NO. 05-35153

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH A. PAKOOTAS, *et al.*,
Plaintiffs-Appellees,

and

STATE OF WASHINGTON,
Plaintiff/Intervenor-Appellee,

v.

TECK COMINCO METALS, LTD., a Canadian corporation,
Defendant-Appellant

On Appeal from the United States District Court
for the Eastern District of Washington

BRIEF OF *AMICI CURIAE* SIERRA CLUB AND SIERRA CLUB OF CANADA IN SUPPORT OF APPELLEES AND INTERVENOR-APPELLEE FOR AN AFFIRMATION OF THE ORDER OF THE DISTRICT COURT

Martin Wagner
Marcello Mollo
EARTHJUSTICE
426 17th Street, 6th Floor
Oakland, California 94612-2820
(510) 550-6700

Richard K. Eichstaedt
CENTER FOR JUSTICE
35 West Main Street, Suite 300
Spokane, Washington 99201
(509) 835-5211

ATTORNEYS FOR *AMICI CURIAE*
SIERRA CLUB AND SIERRA CLUB OF CANADA

RULE 26.1 CERTIFICATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* Sierra Club and Sierra Club of Canada state that they are not-for-profit corporations. Neither Sierra Club nor Sierra Club of Canada has a parent corporation or is owned in whole or part by any other entity.

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INTEREST OF *AMICI CURIAE* SIERRA CLUB AND SIERRA CLUB OF CANADA

Sierra Club and Sierra Club of Canada (*Amici*) submit this brief in support of Appellees Joseph A. Pakootas and Donald R. Michel (Pakootas) and Intervenor-Appellee State of Washington (Washington) urging this Court to affirm the decision of the district court. Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to this filing.

Sierra Club is a U.S. nonprofit organization of approximately 750,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives.

Sierra Club members live and recreate in Lake Roosevelt and the Upper Columbia River Basin. Sierra Club members will be directly and adversely impacted by any delay or derailment of current efforts to remediate contamination in the area, including a reversal of the district court's ruling in this case. Further, Sierra Club and its members have an interest in ensuring that contaminated sites across the United States are properly remediated to the benefit of human health and the environment.

Sierra Club of Canada is a Canadian non-profit, environmental research and advocacy organization. Sierra Club of Canada has chapters, groups and offices across Canada, including Vancouver, Victoria, Edmonton, Toronto, and a national office in Ottawa.

Sierra Club of Canada and its members will be directly and adversely impacted by a decision that erodes long-standing principles of international law that prohibit transboundary pollution and permit nations to address and remediate such harm. Sierra Club of Canada and its members also have an interest in ensuring that Canadian businesses act in an environmentally responsible manner that does not result in detrimental environmental or human health effects within Canada or adjacent countries.

SUMMARY OF ARGUMENT

This case seeks enforcement of an order issued by the U.S. Environmental Protection Agency (EPA) regarding remediation of pollution in a U.S. lake that resulted from nearly one hundred years of slag discharge from a smelter facility owned by Appellant Teck Cominco Metals, Ltd. (TCM) and located upstream in Trail, British Columbia. EPA's order would require TCM to participate in the remediation of the contaminated lake pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.* (2005). Applying CERCLA in this manner is not an extraterritorial

application of U.S. law, is consistent with long-standing principles of international law and does not risk international discord or threaten Canadian sovereignty.

International law prohibits Canada from using its territory in a manner that causes harm to U.S. territory, and permits domestic legal action by the United States to address such harm. Although the Boundary Waters Treaty might complement the CERCLA process, neither the Canadian nor U.S. government has referred this matter to the International Joint Commission (IJC) pursuant to that Treaty, and the mere existence of the Treaty does not preclude this CERCLA claim. Further, applicable international environmental agreements require that the United States enforce CERCLA in this case.

This application of CERCLA also presents no risk of discord between Canada and the United States. CERCLA is consistent with Canadian environmental laws. Canadian sovereignty is not threatened because any U.S. judgment must be enforced through the Canadian courts, and because Canadian sovereignty is limited by an international obligation to prevent transboundary pollution. Last, neither the existence of the Boundary Waters Treaty and other international agreements, nor the participation of the Government of Canada in this case, imply that international discord would result from the application of CERCLA to address TCM's contamination of Lake Roosevelt within the United States.

ARGUMENT

I. APPLYING CERCLA TO REMEDIATE TCM'S CONTAMINATION OF LAKE ROOSEVELT IS CONSISTENT WITH INTERNATIONAL LAW

TCM and its *amici* have argued that applying CERCLA to remediate TCM's contamination of Lake Roosevelt would violate international law. *See* Appellant's Opening Brief (TCM Brief) at 19-32; Government of Canada's *Amicus Curiae* Brief in Support of Appellant (Canada Brief) at 16-23. This assertion is incorrect. Long-standing principles of international law prohibit Canada from using its territory in a manner that harms U.S. territory. These principles also permit the United States to prescribe and enforce domestic laws to address any such transboundary pollution. This is especially the case because neither Canada nor the United States has referred this matter to the IJC pursuant to the Boundary Waters Treaty and because the United States is obligated under several international treaties to effectively enforce its domestic environmental laws in a case such as this.

A. APPLYING U.S. LAW TO REMEDIATE CONTAMINATION WITHIN U.S. TERRITORY CAUSED BY TRANSBOUNDARY POLLUTION IS CONSISTENT WITH INTERNATIONAL LAW

The International Court of Justice has noted that "the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national

control is part of the corpus of international law relating to the environment."[1] *Legality of the Threat of Use of Nuclear Weapons in Armed Conflicts* (ICJ Nuclear Opinion), 1996 I.C.J. 8, para. 29.[2] Derived from the common law principal of *sic utere tuo ut alienum non ladus* (do not use your property to harm another), this prohibition on transboundary environmental harm has been recognized as a fundamental principle of customary international environmental law for over 60 years:

> [U]nder principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

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[1] In *Arc Ecology v. U.S. Dept. of Air Force*, 411 F.3d 1092, 1101-1102 (9th Cir. 2005), this Court characterized the appellants' support for the international prohibition on transboundary environmental harm as a "gloss on international law." While it is not clear from that decision what sources of international law the appellants relied on other than the Restatement (Third) of the Foreign Relations Law of the United States (Restatement), there can be no doubt that a decision of the International Court of Justice (ICJ) constitutes an authoritative interpretation of international law. As a party to the Statute of the International Court of Justice (ICJ), the United States has recognized the ICJ as an authoritative arbiter of international law. *See* Statute of the International Court of Justice, art. 38.1 (http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm) (ICJ's function is to decide cases "in accordance with international law"); Charter of the United Nations, art. 93 ("All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.").

[2] http://www.mint.gov.my/policy/treaty_nuclear/icj9623_nucthreatopinion.htm.

Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1911, 1965 (1941), *reprinted in* 35 Am. J. Int'l L. 684 (1941); *quoted in part in* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (RESTATEMENT) § 601, RN1 (1987);[3] *see also, e.g.*, RESTATEMENT § 601 (each state is obligated to take

[3] The *Arc Ecology* court noted correctly that the Restatement "is not a primary source of authority upon which, standing alone, courts may rely for propositions of customary international law," 411 F.3d at 1102 n.8 (quotation omitted). This statement should not be misunderstood to mean that the Restatement has no value in determining what international law is.

The Restatement is not intended to be a primary source of international law, but rather a determination of international law based on the "sources that contribute to international law, including international agreements and the pronouncements of international and foreign tribunals, and other materials that constitute practice and contribute to 'customary' international law." *See* Restatement at XII. This is consistent with Article 38 of the Statute of the International Court of Justice, which specifies that the sources of international law include "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." ICJ Statute, art. 38.1(d). As a secondary source, these "most highly qualified publicists" – among which are certainly to be numbered the authors of the restatement, *see* Restatement at IX – are tasked with evaluating the direct sources of international law, which include: "(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; [and] (c) the general principles of law recognized by civilized nations." ICJ Statute, art. 38.1(a)-(c); Alvarez-Machain v. U.S., 331 F.3d 604, 617 (9th Cir. 2003), *reversed on other grounds,* 542 U.S. 692 (2004) ("Article 38 … serves as a convenient summary of the sources of international law."). As the work of highly qualified scholars and publicists, the Restatement thus serves as a persuasive guide to the rules of international law.

Moreover, the fact that "the Restatement's own authors admit that 'in a number of particulars the formulations in this Restatement are at variance with positions that have been taken by the United States Government,'" *Arc Ecology*, 411 F.3d at 1102 n.8 (internal quotation and citation omitted), does not diminish the value of the Restatement as a guide to international law. International law is

measures to ensure that activities within its boundaries are conducted to avoid significant injury to the environment of another state).

The United States, Canada, and over 178 other nations have explicitly acknowledged this principle in one or both of the 1972 Stockholm Declaration or the 1992 Rio Declaration, both of which condition State sovereignty over natural resources on States' "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." Principle 2, Rio Declaration on Environment and Development, U.N. GAOR, 46th Sess., U.N. Doc. A/CONF. 151/5/Rev. 1, *reprinted in* 31 I.L.M. 874 (June 13, 1992) (Rio Declaration); Principle 21, Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf. 48/14 (Stockholm 1972), *reprinted in* 11 I.L.M. 1416 (1972) (Stockholm Declaration).[4]

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not determined by the position of any single government. In the unique situations in which U.S. Government positions differ from international law, international law is not changed, but courts are required to look to the numerous and longstanding principles available to them for reconciling those differences.

[4] The prohibition on transboundary environmental harm has been recognized in numerous other international agreements. For example, the UN Convention on the Law of the Sea (UNCLOS), the relevant provisions of which the United States has accepted as a binding expression of international law, *see* Presidential Proclamation No. 7219, 64 Fed. Reg. 48701 (Aug. 2, 1999) (UNCLOS reflects international law), provides that "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution

The contamination of Lake Roosevelt by a source in Canada – TCM's smelter in Trail, British Columbia – thus violated international law. Where such a violation is likely – or has occurred – international law permits nations to prescribe and enforce laws to protect their territorial interests from transboundary harm. *See, e.g.*, RESTATEMENT § 402(1)(c) ("a state has jurisdiction to prescribe law with respect to … conduct outside its territory that has … substantial effect[s] within its territory"); *see also* L. HENKIN, *ET AL.*, INTERNATIONAL LAW 825 (2d ed. 1987) [5] ("Traditionally, a state has exercised authority over its land territory for virtually all purposes…. [This] territorial principle provides the premise for the exercise of jurisdiction … with respect to certain consequences produced within the territory by persons acting outside it."); UN Convention on the Law of the Sea (UNCLOS),

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arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights." Art. 194(2), UN Doc. A/Conf.62/121, *reprinted in* 21 I.L.M. 1245, 1308 (1982) (entered into force 1994).

[5] Article 38 of the Statute of the International Court of Justice specifies that the sources of international law include "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." Statute of the International Court of Justice, art. 38(d) (http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm. The sources also include: "(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; [and] (c) the general principles of law recognized by civilized nations." *Id.*, art. 38(a-c). The Ninth Circuit has recognized that "Article 38 … serves as a convenient summary of the sources of international law." Alvarez-Machain v. U.S., 331 F.3d 604, 617 (9th Cir. 2003), *reversed on other grounds,* 542 U.S. 692 (2004).

Dec. 10, 1982, art. 211(3), UN Doc. A/Conf.62/122, *reprinted in* 21 I.L.M. 1245, 1311 (1982) (entered into force 1994) (recognizing the right of each nation to establish "particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters"). The United States has exercised this authority to protect against environmental harm.[6] For example, in the Oil Pollution Act of 1990 (OPA), the United States conditioned the entry of vessels carrying oil into U.S. territory on their having double hulls to protect the environment by preventing oil spills. *See* 46 U.S.C. § 3703a(a) (1997).

When a nation has jurisdiction to prescribe, it "may employ judicial or nonjudicial measures to induce or compel compliance or punish noncompliance with its laws or regulations." RESTATEMENT § 431(1); *see also* HENKIN at 884 (same). EPA's exercise of CERCLA and the instant effort to enforce EPA's unilateral administrative order (UAO) are therefore valid measures under international law, as they seek only to enforce valid U.S. prescriptions on TCM's illegal and harmful transboundary pollution at Lake Roosevelt.[7]

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[6] As Appellees have noted, *see* Pakootas Brief at 20-27, the United States has exercised this authority to protect against other harms as well.

[7] Placing the cost of remediating Lake Roosevelt on TCM, rather than on U.S. or Canadian taxpayers, is also consistent with the "polluter pays" principle, summarized in Principle 16 of the Rio Declaration:

B. THE BOUNDARY WATERS TREATY OF 1909 DOES NOT APPLY TO THIS CASE, NOR WOULD ITS APPLICATION PROHIBIT THE APPLICATION OF CERCLA TO REMEDIATE TCM'S CONTAMINATION OF LAKE ROOSEVELT

TCM and its *amici* suggest that this Court should defer to the IJC, a non-judicial dispute resolution mechanism available under the Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada (Boundary Waters Treaty). *See, e.g.,* TCM Brief at 24-26; Canada Brief at 13-14. However, neither Canada nor the United States has taken any of the steps necessary to invoke the IJC processes.

The Boundary Waters Treaty allows Canada and the United States to seek both advisory opinions and binding decisions from the IJC. *See* Boundary Waters Treaty, Jan. 11, 1909, arts. IX, X, U.S.-U.K., 36 Stat. 2448. Either government may unilaterally refer a question or matter for an advisory opinion by filing with the IJC a formal referral "setting forth as fully as may be necessary for the information of the [IJC] the question or matter which it is to examine into and report upon and any restrictions or exceptions which may be imposed upon the

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> National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

Commission with respect thereto." Rule of Procedure of the IJC 26(2), (3) (adopted February 2, 1912).[8]

There has been no referral in the present case. As the Government of Canada noted in its *amicus* submission, it has twice written to the United States indicating "an interest" in an IJC referral.[9] *See* Canada Brief at 5-6; *see also id*., Appendix 1 at 2 (Nov. 23, 2004, letter to the U.S. Office of Canadian Affairs, indicating "an interest in referring the matter to the [IJC], for an independent, scientific assessment"); *id*., Appendix 2 at 1 (Jan. 8, 2004, diplomatic note: "Canada encourages the EPA to rescind the Unilateral Administrative Order and to re-examine the offer made by Teck Cominco to undertake an environmental and healthy risk assessment. Canada hopes that the EPA and Teck Cominco Metals will work together to develop a mutually acceptable and enforceable agreement."). These letters are not sufficient to invoke the IJC advisory opinion process, and neither Canada nor the United States has taken any additional action to refer this matter to the IJC. Nor have Canada and the United States reached a diplomatic solution by any other means.

Even if Canada or the United States were to refer this matter to the IJC for

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[8] http://www.ijc.org/rel/agree/water.html.

[9] Although Canada now states that is "has offered to … agree to a reference to the [IJC]," Canada Brief at 5, all it has actually done is "indicate[] an interest in referring the matter to the [IJC]." Canada Brief, Appendix 1 at 2. In any case, no IJC referral has been made.

an advisory opinion, such referral would not be inconsistent with the application of CERCLA to TCM's contamination of Lake Roosevelt. The existence of complementary regulatory and adjudicatory mechanisms is not unusual, and the availability of one does not nullify another. Indeed, U.S. federal agencies regularly use IJC reports to complement their regulatory responsibilities under U.S. law. *See e.g., Swinomish Tribal Comm. v. FERC*, 627 F.2d 499, 511-12 (D.C. Cir. 1980) (IJC report addressing Canadian impacts of hydropower project included in Environmental Impact Statement). The UAO seeks only to determine the "nature and …extent of contamination" and "to develop and evaluate potential remedial alternatives" for Lake Roosevelt, UAO at 9, and does not preclude the consideration of information or recommendations obtained from other sources like the IJC as part of the CERCLA process.

The Boundary Waters Treaty also establishes a process for binding arbitration by the IJC. This process has significant restrictions, however, as Justice William O. Douglas recognized:

> Significantly, the proscription of pollution, which immediately follows this provision in [Article] IV, does not mention approval or action by the International Joint Commission.
>
> Article X does vest the Commission with power to render binding decisions on matters referred by consent of both parties. But [Article] X states that any joint reference "on the part of the United States … will be by and with the advice and consent of the Senate, *and* on the part of His Majesty's Government with the consent of the Governor General in Council."

> In other words, so far as pollution is concerned, the Treaty contains no provision for binding arbitration. Thus, it does not evince a purpose on the part of the national governments of the United States and Canada to exclude their States and Provinces from seeking other remedies for water pollution.

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 507 (1971) (Douglas, J., dissenting; emphasis added). Perhaps for this reason, the parties have never used the binding decision mechanism in its nearly 100-year history. *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, 54 (2000).

Neither government has taken any steps to seek either an advisory opinion or binding decision by the IJC in this matter. To the contrary, the U.S. government's issuance of the UAO indicates that CERCLA is an appropriate means for addressing TCM's contamination of Lake Roosevelt. Because the nuances of U.S. foreign policy "are much more the province of the Executive Branch and Congress" than of the courts, *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983), this Court should defer to EPA's use of CERCLA to investigate and remediate Lake Roosevelt pollution in this case.

C. THE APPLICATION OF CERCLA TO REMEDIATE TCM'S CONTAMINATION OF LAKE ROOSEVELT IS CONSISTENT WITH EXISTING INTERNATIONAL AGREEMENTS ADDRESSING INTERNATIONAL ENVIRONMENTAL PROTECTION

TCM and its *amici* rely on several international agreements to argue that the application of CERCLA is inconsistent with international law and the international practice of the United States. *See, e.g.*, TCM Brief at 27-29 (*citing* Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area (La Paz Agreement), Aug. 14, 1983, U.S.-Mex., 35 U.S.T. 2916); Canada Brief at 14-15 (*citing* Agreement Between the Government of the United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Waste (Transboundary Waste Agreement), Oct. 28, 1986, U.S.-Can., T.I.A.S No. 11099).

However, far from prohibiting the parties from enforcing their domestic environmental laws, these and other agreements explicitly require that the United States and Canada enforce their domestic environmental laws to protect public health and the environment. For example, the La Paz Agreement obligates the United States to address environmental problems "in conformity with [its] own national legislation." 35 U.S.T. 2916, art. 5. Similarly, the Transboundary Waste Agreement mandates the enforcement of "domestic laws and regulations … with respect to the transportation, storage, treatment and disposal of transboundary

shipments of hazardous waste." T.I.A.S No. 11,099, art. 7. That Agreement also provides that its provisions "shall be subject to the applicable laws and regulations of the Parties." *Id.* at art. 11. Similarly, the North American Agreement on Environmental Cooperation (NAAEC) requires that the United States and Canada "effectively enforce" their domestic environmental laws, including CERCLA. Sept. 14, 1993, art. 5(1), 32 I.L.M. 1480. Thus, while these agreements provide diplomatic processes by which the United States *may* resolve international environmental issues, they do not oblige it to use such processes, and they obligate the United States to enforce its existing domestic laws to protect the environment within U.S. territory.

D. THE NATIONAL TREATMENT PRINCIPLE IS IRRELEVANT TO THE APPLICATION OF CERCLA TO TECK COMINCO METALS' CONTAMINATION OF LAKE ROOSEVELT

The Government of Canada argues that the application of CERCLA to the remediation of Lake Roosevelt "contravenes" the principle of national treatment. Canada Brief at 20. However, U.S. courts are not obligated to provide national treatment to TCM in the circumstances of this case. The national treatment principle obligates each state to treat the nationals or goods of another state as the state treats its own nationals or goods. *See, e.g.*, RESTATEMENT § 801(2). As explained below, states are not bound to the national treatment principle as a

matter of customary international law. Rather, the doctrine applies only when one state has explicitly granted such protection to the nationals or goods of another state. No such explicit grant exists here.

U.S. courts have uniformly held that the national treatment doctrine applies only when it has been explicitly adopted by a treaty or statute. *See, e.g.*, *Murray v. British Broadcasting Corporation*, 81 F.3d 287, 291 (2d Cir. 1996) ("When drafters of international agreements seek to provide [national treatment], the long-established practice is to do so explicitly."). *See also, e.g.*, *Grupo Gigante v. Dallo*, 391 F.3d 1088, 1099-1100 (9th Cir. 2004) (applying principles of national treatment in trademark case because United States was a party to the Paris Convention which grants national treatment in the United States as to trademark and related rights); *Subafilms Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1097 (9th Cir. 1994) (applying national treatment doctrine in copyright case because United States acceded to two conventions granting national treatment to literary and artistic works); *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 69 n.2 (2d Cir. 2001) (according to a U.S. Department of Justice letter, national treatment with regard to access to courts arises only from a treaty based on reciprocity); RESTATEMENT § 801, cmt. b (national treatment is *granted* by one state to another); *id.* at § 722, RN 1 (Congress has given benefits to aliens not on the basis of a customary obligation to grant national treatment, but on the basis of

reciprocity); *id.* at § 805, cmt. a (General Agreement on Tariffs and Trade calls for "national treatment in respect of certain regulations, taxes and other domestic requirements"); EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 77-78 (1915) (liberty of commerce, including national treatment-type clauses, is generally provided for in treaties).

The Government of Canada has not identified any international treaty that obligates the United States to afford national treatment to TCM in the circumstances of this case. *See* Canada Brief at 20-22. Nor has it provided any support in Canadian or U.S. law to suggest that any branch of either government has ever recognized national treatment as a principle of customary international law. *Id.* Rather, Canada has looked to scholarly treatises and confused national treatment of individuals in criminal proceedings with national treatment of the property and commercial interests of foreign corporations. *Id.*

As each of these scholars has observed, however, customary international law does not obligate one state to afford national treatment to the property or economic interests of citizens of another state. For example, Borchard notes that public security and state interests may dictate greater restrictions and regulation in the case of aliens than nationals with regard to public rights such as security of property and liberty to carry on commerce and trade. BORCHARD at 73-74. *See also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 502 (6th ed.

2003) ("the alien must take the local law as he finds it in regard to regulation of the economy"); OPPENHEIM'S INTERNATIONAL LAW 911-12 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("[F]ar-reaching interference with private property, including that of aliens, is common in connection with such matters as taxation, measures of police, public health, the administration of public utilities and the planning of urban and rural development.").

While some international trade agreements oblige the United States to provide national treatment to the goods, investments and some services of Canadian companies, TCM's contamination of Lake Roosevelt falls into none of these categories.

II. TCM AND ITS *AMICI* HAVE NOT DEMONSTRATED THAT THE APPLICATION OF CERCLA TO REMEDIATE TCM'S CONTAMINATION OF LAKE ROOSEVELT WOULD CAUSE DISCORD BETWEEN CANADA AND THE UNITED STATES

As described below and in the Pakootas and Washington Briefs, the application of CERCLA to TCM's contamination of Lake Roosevelt is not an extraterritorial application of U.S. law. Even if it were, however, there would be no presumption against extraterritorial application of CERCLA because, contrary to TCM's assertions, TCM Brief at 13-32, this application of CERCLA does not present a risk of "unintended clashes between our laws and those of [Canada] which could result in international discord." *Subafilms*, 24 F.3d at 1097 *(quoting*

E.E.O.C. v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991)). As discussed below, applying CERCLA to remediate TCM's contamination of Lake Roosevelt in the United States does not clash with Canadian laws that impose a similar remediation and emissions scheme north of the border in Canada. Nor does this application of CERCLA "unreasonabl[y] interfere" with Canadian sovereignty, *see F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004), because Canadian courts protect that sovereignty via domestic Canadian enforcement proceedings. In any case, Canada's sovereignty is limited by Canada's obligation to prevent transboundary environmental harm. Finally, neither the existence of the Boundary Waters Treaty nor the Government of Canada's participation in this case implies international discord. To the contrary, this application of CERCLA furthers U.S. and Canadian treaty obligations to enforce their domestic environmental laws within their territory.

A. THE APPLICATION OF CERCLA TO TECK COMINCO METALS' CONTAMINATION OF LAKE ROOSEVELT DOES NOT CONFLICT WITH CANADIAN LAW

TCM and its *amici* have conspicuously failed to identify any specific conflict with Canadian law, presumably because CERCLA is consistent with all Canadian laws applicable to TCM's discharges.

British Columbia's Environmental Management Act, S.B.C. 2003, ch. 53

(2005)[10], and the related Contaminated Sites Regulation, B.C. Reg. 375/96 (2005), were "modeled on" CERCLA's remediation framework. *See* Final Report of the Minister's Advisory Panel on Contaminated Sites (January 2003) at 7;[11] *see also* McNaughton and Godsoe, *Importing CERCLA into Canada: The British Columbia Experience*, International Environmental Law Committee Newsletter, American Bar Association, Section of Environment, Energy and Resources (July 2000).[12]

Like CERCLA, the Environmental Management Act is a vehicle for remediating contaminated sites and provides a similar liability regime. First, it confers upon the Province of British Columbia powers to issue administrative orders requiring private parties to remediate "contaminated sites" at their own cost. Environmental Management Act § 48. The law casts a broad liability net stating, "[a] person who is responsible for remediation of a contaminated site is absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site." *Id.* § 47(1). The law contains detailed processes for determining whether a site is contaminated, and for remediation. *Id.* § 41. It also creates a statutory cause of action by such parties, against other

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[10] http://www.qp.gov.bc.ca/statreg/stat/E/03053_00.htm.

[11] wlapwww.gov.bc.ca/epd/epdpa/contam_sites/ministers_panel/map%20final%20report%202003.pdf.

[12] http://www.abanet.org/environ/committees/intenviron/newsletter/july00/mcn.html.

"responsible persons" to recover their reasonably incurred costs of remediation. *Id.* § 47(5). Unlike CERCLA, the Canadian law provides that liability applies regardless of whether a discharge was allowed under a waste management permit. *Id.* §47(4).

Similarly, Canada's Fisheries Act specifically prohibits the discharge of a deleterious substance in waters frequented by fish that is not otherwise authorized by regulation or permit. Fisheries Act, R.S.C. ch. F-14 (1985) (Can.).[13] This "zero emissions" law is one of the Canadian "… government's main intervention tools for protecting fisheries resources in Canada." Canadian Commission for Environmental Cooperation, *Deposits of Deleterious Substances in the Saint Lawrence River Opposite the Technoparc Site* 2 (Nov. 2003).[14] Specifically, section 36(3) of the Fisheries Act states that "no person shall deposit or permit the deposit of a deleterious substance of any type in the water frequented by fish."

The Fisheries Act's definition of "deleterious substance" is broad, and would likely include TCM's slag. *Id.* at § 34(a-e). The Act requires that individuals take all reasonable measures to prevent discharges and to mitigate any damage if the discharge has already occurred. *Id.* § 38(5). The Act also contains a criminal process related to pollution of waters frequented by fish. *Id.* § 40(2). *Amici*

[13] http://laws.justice.gc.ca/en/F-14/text.html.

[14] www.cec.org/files/pdf/sem/03-5-RSP_en.pdf.

understand that TCM's facility in Trail does not have a Fisheries Act discharge permit. No regulation under the Act permits discharges from the facility. TCM's warning that applying CERCLA in this case would inappropriately compel corporations operating in Canada to adopt a "zero emissions" policy, TCM Brief at 30, is thus faulty because that is already the prevailing standard.

Canadian courts have recognized that CERCLA is similar to Canadian law and that applying CERCLA to remediate transboundary pollution in the United States does not conflict with Canadian sovereignty. In *United States v. Ivey*, the Ontario Court of Appeal addressed whether CERCLA liability could be imposed without adversely affecting Canada's sovereignty and enforced a CERCLA judgment against a Canadian-owned corporation doing business in the United States, stating:

> [T]he law would be seriously deficient and at odds with the reality of modern commercial life if it were possible for a resident of this province to actively engage in a business in the United States for a period of several years, but then shelter behind the borders of Ontario from answering to a claim for civil liability for harm caused by that activity.

[1995] 26 O.R. 3d 533, ¶ 21, *appeal dismissed*, [1996] 930 A.C. 152. The court noted that the situation does not pose "an exercise by a government of its sovereign authority over property beyond its territory" because the affected property was within the United States. The court recognized that "[w]hile the measures chosen

by our legislature do not correspond precisely with those chosen by the Congress of the United States, they are…similar in nature…" *Ivey*, 26 O.R. 3d 533 at ¶53.

Canadian law thus prohibits TCM from polluting the Columbia River and requires TCM to participate in the remediation of pollution it caused north of the border in Canada. Applying CERCLA to force TCM to participate similarly to remediate pollution it caused in the United States complements these Canadian efforts, and thus does not conflict with Canadian law.

Applying CERCLA also does not conflict with any attempt to use Canadian law to remediate the contamination of Lake Roosevelt. Canadian courts have affirmed that British Columbia cannot apply its Environmental Management Act to a contaminated site outside British Columbia. *See JTI- MacDonald Corp. v. British Columbia*, [2000] 74 B.C.L.R.3d 149, 198 ("A Province may not pass legislation that has the effect of imposing obligations outside the Province or has other extra-provincial consequences unless the effect is merely collateral or incidental to legislation otherwise within its power.") (British Columbia Supreme Court). No one has alleged that there is any conflict or "turf battle" between the regulatory agencies in each country regarding the remediation of Lake Roosevelt contamination.

B. THE APPLICATION OF CERCLA TO TECK COMINCO METALS' CONTAMINATION OF LAKE ROOSEVELT DOES NOT INTERFERE WITH CANADIAN SOVEREIGNTY

Applying CERCLA to remediate Lake Roosevelt does not interfere with Canadian sovereignty because any judgment entered against TCM in a U.S. court may ultimately need to be enforced in a Canadian court, giving Canadian courts ample opportunity to determine whether Canadian sovereignty is impacted by this application of CERCLA. In any case, Canada does not enjoy absolute sovereignty to determine its environmental and economic policy; its right to set such policy is conditioned on an obligation not to allow transboundary environmental harm.

Canadian courts are not bound to enforce U.S. judgments issued pursuant to CERCLA. Rather, U.S. judgments will only be enforced if a Canadian court determines that TCM had a "real and substantial" connection to the jurisdiction issuing the judgment, in accordance with Canadian law. *See Ivey,* 26 O.R. 3d 533 (Ontario Court of Justice) (enforcing U.S. CERCLA judgment against Canadian company doing business and contaminating a site in the United States because company had "real and substantial" connection to U.S. jurisdiction); *see also Stoddard v. Accurpress Mfg.*, [1994] 84 B.C.L.R.2d 194 (British Columbia Supreme Court).

Canadian courts will carefully scrutinize – and may refuse to enforce – any U.S. judgment that seeks to enforce a criminal, revenue, or public law, or that is

otherwise inconsistent with Canadian public policy. *See Old N. State Brewing Co. v. Newlands Serv.*, [1998] 58 B.C.L.R. (3d) 144, ¶44-54 (British Columbia Court of Appeal) (enforcement of U.S. punitive damage award depends on whether award would violate Canadian public policy). The authority to refuse to enforce a U.S. judgment on the ground that it is inconsistent with Canadian public policy is based on "the principle that laws will not be enforced if they involve an exercise by a government of its sovereign authority over property beyond its territory." *Ivey*, 26 O.R.3d 533 at ¶ 33. Canadian courts are better placed than this Court to determine the bounds of Canadian sovereignty.

TCM also argues that applying CERCLA to remediate TCM's contamination of Lake Roosevelt would "interfere with [Canada's sovereign right] to formulate [its] own environmental policies." TCM Brief at 31. However, the UAO at issue here does not limit how Canada can regulate TCM, but seeks only to determine the "nature and …extent of contamination" and "to develop and evaluate potential remedial alternatives" for Lake Roosevelt. UAO at 9. And because Canada has already established a "zero emissions" policy that applies to TCM (described above), applying CERCLA will have no actual impact on Canada's regulation of TCM's activities.

Moreover, although international law recognizes the right of nations to set their own economic and environmental policy, that policy is conditioned on the

prohibition against transboundary environmental harm:

> States have … the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 2, Rio Declaration; Principle 21, Stockholm Declaration. As noted above, the ICJ has recognized that the prohibition against transboundary environmental harm is "part of the corpus of international law relating to the environment." ICJ Nuclear Opinion at ¶ 29.

C. NEITHER THE EXISTENCE OF THE BOUNDARY WATERS TREATY NOR CANADA'S PARTICIPATION IN THIS CASE IMPLIES INTERNATIONAL DISCORD

TCM and its *amici* would have this Court believe that the existence of the Boundary Waters Treaty creates the possibility that the application of CERCLA by a U.S. court to remediate TCM's contamination within U.S. territory would create international discord. *See* TCM Brief at 19-20, 24-26, 29-32. However, as explained above, nothing in this or other treaties, or in Canadian or U.S. law, mandates resort to the IJC or suggests that international discord would result if the IJC is not used. Moreover, as noted above, neither Canada nor the United States has actually referred this matter to the IJC. Canada's diplomatic suggestion that it might consider invoking the IJC advisory opinion process falls short of

demonstrating actual conflict. Last, even if an IJC referral were made, the UAO does not preclude the consideration of information or recommendations obtained from other sources like the IJC as part of the CERCLA process.

Nor does Canada's support for TCM as *amicus curiae* in this case suggest that this application of CERCLA would create international discord as that term is defined in U.S. law. The Government of Canada has provided no support for the notion that U.S. courts must dismiss an otherwise valid claim against a foreign person whenever that person's government objects to that claim. Nor could it. A court is not required to abstain from jurisdiction merely because a case involves a foreign government's interests. *See, e.g., Sarei v. Rio Tinto Plc,* 221 F. Supp. 2d 1116, 1207 (C.D. Cal. 2002).

Rather, international discord is demonstrated by an actual risk of "unintended clashes between our laws and those of [Canada]," *Subafilms,* 24 F.3d at 1097 *(quoting Aramco,* 499 U.S. at 248), or by showing "unreasonable interference" with Canadian sovereignty. *See F. Hoffman-La Roche Ltd.,* 124 S. Ct. at 2366. Instead of demonstrating either of these conditions, the Government of Canada has only suggested that this application of CERCLA would violate comity by interfering with Canada's internal affairs and by discriminating between U.S. nationals and TCM, and that this application of CERCLA is precluded by the existence of the Boundary Waters Treaty. Canada Brief at 5 *et seq.* As discussed

at length in this brief and in the briefs of Pakootas and Washington, however, this case does not implicate principles of comity because it does not present an actual conflict between the laws of Canada and those of the United States, and because it does not seek to regulate any activity in Canada or otherwise interfere with Canada's internal affairs. *See supra* Sections II.A& B; Pakootas Brief at 40-43; Washington Brief at 13-18, 38-41. Absent a true conflict between U.S. and Canadian law, dismissal on comity grounds is not appropriate. *See Rio Tinto*, 221 F. Supp. 2d at 1207.

Moreover, dismissal on comity grounds requires a finding that the objecting nation can provide an adequate alternative forum to whose jurisdiction the defendant is subject. *Id.* As discussed above, however, British Columbia's site remediation law does not apply beyond the boundaries of British Columbia and there is therefore no adequate alternative forum in Canada in which to pursue the remediation of TCM's contamination of Lake Roosevelt.

Nor does this application of CERCLA discriminate between U.S. nationals and TCM. As discussed above, the national treatment principle does not apply in this case. Even if it did, there is no discrimination here. *See* Pakootas Brief at 35-38; Washington Brief at 29-32. Further, as discussed above, the existence of the Boundary Waters Treaty does not preclude this application of CERCLA. *See also* Pakootas Brief at 43-53; Washington Brief at 38-41.

D. THE EXISTENCE OF INTERNATIONAL AGREEMENTS DOES NOT MEAN THAT APPLYING CERCLA TO TCMS' CONTAMINATION OF LAKE ROOSEVELT WILL RESULT IN INTERNATIONAL DISCORD

TCM and its *amici* suggest that the mere existence of a complementary regime of multilateral, bilateral, and regional environmental agreements between the United States and Canada means that international discord would result from the application of CERCLA in this case. *See, e.g.,* TCM Brief at 29-32; Canada Brief at 13-16. As discussed above, however, several of these agreements explicitly require domestic enforcement of existing environmental laws. These obligations indicate that the parties did not intend complementary diplomatic processes to supplant domestic remedies in every case.[15]

III. THE PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION OF U.S. LAW DOES NOT APPLY BECAUSE THIS CASE SEEKS ONLY TO REMEDIATE POLLUTION WITHIN THE UNITED STATES

The presumption against extraterritorial application of U.S. law does not apply because this action is related to harm entirely within U.S. territory. *See, e.g.*, *Environmental Defense Fund v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993); *see also NORML v. U.S. Dept. of State*, 452 F. Supp. 1226, 1232 (D.D.C. 1978)

[15] The allegation of discord also fails because, with the exception of the Boundary Waters Treaty discussed above, none of the international agreements cited by TCM or its *amici* could apply to the circumstances of this case.

(requiring environmental impact statement to U.S. participation in herbicide spraying in Mexico because of the spraying's potential impacts in the United States). As a practical matter and as set forth in great detail in the briefs of Pakootas and of Washington, the application of CERCLA to remediate Lake Roosevelt pollution seeks only to remediate pollution within U.S. territory and the presumption therefore does not apply.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the District Court denying Appellant's motion to dismiss.

Respectfully submitted,

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Dated: July 28, 2005

Martin Wagner
Marcello Mollo
EARTHJUSTICE
426 17th Street, 6th Floor
Oakland, California 94612-2820
(510) 550-6700

Richard K. Eichstaedt
CENTER FOR JUSTICE
35 West Main Street, Suite 300
Spokane, Washington 99201
(509) 835-5211

CERTIFICATION OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(C) and FEDERAL RULES OF APPELLATE PROCEDURE 29(d)

I certify, pursuant to Federal Rules of Appellate Procedure 32(a)(7)(c) and 29(d), that the attached *amici curiae* brief is proportionately spaced, has a typeface of 14 points, and contains___6,971___ words.

Dated: July 28, 2005

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STATEMENT OF RELATED CASES

Amici are not aware of any related cases pending before this Court.