UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

05-35153

Joseph A. Pakootas,
Donald R. Michel,
and
State of Washington

Plaintiffs-Appellees,

v.

Teck Cominco Metals, Ltd.,

Defendant-Appellant.

Appeal from the U.S. District Court for the Eastern District of Washington in Case No. CV-04-0256-AAM

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT

SUPPORTING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States states that it has no parent corporation and that no publicly held company owns 10 percent or more of its stock.

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Pursuant to Federal Rule of Appellate Procedure 29, and with the consent of all parties, the Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this brief as *amicus curiae* in support of Teck Cominco Metals, Ltd.'s ("TCM") interlocutory appeal brought pursuant to 28 U.S.C. § 1292(b). The order under appeal, issued by the United States District Court for the Eastern District of Washington on November 8, 2004, is an unwarranted extraterritorial expansion of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") that will have significant negative consequences for many U.S. businesses, particularly those operating in areas close to our nation's borders. Accordingly, the Chamber urges this Court to grant the relief requested by TCM and to reverse the district court's order.

INTERESTS OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing an underlying membership of more than three million U.S. businesses and organizations from every region of the country. An important function of the Chamber is to advocate its members' interests in matters of national concern before all branches and at all levels of government, including filing briefs as *amicus curiae* before federal and state courts. Many members of the Chamber conduct business operations in the border regions of the

United States, and near the U.S.-Canadian border in particular. They are then exposed to the risk of retaliation from foreign governments offended by the lower court's expansive interpretation of CERCLA.

The Chamber endorses TCM's arguments before this Court as to why the district court's extraterritorial application of CERCLA represents an erroneous interpretation of the statute. In this filing, the Chamber seeks to offer the Court an additional perspective by highlighting the negative consequences of the district court's ruling to the United States business community. By extending CERCLA's statutory reach to activities carried out by a foreign company on foreign soil, the district court's decision risks provoking foreign governments into seeking to attach similar liability to activities undertaken by U.S. companies within the United States' borders. Such retaliation would seriously damage the interests of the Chamber's members engaged in business activities in the border regions of the United States and would inject uncertainty and unpredictability into the regulatory framework within which they operate. U.S. companies would no longer be able to assume that compliance with domestic environmental legislation alone will satisfy their legal obligations. Instead, they are open to potential liability based on the environmental standards enforced by other countries.

Under the district court's decision, businesses operating abroad, including U.S. businesses, might even find their activities subject to conflicting

environmental requirements. The complex problem of transboundary pollution has historically been addressed through a variety of bilateral and multilateral diplomatic mechanisms. By displacing these cooperative arrangements in favor of piecemeal litigation projecting U.S. environmental regulations abroad, the district court's ruling interferes with the foreign affairs prerogatives of the federal government and disrupts the settled expectations of the business community.

SUMMARY OF ARGUMENT

The district court's decision to extend CERCLA liability to a foreign company's operations conducted solely on foreign territory is an unwarranted and unsupported expansion of the statute. In adopting this erroneous interpretation, the district court disregarded a long-standing presumption that, absent Congress's clear and affirmative intent to the contrary, a U.S. statute concerned with domestic matters does not operate beyond the nation's borders. As the district court acknowledged, there is no evidence to suggest that Congress intended to apply CERCLA extraterritorially. The district court's decision to ignore congressional intent by invoking the need to address adverse domestic effects rests on a misreading of the case law on extraterritorial application and on a profound misunderstanding of United States law on foreign relations.

The district court's ruling will have severe adverse consequences for the United States business community. By projecting CERCLA's regulatory regime onto the sovereign territory of a neighboring country, the district court authorized a significant intrusion into that foreign country's regulatory scheme, thereby placing the United States on a direct collision course with one of its most important commercial partners. The Canadian government may very well retaliate by seeking to impose liability on companies operating within U.S. territory whenever their U.S. operations have consequences that are felt in Canada. Given Canada's position that substantial portions of its air and water pollution are attributable to sources within the United States, Canadian courts and regulators would have a ready basis for subjecting U.S. companies to liability. The prospect of protracted lawsuits, enforcement actions and potential liability verdicts will inflict considerable economic damage upon U.S. businesses. Moreover, the possibility of foreign interference with U.S. environmental laws would undermine business confidence by denying U.S. companies the benefits of a stable regulatory regime. What is worse, the district court's rationale for applying CERCLA extraterritorially could be readily extended to cover air pollution emanating from non-border countries. Virtually any company whose domestic economic activity could be linked, however remotely, to environmental pollution in other countries could face foreign regulation and lawsuits.

The extraterritorial application of CERCLA needlessly interferes with the foreign affairs prerogatives of the federal government and disrupts an extensive and well-functioning network of inter-governmental arrangements designed to address the problem of cross-border pollution. Acting through these diplomatic mechanisms, the United States already has resolved a number of protracted environmental problems in its border areas. By allowing individual private litigants to pursue CERCLA suits without any regard for the foreign policy considerations or environmental consequences for the nation as a whole, the district court's ruling directly interferes with, and potentially undermines, these U.S. diplomatic efforts.

ARGUMENT

I. The District Court's Ruling Is An Erroneous and Unwarranted Expansion of CERCLA.

The district court's conclusion that a foreign company operating exclusively on foreign soil may be subjected to CERCLA liability rests on a novel and unsupported interpretation of the statute. As the Supreme Court and this Circuit have repeatedly explained, it is an established rule of statutory construction that "where Congress does not indicate otherwise, legislation dealing with domestic matters is not meant to extend beyond the nation's borders." *United States v.*

Corey, 232 F.3d 1166, 1170 (9th Cir. 2000); *see also Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested."); *E.E.O.C. v. Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 248 (1991) (same); *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1095 (9th Cir. 1994) (en banc) (same). Only this Term, the Supreme Court reiterated that, in determining whether a statute applies to conduct occurring abroad, a court must be guided by the "'commonsense notion that Congress generally legislates with domestic concerns in mind.'" *Small v. United States*, 125 S. Ct. 1752, 1755 (2005) (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)). Absent Congress's clear and affirmative indication otherwise, courts must assume that a federal statute operates only within the territorial jurisdiction of the United States. *Smith*, 507 U.S. at 204; *Aramco*, 499 U.S. at 248; *Corey*, 232 F.3d at 1170; *Subafilms*, 24 F.3d at 1095.

The district court acknowledged that neither the language of CERCLA nor its legislative history contains any indication that Congress intended for the Act to be applied extraterritorially. Appellant's Excerpt of Record ("ER") 228. In fact, as the district court admitted, there is no dispute that Congress's intent in enacting the statute was "to remedy 'domestic conditions' within the territorial jurisdiction of the U.S." *Id.* The district court nevertheless refused to apply the presumption

against extraterritorial application to CERCLA, holding that the statute encompassed within its reach activities that occur entirely on the territory of another sovereign nation. The district court's sole justification for disregarding the Supreme Court's and this Court's guidance was its observation that the "failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." *Id.*

As this Court explained in *Subafilms*, however, a court's decision on whether to extend the reach of a federal statute abroad cannot "rest *solely* on the consequences of a failure to give a statutory scheme extraterritorial application." 24 F.3d at 1096 (emphasis in original). Rather, as the Court made clear, this decision must always be rooted in congressional intent, and the presumption against extraterritorial application applies even where adverse domestic effects are present. *Id.* at 1097. Domestic effects are a necessary condition to the extraterritorial operation of U.S. law, but are not enough by themselves to show that Congress actually intended any statute, including CERCLA, to operate beyond the borders of the United States.

In concluding otherwise, the district court relied heavily on dicta by the District of Columbia Circuit in *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993), and a restatement of that dicta, without discussion, in *Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991,

995 (9th Cir. 1998). This Court in *Subafilms* expressly stated, however, that the *Massey* dicta – suggesting that the presumption is generally not applied where the failure to extend the scope of the federal statute to a foreign setting will result in adverse domestic effects – does not justify discarding the traditional application of this presumption and bypassing the required inquiry into congressional intent. As this Court explained, in each statutory scheme discussed by the *Massey* court, the courts have scrutinized the statute's text and legislative history for indicia of congressional intent and allowed extraterritorial application only after finding that this was a considered decision by Congress. *Subafilms*, 24 F.3d at 1096 & n.13 (discussing *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285, 287 (1952) (giving extraterritorial application to the Lanham Act)); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (L. Hand, J.) (applying § 1 of the Sherman Act extraterritorially); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968) (allowing extraterritorial application of § 10(b) of the Securities Exchange Act)). While the presence of adverse effects within the United States was a factor informing those courts' analysis of congressional intent, it was never sufficient alone to mandate extraterritorial application of the statutory scheme.[1]

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[1] In fact, these courts have applied the presumption against extraterritorial application, but concluded that it was outweighed by an affirmative congressional decision to allow such application. *See, e.g.*, *Aramco*, 499 U.S. at 252-53 (the *Steele* Court's conclusion that the Lanham Act applies extraterritorially was based not only on the fact that "the allegedly unlawful conduct had some effects within

The district court also sought to justify its decision not to apply the presumption against extraterritoriality by purporting to invoke principles from the Restatements of Foreign Relations Law of the United States. The district court argued that, under these principles, the presumption against extraterritoriality cannot stand in the way of a statute that applies to conduct producing effects within the territory of the United States. ER 224 (citing *Restatement (Second) of Foreign Relations Law of the United States* § 38 (1965); *Restatement (Third) of Foreign Relations Law of the United States* § 403, cmt. g (1987)). The Restatement, however, expressly explained that, while Congress has unquestionable authority, under international law, to apply a United States statute to "conduct . . . having

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the United States," but also on the statute's "'broad jurisdictional grant'" and its "'sweeping reach into "all commerce which may lawfully be regulated by Congress,"'" which thereby expressly included commerce conducted with foreign nations) (quoting *Steele*, 344 U.S. at 285-88); *Schoenbaum*, 405 F.2d at 206-09 (concluding, on the basis of the statutory language and the underlying legislative purpose, that "Congress intended the [Securities] Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities" despite "the usual presumption against extraterritorial application of legislation").

By contrast, as the Supreme Court and this Circuit repeatedly have held, a statutory scheme that lacks a similarly clear congressional command that the statute be applied outside of the United States cannot override the presumption against extraterritoriality. *Aramco*, 499 U.S. at 253; *Subafilms*, 24 F.3d at 1096. There is certainly no basis in the case law for giving extraterritorial application to a regulatory statute whose concern is avowedly domestic, and whose text and legislative record reveal no indication whatsoever that Congress ever contemplated extending the statute to conduct taking place beyond the nation's borders.

effect within . . . the territory of the United States," this authority does not negate the normal application of the presumption against extraterritoriality. "Federal legislation is usually construed to apply only to conduct taking place within the territory of the United States unless otherwise provided." *Restatement (Second)*, *supra*, § 38 & Reporters' Note 1 (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949)); *see also Restatement (Third)*, *supra*, § 403 cmt. g (federal law must be interpreted "to avoid unreasonableness or conflict," so that "if one construction of a United States statute would bring it in conflict with the law of another state that has a clearly greater interest, or would subject a person to conflicting commands, while another construction would avoid such a conflict, the latter construction is clearly preferred, if fairly possible") (citation omitted); *id.* § 403 Reporters' Note 3 ("Where regulation of transnational activity is based on its effects in the territory of the regulating state, the principle of reasonableness calls for limiting the exercise of jurisdiction so as to minimize conflict with the jurisdiction of other states, particularly with the state where the act takes place."). As the Restatement further observed, "[f]ederal statutes designed to be applied to conduct taking place outside the United States usually expressly so provide." *Restatement (Second)*, *supra*, § 38 Reporters' Note 1.

The Restatement, therefore, is fully in accord with the accepted notion that, while "Congress may enforce its laws beyond the territorial boundaries of the

United States," whether "Congress has in fact exercised such power is a question of statutory construction, normally subject to the rule 'that the legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Corey*, 232 F.3d at 1170 (quoting *Aramco*, 499 U.S. at 248) (internal quotation marks omitted); *see also Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1357 & n.54 (D.C. Cir. 1981) (Congress may direct that a statute apply extraterritorially if it seeks to remedy effects occurring within the United States, but congressional instruction must be "unequivocal"; a court should not infer such intent where "the Congressional mandate is vague") (citing *Restatement (Second)*, *supra*, § 38). Without a clear congressional mandate, the mere presence of adverse effects from foreign activity on the United States territory cannot justify the extraterritorial application of a statute concerned solely with domestic matters.

The presumption against extraterritorial application is essential to the fulfillment of one of the central objectives of United States law concerning foreign relations. The presumption "ensures that [United States courts] do not precipitate 'unintended clashes between our laws and those of other nations which could result in international discord.'" *Corey*, 232 F.3d at 1170 (quoting *Aramco*, 499 U.S. at 248). As the Supreme Court has repeatedly cautioned, most recently this Term in *Spector v. Norwegian Cruise Line Ltd.*, No. 03-1388, slip op. (U.S. June 6, 2005),

a court must construe federal statutes to avoid interference with the sovereign authority of other nations, and therefore, absent Congress's clear and affirmative indication otherwise, a federal statute operates only within the territorial jurisdiction of the United States. *Id.* at 15-16 (plurality opinion) ("[T]he principle that general statutes are construed not to apply extraterritorially . . . ensure[s] Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation."); *id.* at 3 (Ginsburg, J., concurring in part and concurring in the judgment) ("the clear statement rule is an interpretive principle counseling against construction of a statute in a manner productive of international discord"); *see also F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004); *Smith*, 507 U.S. at 204; *Aramco*, 499 U.S. at 248. This Court has similarly emphasized the importance of the presumption again extraterritorial application of U.S. law as a crucial tool for avoiding unnecessary and dangerous conflicts with laws of other nations, and for ensuring that Congress and the Executive enjoy appropriate freedom of action in the sensitive area of foreign relations. *See Subafilms*, 24 F.3d at 1095-96.

The district court's interpretation of CERCLA as covering activities conducted by a foreign company on the territory of a foreign country risks triggering serious diplomatic consequences. "The effects principle has been a major source of controversy when invoked to support regulation of activities

abroad by foreign nationals because of the economic impact of those activities in the regulating state." *Restatement (Third)*, *supra*, § 402 Reporters' Note 2; *see also id.* § 402 cmt. d ("Controversy has arisen as a result of economic regulation by the United States and others, particularly through competition laws, on the basis of economic effect in their territory, when the conduct was lawful where carried out."). TCM's allegedly polluting conduct is subject to Canada's environmental laws and regulations, which seek to protect the natural environment while ensuring opportunities for adequate economic development. The balance that Canadian law has struck between these two potentially conflicting priorities may (or may not) differ from the balance the U.S. Congress struck between these two interests when enacting CERCLA. *See, e.g.*, *United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1977) ("Other states may strike balances of interests [in environmental legislation] that differ substantially from those struck by Congress."). Given the complexity of the system of environmental regulation, moreover, it is almost certain that the requirements of CERCLA do not correspond perfectly to the obligations that a Canadian company faces under Canadian law. By projecting CERCLA's standards onto the sovereign territory of Canada, the district court's order disrupts the integrity of a foreign country's environmental scheme by imposing upon it a potentially inimical set of priorities.

The presumption against extraterritorial application avoids this conflict between two countries' regulatory systems by insisting upon a showing of clear congressional intent to project United States legislation abroad. Absent conclusive evidence of this intent, U.S. laws do not apply to the territory of a foreign sovereign. In this way, the presumption fulfills the stern requirement of United States foreign relations law that a domestic statute be construed so as to avoid a "conflict with the law of another state." *Restatement (Third)*, *supra*, § 403 cmt. g. By disregarding this established principle, the district court put the United States on a direct collision course with one of its most important commercial partners.

II. The District Court's Ruling Will Have Substantial Adverse Consequences for the Business Community.

Many of the Chamber's members and affiliates, as well as the United States business community in general, will be detrimentally affected by the disruptive effects of the district court's ruling. United States companies and individuals are actively engaged in business operation in the regions bordering Canada. These companies will bear substantial risk if, in response to this and similar suits against its nationals, Canada retaliates by extending its own environmental laws to U.S. companies operating on the U.S. side of the border and opening its courts to this type of lawsuit.

The district court's unprecedented projection of CERCLA abroad effectively subjects foreign companies operating outside the United States to the U.S. environmental regulatory regime. The effectiveness of CERCLA is premised on controlling activities that constitute the source of pollution. *See* Memorandum from Marianne L. Horinko, Assistant Administrator, U.S. EPA, to Superfund Nat'l Policy Managers, Regions 1-10 & RCRA Senior Policy Advisors, Regions 1-10, *Principles for Managing Contaminated Sediment Risks at Hazardous Waste Site*, at 2-3 (Feb. 12, 2002); U.S. EPA, *Draft Contaminated Sediment Remediation Guidance for Hazardous Waste Sites* § 2.6 (2005), *available at* http://www.epa.gov/superfund/resources/sediment/pdfs/chs1to3.pdf ("Identifying and controlling contaminant sources is critical to the effectiveness of any Superfund sediment cleanup."). If private litigants are permitted to use CERCLA lawsuits to target foreign companies' allegedly polluting operations outside of the United States, these companies could find themselves forced to conform their conduct to the U.S. environmental requirements for fear of liability, even if those requirements find no correlation in the domestic legislation of the companies' home country.

This imposition of liability on conduct permitted, or regulated differently, by the other countries' environmental laws is bound to elicit strong protests from both foreign companies and foreign governments. The Canadian Chamber of

Commerce and the Mining Association of Canada already joined TCM in its request that this Court review, and reverse, the district court's ruling. Should the district court's interpretation be upheld, Canadian companies faced with the unexpected requirement to comply not only with their country's domestic regulation but also to take CERCLA into account in activities carried out solely on Canadian soil will have every incentive to pressure their government to pursue retaliatory measures. *See* Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. Rev. 363, 414 (2005) ("Little reason exists to believe that Canada would not ultimately respond similarly if the U.S. CERCLA laws are read to apply extraterritorially to Canadian companies doing business solely in Canada. Canada will feel compelled to respond.") As evidenced by the diplomatic protest that Canada delivered to the United States over EPA action in this case, the Government of Canada is watching closely, and the issue is already becoming a point of friction in the U.S.-Canadian relationship.

If private suits in this country become a significant factor in trans-border environmental issues, Canada could very well try to "level the playing field" between companies on either side of the border by imposing corresponding liability on companies operating within U.S. territory whenever their operations

produce consequences that are felt in Canada. Canada already contends that pollutants released into the atmosphere by some U.S. companies migrate across national lines and account for air and water pollution in certain regions of Canada. According to Environment Canada – the country's main environmental protection agency – 10 percent of the mercury deposited in Canada each year comes from U.S. sources. Environment Canada, *Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units* (Mar. 30, 2004). Cross-border pollution originating in the United States has become a high-profile environmental and public health issue in Canada. *See id.*; *see also* Estanislao Oziewicz, *Effects of Mercury Decision May Drift North: "Vicious Debate" over U.S. Emissions Limit Is Key to Canadians' Health, Critics Warn*, Globe and Mail, Feb. 10, 2005, at A20. If Canada decides to retaliate against the unwarranted intrusion into its sovereignty, it will therefore find an easy basis under the district court's own rationale for imposing liability upon U.S. businesses in return. In addition to atmospheric mercury deposits, Canada could contend that power plants and smelters located in the United States bear responsibility for acid rain pollution on the Canadian territory. *See, e.g.*, Erik K. Moller, Comment, *The United States-Canadian Acid Rain Crisis: Proposal for an International Agreement*, 36 UCLA L. Rev. 1207, 1212 (1989) (reporting on

studies indicating that some of the acid rain falling in Canada may have originated in the United States); Michael S. McMahon, *Balancing the Interests: An Essay on the Canadian-American Acid Rain Debate*, *in International Environmental Diplomacy: The Management and Resolution of Transfrontier Environmental Problems* 147, 147 (John E. Carroll ed., 1988) ("The issue [of acid rain] has been identified by Canada's minister of the environment as the 'single most important irritant in US-Canadian relations.'").

Many U.S. businesses, including a significant number of Chamber's members, are engaged in operations, either themselves or through their corporate affiliates, on both sides of the border with Canada. If Canada were to allow its nationals to proceed against these companies through private lawsuits premised solely on the U.S. companies' failure to comply with Canadian environmental standards in their domestic U.S. activities, it would severely undermine business confidence. Aside from potentially frustrating the objectives of the U.S. environmental policy, the resulting instability in the governing regulatory framework may disrupt existing projects in the border regions and deter companies from undertaking new ones. The need to become familiar with the foreign laws and regulations, and to conform company activities to these requirements, would impose a significant informational and operational cost on all businesses in the border regions. The prospect of inconsistent lawsuits and liability verdicts would

inflict considerable damage on the economic cooperation between United States and Canada and decrease the prospects of bilateral investment.

Furthermore, the district court's rationale for applying CERCLA extraterritorially is potentially unbounded. The court below concluded that the statute could apply whenever any adverse effects of foreign activity manifest themselves in the United States. That rationale logically applies even if the connection between these effects and the source of alleged pollution is remote. Likewise, nothing in the district court's analysis restricts its application to alleged polluters operating on the U.S. border, and it could be easily extended to cover air and water pollution emanating from non-border countries. *Cf.* Rebecca Renner, *Science News: Asia Pumps Out More Mercury than Previously Thought*, Envtl. Sci. & Tech., Jan. 5, 2005 (discussing scientific investigation of long-range transport of atmospheric pollutants from Asia); Nordic Council of Ministers, *Lead Review* 11 (2003) (reporting to the United Nations Environment Programme on the long-range air transport of lead emissions); Nordic Council of Ministers, *Cadmium Review* 9 (2003) (reporting on the long-range air transport of cadmium). Given the sweeping nature of cross-border contamination, a limitless range of foreign companies operating solely on foreign soil could be captured by the district court's expansive interpretation. Correspondingly, the district court's rationale would permit any foreign nation that can trace at least some of its environmental pollution

to economic activity occurring in the U.S. to subject the alleged polluter to protracted litigation and potential liability. The risk of retaliation against U.S. companies thus extends well beyond Canada and Mexico.

III. The District Court's Ruling Would Disrupt Functioning Diplomatic Mechanisms for Combating Transboundary Pollution.

Congress's decision not to apply CERCLA extraterritorially reflects that body's judgment that the problem of cross-border pollution is best treated, quite often successfully, through bilateral or multilateral diplomatic mechanisms. The reciprocal nature of the problem makes it inappropriate for resolution by the unilateral projection of a country's domestic laws onto its neighbors' territory. Instead, it is preferable to pursue joint measures to reduce the overall output of pollutants into the shared natural environment. The United States is a party to many regional and global agreements that address transboundary pollution through such cooperative efforts. *See, e.g.*, Moller, *supra*, at 1222-24 (discussing, with respect to the U.S. and Canada, the 1979 Convention on Long-Range Transboundary Air Pollution; the 1980 Memorandum of Intent between the United States and Canada Concerning Transboundary Air Pollution; the 1909 Boundary Waters Treaty; the 1972 and 1978 Great Lakes Water Quality Agreements). The U.S. has also been involved in numerous negotiations addressing environmental

problems in specific border areas. *See generally* John E. Carroll, *Environmental Diplomacy: An Examination and a Prospective of Canadian-U.S. Transboundary Environmental Relations* (1983) (describing the history of the U.S. – Canadian cross-border environmental diplomacy).

As a result of these agreements and negotiations, there exists a robust network of inter-governmental mechanisms dealing with the problem of cross-border contamination. Most prominently, the 1909 Boundary Waters Treaty between the U.S. and Canada established a bilateral International Joint Commission that is charged with resolving disputes concerning the control of boundary water quality, including transboundary pollution, and is vested with quasi-judicial, investigative and arbitral functions. The subsequent Great Lakes Water Quality Agreements have expanded the powers of the Commission, and over the years the Commission has successfully resolved a number of disputes between the two countries. *See* L.H. Legault, *The Roles of Law and Diplomacy in Dispute Resolution: The IJC as a Possible Model*, 26 Can.-U.S. L.J. 47, 49-54 (2000); Shawn M. Rosso, *Acid Rain: The Use of Diplomacy, Policy and the Courts to Solve a Transboundary Pollution Problem*, 8 J. Nat. Resources & Envtl. L. 421, 424-25 (1993) ("The IJC has been an innovative approach to dealing with common problems arising on the border. In effect, it has institutionalized an

acknowledgement of the importance of cooperation in addressing common environmental issues.").

Characteristic of this successful cooperative approach to transboundary pollution is the Commission's recent investigation, upon a joint request by the U.S. and Canada, of the issue of air pollution in the Detroit river area, which encompasses the metropolitan areas of Detroit, in the State of Michigan, and Windsor, in the Province of Ontario. Having concluded that the responsibility for the pollution was shared by both sides, the Commission recommended, and the U.S. and Canada subsequently created, a joint institution to address the problem. Int'l Joint Comm'n, *Detroit River Area of Concern: Status Assessment* (1997); Rosso, *supra*, at 424.

A similarly extensive diplomatic system of dispute resolution has been established to address pollution on the U.S. and Mexican border. *See* Elia V. Pirozzi, *Resolution of Environmental Disputes in the United States-Mexico Border Region and the Departure from the Status Quo*, 12 J. Envtl. L. & Litig. 371, 373-86 (1997) (discussing dispute resolution under NAFTA, North American Agreement on Environmental Cooperation and Environmental Dispute Resolution, "La Paz" Agreement Between the U.S. and Mexico on Cooperation for the Protection and Improvement of the Environment in the Border Area, and Integrated Environmental Border Plan for the Mexican-United States Border

Area). These agreements have allowed the two countries to solve a number of significant environmental problems in the border area. Under the "La Paz" agreement, for instance, a collaborative effort by the U.S. and Mexico has dramatically improved air quality in the El Paso-Ciudad Juárez border region, and has substantially reduced the pollution of copper smelters in Arizona in the United States, and Sonora in Mexico. Sanford E. Gaines, *NAFTA as a Symbol on the Border*, 51 UCLA L. Rev. 143, 161 (2003); John D. Wirth, *Smelter Smoke in North America: The Politics of Transborder Pollution* 175-99 (2000).

The extraterritorial application of CERCLA, which the district court here allowed, risks disrupting these well-functioning diplomatic schemes. It places a matter traditionally handled through diplomacy into the hands of individual private litigants who can unilaterally pursue CERCLA suits without any regard for the foreign policy and international environmental consequences for the nation as a whole. The firmly established presumption against extraterritorial application of federal legislation, which the district court flouted, is designed to prevent precisely this dangerous and counterproductive exercise. As the Supreme Court admonished, "before reading our law to 'run interference in such a delicate field of international relations,' 'where the possibilities of international discord are so evident and retaliative action so certain,' the Court should await Congress' clearly expressed instruction." *Spector*, slip op. at 2 (Ginsburg, J., concurring in part and

concurring in the judgment) (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

Absent a clear showing of congressional intent to apply federal law abroad, the authority to resolve the sensitive problem of cross-border environmental relations is vested in the federal Executive acting through its diplomatic representatives. As the Fifth Circuit has trenchantly observed in an analogous situation, when considering whether to give extraterritorial application to the Marine Mammal Protection Act of 1972:

> When Congress considers environmental legislation, it presumably recognizes the authority of other sovereigns to protect and exploit their own resources. Other states may strike balances of interests that differ substantially from those struck by Congress. The traditional method of resolving such differences in the international community is through negotiation and agreement rather than through the imposition of one particular choice by a state imposing its law extraterritorially.

Mitchell, 553 F.2d at 1002. These mechanisms allow the Executive Branch to evaluate the nation's environmental priorities, to take account of the diplomatic sensitivities involved, and to respond in a manner that appropriately combines the determination and the flexibility necessary to solve the complex issues surrounding transboundary pollution.

The federal government is both willing and able to engage foreign nations in a coordinated effort to combat cross-border pollution. If the federal authorities conclude that some of the pollution at issue in this case is, in fact, traceable to

TCM's Canadian operations, they can conduct the necessary clean-up operations and then pursue the matter further through diplomatic channels with the Canadian government. By not extending the reach of CERCLA to foreign activities, Congress has approved of this course of action and refused to allow private litigants to interfere with it through individual lawsuits. This Court should reject the district court's lack of fidelity to Congress's intent and the district court's intrusion into the Executive Branch's authority over foreign relations.

CONCLUSION

The district court's order should be reversed.

Respectfully submitted,

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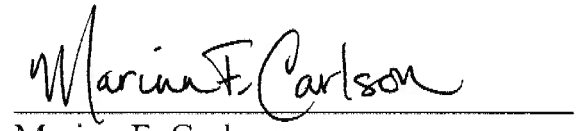
June 13, 2005

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7) and this Court's Rule 32-1, I hereby certify that this brief is proportionately spaced, has a typeface of 14 points and contains 5,500 words, excluding portions exempted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

By: 

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CERTIFICATE OF SERVICE

I, Igor V. Timofeyev, hereby certify that, on June 10, 2005, I served the foregoing Brief of *Amicus Curiae* Chamber of Commerce of the United States of America in Support of Defendant-Appellant on counsel for Teck Cominco Metals, Ltd., counsel for Joseph A. Pakootas, Donald R. Michel, and counsel for State of Washington by causing two true copies to be delivered via Federal Express for next business day delivery to the following:

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