In the United States Court of Appeals
For the Ninth Circuit

JOSEPH A. PAKOOTAS, et al , Plaintiffs-Appellees,	)	No. 15-35228
and	)	
STATE OF WASHINGTON, Plaintiff/Intervenor-Appellee,	)	(Eastern District of Washington No. CV-04-0256-LRS)
v.	)	
TECK COMINCO METALS LTD., a Canadian corporation, Defendant-Appellant.	)	

GOVERNMENT OF CANADA'S *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT AND FOR REVERSAL OF THE ORDERS OF THE DISTRICT COURT

Dated : August 11, 2015

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IDENTITY OF THE *AMICUS CURIAE*

The *Amicus Curiae* is the Government of Canada.

INTEREST OF THE *AMICUS CURIAE*

For the Government of Canada ("Canada"), this case raises concerns about currently-existing cooperative agreements between the United States and Canadian governments, and the avoidance of interference with Canada's sovereign authority. Canada regulates companies within its borders, including Defendant-Appellant Teck Metals Ltd. ("Teck"), through a robust system of environmental laws. The efficacy of these laws is diminished when regulated Canadian entities are exposed to inconsistent compliance obligations through the uncoordinated efforts of other foreign regulatory authorities and judicial proceedings. To avoid such interference, Canada has long cooperated with the United States to coordinate bilateral solutions to disputes involving cross-border pollution, including air pollution. Historically, one such sphere of cooperation has been the smelter located at Trail, British Columbia (the "Trail Smelter"), now operated by Teck and at the center of this litigation.

Canada believes that a United States federal court's interpretation of the United States Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601, *et seq*. ("CERCLA") is not the proper means to address the environmental claims at issue in this litigation. Instead, these matters

should be referred to the long-standing bilateral mechanism specifically established to address Trail Smelter-related claims, in accordance with an existing agreement between the United States and Canada. While utilization of this bilateral mechanism could potentially result in a determination adverse to the Canadian Defendant-Appellant, Canada submits that it is essential that whatever determination is made should come from the workings of that bilateral process – not from a U.S. federal court.

The 5,525-mile border between Canada and the United States makes the proper means of resolving disputes over transboundary pollution claims a matter of recurring importance to Canada. Canada has a vital interest in preserving its sovereign environmental regulatory authority from interference by litigation brought in United States courts against Canadian persons and companies operating in Canada. Under the Canadian Constitution, air pollution is subject to both provincial and federal regulation. The province of British Columbia regulates emissions from the Trail Smelter under a permit issued under the province's Environmental Management Act, S.B.C. 2003, c. 53 (Can., B.C.).[1] The Canadian Environmental

[1] Collated in "Appendix A" hereto are a true and correct Summary of Permits issued to the Trail Smelter, including permits for atmospheric emissions from these three facilities and, by way of example, a copy of Permit PA-02691, setting emissions limits for the Trail Smelter lead refinery.

Protection Act ("CEPA") R.S.C. 1999 c. 33 (Can.)[2] is the framework Canadian federal environmental law designed to control harmful air pollutants such as sulfur dioxide and others at issue in this case (Id. at Part 5, Schedule 1), and to curtail international air pollution (Id. at Part 7, Div. 6). Under CEPA, the federal government of Canada has independent regulatory authority applicable to Trail Smelter in the form of a facility-specific Pollution Prevention Plan, which Plan has been prepared and implemented by Trail Smelter.[3]

Canada has also relied on its bilateral agreements and diplomatic consultations with the United States to address pollution that migrates across the United States-Canada border. For more than twenty years, the United States and Canada have operated a bilateral Air Quality Committee pursuant to the U.S.-Canada Air Quality Accord.[4] For more than a century, the United States and Canada have maintained an International Joint Commission (the "IJC") to address issues of transboundary waterborne pollution under the Boundary Waters Treaty of 1909 (the

[2] *Available at* http://laws.justice.gc.ca/eng/acts/C-15.31/index.html (last visited July 21, 2015).
[3] Canada Gazette, Part I, Vol. 140, No. 18, Page 877 (April 29, 2006), *available at* http://ec.gc.ca/planp2-p2plan/default.asp?lang=En&n=C7D8F7C9-1 (last visited August 11, 2015).
[4] Agreement Between the Government of the United States of America and the Government of Canada on Air Quality, March 13, 1991, T.I.A.S. No. 11783, 30 ILM 678.

"BWT").[5] With specific reference to Trail Smelter, Canada has insisted on numerous occasions that Trail Smelter emissions should be addressed through bilateral solutions outside of national courts. In 2004 and 2006, the United States and Canada exchanged diplomatic notes that resulted in a Settlement Agreement to establish a bilateral process for assessing Trail-Smelter-related pollution.[6] With respect to the litigation now before this Court, Canada has recently transmitted two diplomatic notes to the United States insisting on a bilateral, non-judicial resolution of claims regarding Trail Smelter air emissions.

The crux of the present litigation is that Canada and the United States have since 1935 maintained an exclusive bilateral regime (the "Permanent Regime") to reduce and remedy damages caused by cross-border air emissions from the Trail Smelter facility. *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 (*ratified* June 5, 1935, *entered into force* August 3, 1935), 4 U.S.T. 4009, T.S. No. 893, 49 Stat. 3245, 162 L.N.T.S. 73 (the "Ottawa Convention"); Trail Smelter Arbitral Tribunal Decision (U.S. v. Can.), 3 R.I.A.A. 1911, 33 AM J. INT'L L. 182 (Trail Smelter Arb. Trib. 1938) (the "1938 Decision");

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[5] *See* Treaty Relating to the Boundary Waters and Questions Arising Along the Boundary Between the United States and Canada, January 11, 1909 (entered into force May 5, 1910), T.S. No. 548, 36 Stat. 2448.

[6] True and correct copies of Canada's January 8, 2004 and July 16, 2006 diplomatic notes on this subject are collated in "Appendix B" hereto.

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").[7] When Canada learned that the U.S. EPA was contemplating investigation of air depositions from the Trail Smelter, the Embassy of Canada informed the U.S. State Department that such an investigation was not part of previous bilateral discussions. The Embassy's Diplomatic Note stated that "the Canadian Government opposed any unilateral compulsory measure imposed against a Canadian-incorporated company."[8] The Government of Canada has reiterated this position in its most recent diplomatic note, stressing that the "current federal court litigation disrupts the Permanent Regime and the mechanisms established by the 1938 and 1941 Arbitrations," and "insist[ing] that the proper mechanism for these findings is the one specifically established by the Convention for the Trail Smelter."[9]

The District Court's orders (the "Orders")[10] subjecting the Trail Smelter to liability for air emissions under CERCLA clearly impinge on Canada's sovereignty.

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[7] The 1938 Decision and 1941 Decision *available at* http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf (last visited July 21, 2015).

[8] Embassy of Canada Diplomatic Note to the U.S. Department of State, March 20, 2015, Note No. WSHDC-2100, a true and correct copy of which is collated in "Appendix C" hereto, along with the more recently issued Embassy of Canada Diplomatic Note No. WSHDC-2475.

[9] Id., Note No. WSHDC-2475, pp. 1-2.

[10] *See* Order Denying Motion To Strike or Dismiss, ECF No. 2115, 2:04-cv-00256-LRS (EDWA) (July 29, 2014) (the "Dismissal Order"); Order Denying Motion for Reconsideration, *Inter Alia*, ECF No. 2149, 2:04-cv-00256-LRS (EDWA)

The Orders undermine the long history of cooperation between the United States and Canada in controlling transboundary pollution, and contravene the agreement of the two countries to refer disputes over Trail Smelter air emissions exclusively to the Permanent Regime. The District Court's Orders disrupt the existing bilateral mechanism for Trail Smelter, and U.S. judicial intervention impacts numerous Canadian businesses operating along or near the Canada-United States border.

Pursuant to Fed. R. App. P. 29(a), *amicus* represents that all parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(c)(5), *amicus* also represents that no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person or entity other than *amicus* or its counsel contributed money that was intended to fund preparing or submitting this brief.

(December 31, 2014) (the "Reconsideration Order," together with the Dismissal Order, the "Orders").

SUMMARY OF ARGUMENT

While Canada fully supports Appellant's position that CERCLA is inapplicable to the air emissions for which the Plaintiffs below sought relief,[11] Canada writes to provide this Court with a separate basis under international law for excluding Trail Smelter air emissions from CERCLA's scope of application. Canada does not maintain that the Plaintiffs in this litigation should be deprived of the opportunity to seek redress, only that the appropriate and exclusive forum for providing such redress is the Permanent Regime.

Since 1927, the United States and Canada have resolved Trail Smelter emissions disputes through diplomacy and bilateral agreements. The Permanent Regime was the culmination of a decades-long process, initiated at the instance of the United States, to repair damage done within the State of Washington at a time when no other remedy existed for harm caused by transboundary air pollution. Until the United States and Canada submitted their concerns over the Trail Smelter to the IJC in 1928, individuals and municipalities in the United States sought reparations through a piecemeal claims process operated directly by the Trail Smelter. Both

[11] *See* Appellant's Opening Brief, ECF No. 13-1 ("Teck Brief"), p. 2; Center For Community Action and Environmental Justice v. BNSF Railway Company, 764 F.3d 1019 (9th Cir.2014) (*hereinafter* "CCAEJ"). Consistent with the Ninth Circuit rules, Canada does not repeat Teck's argument in this brief, confines itself to arguments based in international law, and addresses United States law only to contextualize the relevance of international principles.

governments believed that a more streamlined, bilateral process would facilitate the resolution of claims *en masse* for damages to land, private property and wildlife.

The resulting Permanent Regime was designed to be binding, perpetual, final and, consistent with its finality, exclusive of other remedies. Anticipating scientific advancement and changes in circumstance, the two countries created procedures within the Permanent Regime for its modification or suspension. The parties to the Ottawa Convention have never suspended the Permanent Regime, and the United States Department of State recognizes that the Ottawa Convention remains in force today.

The Permanent Regime is fully capable of redressing the injuries alleged by the Fourth Amended Complaints of the State of Washington and the Confederated Tribes of the Colville Reservation (the "WA FAC" and "Colville FAC," together the "FACs").[12] The FACs modified the prior pleadings of the State of Washington and the Colville Tribes by making new allegations that Trail Smelter air emissions can trigger the application of CERCLA liability. Together with a concurrent 2013 case brought against Teck in the Eastern District of Washington,[13] the FACs represent the first time since the 1940's that United States parties have

[12] *See* Fourth Amended Complaint of State of Washington, ECF No. 2098, 2:04-cv-00256-LRS (EDWA) (March 17, 2014); Fourth Amended Complaint of the Confederated Tribes of the Colville Reservation ("Colville Tribes"), ECF No. 2099, 2:04-cv-00256-LRS (EDWA) (March 17, 2014);

[13] *See* Anderson, et al. v. Teck Metals, Ltd., Case No. CV-13-420-LRS (EDWA).

raised claims regarding Trail Smelter air emissions. Canada notes that the subject of Trail Smelter air emissions was not at issue in this litigation until the recent introduction of the FACs. As such, the Permanent Regime was not relevant to the prior appeal in this action, or to the Court's decision thereupon, both of which were limited to allegations of waterborne pollution. *See* Pakootas v. Teck Cominco, 452 F.3d 1066, 1070 *et seq.* (9th Cir.2006).

Precedent already exists in the Decisions of the Trail Smelter Tribunal (the "Tribunal") for compensation of the various damages sought by the FACs. If the United States seeks to recover any new categories of damages in proceedings before the Tribunal, the Permanent Regime provides avenues for doing so, including mechanisms for the modification of the Regime in consultation with a panel of scientists appointed by both parties. Canada urges that the Permanent Regime, not the judiciary of the United States, is the appropriate means of resolving this inherently international dispute. Canada does not ask that Trail Smelter be given immunity – only that it be regulated (as it presently is) by Canadian law, with problems of transboundary pollution resolved through a coordinated bilateral process rather than piecemeal litigation in United States courts.

The District Court's Orders defy principles of international comity by expanding CERCLA's applicability in direct conflict with the Ottawa Convention, the Permanent Regime, and the United States' obligations thereunder. CERCLA

does not express a clear legislative intent to remediate waste caused by air emissions. The District Court has divined this intent from its interpretation of legislative silence and purposes, not from the face of the statute. In making this inferential leap, the District Court ignores the settled rule that a statute should only be construed to violate international law if no other interpretation is available. The District Court, by employing techniques of statutory construction that help resolve textual ambiguities, implicitly acknowledges the availability of other interpretations of CERCLA. The District Court makes this acknowledgement more explicit in the portions of its Reconsideration Order certifying questions for appellate review, observing that the question of whether air emissions fall within CERCLA's ambit is one on which "there is a 'substantial ground for difference of Opinion' on the 'controlling question of law.'" Reconsideration Order, *supra*, at 8 (*quoting* 28 U.S.C. § 1292(b)).

While Canada submits that air emissions are unambiguously excluded from CERCLA's definition of "disposal," international law still compels reversal of the Orders if this definition is deemed ambiguous. The courts, consistent with long-established legal principles, should interpret an ambiguous CERCLA provision in conformity with the United States' international obligations and should avoid interfering with existing bilateral agreements. This Court should not judicially extinguish the Permanent Regime.

Canada respectfully requests that the Orders of the District Court be reversed, that the allegations of the FACs pertaining to air emissions be stricken or dismissed, and that any disputes concerning Trail Smelter's air emissions be resolved through the bilateral mechanism of the Permanent Regime.

ARGUMENT

A. The Governments of Canada and the United States Have Established a Treaty Regime as the Exclusive Means of Resolving Disputes Regarding Air Emissions from Trail Smelter.

The Trail Smelter facility, because of its importance to Canada and its proximity to the Canada-United States border, has long been the subject of bilateral cooperation. The 1991 Air Quality Accord between the United States and Canada references the two countries' "tradition of environmental cooperation, as reflected by the Boundary Waters Treaty, [and] the Trail Smelter Arbitration of 1941." Air Quality Accord, *supra*, T.I.A.S. No. 11783, 30 ILM at 678. The creation of the Permanent Regime, and the issue of Trail Smelter air emissions, played a central role in the history of cooperation between the two countries on matters of cross-border pollution.

The problem of transboundary air emissions passing from Trail Smelter into the State of Washington was first raised by the United States in 1927, when it proposed to refer the matter to the IJC established by the BWT.[14] Canada, in one of many instances of government-to-government cooperation, joined the United States' request. The result was a 1931 report of the IJC proposing several non-binding recommendations for the remediation of damage caused by Trail Smelter air

[14] *See* 1938 Decision, *supra*, 3 R.I.A.A. at 1918; Treaty Relating to the Boundary Waters and Questions Arising Along the Boundary Between the United States and Canada, January 11, 1909, T.S. No. 548, 36 Stat. 2448.

emissions. *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").

Four years later, the United States and Canada signed the Ottawa Convention, adopting certain recommendations of the IJC Report, including the recommendation that Canada pay the United States indemnity in the sum of USD $350,000 for damages caused by Trail Smelter air emissions prior to 1932. *See* Ottawa Convention, *supra*, Article I, 4 U.S.T. at 4010. For damages arising after this date, the Ottawa Convention established the Tribunal to "finally" decide, *inter alia*:

> Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor? . . . [W]hether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent? . . . [and] In the light of the answer to the preceding Question, what measures or regime, if any, should be adopted or maintained by the Trail Smelter?

Id. at 4011, Article III. The Convention provided that "[t]he Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as International Law and Practice, and shall give consideration to the desire of the [United States and Canada] to reach a solution just to all parties concerned." Id. at 4011, Article IV. It also vested the Tribunal with jurisdiction to

hear "claims for indemnity for damage, if any, which may occur subsequently to the period of time" covered by the Tribunal's initial decision. Id. at 4012, Article XI.

The Tribunal rendered its initial decision in 1938, requiring Canada's payment of a further indemnity of USD $78,000 for damage caused by Trail Smelter air emissions from January 1, 1932 through October 1, 1937. *See* 1938 Decision, *supra*, 3 R.I.A.A. at 1933. Finding the research of the Tribunal's scientists insufficiently conclusive to provide guidance for a long-term solution, the Tribunal deferred implementation of a Permanent Regime for two years, prescribing measures for an "experimental period" (the "Temporary Regime") during which experts would conduct further monitoring of Trail Smelter air emissions. Id. at 1934.

In its 1941 Decision, the Tribunal reviewed the findings of the Temporary Regime to develop the framework of the Permanent Regime that remains in place today. Although the Tribunal found that damage had not been caused by Trail Smelter air emissions from October 1, 1937 through October 1, 1940 (*See* 1941 Decision, 3 R.I.A.A. at 1959), it expressly contemplated that such damage might arise again in the future, holding:

> So long as the present conditions in the Columbia River Valley prevail, the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington; the damage herein referred to and its extent being such as would be recoverable under the decisions of the courts of the United States in suits between private individuals.

Id. at 1966 (emphasis added). To promote compliance, the Tribunal further determined "that a regime or measure of control shall be applied to the operations of the Smelter and shall remain in full force unless and until modified in accordance with the provisions of . . . this decision." Id. This determination created what the Tribunal called its "Permanent Regime." Id.

1. The Permanent Regime Was Implemented Indefinitely, Has Not Been Suspended or Modified, and Remains in Force.

The Permanent Regime, by its own terms, remains in effect "unless and until modified in accordance" with the protocols of the 1941 Decision. Id. The Tribunal reserved to itself "the power to provide for alteration, modification or suspension" of the Permanent Regime. Id. at 1973. Anticipating the potential need for modification or suspension of the Permanent Regime after the Tribunal had disbanded, it established procedures for reconstituting a special Commission "for the purpose of considering and acting upon such request." Id. at 1978.

Following the 1941 Decision, the United States and Canada engaged in an exchange of notes concerning disposition of the undistributed indemnity funds deposited by Canada. *See* Exchange of Notes at Washington November 17, 1949, and January 24, 1950, *entered into force* January 24, 1950, 3.1 U.S.T. 539, T.I.A.S. No. 2412, 151 U.N.T.S. 171 (the "1950 Note Exchange"). The 1950 Note Exchange left the Permanent Regime undisturbed, and confirmed Canada's ongoing obligation to make repayments if further valid claims were presented by United States property

owners for the relevant time period. Id. at 539-40. There have been no claims under the Permanent Regime since 1950.

2. The Ottawa Convention and Permanent Regime Impose Binding International Obligations on the United States.

A treaty entered between two sovereigns imposes binding international legal obligations on the parties thereto from the time it enters into force, and continuing indefinitely into the future, until such time as the parties mutually agree to take affirmative steps to modify those obligations. *See* Rest. 3rd, Restatement of the Foreign Relations Law of the United States §§ 301, 312 (defining binding nature of international agreements). Neither the United States nor Canada has ever requested to modify or suspend the Ottawa Convention or the Permanent Regime, which was intended to be a final and exclusive remedial process for damage caused by Trail Smelter air emissions.[15] To the contrary, upon learning of the new allegations propounded by the FACs, Canada initiated an exchange of diplomatic notes aimed at invoking the mechanisms of the Permanent Regime. Twice in the past year Canada has insisted that the appropriate resolution of the issues before this Court lies in bilateral, diplomatic consultation that does not impinge on the

[15] As confirmed by the United States Department of State's publication of Treaties in Force, which continues to list the Ottawa Convention *See* U.S. Dep't of State, Office of the Legal Adviser, Treaties in Force: A List of Treaties and Other International Agreements in Force on January 1, 2013, 40 (2013) ("Treaties in Force"), *available at* http://www.state.gov/documents/organization/218912.pdf (last visited July 22, 2015).

sovereignty of Canada.[16] Further proceedings in the U.S. federal courts are antithetical to the "enhanced consultative role" for the Government of Canada that has been the essence of Canada's position on this litigation for more than 10 years.[17]

Per the terms of the Ottawa Convention, the United States and Canada agreed to be permanently bound by the decisions of the Tribunal. *See* Ottawa Convention, *supra*, Article XII, 4 U.S.T. at 4012. It was the intent of both governments that the Tribunal would "finally decide" certain questions, including whether Trail Smelter should be subjected to ongoing restraint from causing damage in the State of Washington, and if so, under what framework. Id., Article III, 4 U.S.T. at 4011. The Permanent Regime was established in response to these two questions, in what the sovereigns had agreed would be a final, binding decision. *See* 1941 Decision, *supra*, 3 R.I.A.A. at 1966. In keeping with this intention of finality, the Permanent Regime directed that further claims of indemnity for damage caused by Trail Smelter air emissions be allowed "only when and if the two Governments shall make arrangements for the disposition of claims for indemnity under the provisions of Article XI of the Convention." Id., at 1980. Accordingly, the Ottawa Convention reflects the express intent of the United States and Canada to be bound by the 1941 Decision and the exclusive Permanent Regime established thereby.

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[16] *See* Appendix C.

[17] See *supra* n. 5

3. The Permanent Regime Was Intended to Facilitate Diplomatic Resolution of the Types of Harm Alleged in this Suit.

Any judicial interpretation of CERCLA purporting to apply that statute, and the rights and remedies it creates, to air emissions originating from the Trail Smelter conflicts with the finality of the Permanent Regime and the United States' binding obligations thereunder. The Permanent Regime was intended to provide an exclusive and permanent diplomatic solution with respect to air emissions at the Trail Smelter, for the same types of injury that CERCLA redresses with respect to "disposals" of "solid waste or hazardous waste into any land or water." 42 U.S.C. § 6903(3).[18]

The legal issue before the District Court was whether the term "disposal" in CERCLA may be interpreted to include passive migration of particulate waste that originates as air emissions – a question the District Court answered in the affirmative. *See* Dismissal Order, *supra*, at 2-3; Reconsideration Order, *supra*, at 2-4. As explained in Section C, *infra*, the District Court's interpretation, if not incorrect as to all air emissions, is at minimum improper to the extent it is applied to

[18] The key point of contention before the District Court below was whether this phrase could be interpreted to include depositions of waste that originated in air emissions from Trail Smelter. As explained in Section C, *infra*, Canada contests this interpretation because it conflicts with the binding obligations of the United States under the Permanent Regime.

the Trail Smelter in contravention of the United States' binding obligations under the Permanent Regime.

i. The Permanent Regime Sought To Avoid Piecemeal Reparation of Private and Public Claims.

The diplomatic process established by the Permanent Regime was intended to supersede the system of fragmented claims that had existed prior to 1928, when the two countries resolved to submit the matter of Trail Smelter air emissions to the IJC. *See* 1938 Decision, *supra*, 3 R.I.A.A. at 1917 (detailing initial steps taken toward elimination of system of individual claims through municipal creation of a county-wide Citizens' Protective Association). The Tribunal considered a wide spectrum of public and private interests when computing the amounts of indemnity to be paid by Canada to the United States. *See* Id. at 1924-31. The Tribunal considered damage done to privately held crops and timber reserves (*see* Id. at 1925, 1928-29). The Tribunal considered damage done to natural resources, including soil, flora and livestock (*see* Id. at 1925-26, 1931). The Tribunal considered damage done to particular species, the propagation of which had been retarded by Trail Smelter air emissions (*see* Id. at 1929-30). The Tribunal also considered the costs of remediating contaminated soil and awarded indemnity based on such costs. Id. at 1925-1931). The Tribunal initially demurred to award indemnity based on the United States' "investigation" costs (id. at 1932), but amended this decision in its formulation of the Permanent Regime, permitting recovery of assessment costs if

those assessments demonstrated that further damage had occurred (*see* 1941 Decision, *supra*, 3 R.I.A.A. at 1980-81). The indemnity collected from Canada was used to repay individual claimants, and was sufficient to pay all claims with a margin of resulting surplus. *See* 1950 Note Exchange, *supra*, 3 U.S.T. at 539. Each of these items of indemnity is consistent with and parallel to the costs and damages recoverable under CERCLA.

If the District Court's decision is upheld, application of CERCLA to Trail Smelter air emissions will again result in the profusion of piecemeal claims that Canada and the United States had worked for decades to prevent. This would be damaging not only to Teck, but also to Canada's sovereign interests in its domestic environmental protection laws, and most importantly to the integrity of the diplomatic process between the United States and Canada. Principles of comity and of statutory construction require rejection of the District Court's interpretation. *See* Section C, *infra*. This is especially so where the District Court's reading of CERCLA does not follow inexorably from the language of the statute, adequate remedies exist under international law, and the result reached by the Orders is ultimately avoidable.

ii. The Permanent Regime Provides the Same Remedies for Trail Smelter Air Emissions that CERCLA Provides for Disposals into Land or Water.

The damages compensable by the Permanent Regime are coextensive with those that *would be* available under CERCLA *if* that law were applied to Trail Smelter air emissions. CERCLA permits recovery of four categories of damages:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C. § 6907(a)(4). The FACs request damages in three categories: costs of "removal or remedial actions" pursuant to § 6907(a)(4)(A) (WA FAC ¶¶ 5.1-6.3; Colville FAC ¶¶ 6.1-7.3); "natural resource damages" pursuant to § 6907(a)(4)(c) (WA FAC ¶¶ 9.1-10.2; Colville FAC ¶¶ 10.1-11.2); and costs of assessing natural resource damages pursuant to § 6907(a)(4)(c) (WA FAC ¶¶ 7.1-8.3; Colville FAC ¶¶ 8.1-9.3). The decisions of the Tribunal demonstrate that analogous remedies are available under the Permanent Regime.

The award of indemnity made by the 1938 Decision encompassed damages for removal and remediation costs, and damage to natural resources, including harm to reproduction of particular species. *See* 1938 Decision, 3 R.I.A.A. at 1924-31. The

1941 Decision subsequently brought assessment damages within the purview of the Permanent Regime. *See* 1941 Decision, 3 R.I.A.A. at 1980-81. As such, the Permanent Regime has both the mandate and the competence to redress the claims of damage advanced by the FACs. In fact, certain damages requested by the FACs, both of which are predicated on allegations of air emissions occurring "[f]rom approximately 1906 to the present time," have already been redressed by the Ottawa Convention, the 1938 Decision and the 1941 Decision. WA FAC ¶ 4.2; Colville FAC ¶ 4.2. *See also* Ottawa Convention, *supra*, 4 U.S.T. at 4010, Article I (awarding indemnity for the period prior to January 1, 1932); 1938 Decision, *supra*, 3 R.I.A.A. at 1933 (awarding indemnity for the period from January 1, 1932 through October 1, 1937); 1941 Decision, *supra*, 3 R.I.A.A. at 1959 (holding that insufficient damage had been caused between October 1, 1937 and October 1, 1940 to warrant payment of further indemnity). In view of the availability of suitable remedies within the strictures of the Permanent Regime, the District Court's recourse to CERCLA expansion is not only contrary to comity, it is simply unnecessary. The Permanent Regime is well equipped to account for the claims for damages raised in the FACs.

iii. The Permanent Regime Was Meant To Adapt to Progress and Changing Circumstance.

Canada acknowledges that scientific developments since the creation of the Permanent Regime have brought about a more sophisticated understanding of environmental injury than prevailed in the 1930's and 40's. Neither the Ottawa

Convention nor the Permanent Regime excludes consideration of such advancements. To the contrary, the 1941 Decision anticipated that "scientific advance in the control of fumes [c]ould make it possible and desirable to improve upon the methods of control hereinafter prescribed." Id. at 1973. The Tribunal considered it important that the Permanent Regime be flexible, opining that "[i]t would clearly not be a 'solution just to all parties concerned' if its action in prescribing a regime should be unchangeable and incapable of being made responsive to future conditions." Id.

The Tribunal thus made provision for the Permanent Regime's modification, in consultation with a panel of environmental experts appointed by the two parties. *See* Id. at 1978. Evidence of the Tribunal's dynamic nature is apparent from the 1941 Decision, which permitted awards of assessment damages that the 1938 Decision had denied. *See* 1938 Decision, *supra*, 3 R.I.A.A. at 1932-33; 1941 Decision, *supra*, 3 R.I.A.A. at 1980. The adaptive nature of the Permanent Regime would enable the United States to seek, and if warranted obtain, damages based on scientific theories and advancements unavailable to the Tribunal when it rendered its previous Decisions.

B. Insofar as CERCLA Can Be Interpreted To Apply to Air Emissions, this Interpretation Would Require Construing Ambiguities in the Statute.

Canada submits that the CERCLA definition of "disposal" unambiguously excludes airborne emissions of particulate matter, even if that matter, though passive migration, results in depositions "into land and water." 42 U.S.C. §§ 6903(3); 9607(a)(3). *Amicus* offers this brief, however, to articulate an alternative basis for reversing the District Court: principles of statutory construction strongly disfavor any interpretation of CERCLA that conflicts with the United States' obligations under the Ottawa Convention and the Permanent Regime. For even if CERCLA does not unambiguously exclude air emissions from its ambit, it cannot be said that the statute unambiguously *includes* them. Any interpretation of CERCLA that purports to apply that statute to air emissions necessarily requires resolution of textual ambiguities in the legislation.

This much is confirmed by the Orders, which infer much from the legislature's silence on specific issues and rely on a diverse array of interpretive techniques to support the District Court's desired reading of CERCLA. These techniques share one common thread: they need not be invoked where statutory text is clear. The District Court, in certifying its interpretation of this term for interlocutory appellate review, concedes that "there is a 'substantial ground for difference of opinion'"

regarding the construction of "disposal." Reconsideration Order, *supra*, at 8 (*quoting* 28 U.S.C. § 1292(b)).

CERCLA's provisions for "arranger" liability, which underlie Plaintiff's claims below, attach only to defendants who arrange for the "disposal . . . of hazardous substances . . . at any facility." 42 U.S.C. § 9607(a)(3). CERCLA defines "disposal" by reference to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.* ("RCRA"), which in turn states that "'disposal' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3). RCRA does not facially include air emissions in its definition of "disposal," and indeed, the Ninth Circuit has held in the context of RCRA that "disposal" excludes such emissions. *See generally*, CCAEJ, *supra* n. 10, 764 F.3d 1019.

The District Court's Reconsideration Order distinguishes CCAEJ, by holding that RCRA's definition of "disposal" must be understood differently in the context of CERCLA. *See* Reconsideration Order, *supra*, pp. 4-5. In making this leap, the District Court emphasizes that its reading is "not contrary" to CERCLA's text and legislative history, that Congress did not express a clear intent to exclude air emissions from CERCLA, and that no court had ever held that air emissions were

outside the scope of CERCLA. *See* Dismissal Order, pp. 6-7; Reconsideration Order, p. 6. Yet by relying on a combination of context, judicial and legislative silence, and techniques of statutory construction, the District Court demonstrates that its interpretation depends on the resolution of perceived ambiguities in CERCLA.

The District Court's Dismissal Order relies upon certain portions of CERCLA's legislative history and purpose to inform its interpretation of § 9607. *See* Dismissal Order, *supra*, at 6 (determining that its holding was "not contrary" with CERCLA's "legislative history" and "'overwhelmingly remedial statutory scheme' which is intended to allow the government to respond promptly and effectively to problems resulting from hazardous waste disposal"). If the letter of CERCLA were unambiguous, this discussion would be extraneous. "When the statutory language is clear, and there is no reason to believe that it conflicts with the congressional purpose, then legislative history need not be delved into." Heppner v. Alyeska Pipeline Serv. Co., 665 F.2d 868, 871 (9th Cir. 1981). *See also*, Jonah R. v. Carmona, 446 F.3d 1000, 1005 (9th Cir.2006) ("If the statute's terms are ambiguous, we may use canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent") (*citing* Milne v. Stephen Slesinger, Inc., 430 F.3d 1036, 1045 [9th Cir.2005]).

The District Court also relied on other provisions of CERCLA to construe the meaning of "disposal," specifically cross-referencing § 9601(14)'s definition of

"hazardous substance." *See* Dismissal Order, *supra*, at 7. This "canon[] of statutory construction is *noscitur a sociis,* which counsels that an ambiguous term 'is given more precise content by the neighboring words with which it is associated.'" Probert v. Family Centered Servs. of Alaska, Inc., 651 F.3d 1007, 1011 (9th Cir.2011) (quoting United States v. Williams, 553 U.S. 285, 294, 128 S.Ct. 1830, 170 L.Ed.2d 650 [2008]). By definition, this technique is unnecessary where the meaning of the statutory text is unambiguous. Implicit in the District Court's recourse to these interpretive techniques is the acknowledgement that its interpretation of "disposal" requires a look past the language of the statute.

C. Canons of Construction Require that Statutory Ambiguities Be Resolved, to the Extent Possible, in Accordance with the United States' Binding International Obligations.

The District Court's reliance on perceived ambiguities in CERCLA is significant because "[w]hile Congress may legislate beyond the limits posed by international law, it is also well settled that an act of Congress should be construed so as not to conflict with international law where it is possible to do so without distorting the statute." Munoz v. Ashcroft, 339 F. 3d 950, 958 (9th Cir.2003) (*citing* Murray v. The Schooner Charming Betsy, 2 Cranch 64, 6 U.S. 64, 118, 2 L.Ed. 208 [1804] [*hereinafter* "Charming Betsy"]). If CERCLA had expressed an unambiguous intent to redress air emissions and displace the exclusivity of the Permanent Regime, it would, as a subsequently enacted statute, supersede the

Ottawa Convention and the obligations following therefrom. *See* In re Premises Located at 840 140th Ave. NE, Bellevue, Wash., 634 F.3d 557, 568 (9th Cir.2011) ("a later-in-time self-executing treaty supersedes a federal statute and . . . a later-in-time federal statute supersedes a treaty") (*citing* Medellin v. Texas, 552 U.S. 491, 509 n. 5 & 518, 128 S.Ct. 1346, 170 L.Ed.2d 190 [2008]); Serra v. Lappin, 600 F.3d 1191, 1198-99 (9th Cir 2010) ("The Charming Betsy canon comes into play only where Congress's intent is ambiguous") (*quoting* United States v. Yousef, 327 F.3d 56, 92 [2d Cir.2003]). But CERCLA does not unambiguously express this intent, and because an inference of such intent would place CERCLA in conflict with the United States' international legal obligations, the District Court should have avoided this leap.

The District Court's error is encapsulated in the portions of its Dismissal Order concerning reference of the matter to the IJC:

> [F]or 'cross-border air issues,' Defendant says the 'proper forum' is the 'International Joint Commission' pursuant to treaty. Had Congress intended that CERCLA not apply to remediating contamination resulting from aerial emissions, it would have made something that significant abundantly clear in the statute.

Dismissal Order, *supra*, at 7. By holding that clear intent is required to *avoid* superseding a prior treaty, the District Court inverts the central presumption of the Charming Betsy doctrine. Because "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains," it is

incumbent on Congress to eliminate "other possible constructions" by *affirmatively expressing* an unambiguous intent to supersede prior treaties. Charming Betsy, *supra*, at 118. *See also* United States v. Pinto-Mejia, 720 F. 2d 248, 259 (2d Cir.1983) ("[I]n enacting statutes, Congress is not bound by international law. . . . If it chooses to do so, it may legislate with respect to conduct outside the United States, in excess of the limits posed by international law. . . . [a]s long as Congress has *expressly indicated* its intent to reach such conduct") (emphasis added).

The Charming Betsy doctrine applies with greatest force in cases such as this, where the courts' interpretation of a statute implicates the foreign policy interests of another nation. "The purpose of the Charming Betsy canon is to avoid the negative 'foreign policy implications' of violating the law of nations." Serra, *supra*, 600 F.3d at 1198-99 (*quoting* Weinberger v. Rossi, 456 U.S. 25, 32, 102 S.Ct. 1510, 71 L.Ed.2d 715 [1982]). *See also* Arc Ecology v. US Dept. of Air Force, 411 F. 3d 1092, 1102 (9th Cir.2005) (Charming Betsy canon properly invoked to "avoid embroiling the nation in a foreign policy dispute unforeseen by either the President or Congress"); U.S. v. Corey, 232 F. 3d 1166, 1179 n. 9 (9th Cir.2000) (same).

When presented with such foreign policy concerns, the Ninth Circuit has consistently found Charming Betsy principles both persuasive and controlling. *See* In re Korean Air Lines Co., Ltd., 642 F.3d 685, 696 (9th Cir.2011) (refusing to adopt statutory reading urged by plaintiffs because it would "would discriminate against

foreign air carriers in favor of domestic ones, contrary to U.S. treaty obligations mandating nondiscrimination"); Kim Ho Ma v. Ashcroft, 257 F. 3d 1095, 1114 (9th Cir.2001) (refusing, "out of respect for other nations," to interpret ambiguous provision of Illegal Immigration Reform and Immigrant Responsibility Act as permitting indefinite detention of removable aliens) (*citing* United States v. Thomas, 893 F.2d 1066, 1069 [9th Cir.1990]; Chua Han Mow v. United States, 730 F.2d 1308, 1311 [9th Cir.1984]; In re Simon, 153 F.3d 991, 998 [9th Cir.1998]).

Canada is uniquely positioned to comment on the foreign policy implications of this litigation, since the international obligations jeopardized by the District Court's Orders are obligations owed to Canada. In this connection, Canada reiterates its view that the Orders: (1) trample upon Canada's sovereign rights, such as those related to its implementation of CEPA, by subjecting Canadian companies to new spheres of regulation administered by U.S. courts; (2) undermine the long-standing and continuing bilateral agreements between Canada and the United States on issues of transboundary air and water pollution, including the BWT, the Air Quality Accord and the Ottawa Convention; and (3) judicially extinguish a Permanent Regime that Canada and the United States have expended considerable time and energy implementing, thereby casting doubt on the future of bilateral agreements brokered by the two nations.

CONCLUSION

The Ottawa Convention and the Permanent Regime reflect Canada's strong record of diplomatic cooperation and bilateral agreement with the United States in an era predating widespread adoption of environmental laws. In the absence of other means of redress, Canada's cooperation has been instrumental to the vindication of the United States' interests and those of its citizens. In keeping with principles of comity and reciprocity, this Court should uphold this system of cooperation.

Accordingly, Canada respectfully requests that the Orders of the District Court be reversed, that the allegations of the FACs pertaining to air emissions be stricken or dismissed, and that any disputes concerning Trail Smelter's air emissions be resolved through the bilateral mechanism of the Permanent Regime.

Dated: August 11, 2015
Washington, D.C.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B) because this brief contains 6,988 words, excluding the parts of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of F.R.A.P. 32(a)(5) because this brief has been prepared in a 14-point proportionately spaced typeface, with serifs, using Microsoft Word's Times New Roman font.

Dated: August 11, 2015
Washington, D.C.

/s/ Harold G. Bailey, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 11, 2015.

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