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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING DEFENDANT-APPELLANT'S PETITION FOR REHEARING AND REHEARING EN BANC

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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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SCHOLARLY AUTHORITIES

OTHER AUTHORITY

Pursuant to Federal Rule of Appellate Procedure 29, the Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this brief as *amicus curiae* in support of the petition of Teck Cominco Metals, Ltd. ("Teck") for rehearing and rehearing en banc. The panel opinion issued on July 3, 2006, avoids the central question in this case, namely, whether the extraterritorial application of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") to Teck's wholly foreign conduct is consistent with congressional intent. Instead of addressing whether Congress intended CERCLA to apply extraterritorially, the panel held that the enforcement of CERCLA against a Canadian company for conduct that occurred only in Canada constitutes a "domestic" application of U.S. law. But that holding is clearly contrary to the law regarding the scope of the presumption against extraterritoriality.

The panel's decision also risks interference in U.S. foreign relations and no doubt will have significant negative consequences for many U.S. businesses, particularly those operating in areas close to our nation's borders. Accordingly, because the panel decision is inconsistent with Ninth Circuit precedent and involves questions of exceptional national importance, the Chamber urges the Court to grant Teck's petition for rehearing.

INTERESTS OF *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.

The panel's flawed decision will undoubtedly result in negative consequences to the United States business community. By extending CERCLA's statutory reach to activities carried out by a foreign company on foreign soil, the panel's decision risks provoking foreign governments into seeking to attach similar liability to activities undertaken by U.S. companies within the United States' borders. Quite apart from the harm to U.S. relations with the country's neighbors, 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.

ARGUMENT

I. Contrary to the Panel's View, the Presumption Against Extraterritoriality Applies Whenever U.S. Law Purports to Impose Liability for Conduct Occurring Wholly Outside the United States.

The panel's conclusion that the presumption against extraterritoriality does not come into play in this case is contrary to both law and logic. In reaching this conclusion, the panel emphasized that the "release" of hazardous substances in this case (the leaching of heavy metals from slag) occurred at a domestic "facility" (the Upper Columbia River Site). Slip Op. at 7299. But the panel did not dispute the fact that the *conduct* for which Teck, a Canadian company, is being held liable took place exclusively on foreign soil. Nor did it answer the critical question of whether Congress intended CERCLA to impose liability for this wholly extraterritorial conduct. Instead, the panel side-stepped this issue simply by defining the application of CERCLA in this case as "domestic."

Notwithstanding the panel's efforts to avoid the issue, its decision to permit CERCLA liability to attach to a litigant's conduct that occurs outside the United States presents precisely the situation the presumption against extraterritoriality was meant to address. Indeed, from its origins the presumption against extraterritorial application has been concerned with whether U.S. law governs *conduct* outside of the United States. *See Am. Banana Co. v. United Fruit Co.*, 213

U.S. 347, 356 (1909) (Holmes, J.) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."); *see also EEOC v. Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 249-51 (1991) (Title VII of the Civil Rights Act of 1964 does not regulate the employment-related conduct of American firms employing American citizens abroad); *Foley Bros., Inc. v. Filardo,* 336 U.S. 281, 285-86 (1949) (federal labor statute does not apply to impose liability on a private contractor for conduct that took place in a foreign country).

That the presumption against extraterritoriality is applied when U.S. law attempts to impose liability for conduct outside U.S. borders was affirmed by an en banc panel of this Court in *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994). In that case, this Court applied the presumption and held that the Copyright Act does not apply to infringing conduct abroad, even when such conduct may result in "adverse effects" within the United States. *Id.* at 1097. In so doing, this Court explicitly rejected the view that the presumption did not apply when there were (even significant) domestic effects resulting from conduct that was wholly extraterritorial. *See id.* at 1096-97. The panel's decision in this case effectively adopts the interpretation of the presumption that was rejected in *Subafilms*. Even though the panel's decision asserts that the presumption does not come into play because the passive "release" of heavy metals

from slag occurred domestically, *see* Slip Op. at 7299, it nevertheless allows liability to attach to exclusively foreign conduct by Teck solely because the conduct's *effects* occurred within the United States.

The panel's approach therefore is an end-run around the necessary analysis of whether Congress intended for CERCLA to impose liability on conduct that took place extraterritorially. *See Subafilms*, 24 F.3d at 1096 (noting that "the ultimate touchstone of extraterritoriality" analysis is the "ascertainment of congressional intent"; courts cannot "rest *solely* on the consequences of a failure to give a statutory scheme extraterritorial application").[1] Given the Supreme Court's and this Circuit's holdings that only a clear congressional command that a statute be applied outside of the United States can override the presumption against extraterritoriality, *Aramco*, 499 U.S. at 253; *Subafilms*, 24 F.3d at 1096, there is no doubt that, had the panel performed the required analysis, it would have concluded that there was no basis for giving extraterritorial application to CERCLA. The statute's concern is "decidedly domestic," and its text and legislative history reveal no indication whatsoever that Congress contemplated extending the statute to

[1] Even in those instances where courts have determined that the presumption against extraterritoriality has been overcome, they have *applied* the presumption but concluded that it was outweighed by an affirmative congressional decision to allow such application. *See Subafilms*, 24 F.3d at 1096 & n.13 (discussing *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285, 287 (1952) (Lanham Act), *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (L. Hand, J.) (Sherman

conduct taking place beyond the nation's borders. *Arc Ecology v. Dep't of the Air Force*, 294 F. Supp. 2d 1152, 1156-57 (N.D. Cal. 2003), *aff'd*, 411 F.3d 1092 (9th Cir. 2005).

II. The Panel's Decision Interferes with U.S. Diplomacy and Threatens International Discord.

The panel's failure even to weigh the presumption against extraterritoriality is plainly inappropriate because this case raises the very concerns the presumption was designed to ameliorate, namely, the "unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248; *see also Subafilms*, 24 F.3d at 1097-98 & n. 14 ("[P]reventing international discord clearly is one of the most important values that [the presumption against extraterritoriality] furthers.").

The panel's conclusion that CERCLA extends to activities conducted by a foreign company on the territory of a foreign country risks triggering serious diplomatic consequences. The Canadian government has already protested the extension of CERCLA liability to Teck's exclusively Canadian operations. *See* Pet. for Reh'g at 2-5. The reason for the protest is clear: by projecting CERCLA's standards onto the sovereign territory of Canada, the panel's decision disrupts the

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Act), *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968) (Securities Exchange Act)).

integrity of a foreign country's environmental scheme by imposing upon it a potentially inimical set of priorities.

The extraterritorial application of CERCLA also needlessly interferes with the foreign affairs prerogatives of the U.S. government and disrupts an extensive and well-functioning network of inter-governmental arrangements designed to address the problem of cross-border pollution. For example, under the auspices of the International Joint Commission established by the 1909 Boundary Waters Treaty between the U.S. and Canada, the two countries already have resolved a number of environmental problems along their borders. *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). By allowing individual private litigants to pursue CERCLA suits without regard for foreign policy considerations or consequences, the panel's decision directly interferes with, and potentially undermines, these diplomatic efforts.

III. The Panel's Decision Will Have Substantial Adverse Consequences for the Business Community.

Regardless of whether the application of CERCLA in this case is characterized as "domestic" or "extraterritorial," by attaching liability to conduct that occurred wholly outside the United States, the panel's decision will detrimentally affect many of the Chamber's members and affiliates, as well as the U.S. business community in general. United States companies and individuals are

actively engaged in business operations in the regions bordering Canada. These companies will be exposed to 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 panel's projection of CERCLA abroad effectively subjects foreign companies operating outside the United States to the U.S. environmental regulatory regime. If private litigants are permitted to use CERCLA lawsuits to target foreign companies' 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 country in which they operate. As a result, 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 respond. *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."). The panel's insistence that this case involves only a "domestic" application of CERCLA is unlikely to alleviate this cross-border tension, given that under the panel's approach CERCLA liability can attach to conduct exclusively outside the United States.

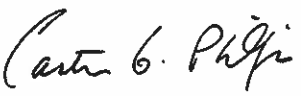
In response, Canada could very well try to "level the playing field" between companies on either side of the border by imposing corresponding liability on companies operating within U.S. territory whenever their operations produce pollution that later ends up in Canada. Canada already contends that pollutants released by some U.S. companies migrate across national boundaries and account for air and water pollution in certain regions of Canada. *See* Env't Canada, *Proposed National Emission Standards for Hazardous Air Pollutants* (Mar. 30, 2004), *available at* http://www.ec.gc.ca/mercury/en/mcepa.cfm#ECC (reporting that 10 percent of the mercury deposited in Canada each year comes from U.S. sources). If Canada wishes to retaliate for the unwarranted intrusion into its sovereignty, it will find an easy basis under the panel's rationale for imposing liability upon U.S. businesses. The risk that Canada would open the door to proceedings against U.S. companies, premised on the U.S. companies' failure to comply with Canadian environmental standards in their domestic U.S. activities, will severely undermine business confidence.

The resulting instability in the governing regulatory framework may also disrupt existing projects in the border regions and deter companies from undertaking new ones. The need to become familiar with foreign laws and regulations, and to conform domestic company activities to these requirements, would impose a significant informational and operational cost on all businesses in the border regions. Likewise, the prospect of inconsistent lawsuits and liability verdicts would inflict considerable damage on the economic cooperation between the United States and Canada and decrease the prospects for bilateral investment.

CONCLUSION

For the foregoing reasons, rehearing or rehearing en banc should be granted.

Respectfully submitted,



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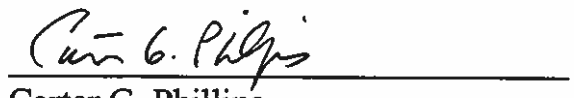
July 25, 2006

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 2093 words, excluding portions exempted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

By: 

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I, Matthew B. Archer-Beck, hereby certify that, on July 25, 2006, I served the foregoing Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* Supporting Defendant-Appellant's Petition for Rehearing and Rehearing En Banc on counsel for Teck Cominco Metals, Ltd., counsel for Joseph A. Pakootas and Donald R. Michel, and counsel for the 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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