Granted

Nos. 98-1701 & 98-1706

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

GARY LOCKE, ET AL.,

Respondents.

INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS,

Petitioner,

v.

GARY LOCKE, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE GOVERNMENT OF CANADA IN SUPPORT OF PETITIONERS

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October 22, 1999

QUESTION PRESENTED

Whether the Best Available Protection regulations adopted by the State of Washington with respect to the operation of vessels in the waters of the State of Washington conflict with the treaty obligations that the United States owes to Canada.

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This amicus brief is submitted in support of Petitioners. All parties have consented to the filing of this brief amicus curiae.[1/]

[1/] No counsel for a party authored this brief in whole or in part. No person other than the amicus made a monetary contribution to the preparation or submission of this brief.

THE INTEREST OF AMICUS CURIAE THE GOVERNMENT OF CANADA

Canada and the United States are parties to the bilateral treaty proposed by Canada and accepted by the United States on December 19, 1979, and entitled Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region (CVTMS Agreement), Dec. 19, 1979, U.S.-Can., 32 U.S.T. 377 (entered into force Dec. 19, 1979).[2/] The geography of the Strait of Juan de Fuca region makes the CVTMS Agreement vital to the ability of both countries' ship traffic to operate safely in that region.

Canada and the United States are also parties to several multilateral conventions governing international shipping, collectively referred to as the International Maritime Treaties.[3/] Canada has participated in good

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[2/] The CVTMS Agreement is set forth in the Appendix at A-3 toA-22.

[3/] These include the International Convention for the Safety of Life at Sea (SOLAS Convention), Nov. 1, 1974, 32 U.S.T. 47 (entered into force May 25, 1980), as amended; the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention), July 7, 1978, Int'l Maritime Org., Doc. Sales No. IMO-945E (1996) (entered into force April 28, 1984), as amended by the Seafarers' Training, Certification and Watchkeeping Code, July 7, 1995, Int'l Maritime Org., Doc. Sales No. IMO-945E (1996); and the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), Nov. 2, 1973, Int'l Maritime Org., Doc. Sales No. IMO-520E (1997), as amended by the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, Int'l Maritime Org., Doc. Sales No. IMO-520E (1997).

faith in negotiating and implementing these treaties with the United States.

Because the State of Washington's Best Available Protection (BAP) regulations, Wash. Admin. Code § 317-21-010 et seq., undermine internationally-agreed standards adopted through these treaties, those regulations threaten the orderly operation of maritime traffic in the region. Moreover, if the State of Washington is permitted to dictate the conditions of operation of this international maritime traffic, the door will be open for other local jurisdictions of the United States to erect their own, varying regulations, thereby creating a regulatory patchwork along North America's sea coasts and inland shores and endangering the uniform system adopted by treaty.[4/]

STATEMENT OF FACTS

Vancouver is Canada's largest port. In concert with ports in the surrounding area, it handles thousands of cargo, container, and bulk shipments each year. These ports are the gateway to western Canada and their smooth operation is key to Canada's economy.

[4/] Canada also notes that, given the interests of its members, Intertanko chose to challenge only those portions of the BAP regulations dealing with tank vessels. Other sections of the BAP regulations raise many of the same concerns with respect to oil barges, especially vis-à-vis the CVTMS Agreement. The BAP regulation of oil barges should not be permitted to stand independent of the BAP regulations on oil tankers.

Commercial vessel traffic can access Vancouver and those regional ports from sea in two ways: Johnstone Strait and the Strait of Juan de Fuca. *See* Diagram 1. Johnstone Strait is narrow and hazardous. For that reason it has become accepted practice in the international shipping community to access Vancouver and the regional ports via the Strait of Juan de Fuca.

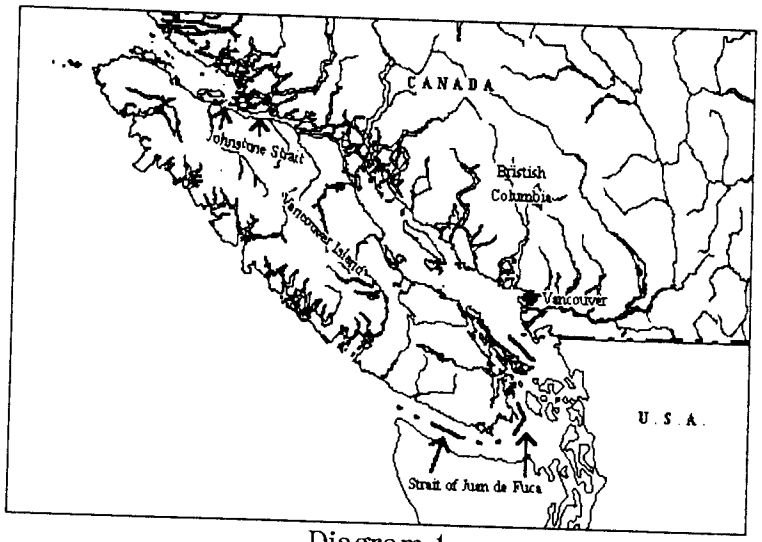

Diagram 1

To promote safe and orderly passage through the Strait of Juan de Fuca, Canada and the United States agreed in the CVTMS Agreement to devise a cooperative system of vessel traffic management. Under this system, all inbound traffic in the strait, regardless of destination, is routed through United States waters, while all outbound traffic is directed through Canadian

waters. The International Maritime Organization endorses this vessel traffic separation scheme.

In agreeing to this vessel traffic separation scheme, Canada relied on the United States' undertaking in the CVTMS Agreement that vessels bound for Canadian ports that complied with Canadian regulations regarding "vessel design, construction, manning and equipment" would be deemed to be in "material compliance" with the United States' own requirements. CVTMS Agreement, art. 204.2 (A-12). Canada has expressed its difficulties with the BAP regulations to United States authorities over many years, as well as through diplomatic representations, the most recent of which was a diplomatic note dated 7 May 1997. Diplomatic Note from the Embassy of Canada to the U.S. Department of State (Note No. 0389).[5/]

SUMMARY OF ARGUMENT

The treaties between the United States and Canada require the United States to honour its treaty obligations in respect of its entire territory. The BAP regulations enacted by Washington State are incompatible with the reciprocity provisions of both the CVTMS Agreement and the International Maritime Treaties.[6/]

[5/] Diplomatic Note 0389 is set forth in the Appendix at A-1 to A-2.

[6/] Both Petitioners contest, as a matter of United States law, the propriety of the Ninth Circuit's refusal to consider the United States'

(continued...)

ARGUMENT

I.

The United States Is Required to Honour Its Treaty Obligations in Respect of its Entire Territory

Customary international law is binding on the United States. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793). *Pacta sunt servanda* is a well-established principle of international law, which provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith. *See* 1 *Oppenheim's International Law*, Part 4, § 584, at 1206 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992); Vienna Convention on the Law of Treaties, May 22, 1969, arts.

[6/](...continued)
obligations to Canada. *International Ass'n of Independent Tanker Owners* v. *Locke*, 148 F.3d 1053, 1063-64 (9th Cir. 1998). *See* U.S. Pet. Cert. at 27 n.14 & Intertanko Pet. Cert. at 26-27. Regardless of whether the specific parties to this dispute properly preserved the issue of the United States' obligations to Canada in the lower court, the United States remains obligated under standards of international law to conform its conduct to its treaty obligations to Canada.

26, 27, U.N. Doc. A/CONF.39/27, 1155 U.N.T.S. 331 (1969) ("Treaty Convention").[7/]

It is equally well-established that a party to a treaty may not invoke provisions of its internal law as justification for failing to honour its treaty obligations, and that, unless a different intention is set forth in the treaty in question, a treaty is binding upon each party in respect of its entire territory. Treaty Convention, art. 29; *Estate of Pellat* v. *Mexico*, 5 Reports of Int'l Arbitral Awards 534, 536 (Fr.-Mex. 1929); Ian Brownlie, *State Responsibility in* 1 *System of the Law of Nations* 1, 141-42 (Fr.-Mex. 1983). When a state party is internally constituted as a federal system, that state party may not justify a failure to comply on the grounds that the noncompliance is the act of a constituent state. *The Montijo* (U.S. v. Colom. 1875), *reprinted in* 2 John Basset Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* 1421, 1440 (1898); Ivan Bernier, *International Legal Aspects of Federalism* 83 (1973).

Having undertaken solemn treaty obligations to Canada under the CVTMS Agreement, and to Canada and other parties to the International Maritime Treaties, the United States is not free to allow its constituent states to impose on maritime traffic within United States

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[7/] Although the United States is not a party to the Treaty Convention, that convention is recognized as a codification of existing norms of customary international law. *See Restatement (Third) of Foreign Relations Law of the United States*, introductory note 18-19 (1987).

waters regulations or conditions that conflict with these treaty obligations to Canada.

II.

If Enforced, the BAP Regulations Would Violate the United States' Obligations to Canada Under the CVTMS Agreement

The key to the functioning of the CVTMS system is the parties' joint recognition of each other's regulatory regimes insofar as these affect vessels operating in the Strait of Juan de Fuca region. *See supra* pp. 4-5. This system based on mutual recognition was established in 1979 with the signing of the Agreement; in 1994, it was further strengthened by the Marine Safety and Marine Environmental Protection Comparability Analysis ("1994 Study"), which was conducted jointly by the United States and Canadian Coast Guards.[8/]

The 1994 Study was prompted by new legislative and regulatory changes introduced in both countries, in particular the United States Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified as amended in various portions of Titles 33 & 46 of the United States Code) and the amendments to the Canada Shipping Act, S.C. 1993, ch. 36 (Can.). The Canadian and United States Coast Guards reviewed their respective regulations in the areas of vessel design and

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[8/] Canada has lodged twelve copies of the 1994 Study with the Office of the Clerk of the Supreme Court of the United States.

construction, shipboard equipment, personnel qualifications and manning, shipboard operations, and pollution response, and determined that "broad overall comparability exists between the United States' and Canada's marine safety and marine environmental protection regimes." 1994 Study at i.

Of special relevance in this case is the provision of the CVTMS Agreement mandating reciprocal recognition of "vessel design, construction, manning and equipment requirements, and the measures for enforcement of these requirements" for ships incidentally transiting the waters of the other party in the Juan de Fuca region. CVTMS Agreement, art 204.2 (A-12). As a result of these provisions, ships bound for Canada, which are required by the CVTMS Agreement to transit United States waters, are deemed to be in material compliance with United States regulations so long as they comply with Canadian regulations. Similarly, ships outbound from the United States, which are required by the CVTMS Agreement to transit Canadian waters, are deemed to be in material compliance with Canadian regulations so long as they comply with United States regulations.

This reciprocity in according deference to the regulatory regime of each state party is vital to the functioning of the CVTMS Agreement and to the safe operation of ship traffic in the Juan de Fuca region. In the twenty years that the Agreement has been in effect, this system based on mutuality of recognition has worked well; indeed, the CVTMS Agreement has served as a model for the international community.

The BAP regulations repudiate the very basis of the Agreement – the reciprocal recognition of, and

acquiescence in, each state party's regulatory regime – for they purport to override Canada's standard-setting by imposing additional requirements on ships bound for Canadian ports. Not only is this result legally offensive, but, on a practical level, the BAP regulations undermine the viability of a traffic management system that was put in place to promote safe passage through a busy shipping corridor and to minimize the occurrence of environmental damage. Ships may seek to avoid the additional Washington State regulations by remaining in Canadian waters, either approaching Canada via the hazardous Johnstone Strait or transiting inbound and outbound in Canadian waters in the Strait of Juan de Fuca. Either way, the chance of an accident causing environmental damage is increased.

The BAP regulations thus threaten the integrity of the system, as well as the ability of the United States and Canada to achieve the goals of the CVTMS Agreement.

III.

If Enforced, the BAP Regulations Would Violate the United States' Obligations to Canada under the International Maritime Treaties

Canada, the United States, and other countries have worked for many years in international fora such as the International Maritime Organization to establish treaties governing international shipping. Under the International Maritime Treaties, the United States owes a number of obligations to Canada that are in addition

to those obligations established in the CVTMS Agreement. These obligations include, for example, the acceptance of Canada's certification that Canadian flagged vessels meet the criteria set out in the treaties, unless there are clear grounds for believing otherwise. Canada is similarly bound under these treaties to accept the United States' certification of United States-flagged ships.

Washington's BAP regulations cover subjects squarely dealt with under the International Maritime Treaties, notably the SOLAS Convention and the STCW Convention, in a manner inconsistent with the obligations created by those treaties. For example, BAP creates fleet-wide standards for bridge resource management, Wash. Admin. Code § 317-21-200(2), that are mandatory even for vessels never entering Washington waters. Bridge resource management is a nonmandatory item under the STCW Convention and is treated as such under Canadian regulations. In essence, if compliance with the BAP regulations affecting vessel operations, equipment, and manning were required, the United States effectively would be refusing to recognize as valid Canada's certification that its own ships meet the standards required under the treaties.

CONCLUSION

If upheld by this Court, the decision below would place the United States in the position of violating its treaty obligations to Canada. Canada therefore urges this Court to set aside the offending BAP regulations and to enforce the United States' obligations under the relevant international agreements.

Dated: Washington, D.C.
October 22, 1999

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