively supplemented by a number of more detailed conventions examined in section IV-C below.

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397Id. arts. 94 & 217; see generally Restatement, supra note 385, at § 502.
398LOS Convention art. 91; Lauritzen v. Larsen, 345 U.S. 571, 584, 1953 AMC 1210 (1953).
399LOS Convention arts. 94(5) & 217 (“States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organization or general diplomatic conference, and with their laws and regulations adopted in accordance with this Convention for the prevention, reduction, and control of pollution of the marine environment from vessels.”).
400Id. art. 211(2).
401Id. art. 217(1).
402Id. arts. 94(4)(a) & 213(3).
403Id. art. 92(4)(b).
The LOS Convention significantly extends the coastal State's influence and control over its adjacent waters. It provides for recognition of a territorial sea up to twelve nautical miles in breadth, and contiguous zones of up to twenty-four miles. Within its territorial sea a coastal State has jurisdiction to prescribe regulations for the prevention, reduction, and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Coastal States may also adopt laws consistent with generally accepted international rules and standards and apply them to vessels navigating in their exclusive economic zone. If a coastal State believes that the international standards are inadequate to protect a clearly defined area of particular ecological sensitivity within its Exclusive Economic Zone (EEZ), it may apply to the International Maritime Organization (IMO) for authorization to adopt special mandatory measures for prevention of vessel pollution within the area. Those measures, if approved by the IMO, may exceed international standards.

The LOS Convention draws a distinction between a coastal State's regulation of vessels transiting its territorial seas to enter the State's internal waters or ports and those transiting the territorial sea in innocent passage, bound for sea, or for another nation's port. For vessels in the former category, the coastal State has jurisdiction to take any necessary steps to prevent a breach of the conditions of port entry. The coastal State is more restricted in the regulations it may impose on foreign vessels in innocent

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405 LOS Convention art. 33.

406 Id. art. 211(4). Such laws shall not hamper innocent passage of foreign vessels.

407 Id. art. 211(5).

408 Id. art. 211(6).

409 See also MARPOL Annex I, reg. 10 (establishing prohibition on discharges in "special areas").

410 LOS Convention art. 25; see generally Restatement, supra note 385, at §§ 512–513.

411 LOS Convention art. 25(2).
passage in its territorial sea,\textsuperscript{412} or on vessels exercising the right of “transit passage” through an international strait.\textsuperscript{413} Such laws shall not apply to the construction, design, equipment, and manning (commonly referred to as “CDEM” standards) of foreign ships, unless they are giving effect to generally accepted international standards.\textsuperscript{414} The LOS Convention does not, however, limit the coastal State’s jurisdiction to establish stricter discharge and liability standards to vessels in transit through the territorial sea, so long as those requirements are non-discriminatory and do not hamper innocent passage.\textsuperscript{415}

The Convention recognizes that coastal States may establish sea-lanes and traffic separation schemes within their territorial sea.\textsuperscript{416} Tankers and vessels carrying inherently dangerous or noxious substances can be required to confine their transit to such lanes. Coastal State jurisdiction over civil and criminal matters occurring on board foreign vessels passing through their territorial sea is circumscribed by the Convention.\textsuperscript{417} A coastal State’s jurisdiction over vessels in transit through its EEZ is limited to enforcing generally accepted international rules and standards for the prevention,

\textsuperscript{412}See id. art. 21. Under domestic United States law, the President may suspend innocent passage during a national emergency. 50 C.F.R. § 191.

\textsuperscript{413}LOS Convention arts. 37–44; see also Corfu Channel Case (U.K. v. Albania), 1949 I.C.J. 4, 28.

\textsuperscript{414}LOS Convention art. 21(2). Specific mention of construction, design, equipment, and manning standards was new with the 1982 Convention. Cf. International Convention on the Territorial Sea and Contiguous Zone, art. 17, 15 U.S.T. 1606, T.I.A.S. No. 5639 (1958) (“Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation.”).

\textsuperscript{415}See LOS Convention art. 24(1). If the coastal State is a party to another pollution liability convention it may, however, be limited by the terms of that convention. The two principal international conventions on liability for marine pollution are the International Convention on Civil Liability for Oil Pollution Damage (CLC), entered into force Jun. 19, 1975, 973 U.N.T.S. No. 14097, reprinted in 9 I.L.M. 45 (1970), and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution (Fund Convention), entered into force Oct. 16, 1978, reprinted in 11 I.L.M. 284 (1972). The history of both conventions is traced in 3 Benedict on Admiralty ch. 9, §§ 116–117 (7th rev. ed. 1997).

\textsuperscript{416}LOS Convention art. 22. The United States has adopted certain shipping safety fairways (33 C.F.R. pt. 166) and offshore traffic separation schemes (33 C.F.R. pt. 167).

\textsuperscript{417}LOS Convention art. 27 (criminal jurisdiction) & art. 28 (civil jurisdiction). The United States’ procedures for consular officers are codified at 22 U.S.C. §§ 256–258; see also Vienna Convention on Consular Relations, entered into force Mar. 19, 1967, T.I.A.S. 6820, 596 U.N.T.S. 261. Although under customary international law port States may—unless otherwise agreed to by treaty between the flag State and port State—exercise criminal and civil jurisdiction over non-public vessels voluntarily in their ports and internal waters, Cunard S.S. Co. v. Mellon, 262 U.S. 100, 124 (1923), as a matter of international comity they usually refrain from doing so unless the offense disturbs the peace of the port. In re Wildenhus, 120 U.S. 1, 12 (1887). Jurisdiction is even more limited where the alleged crime occurred on the high seas. See LOS Convention art. 97; International Convention on Penal Jurisdiction in Matters of Collision, May 10, 1952, 439 U.N.T.S. 233. But see S.S. Lotus, P.C.I.J. Ser. A, No. 10 (1927) (upholding Turkish criminal jurisdiction over French vessel officer following collision on the high seas).
reduction, and control of pollution from vessels or laws and regulations of the coastal State conforming or giving effect to such rules and standards.418

The coastal State’s authority is greatest with respect to ships within its ports. In fact the port State’s role respecting safety of foreign vessels is not entirely permissive. The LOS Convention imposes a “duty to detain” on States other than flag States which, upon request or on their own initiative, have ascertained that a foreign vessel within one of their ports is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment.419 Under such circumstances the port State must take administrative measures to prevent the vessel from sailing. Parties to the International Convention for the Safety of Life at Sea (SOLAS)420 have a similar duty to “intervene,” in order to prevent a foreign vessel from sailing until the crew corrects any unseaworthy conditions.421

In 1982, when the LOS Convention was opened for signature, certificates of inspection valid on their face were widely accepted as conclusive evidence of a vessel’s compliance with the applicable international standards. Port States wishing to verify compliance with international marine safety standards are therefore initially limited by the LOS Convention to an examination of the vessel’s certificates, records, and documents.422 Actual physical inspection of vessels carrying valid certificates is authorized under the LOS Convention only when the port State has “clear grounds for believing” that the condition of the vessel does not correspond substantially with the particulars of the documents.423 Notwithstanding the deference accorded flag State certificates under the LOS Convention, many nations—including the United States—are growing increasingly reluctant to accept those certificates without question, particularly certificates from so-called open registry nations, or nations whose vessel or owner safety records or government-approved classification society statistics indicate serious deficiencies in inspection practices or a larger than expected number of

418 LOS Convention art. 220(3).
419 Id. art. 219. The State may permit the vessel to proceed to the nearest repair yard, and upon removal of the causes of the violation shall permit the vessel to proceed.
421 Id. ch. I, reg. 19(c) (requiring detention for unseaworthy conditions) & ch. XI, reg. 4 (requiring detention if vessel’s master or crew is not familiar with “essential shipboard procedures relating to the safety of ships”).
422 LOS Convention art. 226.
423 Id. This standard is consistent with existing international agreements.
substandard vessels.\textsuperscript{424} The reluctant answer for many nations is port State control.

3. The Role of Port States in Vessel Safety and Pollution Prevention

Under customary international law a State’s jurisdiction over its internal waters is equivalent to the State’s jurisdiction over its land territory.\textsuperscript{425} Accordingly, coastal States have broad jurisdiction to prescribe and enforce regulations governing foreign, non-public vessels within their internal waters. Supplementing and modifying this principle of customary international law, at least seven IMO-sponsored conventions contain provisions for port State enforcement that are in some respects more restrictive than the rules of customary international law.\textsuperscript{426} The IMO-sponsored conventions (discussed below in section IV-C) establish international vessel safety and pollution prevention standards and confer varying degrees of control authority on port States. Generally speaking each convention requires flag States to adopt and enforce standards at least as stringent as those established by the convention, and to issue such vessels certificates confirming their compliance with those standards. Valid certificates must be accepted by port States as evidence of compliance with the convention standards unless there are clear grounds for believing that the actual condition of the ship or her equipment does not correspond substantially with the conditions reflected in the certificates.\textsuperscript{427} Beyond these general common features, several differences exist among the conventions. For example, the SOLAS Convention confines port State remedial measures to non-punitive interventions or detentions.\textsuperscript{428} By contrast, the 1973 International Convention for Prevention

\textsuperscript{424} For years, the term “substandard” was not defined adequately under the applicable conventions or port State control protocols. See, e.g., IMO Res. A.466 (XII), A.542(13) & A.597(15). As a result, the label is occasionally assigned under circumstances where it is unwarranted. Partly to remedy the too-common solecisms, the IMO Flag State Implementation Subcommittee consolidated the IMO Port State Control resolutions into a single document, which defines the criteria under which a vessel may be classified “substandard.” See IMO Res. A.787(19). The new Resolution adds guidance on detention of vessels, qualification, and training requirements for port State control officers, and procedures for port State control boardings.

\textsuperscript{425} H.D. O’Connell, The International Law of the Sea 848 (1984); United States v. Louisiana, 394 U.S. 11, 22–23, 1969 AMC 1019 (1969) (footnotes omitted); LOS Convention art. 2(l) (affirming State sovereignty over its internal waters); Restatement, supra note 385, §§ 511 cmt. e & 512 cmt. c. The authorities are analyzed in Restatement § 512 n.3.


\textsuperscript{427} See, e.g., SOLAS ch. I, reg. 19(b); MARPOL art. 5.

\textsuperscript{428} SOLAS ch. I, regs. 12 & 19. Under the United States Port State Control Initiative, the usual
of Pollution from Ships and its 1978 Protocol (MARPOL) permit the port State not only to board foreign vessels to confirm compliance with MARPOL, but to also take enforcement action against vessels found to be in violation of the convention. Both conventions require port States to avoid unduly delaying a ship, and call for compensation by the port State for any loss or damage suffered as a result of an undue delay or detention.

The Supreme Court examined the scope of port State authority under international law and the laws of the United States in Cunard S.S. Co. v. Mellon. The case concerned a challenge to application of the Volstead Amendment to British flag vessels while in United States ports or waters. Justice Van Devanter's majority opinion began by declaring that it was settled under domestic and international law that United States sovereign control extended not only to its land territories but also to its ports, harbors, bays, and territorial sea. With respect to vessels in those waters, the Court articulated both the rule of jurisdiction and the principle of comity, holding that:

A merchant ship of one country voluntarily entering another subjects herself to the jurisdiction of the latter. . . . Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion.

Most of the leading IMO-sponsored conventions contain such voluntary limitations on port State control authority. The LOS Convention’s “framework” port State authority and control articles closely follow existing provisions of the SOLAS Convention. The LOS Convention imposes no restrictions on States to inspect foreign merchant vessels in their ports to

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429MARPOL art. 5.
430Id. art. 7; SOLAS ch. I, reg. 19(f).
431262 U.S. 100 (1923).
432Id. at 122.
433Id. at 124.
434Some commentators have questioned whether all of the 1982 LOS Convention articles on marine pollution and port State enforcement have the status of customary international law, and would therefore bind even States not party to the LOS Convention. See, e.g., Vallarta, Protection and Preservation of the Marine Environment and Marine Scientific Research at the U.N. Conference on the Law of the Sea, 46 Law & Contemp. Probs. 147, 152 (1983); Degan, Internal Waters, 17 Neth. Y.B. Int'l L. 27 (1986) (concluding that it is not yet certain whether article 218 of the LOS Convention has attained customary international law status).
determine if they are in compliance with applicable international rules and standards relating to seaworthiness of vessels. As earlier discussed, if a vessel is not in compliance, and her unseaworthiness threatens damage to the marine environment, the coastal State has a duty to prevent the vessel from sailing until the condition is corrected. This aspect of "port State control" over foreign vessels has evolved rapidly in the years since the LOS Convention was drafted.

Dissatisfied with the efforts by some flag States to ensure that vessels flying their flag comply with the applicable IMO conventions, most of the key port States of the world have entered into regional agreements which call for inspection by member States, as port States, of 25% or more of all arriving foreign merchant vessels. The more than sixty nations participating in the Paris MOU of 1978, the Latin American Agreement of 1992, the Asia-Pacific MOU of 1993, the Caribbean Region MOU of 1996, and the Mediterranean Region MOU of 1997 have embarked on ambitious port State control programs designed to ensure foreign vessels calling at their ports meet minimum international standards for safety and protection of the marine environment. While no nation yet advocates anything approaching a complete transfer of vessel control authority from flag States to port States, the growing prominence of port State control programs is perhaps the single most significant development in merchant

reprinted in 1978 U.S.C.C.A.N. 3270, 3276–77. This demand for an expansion of port State authority was carried into the Third Conference on the Law of the Sea, which drafted the 1982 LOS Convention.


Algeria, Cyprus, Egypt, Israel, Malta, Morocco, Tunisia, and Turkey signed the Mediterranean MOU in Valletta, Malta on July 11, 1997. Other Mediterranean maritime authorities, which meet the criteria stipulated in the Memorandum, such as Lebanon and Libya, may join the agreement at a later date.

See generally G. Kasoulides, Port State Control and Jurisdiction: Evolution of the Port State Regime ch. 6 (1993).
vessel safety in the past decade. Two recent developments portend continued growth of these programs. The first is the expanded scope of boardings. Recent amendments to the SOLAS and MARPOL conventions now expressly provide for port State authority to evaluate foreign vessel "operational requirements," including crew performance.\textsuperscript{444} Parties to the Paris MOU recently agreed to extend port State inspections to include operational requirements and an assessment of equipment and crew performance by drills.\textsuperscript{445} The impetus for extending port State inspections to include crew performance lies in findings that point to human error as the cause of 80% or more of all marine casualties.\textsuperscript{446}

4. Procedural Safeguards and Dispute Resolution under the LOS Convention

The LOS Convention establishes a number of safeguards for foreign flag vessels subject to enforcement measures by coastal States, to guard against abusive investigative practices, unreasonable detentions, or hearing procedures that are fundamentally unfair.\textsuperscript{447} Coastal States that violate the Convention's safeguards may be liable for any resulting damages or losses suffered by the vessel.\textsuperscript{448} Claims against coastal States for failing to release vessels and their crews promptly are subject to the Convention's provisions for compulsory dispute settlement if both the port State and the flag State are parties to the Convention.\textsuperscript{449} A coastal State may also apply to a dispute settlement tribunal for "provisional measures" (akin to a temporary restraining order), to prevent serious harm to the marine environment.\textsuperscript{450} Such provisional measures may include further detention of the vessel.

\textsuperscript{444}SOLAS ch. XI, reg. 4; MARPOL Annex I, reg. 4A. These provisions, sponsored by the Flag State Implementation Subcommittee of the IMO's Maritime Safety Committee, entered into force in 1996. SOLAS ch. XI, reg. 4. See also IMO Resolution A.742(18) (1993), which permits port State inspections to ensure crews are able to carry out essential shipboard marine pollution prevention procedure.

\textsuperscript{445}See Paris MOU, supra note 438.


\textsuperscript{447}LOS Convention arts. 223–231.

\textsuperscript{448}Iid. art. 232. The nation may also be liable under other relevant conventions. See, e.g., MARPOL art. 7(2).

\textsuperscript{449}LOS Convention art. 292. The first case decided by the International Tribunal for the Law of the Sea arose under this article. See M/V Saiga (Saint Vincent and the Grenadines v. Guinea), 37 I.L.M. 360 (1997). Until it becomes a party to the LOS Convention, the United States may not take advantage of its dispute settlement procedures. Interestingly, the United States Senate rejected the optional compulsory dispute settlement protocol, which accompanied the 1958 conventions on the law of the sea. See 12 M. Whiteman, Digest of International Law 1333 (1971).

\textsuperscript{450}LOS Convention art. 290.
B. International Agreements Establishing Terms of Access to United States Ports and Waterways

Ready access to foreign ports is vital to maritime trade and transportation. The LOS Convention establishes a regime for foreign vessel navigation through a nation’s territorial sea or through waters forming an international strait, but does not address directly the terms of foreign vessel access to a nation’s internal waters or ports. Although there is authority for the proposition that customary international law requires that the ports of every State be open to foreign merchant vessels, and that ports may only be closed when the vital interests of the State so require, the weight of authority is to the contrary. Nevertheless, within the United States this important principle has been voluntarily implemented through a number of treaties of friendship, commerce, and navigation (FCN treaties). Merchant vessel access under an FCN treaty is not completely unrestricted. For example, the President may suspend commercial privileges of vessels whose flag State discriminates against United States vessels. And the right of port access, even under an FCN treaty, does not carry with it immunity from regulations by the port nation. The United States may and does require

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454 For example, the 1961 Treaty of Friendship, Establishment and Navigation between the United States and Belgium provides that:

Vessels of either Contracting Party shall have liberty, on equal terms with vessel of the other Party and on equal terms with vessels of any third country, to come with the cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation. Such vessels and cargoes shall in the ports, places and waters of such other Party be accorded in all respects national treatment and most-favored-nation treatment.

Feb. 21, 1961, 14 U.S.T. 1284, T.I.A.S. No. 5432, art. 13(1). FCN treaties do not necessarily preclude a port State-party from denying access of vessels flying the flag of the other State-party. See McDougal & Burke, supra note 451, at 109. For a compilation of FCN treaties to which the United States is party see 6E Benedict on Admiralty ch. XVIII (7th rev. ed. 1997). Such treaties have been held by the Supreme Court to be self-executing. Asakura v. City of Seattle, 265 U.S. 332, 340 (1924). The purpose of FCN treaties is to free foreign corporations and citizens from discrimination based on alienage, not to accord them greater rights than those held by United States citizens or domestic corporations. Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 187–88 (1982).
456 See McDougal & Burke, supra note 451, at 156 ("It is universally acknowledged that once a ship voluntarily enters a port it becomes fully subject to the law and regulations prescribed by the officials of
foreign, non-public vessels entering United States ports and waterways pursuant to an FCN treaty to comply with a variety of domestic laws and regulations. By contrast, state and local governments within the United States are limited in the extent to which they may impede a foreign vessel’s access to United States ports where the federal government has permitted such access by international agreement or other federal law.

Within the United States the terms of foreign vessel access to some navigable waterways may also be controlled by bilateral vessel traffic management agreements, such as the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region, executed in 1979 (CVTMS Agreement). The CVTMS Agreement establishes a closely coordinated system for vessel reporting and tracking throughout the north-west straits that make up the boundary waters along the United States-Canadian border in the State of Washington and the Province of British Columbia. The President entered into the Agreement under authority of the Ports and Waterways Safety Act of 1972. The CVTMS is composed of a Vessel Movement Reporting System, a Traffic Separation Scheme (TSS), and a Radar/TV Surveillance System. The TSS has been approved by the IMO. Although vessels are not officially required to adhere to the TSS, any vessel that fails to do so risks being found in violation of Rule 10 (or Rule 2a) of the Convention on International Regulations for Preventing Collisions at Sea (COLREGS) of 1972 if a collision results. The TSS thus effectively forces in-bound vessels to transit through United States waters regardless of their port of destination. Similarly, out-bound vessels are forced into Canadian waters, regardless of their port of departure. Recognizing the desirability of reciprocally facilitating transit of vessels in the region, the United States and Canadian governments agreed that each nation will

in applying its regulations to vessels proceeding through its portion of the applicable waters solely en route to or departing from a port of the other Party, consider compliance with the requirements and enforcement practices of the other Party, [and] consider compliance with the requirements of the other Party to be effectively equivalent to material compliance with its own requirements, so long as the requirements and enforcement practices of the other Party, in

that territory.

Cunard S.S. Co. v. Mellon, 262 U.S. 100, 124–25 (1923) (access to ports may be conditioned on compliance with United States law).

Lauritzen v. Larsen, 345 U.S. 571, 1953 AMC 1210 (1953); Restatement, supra note 385, at § 152, n.3. The United States is a party to the Convention on Facilitation of International Maritime Traffic, Apr. 9, 1965, T.I.A.S. No. 6251, 18 U.S.T. 411, which seeks to “facilitate maritime traffic by simplifying and reducing to a minimum the formalities, documentary requirements and procedures on the arrival, stay and departure of ships engaged in international voyages.” Id. art. 1.


their totality, continue to provide a comparable degree of marine safety and environmental protection.

This provision lies at the heart of the Canadian Government protest over the State of Washington's decision to apply Washington's merchant vessel regulations to Canadian-bound vessels, at issue in the *Intertanko v. Locke* litigation discussed in the first and third parts of this article.

C. International Conventions on Vessel Safety and Pollution Prevention

To facilitate analysis, the body of customary and conventional international law addressing merchant vessel safety and marine pollution may be divided into two broad spheres. The first sphere—the subject of this article—includes the body of international law that establishes rules and standards for vessel safety and vessel-source pollution prevention. The second sphere, which is beyond the scope of this article, includes the conventions addressed to pollution response, compensation, and liability. The first sphere is principally a body of public international law, while the second includes subjects of private international law. Examination of United States acceptance of international conventions on maritime matters demonstrates that the nation has been quite selective in its decision whether to become party to any given international regime. Although the United States has been criticized for its reluctance to become party to some of the major international conventions relating to the law of the sea and pollution liability, the United States has been an outspoken supporter of international conventions which set international standards for vessel safety and pollution prevention. Dr. Frank L. Wiswall, Jr., a leading United States commentator on international maritime law, has observed that "the present strong growth of maritime law toward global uniformity based upon international maritime regulation should be seen as a direct reaction to chaotic diversity of national maritime legislation." The role of international conventions in promoting uniformity in maritime safety and pollution prevention has been well documented. The LOS

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462 Conventions falling within this sphere include the CLC and Fund Conventions, supra note 415; the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, T.I.A.S. No. 8068; and the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation, reprinted in 30 I.L.M. 733 (1991).


464 See, e.g., Ivanov, The Role of IMO in the Development of International Maritime Law, IMO News 1997:1 at 21-26; Berlingieri, Uniformity in Maritime Law and Implementation of International
Convention refers frequently to "generally accepted international standards" for vessel safety and pollution prevention. "Generally accepted international standards" that must be enforced under the LOS Convention are those adopted under the auspices of the IMO\textsuperscript{465} and, to a lesser extent, the International Labor Organization (ILO).\textsuperscript{466} Created in 1948,\textsuperscript{467} the IMO, an organ of the United Nations, has sponsored some forty international conventions, protocols, and other treaties, as well as hundreds of international codes and recommendations.\textsuperscript{468} The IMO Charter calls for the organization to facilitate development of the "highest practicable standards."\textsuperscript{469} By requiring compliance with generally accepted international standards, the LOS Convention seeks to halt any international "race to the bottom" by effectively universalizing the principal IMO and ILO conventions, and by requiring flag States to enforce those conventions whether a party to the underlying convention or not.\textsuperscript{470}

IMO or ILO Conventions that establish the generally accepted international standards include the 1974 Convention for the Safety of Life at Sea and its 1978 Protocol (SOLAS);\textsuperscript{471} the 1973 Convention for the Prevention of Pollution from Ships and its 1978 Protocol (MARPOL);\textsuperscript{472} the 1978 Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW);\textsuperscript{473} the 1972 COLREGS Convention;\textsuperscript{474} the 1969 Convention on Load Lines;\textsuperscript{475} and the International Convention Concerning

\textsuperscript{465}The principal IMO-sponsored conventions are collected in 6D & 6E Benedict on Admiralty ch. XIV (7th rev. ed. 1997).

\textsuperscript{466}The principal ILO-sponsored conventions are collected in 6B Benedict on Admiralty ch. IX (7th rev. ed. 1997).


\textsuperscript{468}Current information on the IMO can be found at <http://www.imo.org>.

\textsuperscript{469}IMO Convention, supra note 467, art. I. Current information on treaties sponsored by the IMO is available at <http://www.imo.org/imo/convent/treaty.htm>.

\textsuperscript{470}See LOS Convention art. 94(5); Restatement, supra note 385, at § 502 cmt. c. For an example under United States law, see The Scotia, 81 U.S. (14 Wall.) 170, 188 (1871) (holding that the rules of the road treaties had become international law by "universal acceptance.").


\textsuperscript{472}See supra note 388.


\textsuperscript{474}See supra note 460.

Minimum Standards in Merchant Ships (ILO Convention 147). Although potentially all of these conventions could prescribe the standards applicable to any given vessel (depending on the vessel’s tonnage, route, and cargo), only three of the treaties will be analyzed here. Any preemption analysis of a particular state act or regulation may, of course, require careful consideration of all the relevant conventions.

Primary responsibility for implementing and enforcing the international standards under the IMO conventions (and under the LOS Convention) is assigned to flag States. Flag States which are party to the conventions may set stricter standards for vessels flying their flag, as did the United States until quite recently. But flag States may not set standards that fall below those established by the conventions. The conventions require flag State “administrations” to conduct periodic surveys of their vessels, to verify compliance with the conventions, and to issue appropriate certificates. The IMO conventions also define the legal authority upon whom port State enforcement powers may be conferred. Only the designated port State control authority may take action to enforce the conventions. Within the United States, the United States Coast Guard has been designated as the nation’s port State enforcement “authority.”

1. The Convention for the Safety of Life at Sea (SOLAS)

The SOLAS Convention of 1974, as augmented by its 1978 Protocol, is widely regarded as the most important and comprehensive of the international treaties on vessel safety. By January 1998, 137 nations, representing over 98% of the world’s shipping, had become parties to SOLAS. The Convention’s principal objective is to specify minimum international standards for construction, equipment, stability, machinery and electrical equipment, lifesaving appliances, and fire detection and extinguishing equipment.
on passenger vessels and cargo vessels of 500 gross tons or more engaged on international voyages. In addition, Chapter V of the Convention, titled “Safety of Navigation,” establishes operational requirements for all ships on all voyages, and now provides for the introduction of mandatory ship reporting systems. Other chapters of the Convention address precautions for the carriage of grain and other bulk cargoes and dangerous goods carried in packaged form. SOLAS has been the subject of frequent amendments. The 1978 Protocol to SOLAS, developed by the Conference on Tanker Safety and Pollution Prevention (TSPP Conference) following a number of tanker disasters in the Winter of 1976–77, added new requirements for inert gas systems, crude oil tank washing apparatus, and redundant radar and steering equipment. Additional amendments, drafted by the IMO Maritime Safety Committee, have been adopted over the years to address hazards identified with ferries and bulk cargo vessels. SOLAS amendments adopted in 1994 established a requirement for tankers to be fitted with emergency towing equipment and added Chapter IX, requiring vessel operators to implement the International Safety Management Code (ISM Code), and Chapter XI, establishing enhanced inspection requirements for older vessels. The ISM Code, the purpose of which is to “provide an international standard for the safe management and operation of ships and for pollution prevention,” promises to be one of the most profound developments in the regulation of merchant shipping since the original 1974 SOLAS Convention was concluded.

The SOLAS Convention expressly provides for port State control, and now includes provisions for port State control authorities to assess the

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484 SOLAS Annex, ch. I, reg. 1, 3 & 4. Vessel construction is addressed in SOLAS ch. II; equipment in chs. II, IV & V/12; operations and management in chs. V-XI. Vessel Manning and crew language capability is addressed in ch. V, reg. 13. Covered vessels are required to carry a SOLAS Minimum Safe Manning Document, SOLAS ch. V, reg. 13(b), in addition to the individual licenses required by STCW art. VI. Tanker emergency towing equipment is addressed in SOLAS ch. V, reg. 15–1.

485 SOLAS ch. V now requires vessels to carry gyro and magnetic compasses, radar and radar plotting aids (ARPAs), an echo-sounder, devices to indicate speed and distance, rudder angle indicators and rate of turn indicators, radio-direction finding equipment, and equipment for homing on the radiotelephone distress frequency. SOLAS ch. V, reg. 12. Since May 1994, coastal States have also had the power to implement mandatory ship reporting systems. Id. ch. V, reg. 8–1.

486 SOLAS ch. VI. Grain cargoes are prone to shift within the vessel, potentially capsizing the vessel. Chapter VI contains provisions concerning stowing, trimming, and securing grain cargoes.

487 SOLAS ch. VII.

488 SOLAS ch. V, reg. 15–1.


491 Id. ch. I, reg. 19.
crew's performance in executing operational requirements.\textsuperscript{492} The Convention provides that "[e]very ship when in a port of another Contracting Government is subject to control by officers duly authorized by such Government in so far as this control is directing toward verifying that the [certificates] are valid."\textsuperscript{493} Certificates required by SOLAS include a Minimum Safe Manning Document, Safety Construction Certificate, Safety Equipment Certificate, an Intact Stability Book, and a Safety Radio Certificate.\textsuperscript{494} As of July 1998, covered vessels must also hold certificates attesting to their compliance with the new ISM Code. The Convention provides that SOLAS and ISM certificates shall be accepted unless there are clear grounds for believing that the condition of the ship or of her equipment does not correspond substantially with the particulars of any of the certificates.\textsuperscript{495}

SOLAS requirements have been made applicable to United States vessels by federal statutes and regulations.\textsuperscript{496} Even in the absence of implementing federal statute, United States courts have treated the SOLAS requirements as self-executing\textsuperscript{497} or have applied them as a component of the general maritime law.\textsuperscript{498} The port State control provisions in the SOLAS Convention restrict United States authority over foreign vessels whose flag State is party to SOLAS \textit{ex cathedra} and are therefore self-executing with respect to foreign vessels within United States waters.\textsuperscript{499} Within the United States, the President has assigned SOLAS enforcement authority to the United States Coast Guard.\textsuperscript{500} As discussed below, the Coast Guard implements its authority as a port State control authority under SOLAS (and the other IMO-sponsored conventions) through an elaborate Port State Control Initiative.\textsuperscript{501}

\begin{thebibliography}{99}
\item \textsuperscript{492}Id. ch. XI, reg. 4; IMO Res. A.787(19).
\item \textsuperscript{493}SOLAS ch. I, reg. 19(a).
\item \textsuperscript{494}A compilation of the certificates required by the principal international conventions is provided in Doc. No. 14–19 in \textit{6E Benedict on Admiralty} (7th rev. ed. 1997).
\item \textsuperscript{495}SOLAS ch. I, reg. 19(b).
\item \textsuperscript{496}See infra section V-A.
\item \textsuperscript{497}Complaint of Damodar Bulk Carriers, Ltd., 903 F.2d 675, 1990 AMC 1544 (9th Cir. 1990) (holding that "[t]his circuit recognizes SOLAS as having the status of law enforceable in American courts.");\textsuperscript{498} (citing Alkmeon Naviera, S.A. v. \textit{M/V Marina L}, 633 F.2d 789, 793, 1982 AMC 153 (9th Cir. 1980)).
\item \textsuperscript{499}See United States v. Ultramar Shipping Co., 685 F. Supp. 887, 1988 AMC 527 (S.D.N.Y. 1987), aff'd mem., 854 F.2d 1315, 1988 AMC 2408 (2d Cir. 1988) (holding that "[t]he SOLAS Conventions 'represent a uniform set of internationally recognized navigational rules and thus they have the status of general maritime law.'").
\item \textsuperscript{500}See supra notes 329, 330, and 386 (listing authorities concluding that treaty provisions which restrict a party's actions are self-executing).
\item \textsuperscript{502}See infra section V-A.
\end{thebibliography}
2. The Convention for the Prevention of Pollution from Ships (MARPOL)

In 1973, the IMO member States adopted the International Convention for the Prevention of Pollution from Ships, which eventually superseded its 1954 predecessor.\footnote{502}{MARPOL art. 9(1).} The ambitious, but unrealized, goal of the MARPOL Convention is "the complete elimination of international pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharges of such substances."\footnote{503}{Id. Preamble. Compare Clean Water Act, 33 U.S.C. § 1251(a)(1) ("it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.").} MARPOL is presently organized into five annexes,\footnote{504}{The five Annexes are: I - Pollution by Oil; II - Pollution by Noxious Substances; III - Pollution by Harmful Substances in Packages; IV - Pollution by Sewage; and, V - Pollution by Garbage from Ships.} which collectively cover the technical and operational aspects of pollution from ships. Each annex is addressed to a distinct class of pollutants, including oil (Annex I); noxious liquid substances carried in bulk (Annex II); harmful substances carried in packages such as containers and tanks (Annex III); vessel sewage (Annex IV); and garbage and other ship-generated wastes (Annex V). The IMO Assembly has adopted a sixth annex which, if ratified, will eventually establish international standards for air pollution emissions by vessels.\footnote{505}{Id. Art. 10(1).} All parties to the Convention are bound by Annexes I and II. Annexes III, IV, and V are optional, permitting States-parties to opt out of those provisions by entering appropriate declarations. As of January 1998, Annex IV lacked sufficient ratifications to enter into force. A total of 104 nations are party to MARPOL, representing over 93% of the world’s ships by tonnage.\footnote{506}{The United States has ratified most of the Convention and Protocols and has implemented their provisions by statutes and regulations.} The United States has ratified most of the Convention and Protocols\footnote{507}{See infra section V-A.} and has implemented their provisions by statutes and regulations.\footnote{508}{See IMO Treaty Ratification table available at <http://www.imo.org/imo/convent/treaty.htm>; 1997 Green Globe Yearbook 114 (H. Bergesen & G. Parmann eds. 1997). Some nations have entered exceptions to individual annexes to the Convention. Id.}

MARPOL establishes international vessel design, construction, and equipment standards designed to prevent or reduce pollution. Those standards include, inter alia, requirements for minimum vessel subdivision and damage stability, segregated ballast tanks, double bottom tanks, crude oil
tank washing equipment, inert gas systems (for fire protection), oily-water separators, and discharge monitoring equipment. Vessel size and cargo govern the applicability of MARPOL rules and standards.\textsuperscript{509} The 1978 MARPOL Protocol, drafted at the 1978 TSPP Conference, established stricter standards for all vessels and a requirement for periodic flag State surveys. A vessel’s compliance with MARPOL is demonstrated by issuance of an International Oil Pollution Prevention (IOPP) certificate.\textsuperscript{510} MARPOL was substantially amended in 1992, adopting proposals developed by the IMO Marine Environment Protection Committee. The 1992 amendments, widely regarded as the most significant changes to the convention since the 1978 Protocol was adopted, entered into force in 1995. They include a requirement for enhanced inspections of tank vessels five or more years old\textsuperscript{511} and a schedule for phased-in implementation of double hull construction or an equivalent design for tank vessels.\textsuperscript{512} Since 1995, all tank vessels over 150 tons and all dry cargo vessels over 400 tons have also been required to hold a Shipboard Oil Pollution Emergency Plan (SOPEP).\textsuperscript{513}

As with SOLAS, MARPOL places primary responsibility for enforcement on the vessel’s flag State. Flag States are required to conduct initial and recurrent vessel surveys and to issue IOPP Certificates to vessels which meet MARPOL requirements.\textsuperscript{514} Port State control measures are also included in the Convention\textsuperscript{515} and may now extend to operational requirements.\textsuperscript{516} Possession of a valid IOPP certificate is prima facie evidence that the vessel complies with the Convention. Port States may extend their inspection beyond the IOPP certificates only where there are clear grounds for believing that the condition of the ship or of her equipment does not correspond substantially with the particulars of any of the certificates.\textsuperscript{517}

Any violation of MARPOL within the jurisdiction of any party is punishable

\textsuperscript{509} Certain MARPOL rules or standards, such as those establishing construction and equipment requirements, apply only to larger vessels.

\textsuperscript{510} MARPOL. Annex I, reg. 5. IOPP certificates may be issued only to a vessel the flag State of which is a party to the Convention. Id. reg. 6(4). Vessels sailing under the flag of a non-party may be issued an IOPP certificate equivalent. Id. reg. 6(1).

\textsuperscript{511} MARPOL. Annex I, reg. 13-G (entered into force July 6, 1993).

\textsuperscript{512} Id. reg. 13-F (entered into force July 6, 1993). MARPOL requires affected vessels to be fitted with double hulls or an equivalent design that will ensure the same level of protection against pollution in the event of a collision or stranding. Alternative design standards must be approved by the Marine Environment Protection Committee, based on guidelines developed by the IMO.


\textsuperscript{514} MARPOL. Annex I, regs. 5–8.

\textsuperscript{515} Id. arts. 4–6. Under article 5(4) of MARPOL, contracting port States must apply the Convention’s requirements to ships flying the flag of a non-party “as may be necessary to ensure that no more favorable treatment is given to such ships.”


\textsuperscript{517} Id. art. 5(2).
by either the party in whose waters the violation occurred or the vessel’s flag State.\textsuperscript{518} States are required to take action against violators, ensuring that penalties are “adequate in severity to discourage violations.”\textsuperscript{519}

3. The Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW)

For decades, national merchant vessel safety authorities throughout the world have recognized that human error is the cause of the vast majority of marine casualties. Recent studies estimate that approximately 80% of all vessel casualties can be traced to human error.\textsuperscript{520} Yet it was not until 1978 that the IMO member nations directly addressed the urgent need to ensure the competence of seafarers by crafting a comprehensive convention on standards for professional mariners.\textsuperscript{521} Until that time, individual governments, often with no intergovernmental cooperation, established training, certification, and watchkeeping standards for seafarers. The standards adopted by a number of nations proved unsatisfactory to many port States. The STCW Convention, the purpose of which is “to promote the safety of life and property at sea and the protection of the marine environment by establishing in common agreement international standards of training, certification and watchkeeping for seafarers,”\textsuperscript{522} now provides almost universally accepted minimum international standards for professional mariners. The Convention has been described as reflecting “the highest practicable standards which could be globally agreed [to] at the time of its adoption.”\textsuperscript{523}

The STCW Convention is organized into seventeen substantive articles, accompanied by a new STCW Code, added by the 1995 amendments.\textsuperscript{524} The STCW Code is further divided into Part A, containing mandatory provisions, and Part B, containing recommended guidance to assist parties in implementing the convention. A total of 130 nations, representing 98% of the

\textsuperscript{518}Id. art. 4; see also 33 U.S.C. § 1907.
\textsuperscript{519}Id. art. 4.
\textsuperscript{520}See supra note 446 and accompanying text.
\textsuperscript{521}The STCW Convention is a product of the IMO/ILO Joint Committee on Training. See Focus on IMO: The New STCW Convention 1 (Apr. 1997).
\textsuperscript{522}STCW Convention, preamble.
\textsuperscript{523}Id. at 2.
\textsuperscript{524}The 1995 amendments became effective on February 1, 1997. See 62 Fed. Reg. 34506, 34506 (1997) (United States Coast Guard interim rules implementing 1995 Amendments) ("The amendments adopted in July 1995 are comprehensive and detailed. They concern port-state control, communication of information to IMO to allow for mutual oversight, and responsibilities of all Parties to ensure that seafarers meet objective standards of competence.").
world’s shipping, have become party to the Convention. The STCW Convention and Code apply to all seagoing vessels other than public vessels, fishing vessels, and yachts. STCW does not establish minimum manning requirements for vessels. Manning standards are established instead by the SOLAS Convention.

Primary authority for ensuring compliance with the STCW is assigned to flag States and to the States issuing STCW certificates to seafarers. Parties to the STCW Convention have a duty to issue certificates to merchant mariners attesting to their compliance with the training, qualification, and medical standards. Candidates for certificates must pass an examination requiring the applicant to demonstrate not only professional knowledge but also “adequate knowledge of the English language,” including an ability to use the IMO Standard Marine Navigational Vocabulary. Mariners must be reexamined for fitness and professional competence at least every five years and attend periodic refresher courses to maintain their competency. The STCW Convention contains particularized requirements for tank vessels, requiring officers and rated crewmembers on tankers to possess specialized training in firefighting and to complete a tanker familiarization course. The Convention also establishes elaborate in-port and underway watchkeeping requirements, and fixes minimum crew rest periods.

While in the port of a party, ships are subject to STCW control provisions by officers duly authorized by the port State. Even ships of non-parties are subject to control when they are visiting ports of a nation which is party to the STCW Convention. Port State control officers are authorized by the Convention to verify that all seafarers serving on board who are required under the Convention to hold certificates do in fact possess such certificates. STCW certificates shall be accepted by port State control officers unless there are clear grounds for believing that the certificate was obtained fraudulently, the holder is not the person named on the certificate, or that the issuing nation failed to follow the STCW standards in issuing the certifi-
The 1995 amendments to the STCW Convention require the IMO to monitor individual State compliance with the Convention. Under those same 1995 amendments, port State control authority has also been extended, permitting control authorities to require foreign vessel crewmembers to demonstrate operational competency at their place of duty.

V

FLAG STATE/PORT STATE PRESCRIPTIONS AND ENFORCEMENT IN THE UNITED STATES

In prescribing and enforcing rules and standards for merchant vessels the United States government acts in two distinct capacities. First, the federal government acts as a flag State, enforcing the generally accepted international rules and standards and prescribing and enforcing any additional United States domestic standards applicable to United States flag vessels. Second, the federal government acts as a port State (or, in its adjacent waters, as a coastal State) with respect to foreign vessels entering United States ports and waters. In its capacity as a port State, the United States enforces the generally accepted international rules and standards to the extent permitted by international agreement and prescribes and enforces any additional domestic rules and standards applicable to foreign vessels while in United States ports or waters. As discussed above, in its capacity as a port State the United States government's power to prescribe and enforce rules and standards against foreign flag vessel has been limited by international agreements. These limitations are incorporated into a number of federal statutes and regulations and the United States Port State Control program.

A. Implementation of International Agreements on Port Access and Vessel Safety

As a flag State, the United States has plenary jurisdiction to prescribe and enforce rules and standards for vessels flying its flag. Indeed, as a flag State, the nation has a duty to prescribe and enforce standards which are at least as stringent as the generally-accepted international standards. As a port

536 Id., art. X (1-2).
537 Id., Annex, art. I, reg. 7 & 8(1.3). If the IMO determines that a State has failed to comply, its certificates may not be recognized as meeting STCW requirements. Id. art. I, reg. 7(3).
538 Id., Annex, art. I, reg. 4(1.3); STCW Code § A-I/4(4).
539 LOS Convention arts. 94 & 217.
State, however, United States jurisdiction to prescribe rules and standards for foreign vessels is limited by international law. Beyond the limits imposed by customary international law and the LOS Convention, the United States has, by entering into a number of international agreements, voluntarily limited its jurisdiction over vessels flying the flag of any other party to those agreements. These limitations, contained in the principal IMO-sponsored conventions and, to a lesser extent, the various FCN treaties, are generally seen as justified by the national interest in promoting comity and obtaining reciprocal treatment for United States flag vessels.

1. Implementation of IMO Conventions in the United States

Congress has recognized that “the United States is signatory to a number of international treaties on maritime safety and seamen’s welfare, such as the various Safety of Life at Sea (SOLAS) treaties,” and that their provisions and requirements are part of the United States maritime law and in many cases are quite extensive.\(^{540}\) SOLAS has been implemented for United States flag vessels by various provisions of Titles 33 and 46 of the United States Code and a multitude of Coast Guard regulations (discussed below).

The United States is also a party to the MARPOL Convention. One recent United States exception to the Convention concerns the MARPOL requirement for double hull or equivalent protection. MARPOL regulations I/13F and I/13G require tankers to be fitted with double hulls or an alternative design which, in the opinion of the IMO, “provides the same level of protection against oil outflow in the event of collisions or strandings.”\(^{541}\) The United States has rejected the “equivalent” design alternative, electing instead to require that tankers be fitted with double hulls.\(^{542}\) Consistent with its position under domestic law, the United States notified the IMO that it did not intend to be bound by the IMO standards unless and until it expressly consented.\(^{543}\) Canada entered a


\(^{541}\) MARPOL Annex I, reg. 13F(5).


\(^{543}\) Fed. Reg. 44,051, 44,052 (1991) (“The United States delegation to the [IMO Marine Environment Protection Committee] reserved its position on provisions within the MARPOL amendments that are inconsistent with the Oil Pollution Act of 1990.”). MARPOL art. 16(4)(b) (“Any party [to the convention] which has declined to accept an amendment to an Annex shall be treated as a non-Party only for the purpose of application of that amendment.”). In accordance with MARPOL art. 16(2)(f)(ii), the United States notified the Secretary-General of the IMO that the amendments would not enter into force in the United States until the United States provided its “express approval” of the amendment. See
similar exception in its ratification of the North America Free Trade Agreement.\textsuperscript{544}

Several statutes and regulations, including the Act to Prevent Pollution by Ships (APPS), implemented the MARPOL Convention in the United States.\textsuperscript{545} APPS makes no provision for "saving" application of state law. The Act does, however, provide that "[a]ny action taken under this chapter shall be taken in accordance with international law."\textsuperscript{546} In enacting implementing legislation in the United States, Congress expressly incorporated the MARPOL port State control limitations.\textsuperscript{547} In closely related legislation, the federal Clean Water Act exempts oil discharges permitted under MARPOL.\textsuperscript{548} Many of the MARPOL requirements applicable to tank vessels were enacted into United States law by the Port and Tanker Safety Act of 1978 (PTSA)\textsuperscript{549} and the Regulations Relating to Tank Vessels Carrying Oil in Bulk (33 C.F.R. part 157). Those regulations establish standards for the design, equipment, and operations of oil tank vessels. Among other things, the regulations require crude oil washing systems and dedicated clean ballast tanks\textsuperscript{550} on certain tank vessels of specified tonnages and ages.

The United States is a party to the STCW Convention and has adopted the 1995 amendments. Coast Guard regulations implementing the 1995

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\textsuperscript{544}North America Free Trade Agreement art. 1203 (Most-Favored-Nation Treatment) (Canada-U.S.-Mexico), entered into force Jan. 1, 1994 ("Canada reserves the right to adopt or maintain any measure relating to the implementation of agreements, arrangements and other formal or informal undertakings with other countries with respect to maritime activities in waters of mutual interest in such areas as pollution control (including double-hull requirements for oil tankers), safe navigation, barge inspection standards, water quality, pilotage, salvage, drug abuse control and maritime communications.").


\textsuperscript{546}33 U.S.C. § 1912.

\textsuperscript{547}Id. § 1904(d).

\textsuperscript{548}Id. § 1321(b)(3); 40 C.F.R. § 110.9; see generally 33 C.F.R. pt. 151 and MARPOL Annex I, reg. 9. The exemption dates back to Pub. L. No. 91-224 (discharges permitted under the Convention are not prohibited).

\textsuperscript{549}See infra section V-C.

\textsuperscript{550}Dedicated clean ballast tanks (CBT) are tanks used exclusively for carrying ballast water. Installing CBTs on tank vessels obviates the need to ballast oil cargo tanks, thus avoiding the pollution associated with discharging "dirty," i.e., oil-contaminated, ballast water.

With few exceptions (discussed below) the rules and standards that foreign vessels in United States ports and waters must meet are prescribed by international conventions. In a development that surprised many, and one that bespeaks a new confidence in the international regime, the United States has embarked on a regulatory reform initiative that will harmonize the domestic law requirements applicable to United States flag vessels with the international standards established by the IMO conventions. The Coast Guard’s stated goal is to “implement its statutory mandate in regulations that are consistent with international standards whenever doing so is lawful, appropriate and practical.”

2. United States Enforcement of IMO Conventions

Enforcement refers to the process used to induce or compel compliance with rules prescribed by competent authority. An authority other than the one that prescribed the rule being enforced may take enforcement actions. A distinction must be made between enforcement of United States law against United States vessels, as an exercise of its jurisdiction as a flag State, and United States enforcement of international rules and standards against foreign vessels under applicable port State enforcement provisions. Implementation and enforcement of rules and standards prescribed by the IMO conventions with respect to United States flag vessels is examined in section V-B below. Enforcement of those rules and standards with respect to foreign vessels in United States ports and waterways is accomplished through the United States Port State Control Initiative.

Any international agreement to which the United States is party and which is self-executing is incorporated into United States federal law without the

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552 Id. at 34,529 (incorporating STCW into 46 C.F.R. § 10.102(b)); 34,534 (incorporating STCW into 46 C.F.R. § 12.01–3(b)); 34,538 (incorporating STCW into 46 C.F.R. § 15.105(b)).
555 Restatement, supra note 385, at § 431.
need for implementing legislation. As earlier discussed, aspects of certain of the IMO conventions are self-executing. Of particular importance in any preemption analysis is the fact that the port State control provisions established by the principal IMO-sponsored conventions are self-executing. Those limitations on United States prescriptive and enforcement jurisdiction to which the federal government has agreed in the IMO conventions are "law of the land" under Article VI of the Constitution.

Foreign vessel violations of governing international conventions are detected and remedied through the port State control program. Congress has, for the most part, left port State control to the Executive Branch. The United States Coast Guard launched a Port State Control Initiative (PSCI) for the United States in 1994. The PSCI built upon the Coast Guard's foreign passenger vessel control verification program and its foreign tanker-boarding program, in place since 1977. Recognizing that 95% of all passenger and cargo vessels and 75% of all tank ships calling on United States ports fly foreign flags, the Coast Guard resolved to devote increased attention to the condition of those vessels and their crews. The Coast Guard program is designed to identify substandard vessels and vessel operating companies and force them to either comply with vessel safety and pollution prevention standards or stay out of United States waters. Key features of the Coast Guard's PSCI include a risk-oriented matrix used for prioritizing vessels for boarding and so-called "target" lists of vessel owners and operators, classification societies, and flag States whose vessels will be assigned a boarding priority. During the first year of its PSCI the Coast Guard boarded over 16,000 foreign vessels—up 92% over the prior year. Thirty percent of those vessels were found to be deficient, and 2% were detained. It bears repeating that, in each case, the Coast Guard was enforcing international standards, established by the IMO-sponsored conventions, not United States law.

Congress has, in nearly all subjects, recognized that a foreign vessel's compliance with international standards satisfies conditions for entry into United States ports and waterways. In establishing a system of reciprocity for foreign vessels, other than tank vessels, entering United States ports or

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556 See supra note 497.
557 Assignment of primary enforcement authority to the flag State, while reserving port States a limited role, serves important foreign and domestic policy purposes and objective of the national government, the most prominent being the desire to obtain similar favorable treatment for United States vessels in foreign ports.
waters by 46 U.S.C. § 3303, Congress noted that the statute "acknowledges the international concept of comity with respect to recognizing inspection laws and standards for foreign flag vessels that are similar to those of the United States. If a foreign nation is signatory to the SOLAS Convention, it is presumed to have similar standards." Although Congress did not extend the same absolute reciprocity to foreign tankers entering United States ports or waters, it granted authority to the Secretary of Transportation to accept a foreign vessel's compliance with treaties to which the United States is a party as evidence of the vessel's qualification for a certificate of compliance with United States tanker laws.

United States law does not address manning standards for foreign vessels other than tank vessels operating within United States ports and waters. The SOLAS Convention requires that such vessels hold a valid Safe Manning Certificate, and any mariners on board must hold certificates complying with the STCW Convention. By contrast, United States law requires the Secretary of Transportation to review the manning levels, training, qualification, and watchkeeping standards on foreign tank vessels entering United States ports and waters, to determine whether those standards are at least equivalent to United States or international standards accepted by the United States. Congress intended that the STCW Convention would provide the acceptable international standards for training, qualification, and watchkeeping. The statute requires the Secretary to prohibit entry of vessels failing to meet those standards.

B. Regulation of Shipping and the Navigable Waters

Any analysis of preemption of state regulation of merchant vessels must consider the full panoply of federal statutes and regulations, including Title 46 of the United States Code and the implementing regulations promulgated in Title 46 of the Code of Federal Regulations. These statutes and regulations, together with selected sections of Title 33 of the United States Code and the Code of Federal Regulations, comprehensively regulate

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563 SOLAS ch. V, reg. 14; IMO Res. A.481. See supra note 494 and accompanying text.
565 H.R. Conf. Rep. No. 101–653, at 132 (1990) ("The conferees intend that 'standards equivalent to United States law' or 'international standards accepted in the United States' may be considered to include the Convention on Standards for the Training, Certification, and Watchkeeping for Seafarers.").
566 See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51–52 (1987) (in examining whether a state statute is preempted, a court must look to federal law as a whole and to the federal law's object and policy).
commercial vessels. These two statutory titles, as well as international law, define the boundaries of federal and state authority over commercial vessel safety and pollution.

Federal regulation of merchant vessel safety began 160 years ago with Congress’ enactment of the Steamboat Act of 1838.\(^567\) Under that Act, all steamboats were required to be inspected every six months and to carry a federal certificate of inspection attesting to the vessel’s seaworthiness. Additional merchant vessel safety legislation followed in short order.\(^568\) The 1852 Boiler Inspection Act created a requirement for pilots and engineers to hold federal licenses.\(^569\) In 1871, Congress repealed all previous vessel safety statutes and enacted a new comprehensive code of navigation and inspection laws.\(^570\) This code eventually became Title 52 of the Revised Statutes. In 1885, Congress extended the United States steamboat inspection laws to cover foreign vessels carrying passengers to or from United States ports.\(^571\) The currently effective provisions of these early acts are now collected in Title 46 of the United States Code.

Title 46 imposes on the Coast Guard a mandatory duty to establish regulations governing the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of tank vessels.\(^572\) The Secretary is required to consult with other federal agencies and with state representatives in formulating the regulations.\(^573\) The statute, which extends to both United States and foreign flag vessels, provides that in promulgating regulations the Secretary may prescribe different regulations applicable to vessels in the domestic trade, and also may prescribe regulations that exceed standards set internationally.\(^574\) The Coast Guard’s implementing regulations span seven volumes of Title 46 of the Code of Federal Regulations, along with a number of chapters in Title 33 of the Code of Federal Regulations.

United States and foreign flag tank vessels in United States waters are


\(^{569}\) Id. at 1852 (1852).

\(^{570}\) Id. § 3703(a), & 3306(a).

\(^{571}\) Id. § 3703(c).
subject to inspection by the Coast Guard. Under the “reciprocity” section of the statutes, however, inspection of vessels, the flag State of which has standards similar to those of the United States and which has an unexpired certificate of inspection issued by its flag State, are limited to ensuring that the condition of the vessel is as stated in the certificate of inspection. A flag State’s inspection laws (and its safety “standards”) are deemed “similar” to those of the United States when the flag State is a party to the SOLAS Convention. The privilege is extended only on a reciprocal basis, to vessels of States that have by their “laws accorded to vessels of the United States visiting that country the same privileges." Similar reciprocity privileges are incorporated into the United States load line and vessel tonnage measurement statutes. The Coast Guard Authorization Act of 1996 included new requirements that implement the ISM Code for safe ship management contained in Annex IX of the SOLAS Convention. The Coast Guard is directed by the Act to ensure that the regulations adopted are consistent with the Annex IX of SOLAS (the ISM Code).

Foreign tank vessels operating in United States navigable waters must, in addition to meeting relevant international requirements, obtain a certificate attesting to their compliance with chapter 37 of Title 46 of the United States Code. The statute contains two important accommodations for foreign flag vessels. First, the requirements do not apply to foreign vessels in innocent passage on the navigable waters of the United States. Second, in determining the vessel’s compliance with chapter 37, the Secretary may accept any part of a certificate, endorsement, or document issued by a foreign nation under “a treaty, convention, or other international agreement to which the United States is a party.”

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575 Id. § 3301 & ch. 37.
576 Id. § 3303(a).
577 See supra note 560 and accompanying text.
578 Id.
579 Id.
580 Id. § 5109(a) & (b).
581 Id. § 14306.
584 Id. § 3711(a).
585 Id. § 3702(e).
586 Id.

The Ports and Waterways Safety Act of 1972 (PWSA)\textsuperscript{587} comprises two titles. Title I, codified at 33 U.S.C. §§ 1221–1236, focuses on port and waterfront safety, vessel navigation safety, operating requirements, and traffic control. Title II addresses certain aspects of tanker design and construction standards. Title II provisions were principally codified at 46 U.S.C. § 391a.\textsuperscript{588} As recodified and enacted into positive law, those provisions are now found at 46 U.S.C. chapters 33 and 37.\textsuperscript{589} The Port and Tanker Safety Act (PTSA) amended the PWSA in 1978. Together these acts serve a critical role in the regulation of merchant vessel safety and pollution prevention and figure prominently in contemporary preemption analyses.

1. The Ports and Waterways Safety Act of 1972

In enacting the PWSA, Congress sought to protect vessels, bridges, and waterfront structures on or immediately adjacent to the navigable waters of the United States from damage or destruction and to protect the waters and the resources therein from environmental harm which may result from accidents involving those vessels and waterfront facilities.\textsuperscript{590} Title I of the Act authorized the secretary of the department in which the Coast Guard is operating to establish vessel traffic services (VTSs) for United States ports and waterways, to require vessels operating within a VTS to comply with VTS requirements, and to carry equipment necessary to participate in the VTS.\textsuperscript{591} The Coast Guard\textsuperscript{592} was further given broad authority to control vessel traffic


\textsuperscript{589}Implementing regulations can be found at 33 C.F.R. pt. 157.

\textsuperscript{590}PWSA, supra note 587, tit. I, § 101, 86 Stat. at 424.


\textsuperscript{592}The Secretary of Transportation delegated rulemaking authority to the Commandant of the Coast Guard. 49 C.F.R. 1.46(n).
where hazardous conditions warranted and to establish safety zones, regulated navigation areas, and limited access areas in hazardous areas. Where necessary for safety, the Coast Guard may direct the movement of specific vessels.

Under authority of both Title I and Title II of the Act, the Coast Guard promulgated a body of navigation safety regulations (NSRs) and vessel operating and equipment requirements. The NSRs apply to all non-public vessels over 1,600 gross tons while operating in the navigable waters of the United States, with the exception of foreign vessels in innocent passage through the territorial sea or transit passage through an international strait. The NSRs specify equipment, charts, and publications that all covered vessels must carry. They also establish requirements for testing equipment before entering port or getting underway, vessel operating requirements for vessels underway and at anchor, and a requirement for master-pilot conferences before beginning a transit. Additional requirements are established specifically for tankers.

The PWSA authorized the Coast Guard to prescribe minimum safety equipment standards for structures in or immediately adjacent to the navigable waters, while preserving state authority to prescribe "higher safety equipment requirements or safety standards" than those established by the Coast Guard. The Act limits the states' authority to prescribe more stringent standards to "structures only." Title I applies equally to United States and foreign vessels; however, it does not supplant or modify any treaty or any other federal statutes. Congress announced in Title II of the PWSA that existing standards for the design, construction, and operation of all United States tank vessels and foreign tank vessels entering United States waters needed to be improved to ensure adequate protection of the marine environment. The Act therefore

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593 Under this authority the Coast Guard promulgated the General Ports and Waterways Safety Regulations, 33 C.F.R. pt. 160.
595 An exception is made for foreign vessels that are transiting through the navigable waters, but are not destined for or departing from a United States port. 33 C.F.R. § 164.02.
596 Id. § 164.02.
597 Id. § 164.13 & 164.39.
599 Id. § 102(b), 86 Stat. at 426.
602 Id. tit. II, § 201(1), 86 Stat. at 427.
required the Coast Guard to promulgate regulations establishing standards for the construction, design, equipment, and manning (the previously mentioned “CDEM” standards) of such vessels and for their operation.\textsuperscript{603} Rules established under Title II were not to be applied to foreign vessels having on board valid inspection certificates recognized under laws or treaties of the United States,\textsuperscript{604} and the Act expressly provided for reciprocal recognition of certificates issued pursuant to treaties to which the United States was party.\textsuperscript{605} The Act directs the Secretary to transmit any proposed rules to the appropriate international forums for their consideration as international standards.\textsuperscript{606} Finally, the Act granted the Secretary authority to deny entry into United States navigable waters to any vessel not in compliance with the Act or any regulations promulgated under authority of the Act.\textsuperscript{507}

2. The 1978 Port and Tanker Safety Act

In response to a series of tanker disasters in the latter half of the 1970s, the President and Congress joined in a call for more stringent merchant vessel safety and pollution prevention standards.\textsuperscript{608} Despite their frustration with the pace of international developments, both Congress and the Executive Branch remained hopeful that international standards would be tightened up sufficiently to ensure an adequate level of protection, thus obviating the need to establish a separate regime for the United States. President Carter “placed heavy emphasis on international negotiations as a primary means of advancing” pollution prevention initiatives.\textsuperscript{609} The State Department observed that international standards “enable the United States to avoid a conflicting patchwork of national standards that would impeded the free flow of commerce.”\textsuperscript{610} Under directions of the President, the Coast Guard representatives to the IMO “urged prompt action in improving international standards on tanker construction equipment and operations and...
In response to the urgings of the United States (punctuated by a personal appearance of the Secretary of Transportation before the IMO) an International Conference on Tanker Safety and Pollution Prevention (TSPP) was held from February 6–17, 1978. The Secretary of Transportation expressed his intention that the United States domestic program would be consistent with the TSPP measures, noting that "the worth of any domestic program for marine safety and environmental protection, whether regulatory or legislative, must be measured not only in terms of its immediate effectiveness, but also in terms of its ultimate impact on international efforts toward the same goal." The TSPP conferees adopted protocols to enhance both the SOLAS and MARPOL conventions, including new provisions for port State control; however, the 1978 SOLAS Protocol was not scheduled to enter into force until 1981, and the 1978 MARPOL Protocol not until 1983. The STCW Convention was also adopted in 1978, but would not enter into force until 1984. The Law of the Sea Convention would not even be completed until 1982, and would not enter into force until 1994.

Congress enacted the 1978 Port and Tanker Safety Act (PTSA) against this backdrop of slowly developing international rules. Understandably, the PTSA evinces Congress' impatience with the pace of the international response to the growing threat of pollution by ships. Convinced that the then-existing international standards failed to protect adequately the marine environment, Congress directed the Coast Guard to study the international scheme and report its findings to the Congress. At the same time, Congress sanctioned a domestic regime for the United States that could include standards that were more stringent than those established by the existing international conventions. The legislative history makes it clear, however, that Congress intended the vast majority of the standards to be those that would be established by the new 1978 protocols and the STCW Convention developed by the TSPP conferees.

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611 Id.
612 Id. at 35 (Letter from John Wofford, United States Department of Transportation, to Representative John M. Murphy, Chairman of the House Merchant Marine & Fisheries Committee, dated May 11, 1978).
614 H.R. Rep. No. 95–1384, supra note 435, at 21 ("In general, the minimum standards to be required are consistent with the internationally accepted standards agreed to by an overwhelming majority of the delegations participating in the International Conference on Tanker Safety and Pollution Prevention held in London in February 1978. ... To the extent feasible, the committee elected to endorse standards internationally agreed to. However, it declined to await the ratification of any international agreement on this subject and established specific dates on which certain standards would go into effect, whether or not there is a final convention in force at the time of such effective dates."). The committee rejected the charge that United States action under the PTSA constituted "bad faith" in our international relations. Id. at 21–22.
The PTSA enhanced the federal government’s ports and waterways safety regime in a number of important respects. Section 9 of the Act provided, for the first time, authority for the Coast Guard to establish conditions of entry into United States ports. Under the new authority the Coast Guard could exclude vessels with a history of accidents or pollution incidents and those which did not comply with the Act’s manning requirements. Congress further directed the Coast Guard to create and maintain a “marine safety information system,” (MSIS) to record information on vessels which could be used in evaluating their safety history.

The PTSA further authorized and encouraged the President to enter into international agreements relating to port and vessel safety. More specifically, the PTSA authorized the President to establish compatible vessel standards and vessel traffic services with adjacent nations. Such agreements may—on a reciprocal basis—waive application of United States design, construction, operation, equipment, personnel qualifications, and manning standards for vessels transiting United States waters en route to a port in the adjacent nation. The PTSA also recognized the international law limits on coastal State jurisdiction over foreign vessels. Section 4 of the Act, which authorizes the Secretary to promulgate “vessel operating requirements” for vessels in United States navigable waters, expressly exempts foreign vessels in innocent passage through the United States territorial sea or in transit passage through an international strait within the navigable waters of the United States, except where authorized by international treaty, convention, or agreement. The implementing regulations promulgated by the Coast Guard include an identical exemption.

The PTSA sections that amended Title II of the original PWSA are, like their predecessor, addressed to “vessel construction, equipment, manning

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616 The MSIS later became an important element in the Coast Guard’s Port State Control program.
618 The concern of the Executive Branch that the freedoms of navigation recognized under international law be preserved under the PTSA was forcefully articulated in the Act’s legislative history. H.R. Rep. No. 95-1384, supra note 435, at 45–48 (Letter from Douglas J. Bennett, United States Department of State, to Representative John M. Murphy, Chairman of the House Merchant Marine & Fisheries Committee, dated Sept. 13, 1977).
619 PTSA, supra note 613, § 4(d), 92 Stat. 1474 (codified at 33 U.S.C. § 1223(d)).
620 See supra note 596 and accompanying text.
621 PTSA, supra note 613, § 5(4), 92 Stat. at 1482 (originally codified at 46 U.S.C. § 391a, now at 46 U.S.C. § 3702(e)).
and operational procedures." The 1978 Act initially required the Coast Guard to adopt vessel construction standards consistent with the "best achievable technology" (BAT); however, Congress later deleted that requirement. The Act specified the minimum standards that the Secretary was to establish for certain crude oil and product tankers, and gave the Secretary the authority to exceed the congressionally mandated "minimum" standards even if the Secretary's regulations exceeded internationally agreed upon standards. It grants the Secretary authority to require vessels to install and use specified navigation equipment, communications equipment, or any electronic or other device necessary to comply with the vessel traffic service or which is necessary in the interest of vessel safety. The PTSA clarifies the Secretary's duty to consult with involved federal and state officials. The legislative history explains that the Act requires the Secretary to identify and "reconcile" conflicting uses of the waterways.

The PTSA may serve as a basis for effectuating treaty provisions without regard to whether the underlying treaty is self-executing. Under 33 U.S.C. § 1228(a)(2), the Secretary of Transportation is authorized to deny entry to a vessel that fails to comply with any "applicable law or treaty." Section 1228(a)(5) similarly provides authority to deny entry to a vessel the officers of which are licensed by a state which the Secretary has determined has licensing standards which are not comparable to or more stringent than United States' standards, or international rules and standards that are accepted by the United States. Under either provision, the Secretary has discretion to enforce treaties without regard to whether they are self-
executing or have been implemented by domestic statutes. In any event, the PTSA largely answered the question whether any given IMO treaty is self-executing. The Act facilitates consistency with later-enacted international developments by authorizing the Secretary to modify any regulation or standard prescribed under § 5 of the PWSA “to conform to the provisions of an international treaty, convention, agreement or an amendment that is ratified by the United States.” Thus, later developments in international standards may, in some circumstances, be incorporated into United States law without further legislation, as soon as the United States ratifies the treaty or amendment.


In Ray v. Atlantic Richfield Co. the Supreme Court observed that under the PWSA, federal law controls navigation in the United States navigable waters in major respects. Nevertheless, before promulgating vessel operating requirement regulations or vessel construction, design, equipment, or manning requirements for tank vessels under authority of the PTSA, the Secretary is required to consult with representatives of the maritime community, port and harbor authorities, and environmental groups. Under § 5 of the Act the Secretary must also establish procedures for consulting with and receiving and considering the views of any affected states and parties in the exercise of the Secretary’s regulatory authority under the Act. The Act thus gives states and the interested maritime community an important role in developing vessel operating regulations to implement the Act.

Under the PWSA, states may enact higher equipment safety standards for structures, but not for vessels. The Court held in Ray that the Act impliedly forbids higher state equipment or safety standards for vessels. That section of the Act, the Court concluded, prevents a state from issuing “higher safety equipment requirements or safety standards” with respect to those requirements “which may be prescribed pursuant to this chapter.” The state of Washington had argued that the preclusive effect of 33 U.S.C.
§ 1222(b) was limited to "vessel equipment requirements." But the Supreme Court rejected the argument and held that the statute "expressly reaches 'safety standards'" as well as equipment. Thus, once the Secretary has established a safety equipment or safety standard, or determined that no such requirement should be imposed at all, the state is no longer free to impose a standard of its own. The statutory language and legislative history of the PWSA is silent on whether Congress intended to occupy the rest of the field of ports and waterways safety (other than safety equipment or standards).

The Court in Ray also held that the PWSA and PTSA "subjects to federal rule the design and operating characteristics of oil tankers." The Court observed that the statutory pattern of the Act demonstrates that Congress intended uniform national standards for design and construction of tankers that foreclose the imposition of different or more stringent state requirements. The Court then concluded that:

Congress did not anticipate that a vessel found to be in compliance with the Secretary's design and construction regulations and holding a Secretary's permit, or its equivalent, to carry the relevant cargo would nevertheless be barred by state law from operating in the navigable waters of the United States on the ground that its design characteristics constitute an undue hazard.

In reaching its conclusion the Court found it significant that the Secretary was required to promulgate regulations implementing Title II of the Act, but that no similar mandatory duty was imposed under Title I of the Act.

D. The Clean Water Act and the Oil Pollution Act of 1990

Federal water pollution prevention and control statutes, which date from as early as 1899, are among the oldest of the nation's environmental laws.
The evolution of the principal federal statutes and regulations has been comprehensively described by others.\textsuperscript{644} This section of the article will focus on those provisions in the relevant statutes that may be relevant to the federal and state roles in preventing vessel-source pollution and the relevant provisions saving or preempting state authority over that subject.

1. Federalism Under the Clean Water Act

Protection of United States waters from pollution has been the goal of a series of federal acts that have been mostly consolidated into the Clean Water Act (CWA).\textsuperscript{645} The CWA addresses a variety of water pollution problems, both by type of pollutant and source. The Act regulates the discharge of oil, hazardous substances,\textsuperscript{646} sewage, and thermal pollutants. The CWA also establishes pollution prevention\textsuperscript{647} and response requirements, a mandate for national contingency planning, spiller liability and financial responsibility requirements, discharge prohibitions, and penalties for violations of the Act.

As with the PWSA, Congress, in drafting the CWA, sought to avoid any conflict with international law. The Act expressly states that it shall not be construed as affecting or impairing any treaty of the United States.\textsuperscript{648} In 1980, the CWA was amended to make clear that discharges permitted under the 1978 MARPOL Protocol are exempt from the CWA discharge prohibitions.\textsuperscript{649} In addition, the Act now requires that any regulations issued under the discharge prohibition section of the CWA be consistent with maritime safety and with marine and navigation laws and regulations.\textsuperscript{650}

The geographic reach of CWA jurisdiction is coextensive with the federal power over commerce,\textsuperscript{651} and therefore extends even to waters which would not be deemed "navigable" in determining the applicability of the PWSA or...
Title 46 of the United States Code.\textsuperscript{652} It is therefore not surprising that, in enacting the CWA, Congress declared its intent to "protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."\textsuperscript{653} Consistent with that policy, Congress included in the Act a saving clause preserving state prescriptive and enforcement authority respecting discharges of pollutants or respecting the control or abatement of pollution of state waters, so long as the state standards are at least as stringent as federal standards.\textsuperscript{654} The Act also expressly declines to preempt the states from imposing any requirement or liability with respect to the discharge of oil or hazardous substances into state waters,\textsuperscript{655} or with respect to any removal activities related to such discharge.\textsuperscript{656} Although the congressional intent in declining to preempt state liability regimes is for the most part clear, neither the Act nor its legislative history provides satisfactory guidance on what Congress intended in declining to preempt state requirements. One prominent subject removed from state jurisdiction was the regulation of the discharge of vessel-generated sewage.\textsuperscript{657}

The preemptive effect of the state law saving provision which now appears in the CWA was examined briefly by the Supreme Court in \textit{Askew v. American Waterways Operators, Inc.}\textsuperscript{658} In 1971, shortly after enactment of the predecessor Water Quality Improvement Act, a three judge district court panel struck down the Florida Oil Spill Prevention and Pollution Control Act on preemption grounds.\textsuperscript{659} The Florida Act under challenge

\begin{footnotes}
\item[652] Compare 33 C.F.R. § 2.05–25(a) (defining "navigable waters of the United States" for laws other than the CWA) with id. § 2.05–25(b) (defining "navigable waters of the United States" for purposes of enforcing the CWA). The latter includes all waters "tributary to" the waters defined under § 2.05–25(a) and all "other waters over which the Federal Government may exercise Constitutional authority."

\item[653] 33 U.S.C. § 1251(b).

\item[654] Id. § 1370.

\item[655] Id. § 1321(o)(2). The clause originated in § 11(o)(2) of the WQIA ("Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State."). The clause was carried forward into the 1972 FWPCA, which added "hazardous substances" to "oil." 86 Stat. 870, § 311(o)(2) (1972).


\item[658] 411 U.S. 325, 1973 AMC 811 (1973). The Court's decision is actually based on the earlier version of the current § 1321(o) non-preemption clause that was contained in the WQIA. See supra note 655. The Court has also held that the CWA preempts the federal common law of nuisance in interstate waters, City of Milwaukee v. Illinois, 451 U.S. 304 (1981), and, together with the Marine Protection, Research, and Sanctuaries Act, in ocean waters. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). The Act does not, however, preempt state common law nuisance claims, if liability is determined under the law of the source state. International Paper Co. v. Ouellette, 479 U.S. 481 (1987).

\end{footnotes}
applied to facilities within the state and to vessels destined for or departing from such facilities. It did not purport to apply to vessels in innocent passage through Florida waters. In the direct appeal to the Supreme Court, both the Maritime Law Association of the United States and the American Bar Association filed amicus curiae briefs urging the Court to affirm the decision below. Nevertheless, the Supreme Court reversed. Writing for the Court, Justice Douglas, in an opinion described by Professors Gilmore and Black as “bland” and one giving “the impression as having been written with great care so as to commit the uncharacteristically unanimous Justices to as little as possible,” held that the Florida Act’s liability provisions were not unconstitutional per se. The Court found that the Florida Act addressed oil spill liability for damage to state or private property, while the federal WQIA dealt only with cleanup costs incurred by the federal government. Because the two acts focused on different subjects, the Court concluded that there could be no conflict between them. The Court limited its holding, however, stating that “[i]t is sufficient for this day to hold that there is room for state action in cleaning up the waters of a State and recouping, at least within federal limits so far as vessels are concerned, her costs.”

2. The Oil Pollution Act of 1990

During the one year period from March 1989 to February 1990, the United States suffered a series of major vessel-source marine pollution incidents which blackened the waters and coastal shorelines in Alaska, Rhode Island, Texas, Delaware, and California. The congressional response was uncharacteristically prompt. A number of bills, some of which

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66011 U.S. at 327.
662Id. at 831.
663Askew, 411 U.S. at 335–36.
664Id. at 332.
666On June 23, 1989 the T/V World Prodigy ran aground in Narragansett Bay near Newport, Rhode Island, spilling 280,000 gallons of heating oil. Id.
667A tug-driven barge collided with another vessel in the Houston Ship Channel near La Porte, Texas, on June 23, 1990 spilling 250,000 gallons of crude oil. Id.
668On June 24, 1989 the Uruguayan T/V Presidente Rivera ran aground in the Delaware River near Claymont, Delaware, spilling 300,000 gallons of industrial heating oil. Id.
669The T/V American Trader holed herself on her own anchor on February 11, 1990, spilling approximately 400,000 gallons of crude oil off Huntington Beach, California. Casuso, Workers Try to Sweep Oil Off of California Beach, Chi. Trib., Feb. 11, 1990, at 10C.
were introduced just a month before the Exxon Valdez oil spill, competed for attention in the 101st Congress.\textsuperscript{670} A unanimous Congress eventually passed the Oil Pollution Act of 1990 (OPA 90) on August 18, 1990.\textsuperscript{671} Far from a "single purpose" work of legislation, OPA 90 comprises eighty sections spanning nine chapters.

\textit{a. The OPA 90 Pollution Prevention Measures}

It is well known that OPA 90 vastly increased both the scope and limits of spiller liability and the potential civil and criminal penalties spillers may face.\textsuperscript{672} But, more than that, OPA 90, like the PWSA, evinces a preference for spill prevention over response and compensation. As a result, the drafters included a number of provisions amending Title 46 of the United States Code. For example, \S 4115 established a phased-in requirement for double hulls on tankers.\textsuperscript{673} Significantly, the double hull requirement does not apply to foreign vessels in innocent passage in the United States territorial sea or in the EEZ.\textsuperscript{674} Section 4101 established new drug and alcohol testing requirements for licensed or documented mariners.\textsuperscript{675} As implemented by the Coast Guard, this requirement has been similarly limited in its application to foreign vessels and to United States vessels while in foreign waters.

\textsuperscript{670}On March 16, 1989, Representative Walter Jones, Chairman of the House Merchant Marine and Fisheries Committee, introduced H.R. 1465, the Oil Pollution Prevention, Removal and Compensation Act, which passed the House on November 9, 1989. On April 4, 1989, Senator George Mitchell introduced S. 686, the Oil Pollution Liability and Compensation Act, which passed the Senate on August 4, 1989. Differences between the two bills were resolved by a Conference Committee during the summer of 1990.


\textsuperscript{672}See, e.g., 33 U.S.C. §§ 2702 (elements of liability), 2704 (limits of liability), and 1319 (civil and criminal penalties). In enacting OPA 90, Congress rejected the liability scheme established by the International Convention on Civil Liability for Oil Pollution Damage (CLC) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution (Fund Convention), supra note 415.


\textsuperscript{674}46 U.S.C. \S 3702(e). The exemption from such a design and construction requirement is consistent with Article 21 of the LOS Convention (coastal State shall not enforce construction, design, equipment, or manning requirements to vessels in innocent passage unless giving effect to generally accepted international standards).

\textsuperscript{675}Codified at 46 U.S.C. \S 7101.
to avoid any conflict with foreign laws or policies.\textsuperscript{676} Section 4106 requires the Coast Guard to evaluate the manning standards for foreign flag tank vessels.\textsuperscript{677} Congress made it clear, however, that it did not intend that this section would conflict with international comity or interfere with the right of innocent passage.\textsuperscript{678} Subsection 4106(a)(3) of the Act requires the Secretary to deny entry to any foreign tanker the manning of which does not comply with "standards equivalent to United States law" or "international standards accepted by the United States."\textsuperscript{679} The legislative history states that the Secretary may consider the standards set by the STCW Convention in making the determination.\textsuperscript{680} Subsection 4106(b)(2) extends United States marine casualty reporting requirements to foreign flag tank vessels in the United States EEZ, "to the extent consistent with generally recognized principles of international law."\textsuperscript{681} Section 4109 directs the Secretary to promulgate regulations establishing minimum hull plate thicknesses for tankers. Section 4110 requires the Secretary to promulgate regulations for tanker overfill devices and tank level or pressure monitoring devices. In both cases, the Secretary’s regulations are to be consistent with generally recognized principles of international law. Section 4114 limits tanker crew working hours to not more than fifteen hours in any 24-hour period and not more than 35 hours in any 72 hours period. OPA 90 has been hailed as a singular success. Since its enactment, the volume of oil pollution from maritime sources in the United States has been reduced by 75%.\textsuperscript{682}

\textit{b. The OPA 90 § 1018 Saving Clause: Requiem for Uniformity in Merchant Vessel Regulations?}

Courts and commentators disagree over the extent to which OPA 90 may have amended federal and state authority to regulate vessel safety and pollution prevention. Most would agree, however, that § 1018 of the Act and its associated legislative history holds the answer. The Senate Environment and Public Works Committee reported that preemption of state law was "discussed by the Committee more than any other single issue" in drafting

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\textsuperscript{676}46 C.F.R. § 16.207.
\textsuperscript{677}Codified at 46 U.S.C. § 9101(a).
\textsuperscript{680}H.R. Conf. Rep. No. 101-653, at 132 (1990) ("The conferees intend that ‘standards equivalent to United States law’ or ‘international standards accepted in the United States’ may be considered to include the Convention on Standards for the Training, Certification, and Watchkeeping for Seafarers."). At the time OPA 90 was enacted, the United States was not yet a party to the STCW Convention. Id.
\textsuperscript{681}Codified at 46 U.S.C. § 6101(d).
the OPA 90 legislation. Preemption was, in fact, the principal point of disagreement between the Senate and the House of Representatives. It is clear, however, that the preemption debate focused primarily on preemption of state liability laws. The House bill (H.R. 1465) eventually passed, which called for adoption of the international CLC and Fund oil spill liability conventions, necessarily would have preempted state liability laws. Within the Senate, however, majority leader George Mitchell announced early in the legislative process that he would hold no hearings on any oil pollution bill until the House passed a bill with no preemption statement in it. The Senate bill (S. 686) eventually passed included a non-preemption clause that is remarkably similar to the ones contained in earlier water pollution statutes. Because the two houses eventually passed conflicting bills, the issue of preemption (and others) was referred to the Conference Committee, which negotiated for a year before reaching an agreement. The Conference Substitute included two state law saving clauses. Section 1018(a), now codified at 33 U.S.C. § 2718(a), provides that:

Nothing in this Act or the Act of March 3, 1851 shall (1) affect, or be construed or interpreted as preempting, the authority of any State or 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 (2) any removal activities in connection with such a discharge. . . .

Similarly, Section 1018(c), codified at 33 U.S.C. § 2718(c), provides that:

Nothing in this Act, the Act of March 3, 1851 or section 9509 of Title 26 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.

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686 Both saving clauses originated in § 106 of Senate Bill 686, the “Oil Pollution Liability and Compensation Act of 1989,” which was developed by the Senate Environment & Public Works Committee. 135 Cong. Rec. S9678 (daily ed. Aug. 3, 1989).
In addition to the state law saving clauses eventually incorporated into § 1018 of OPA 90, Senate Bill 686 contained a second clause which would have authorized states to regulate tanker safety. The second clause originated in Senate Bill 1461 (the proposed Oil Tanker Navigation Safety Act of 1989). When Senate Bills 686 and 1461 were merged to form the consolidated Senate bill eventually passed, many of the latter’s provisions were incorporated into title III of Senate Bill 686. The merged Senate Bill 686 (now in its third version) thus included two non-preemption clauses: one set out in § 106, which largely mirrors § 1018 of the OPA 90, and another at § 310, which would have permitted the states to regulate tanker safety. The Conference Committee deleted § 310, however, after the House conferees objected. In fact, the House conferees, apparently unsatisfied with merely deleting § 310, inserted in the Conference Report an expression of their understanding that the final conference substitute bill would not disturb the Supreme Court’s decision in Ray. The Conferees also included a provision that saved the application of admiralty and maritime law.

Inspection of OPA 90 reveals that the terminology adopted by Congress in § 1018 originated in the 1970 WQIA savings clause. In fact, the

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687S. 1461, 101st Cong., § 112 (1989); see also S. Rep. No. 101–99 (1989). The original Senate Bill 1461 (Oil Tanker Navigation Safety Act of 1989), § 112 would have provided that:

Nothing in this legislation shall be construed or interpreted to affect in any way the authority of a State or political subdivision to regulate oil tankers or to provide for liability or response planning activities in state waters.

S. Rep. No. 101–99, supra note 684, at 21. Similarly, H.R. 2158 (Prince William Sound Oil Spill Response Act) § 107 would have provided:

Nothing in this title shall be construed or interpreted as changing, diminishing, or preempting in any way the authority of the State of Alaska, or any political subdivision thereof, to regulate oil tankers or to provide for oil spill contingency response planning in state waters.

The House Merchant Marine and Fisheries Committee Report on H.R. 2158 (Prince William Sound Oil Spill Response Act) reveals that:

This section does not provide any new authority to the State of Alaska or any of its political subdivisions; it merely emphasizes that existing authority is not affected consistent with legal precedent and court decisions.

Further, the Committee recognizes that the State of Alaska has imposed regulations on vessel operators in state waters that are similar to the requirements of this Act. In exercising responsibility under title I, the Secretary should examine those state regulations to ensure that, where possible, a single standard is imposed on vessel owners and operators.


688See infra note 712 and accompanying text.


69033 U.S.C. § 2751(e); National Shipping Co. of Saudi Arabia v. Moran Mid-Atlantic Corp., 924 F. Supp. 1436, 1996 AMC 2604 (E.D. Va. 1996), aff’d mem., 122 F.3d 1062, 1998 AMC 163 (4th Cir. 1997), cert. denied, 118 S. Ct. 1301 (1998) (§ 2751 only preserves admiralty claims which are not addressed in the Oil Pollution Act itself, such as a claim for collision damage).

691WQIA, 84 Stat. 91, § 11(o)(2) (1970) (“Nothing in this section shall be construed as pre-empting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.”). Section 1018 is also similar to the non-preemption
operative phrase "requirement or liability" was carried forward, nearly verbatim, from the WQIA, through the Federal Water Pollution Control Act and CWA amendments, and into OPA 90. The construction given to the WQIA saving clause, both by Congress and by the Supreme Court in Askew, should therefore guide any analysis of OPA 90 § 1018. Section 1018 is also identical in all relevant respects to the state law saving clause in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Accordingly, whatever construction is given to § 1018 arguably should apply equally to CERCLA.

At the time the WQIA savings clause was enacted, the only state water pollution statutes to be "saved" focused on liability for spills. The sparse legislative history of the WQIA does little to indicate whether Congress had anything in mind beyond oil spill response and liability when it passed the WQIA. The Conference Report states that the WQIA saving clause disclaims any intention of preempting any State or political subdivision from imposing any requirement or liability with respect to the discharge of oil into waters of that State. Thus, any State would be free to provide requirements and penalties similar to those imposed by this section or additional requirements and penalties. These, however, would be separate and independent from those imposed by this section and would be enforced by the States through its courts.

Although the Court in Askew held that the Florida oil spill act's liability provisions were not preempted per se by the WQIA, the Court was less certain about whether Florida's regulations requiring oil spill response equipment was protected from preemption by the Act. Noting that resolution of that question would depend on whether the subject required a uniform provision in several predecessor statutes addressed to pollution liability. See Deepwater Port Act, 33 U.S.C. § 1517(k)(1) (1988); Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653(c)(9) (1988); Outer Continental Shelf Lands Act, 43 U.S.C. § 1820(c) (1988).

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692 See supra note 655.
693 See supra notes 658–64 and accompanying text.
698 Before the Oil Pollution Act of 1990 was enacted, states could impose additional liabilities for cleanup and removal, but state laws governing damages caused by spills were preempted. State of Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1985 AMC 1521 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903 (1986).
national rule and whether the Florida rule conflicted with rules promulgated by the Coast Guard, the Court deferred the question.\textsuperscript{699} The Court gave no indication, however, that the WQIA saving clause would, in itself, permit the state to promulgate requirements for vessels to carry oil spill containment equipment (as additional state “requirements”). Nor does the Court’s opinion imply that the WQIA saving clause would insulate state statutes enacting additional “liability” or other “requirements” from preemption by statutes other than the WQIA. In fact, the Court recognized that state liability requirements may be preempted by other federal statutes, most notably the Shipowners’ Limitation of Liability Act.\textsuperscript{700}

Nothing in the Court’s decision in \textit{Askew} intimates a view that the WQIA saving clause, which guards against preemption of state laws respecting additional “liability” or “requirements,” was addressed to anything other than oil spill notification, financial responsibility requirements, liability, and removal. Indeed, neither the State of Washington, in \textit{Ray},\textsuperscript{701} nor Alaska, in \textit{Chevron U.S.A., Inc. v. Hammond},\textsuperscript{702} relied upon the saving clause in the WQIA (or its successor statutes) to defend the state’s regulation of merchant vessel safety or pollution prevention. In fact, while defending its ballast water discharge prohibitions, the State of Alaska conceded that its laws governing vessel safety, including those requiring navigation equipment, twin radars, collision avoidance systems, and tug escorts, were preempted under the Supreme Court’s decision in \textit{Ray}.\textsuperscript{703} In \textit{Ray}, the Supreme Court rejected the argument that the CWA evinces a congressional intent to permit states to regulate tanker design.\textsuperscript{704}

The text and legislative history of OPA 90\textsuperscript{705} make it clear that Congress, in enacting OPA 90, intended to permit states to enact pollution liability and

\textsuperscript{699}\textit{Askew}, 411 U.S. at 336–37.

\textsuperscript{700}46 U.S.C. app. §§ 181–189. The Solicitor General had argued to the Court that the Florida Act was preempted by the Shipowners’ Limitation of Liability Act. 411 U.S. at 331. The Court avoided the issue by reasoning that Florida might construe its statute in a way that avoided the conflict. Id. The question is now answered by the Oil Pollution Act of 1990. See 33 U.S.C. § 2718.

\textsuperscript{701}435 U.S. 151, 1978 AMC 527 (1978).


\textsuperscript{703}Id. at 1701 (“Following the decision of the Supreme Court of the United States in \textit{Ray v. Atlantic Richfield Company} ... the defendants have stipulated with plaintiffs for entry of a partial summary judgment and permanent injunction.”).

\textsuperscript{704}435 U.S. 151, 178 n.28, 1978 AMC 527 (1978) (rejecting argument that the CWA, the Coastal Zone Management Act, or the Deep Water Port Act demonstrates Congressional intent for coexistent regulation of tanker design).

response requirements more stringent than federal standards. But there is no support for the occasional comment that § 1018 expressly permits states to enact their own oil pollution standards, or that § 1018 somehow disturbs the rule in Ray. The Conference Report twice speaks of preserving existing state authority. The Conferees then cited a list of statutes that, by virtue of OPA 90, no longer preempt state authority. There is no indication that the statute would disturb the preemptive effect of the PWSA, Title 46 of the United States Code, or any of the various international conventions on merchant vessel safety or pollution prevention implemented by the United States. The Conference Committee concluded its analysis of § 1018 by admonishing that “[t]he Conference substitute does not disturb the Supreme Court’s decision in Ray v. Atlantic Richfield Company, 435 U.S. 151 (1978).” Thus any construction of § 1018 should be limited not only by interpretations given to its WQIA predecessor in Askew, but also by the limitations on state authority identified by the Supreme Court in Ray.

Nothing in legislative history of § 1018 indicates that, in enacting the Conference Substitute Bill, Congress intended by that Act to permit the several states to regulate merchant vessel safety and vessel-source pollution prevention. On the contrary, Senator Stevens of Alaska acknowledged that parts of his Oil Tanker Navigation Safety Bill (S. 1461) were “lost” in

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The theory behind the [savings clause] is that the Federal statute is designed to provide basic protection for the environment and victims damaged by spills of oil. Any State wishing to impose a greater degree of protection for its own resources and citizens is entitled to do so. See also In re Jare Spray II K/S, 1997 AMC 845 (D.N.J. 1996) (construing the provisions with particular emphasis on the “with respect to” clause).


708 For example, the Conference Committee noted that § 106 of S. 686 and § 1018 of H.R. 1465 “are generally similar provisions preserving the authority of any State to impose its own requirements or standards with respect to discharges of oil within that State.”

709 The listed acts include OPA 90 itself, § 9509 of the Internal Revenue Code, and the Shipowners’ Limitation of Liability Act of 1851.


the process which produced the Conference Substitute which ultimately became OPA 90.\textsuperscript{712} Among the provisions "lost" in conference was § 310, which would have authorized the states to regulate tanker safety. Statements made in support of adoption of the Conference Substitute intimate no intention to enlarge state authority to regulate vessel safety.\textsuperscript{713} In a contemporaneous analysis of the Act, three members of the legislative counsel for the House Merchant Marine and Fisheries Committee similarly concluded that the Conferees did not intend that federal jurisdiction over vessel construction, manning, or licensing would be ceded to the states.\textsuperscript{714}

Any construction of § 1018 must also be consistent with existing international law, including those IMO-sponsored conventions to which the United States is party.\textsuperscript{715} Although Congress can, by subsequently-enacted legislation, override the effect of an international agreement, the courts will not infer such intent. Rather, such intent must be clearly expressed.\textsuperscript{716} Nothing in § 1018 indicates an intent by Congress to affect United States obligations under SOLAS, MARPOL, STCW, customary international law, or any other merchant vessel safety or pollution prevention convention. As the next part of this article will demonstrate, however, there exists widespread confusion within the federal courts over the effect of § 1018.

\textsuperscript{715}Weinberger v. Rossi, 456 U.S. 25, 32 (1982) ("[L]egislative silence is not sufficient to abrogate a treaty.").
\textsuperscript{716}See supra note 351 and accompanying text.