No. 18-1160

IN THE

Supreme Court of the United States

TECK METALS LTD., FKA TECK COMINCO METALS, LTD.,

Petitioner,

v.

THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, *et al.*,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* THE GOVERNMENT OF CANADA IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Page

STATUTES AND OTHER AUTHORITIES

Cited Authorities

Page

INTRODUCTION

The Government of Canada ("Canada") respectfully submits this Brief *amicus curiae*[1] in support of Petitioner Teck Metals Ltd. ("Petitioner"). This brief expresses Canada's interest in, and provides additional context regarding, Petitioner's first question for review.[2] Canada maintains abiding concerns about the Ninth Circuit's 2006 ruling (the "2006 Judgment")[3] applying the United States' Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), to Petitioner's extraterritorial conduct in Canada. The 2006 Decision, relied upon by the 2018 Ninth Circuit judgment that is the subject of the present Petition (the "2018 Judgment"), accords insufficient weight to principles

1. No counsel for a party authored this Brief in whole or in part. No person other than the *amicus curiae* made a monetary contribution to the preparation or submission of this Brief. Counsel for the *amicus curiae* has provided 10 days' notice of its intention to file this Brief to counsel of record for all parties. This Brief is submitted with the consent of both Petitioner and Respondents the Confederated Tribes of the Colville Reservation and the State of Washington.

2. Petitioner's remaining questions concern matters of United States law that do not implicate Canada's interests and are not within the purview of this Brief.

3. *Pakootas v. Teck Cominco Metals Ltd.*, 452 F.3d 1066 (9th Cir. 2006). While the question addressed herein was first decided in the 2006 Judgment, this Court did not grant *certiorari* to conclusively affirm or reverse that ruling. Petitioner's brief to the Court of Appeals below renewed Petitioner's argument regarding the extraterritorial application of CERCLA, and the Ninth Circuit again addressed this argument in the decision on appeal. *See* Pet. App. 35a, n. 13. Accordingly, the issue has been properly preserved for this Court's review.

of international comity and the history of successful diplomatic efforts between the U.S. and Canada to comprehensively resolve matters of cross-border pollution without necessitating recourse to the courts. These matters are of pronounced importance to Canada and its citizens, a significant majority of whom live and work in close proximity to the U.S. border. Canada believes that its perspective on these matters will assist this Court in deciding the Petition, especially in view of the implications of the 2006 and 2018 Judgments for the United States' foreign relations. It should be noted that Canada is engaged in a comprehensive and ongoing reconciliation process with Indigenous peoples in Canada. Furthermore, Canada views environmental pollution as an important societal concern.

THE INTEREST OF *AMICUS CURIAE* THE GOVERNMENT OF CANADA

For Canada, this litigation raises concerns about (1) the preservation and vitality of established bilateral mechanisms and agreements between the U.S. and Canadian governments, and (2) Canada's sovereign prerogative to regulate conduct within its own borders through its own robust framework of environmental laws.

Petitioner is domiciled in Canada, in the Province of British Columbia. Like the vast majority of Canadian citizens and businesses, Petitioner's facility is located near the 5,525-mile border that separates Canada and the United States. This is the longest land border anywhere in the world, and its significance to Canada makes the appropriate resolution of transboundary issues, including transboundary pollution claims, an issue of sovereign importance.

Canada and British Columbia govern Petitioner's conduct through a harmonized system of national and provincial environmental laws. Canada has a strong sovereign interest in regulating the conduct of its own corporate citizens through this two-tiered system of environmental laws. The coherence and efficacy of these laws are compromised when Canadian-regulated entities face inconsistent compliance obligations from foreign regulatory authorities, or unpredictable liabilities from piecemeal foreign lawsuits. To avoid a system of double-regulation that burdens and frustrates compliance by private actors on both sides of the U.S.-Canada border, the two nations have historically pursued state-to-state solutions to problems caused by transboundary pollution. Through a combination of bilateral agreements, diplomatic consultations and treaty-based dispute resolution processes, Canada and the United States have worked in tandem to prevent and repair cross-border contamination for more than a century. These diplomatic solutions have been used on several occasions to successfully resolve disputes stemming from Petitioner's smelting facility in Trail, British Columbia (the "Trail Smelter"), including grievances raised by private parties.

Canada has repeatedly expressed, in diplomatic correspondence[4] and in *amicus* submissions to the

4. These include a series of diplomatic notes, dated January 8, 2004, July 18, 2006, March 20, 2015 and August 10, 2015 (the "Diplomatic Notes"), concerning the U.S. Environmental Protection Agency's ("EPA") initially unilateral, but eventually cooperative efforts to require Petitioner to conduct a Remedial Investigation and Feasibility Study ("RI/FS") under CERCLA. *See* 2015 Canada Brief, Apps. B, C.

Ninth Circuit[5] and this Court,[6] its interest in having disputes related to Trail Smelter addressed through these established bilateral procedures, rather than a unilateral judicial process. In light of this Court's recent pronouncements regarding the extraterritorial reach of U.S. laws, Canada takes this opportunity to renew these expressions of interest. Canada reiterates its strong preference for upholding bilateral mechanisms as the exclusive means of resolving cross-border pollution claims related to the Trail Smelter facility.

SUMMARY OF ARGUMENT

The 2018 Judgment, by affirming the 2006 Judgment's holdings on the extraterritorial application of CERCLA, flouts principles of international comity and threatens to bypass treaties and bilateral mechanisms engineered through decades of diplomatic labor. While acknowledging the many ambiguities of the CERCLA statute, the Ninth Circuit ignored principles of national and customary international law requiring that these ambiguities be resolved in consonance with the United States' international legal obligations. The Ninth Circuit's holding threatens to undermine the diplomatic processes that have, for more than a century, proven to be the most effective method of dealing with environmental contamination that crosses the U.S.-Canada border.

The United States' international legal obligations include a number of binding treaties that remain good

5. *See generally*, *id.*, Doc. 25.

6. *See generally*, Brief of the Government of Canada as *Amicus Curiae* in Support of Petitioner, *Teck Cominco Metals, Ltd. v. Pakootas*, No. 06-1188 (U.S. May 2, 2007)

law and are directly applicable to the Trail Smelter facility. Chief among these is the 1909 Boundary Waters Treaty ("BWT"), which established an International Joint Commission ("IJC") to address disputes relating to transboundary waters, including pollution between the United States and Canada. *See* Treaty Relating to the Boundary Waters and Questions Arising Along the Boundary Between the United States and Canada, Jan. 11, 1909, Gr. Brit. (for Can.)-U.S, T.S. No. 548, 36 Stat. 2448.[7] The two nations have successfully used the IJC to resolve disputes related to Trail Smelter in the past. Indeed, the seminal Trail Smelter arbitration, widely regarded as the pioneering case in the field of international transboundary pollution, began with an IJC reference. *See* Injury to Property in the State of Washington by Reason of the Drifting of Fumes from the Smelter of the Consolidated Mining and Smelting Company of Canada, in Trail, British Columbia: Report and Recommendations of the International Joint Commission (U.S. v. Can.), 29 R.I.A.A. 365 (International Joint Commission 1931) (the "IJC Report").[8]

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7. *See also* U.S. Dep't of State, Office of the Legal Adviser, Treaty Affairs Staff, Treaties in Force: A List of Treaties and Other International Agreements in Force on January 1, 2018, 65 (2018) ("Treaties in Force") (*available at* https://www.state.gov/documents/organization/282222.pdf) (last visited March 24, 2019). The United States and Canada have productively invoked the IJC process to address concerns of cross-border water pollution in the past. *See, e.g.*, International Joint Commission, Docket 101R (A Reference to examine the potential pollution of transboundary waters by Garrison Diversion Unit, in North Dakota), Can.-U.S., (Jan. 1, 1975) (*available at* https://www.ijc.org/en/101).

8. *Available at* http://legal.un.org/docs/?path=../riaa/cases/vol_XXIX/365-371.pdf&lang=O (last visited March 24, 2019).

Though the Trail Smelter Arbitration focused on air rather than water pollution, its genesis is instructive to the questions presented for this Court's review. In 1927, the United States voiced concerns about air emissions from the Trail Smelter traveling into the State of Washington, and proposed to refer the matter to the IJC.[9] In keeping with the two nations' tradition of bilateral cooperation, Canada voluntarily consented. This reference culminated in the 1931 IJC Report, which in turn served as the basis for a 1935 treaty commonly known as the Ottawa Convention. *See* Convention for the Establishment of a Tribunal to Decide Questions of Indemnity Arising from the Operation of the Smelter at Trail, British Columbia, April 15, 1935, U.S.-Can. (*ratified* June 5, 1935, *entered into force* Aug. 3, 1935), 4 U.S.T. 4009, T.S. No. 893, 49 Stat. 3245, 162 L.N.T.S. 73 (the "Ottawa Convention"). This treaty remains in force today.[10] The Tribunal established by the Ottawa Convention issued its famous decisions in 1938 and 1941.[11]

Of particular relevance is the unruly regime of piecemeal private claims that preceded and prompted

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9. *See* Trail Smelter Arbitral Tribunal Decision (U.S. v. Can.), 3 R.I.A.A. 1911, 1918, 30 Am. J. Int'l L. 182 (Trail Smelter Arb. Trib. 1938) (the "1938 Decision") (describing origins of Trail Smelter Arbitration) (*available at* http://http://legal.un.org/riaa/cases/vol_iii/1905-1982.pdf) (last visited March 24, 2019).

10. *See* Treaties in Force, p. 67.

11. *See generally*, 1938 Decision, 3 R.I.A.A. 1911; Trail Smelter Arbitral Tribunal Decision (U.S. v. Can.), 3 R.I.A.A. 1938, 35 Am. J. Int'l L. 684 (Trail Smelter Arb. Trib. 1941) (the "1941 Decision"). These decisions are discussed at greater length in Section I(B), *infra*.

the 1927 reference of the Trail Smelter dispute to the IJC.[12] Even before the advent of national environmental laws that enabled private parties to seek judicial redress of environmental injuries, the two nations recognized that a fractured system of private claims was neither a fair nor efficient means of addressing transboundary environmental issues.[13] Instead, both countries have worked together to develop streamlined bilateral processes that facilitate *en masse* resolution of claims for cross-border environmental damage to land, private property and wildlife. The 2006 Decision marks a relapse to the disfavored system of private claims that both governments recognized, even before passage of modern environmental laws, to be ungovernable and unsustainable. In resolving ambiguities in the text of CERCLA, the Ninth Circuit failed to give due weight to existing bilateral mechanisms and comity, both of which embody a strong preference for non-judicial solutions to problems of cross-border contamination.

In requesting that this Court reverse the 2018 and 2006 Judgments, Petitioner contends that the Ninth Circuit's ruling will harm the United States' foreign relations with Canada and other nations. While the close bonds between Canada and the United States would not be weakened by an adverse ruling in this litigation, Canada does harbor legitimate concerns about the primacy and

12. *See* 1938 Decision, 3 R.I.A.A. at 1915-16 (describing disparate claims brought against Trail Smelter's predecessor between 1896 and 1921), 1917-18 (describing private claims process operated by Trail Smelter between 1925 and 1928 for paying private settlements to downstream farmers in the United States).

13. *See* id. at 1918.

efficacy of its own environmental laws within its own territorial borders. Canada also worries that the 2006 Judgment could establish a precedent that invites further lawsuits by private parties on both sides of the U.S.-Canada border. Such a precedent would hamper Canada in its ability to discourage or divert copycat lawsuits by Canadian citizens against U.S. polluters who cause environmental harm to public welfare or private property interests in Canada. Both of these concerns implicate the principle of comity of nations, a principle equally observed by the courts of Canada and the United States. The Ninth Circuit erred by failing to accord due respect to principles of international comity.

Canada respectfully submits that this Court should grant the Petition for a Writ of Certiorari and reverse the 2006 and 2018 Judgments, clearing a path for Respondents' claims to be resolved completely, efficiently and finally through bilateral processes established by the United States and Canada, or by other means consistent with international legal norms and principles of comity.

ARGUMENT

I. THE NINTH CIRCUIT FAILED TO RECONCILE CERCLA'S AMBIGUITIES WITH THE UNITED STATES' INTERNATIONAL LEGAL OBLIGATIONS AND CUSTOM OF RESOLVING TRANSBOUNDARY ENVIRONMENTAL ISSUES THROUGH BILATERAL PROCEDURES

A. Statutory Ambiguities Should Be Resolved, Whenever Possible, in Accordance with the United States' International Legal Obligations

Petitioner has framed its first question for review in terms of the juridical "presumption against extraterritoriality" of the United States' laws. Pet. Br. 11-16. This doctrine is well elucidated in Petitioner's Brief. Out of deference to the Court's interpretations of its own decisions, and mindful of Supreme Court Rule 37.1, Canada will not comment further upon this presumption, except to note that:

> (1) as applied in this case, the presumption would serve interests of comity and bilateral cooperation that are significant to Canada;
>
> (2) the Court, in reaffirming the presumption's application, has often given weight to expressions of concern from foreign sovereigns. *See RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090, 2016-17, 195 L.Ed.2d 476, 84 USLW 4450 (2016) (considering the *amicus curiae* advisories of "numerous foreign countries"); *Morrison v. Australia National Bank Ltd.*,

> 561 U.S. 247, 269, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010) (addressing opinions of sovereign *amici curiae* regarding the "probability of incompatibility with the applicable laws of other countries"); and
>
> (3) Canadian courts apply similar rules and presumptions against the extraterritorial application of Canadian law. *See R. v. Hape*, [2007] 2 S.C.R. 292, 332, ¶ 69 (Can. 2007) ("Simply put, Canadian law, whether statutory or constitutional, cannot be enforced in another state's territory without the other state's consent"); *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assoc. of Internet Providers*, [2004] 2 S.C.R. 427, 454 (Can. 2004) ("SOCAN") ("While the Parliament of Canada, unlike the legislatures of the Provinces, has the legislative competence to enact laws having extraterritorial effect, it is presumed not to intend to do so, in the absence of clear words or necessary implication to the contrary").

Instead, Canada addresses an equally important canon of statutory construction, which arises "'wholly independent' of the presumption against extraterritoriality," and casts independent doubt on the Ninth Circuit's ruling. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) (Scalia, J., dissenting) (*quoting EEOC v. Arabian Am. Oil Co.* ("Aramco"), 499 U.S. 244, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991)). The so-called *Charming Betsy* canon holds that "even where the presumption against extraterritoriality does

not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Id.*, 509 U.S. at 815. *See also F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 164, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004) ("Empagran I") ("this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. . . . '[A]n act of congress ought never be construed to violate the law of nations if any other possible construction remains'") (*quoting Murray v. Schooner Charming Betsy*, 6 U.S. 64, 2 Cranch 64, 2 L.Ed. 208 (1804) (Marshall, C.J.)) (other internal citations omitted). Canadian courts apply a kindred "presumption of conformity" under which "the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations." *Hape*, [2007] 2 S.C.R. at 323, ¶ 53.

The *Charming Betsy* canon, like the presumption against extraterritoriality, looks to the intent expressed by Congress, and presumes that Congress intended to comply with international law absent its express indication to the contrary. Unlike the presumption against extraterritoriality, the *Charming Betsy* canon remains in play even when federal statutes are applied domestically. *See Hartford Fire*, 509 U.S. at 815 (*citing Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959)). As such, even if this Court does not disturb the Ninth Circuit's ruling that CERCLA's application to Petitioner was "domestic" in nature, the Court of Appeals should have considered

whether CERCLA's application to Petitioner comported with the United States' international legal obligations and customs, and other principles of international law.

B. The Ninth Circuit Erred by Interpreting CERCLA's Ambiguities without Regard to the United States' International Legal Obligations and Custom of Addressing Cross-Border Pollution Claims through Bilateral Cooperation

In reaching its 2006 Decision, the Ninth Circuit lamented CERCLA's lack of clarity, and acknowledged that CERCLA's provision on arranger liability "does not indicate whether foreign corporations are covered." *Pakootas*, 452 F.3d at 1076, 1079-80 (interpreting 42 U.S.C. § 9607(a)(3)). To ascertain whether CERCLA's reference to "any person" in this provision encompasses extraterritorial actors like Petitioner, the Ninth Circuit embarked on a complicated exposition of the statute, searching for contextual clues of Congressional intent. *See id.* at 1077 (examining CERCLA's purpose, legislative history and geographic scope to determine whether it applies to extraterritorial actors, because statute was "silent about who is covered by the Act").

Canada reserves comment about the soundness of the Ninth Circuit's interpretation of CERCLA as a matter of U.S. law. Canada reviews the Ninth Circuit's analysis only to note that the Court of Appeals employed techniques of statutory construction that are called upon when interpreting facially ambiguous statutes. Presented with a facially ambiguous statute that is "silent about who is covered," the Ninth Circuit should have consulted

principles of international law to determine whether its interpretation conflicted with those principles, or interfered with bilateral mechanisms established for the extra-judicial resolution of transboundary disputes.

These mechanisms include the previously mentioned BWT, and the IJC chartered thereunder. *See* BWT, 36 Stat. 2448, Article III. The IJC has authority to consider any difference between Canada and the United States "involving the rights, obligations, or interests of either in relation to the other *or to the inhabitants of the other*, along the common frontier between the United States and the Dominion of Canada," and to issue a decision, or report and recommendation in connection therewith, depending on the terms of the parties' reference. Id., Articles IX, X (emphasis added).

It was upon the recommendation of the IJC that Canada and the United States entered into the Ottawa Convention. *See* IJC Report, 25 R.I.A.A. at 368-370. This bilateral solution was necessitated by the failures of the previous framework, in which residents of the Columbia River Basin made individual claims for compensation directly to the Trail Smelter. *See* 1938 Decision, 3 R.I.A.A. at 1917. This system reached a standstill after American landowners organized into a citizens' association to seek aggregate settlement of their claims. *See* id. The United States requested reference to the IJC in response to this impasse.

Under the Ottawa Convention, Canada voluntarily agreed to pay damages of $350,000 for environmental contamination caused by the Trail Smelter in the United States prior to 1932. *See* Ottawa Convention, 4 U.S.T. at

4010, Art. I. The governments also agreed to constitute a Tribunal that would determine damages payable by Canada for Trail Smelter contamination occurring after 1932, and institute an indefinitely continuing regime (the "Permanent Regime") for the resolution of future disputes and payment of future damages. *See* id., Arts. II, III.

The Tribunal's decisions dealt solely with transboundary air pollution. *See* 1938 Decision, 3 R.I.A.A. at 1921-22 (focusing on airborne emissions of sulfur dioxide); 1941 Decision, 3 R.I.A.A. at 1946-48 (same). The 1941 Decision, in establishing the Permanent Regime, implemented protocols solely for the measurement and prevention of airborne contamination. 1941 Decision, 3 R.I.A.A. at 1966-78. Neither the United States nor Canada has suspended or modified the Permanent Regime. Moreover the Ottawa Convention, which remains in force,[14] is not limited to cases airborne pollution and therefore provides an avenue for bilateral resolution of Respondents' claims. *See* Ottawa Convention, 4 U.S.T. at 4010, Art. III.

The BWT, Ottawa Convention and Trail Smelter arbitration are but a few of many successful bilateral efforts between Canada and the United States to address cross-border environmental disputes. In 1972, following an extensive scientific study by the IJC, Canada and the United States entered into the Great Lakes Water Quality Agreement, which they have regularly updated and amended, most recently in 2012. *See* Agreement on Great Lakes Water Quality, Apr. 15, 1972, U.S.-Can., 23 U.S.T.

14. *See* Treaties in Force, p. 67.

301 ("Great Lakes Agreement").[15] This Agreement has been followed by the U.S.-Canada Agreement Concerning the Transboundary Movement of Hazardous Waste, Oct. 28, 1986, Can.-U.S., T.I.A.S. No. 11099,[16] the Agreement Between the Government of the United States of America and the Government of Canada on Air Quality, Mar. 13, 1991, U.S.-Can., T.I.A.S. No. 11783, 30 ILM 678,[17] and the countries' periodically maintained Canada-United States Joint Inland Pollution Contingency Plan, Oct. 28, 2009, U.S.-Can.[18] As regards the preservation of wildlife, Canada and the United States have both entered the Convention for the Protection of Migratory Birds in the United States and Canada, Aug. 16, 1916, U.S.-Gr. Brit. (for Can.), 39 Stat. 1702, T.S. 628,[19] The foregoing list is only a representative sampling of the dozens of in-force bilateral agreements between the two nations relating to boundary waters, fisheries and pollution.[20]

The United States and Canada have a proven track record of addressing issues of cross-border pollution through bilateral agreements, bilateral discussions, and bilateral dispute resolutions dating back to the

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15. The 1978 reformation of this Agreement, as amended in 1983, 1987 and 2012, remains in force today. *See* id., p. 74.

16. This agreement remains in force. *See* id.

17. This agreement remains in force. *See* id., p. 75.

18. *Available at* https://www.epa.gov/sites/production/files/2014-08/documents/us_can_jcp_eng.pdf (last visited March 24, 2019).

19. This treaty remains in force. *See* Treaties in Force, p. 71.

20. *See* id., pp. 65-67, 72, 74, .

early 20th century. With the benefit of this historical perspective, the two nations understand the pitfalls of a system that permits uncoordinated individual claims against extraterritorial polluters: it is unfair to aggrieved parties, who must race to settle; it is burdensome, costly and confusing for regulated businesses; and it has the potential to result in stalemates that create tensions on both sides of the border.

Most recently, the United States and Canada attempted to reach a cooperative resolution to the EPA's investigation of Petitioner, commenced in 1999 at the instance of the Respondent Confederated Tribes. Pet. App. 5a. After a site investigation and preliminary assessment coordinated with the Tribes, the EPA issued a Unilateral Administrative Order ("UAO") against Petitioner on December 11, 2003. Id. at 5a, 64a. The UAO directed Petitioner to conduct a remedial investigation and feasibility study ("RI/FS") under CERCLA. Id. at 65a.

Canada swiftly responded by sending a Diplomatic Note on January 8, 2004, requesting that the EPA rescind the UAO and accept Petitioner's offer to conduct a voluntary study, funded through its U.S. subsidiary, in conjunction with the EPA. *See* id. at 6a; 2015 Canada Brief, App. B. Canada's response preceded Respondents' July 21, 2004 filing of this lawsuit by seven months. Canada's diplomatic intervention resulted in the successful negotiation of a June 2, 2006 settlement agreement between Petitioner and the EPA ("2006 Agreement"), outside the rubric of CERCLA. Pet. App. 6a. This agreement provides an "enhanced consultative role" for Canada, which the two countries have defined through the subsequent exchange of Diplomatic Notes. *See* 2015

Canada Brief, App. B. In this role, Canada has made efforts to facilitate bilateral oversight of Petitioner's compliance with the 2006 Agreement, and identify bilateral solutions to corresponding problems. *See* id., App. C. Under the 2006 Agreement, Petitioner's U.S. subsidiary has funded a RI/FS modeled after CERCLA methodologies. Pet. App. 6a. To date, Petitioner's subsidiary has spent more than $90 million on this RI/FS, and has conducted voluntary remediation efforts at the affected site. CA. ER 248, 250-52.

In desisting from further investigative or enforcement action against Petitioner, and giving Canada a "seat at the table" under the 2006 Agreement, the EPA carried forward a long tradition founded on the nations' mutual preference for streamlined bilateral solutions to problems of transboundary contamination. Unfortunately, the cooperative solution brokered by the United States and Canada has been repeatedly undermined by the continuation of Respondents' lawsuit. *See RJR Nabisco*, 136 S.Ct. at 2115 (Ginsburg, J. concurring in part and dissenting in part) ("When the United States considers whether to initiate a prosecution or civil suit, the Court observes, it will take foreign-policy considerations into account, but private parties will not").

The 2006 and 2018 Judgments adopt a reading of admittedly ambiguous CERCLA provisions that jeopardizes bilateral efforts like the 2006 Agreement, while overlooking the international legal obligations set forth in the Ottawa Convention and BWT. In light of the Ninth Circuit's candid admission that CERCLA "does not indicate whether foreign corporations are covered," and the clear availability of statutory constructions compatible

with the diplomatic practice and treaty obligations of the United States and Canada, the Court of Appeals' determination was plain error.

II. THE NINTH CIRCUIT'S EXTRATERRITORIAL APPLICATION OF CERCLA CONTRAVENES PRINCIPLES OF COMITY, ABSENT ANY INDICATION OF CONGRESSIONAL INTENT TO IMPOSE CERCLA ON FOREIGN ACTORS

The doctrine of international comity, characterized as the "respect sovereign nations afford each other by limiting the reach of their laws," informs the presumption against extraterritoriality while standing apart from it. *Hartford Fire*, 509 U.S. at 817-819 (Scalia, J., dissenting) (prescriptive comity governs interpretation even of laws having extraterritorial reach). *See also Morrison*, 561 U.S. at 280 (Stevens, J., concurring) ("[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations") (*quoting Empagran I*, 542 U.S. at 164); *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. Of Ohio*, 482 U.S. 522, 543, n. 27, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987) (more broadly defining comity as "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states").

Principles of comity thus provide an independent basis for limiting the extraterritorial application of U.S. laws, even in cases to which the presumption against extraterritoriality might not be suited. *See, e.g. Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 127-29, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013) (Breyer, J., concurring)

(declining to apply presumption against extraterritoriality, but concluding that adjudication of claims with foreign policy implications must "be consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its own laws and their enforcement"); *Morrison*, 561 U.S. at 280 (Stevens, J., concurring).

The principle of international comity is likewise enshrined in Canadian jurisprudence. "The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limits. Absent a breach of some overriding norm, other states as a matter of 'comity' will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits." *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, 1047 (Can. 1994). *See also*, *Hape*, [2007] 2 S.C.R. 292, 320, ¶¶ 48-49 (Can. 2007) (comity, while not a strict legal obligation, is a "principle of interpretation" triggered when Canada's laws "could have an impact on the sovereignty of other states"); *Monguard Investments Ltd. v. De Savoye*, [1990] 3 R.C.S. 1077, 1096 (Can. 1990) (adopting this Court's formulation of comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience") (*quoting Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S.Ct. 139, 40 L.Ed. 95 (1895)). Canada's courts recognize comity as the basis for their presumption against extraterritoriality. "While the notion of comity among independent nation States . . . does not operate as a limitation on Parliament's legislative competence, the courts nevertheless presume, in the absence of clear words to the contrary, that Parliament did not intend

its legislation to receive extraterritorial application." *SOCAN*, [2004] 2 S.C.R. at 454 (Can. 2004).

Whether or not the Ninth Circuit's rulings correctly apply the presumption against extraterritoriality, the Court of Appeals erred by parsing CERCLA's ambiguities without considering the impact of its decision on Canada's sovereign authority. Canada and its provincial governments have designed and implemented environmental laws in keeping with the goals and practices promulgated by the nearly 200 multilateral and bilateral environmental treaties to which Canada is a party. *See generally*, 2015 Canada Brief, App. A (provincial permits controlling acceptable releases in Petitioner's effluent discharges); Canada Ministry of Environment, Compendium of Canada's Engagement in International Environmental Agreements (2017).[21] Pursuant to these laws, Canada has been proactive in responding to cross-border environmental issues and pursuing cooperative bilateral solutions. Canada's vigilance in addressing such matters is also aimed at preserving Canada's exclusive dominion over its own corporate citizens by defusing transboundary disputes and obviating the need for foreign regulation of Canadian companies.

Canada reacted within weeks to the 2003 UAO against Petitioner, issuing a Diplomatic Note that asked that the EPA to withdraw its Order in favor of a diplomatically managed process that Petitioner would voluntarily

21. *Available at* https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/participation-international-environmental-agreements.html (last visited March 24, 2019).

fund and comply with. *See* Pet. App., 6a; 2015 Canada Brief, App. B. Canada did so of its own initiative, well before Respondents brought this litigation – indeed, before any such litigation could be foreseen. The Courts below overlooked Canada's urgent, direct and repeated overtures to remove this dispute from the jurisdiction of American courts and redress Respondents' injuries through the cooperative procedures historically favored by the two governments. In adopting an interpretation of CERCLA's ambiguities that frustrates diplomatic efforts by the United States and Canada, and trammels upon Canada's sovereign prerogative, the Ninth Circuit abandoned the principles of comity held dear by both nations and committed judicial error.

CONCLUSION

Long before the modern era of environmental law and the widespread recognition of the troubles posed by transboundary pollution, the United States and Canada worked together to cooperatively pioneer solutions to these novel problems. While both nations' domestic environmental laws have evolved significantly since that time, the decisions that emerged from their Trail Smelter arbitration have "assumed immense importance in the development of the customary international law on transboundary pollution, primarily because [they are] the only adjudicative decision[s] of an international tribunal that speak[] directly to the substantive law of transboundary pollution." Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 947 (1997). These advancements were made possible by the close relationship and cooperative spirit of the two nations.

Canada has expressed its strong sovereign interest in subjecting Canadian businesses to a single set of environmental laws, and resolving issues of cross-border pollution through coordinated bilateral processes. Faced with an ambiguous statute that could have been construed not to apply to Petitioner, the Ninth Circuit erred by failing to consider Canada's sovereign interests, the United States' international legal obligations, and both countries' custom of favoring government-to-government solutions to cross-border environmental issues.

Canada respectfully submits that this Court should grant the Petition for a Writ of Certiorari and reverse the 2006 and 2018 Judgments, so that Respondents' claims maybe be resolved through bilateral mechanisms developed by the United States and Canada, or by other means consistent with international legal norms and principles of comity.

Respectfully submitted,

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