NO. 06-1188

IN THE SUPREME COURT OF THE UNITED STATES

TECK COMINCO METALS, LTD.,

Petitioners,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, AND THE STATE OF WASHINGTON,

Respondents.

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

BRIEF FOR THE STATE OF WASHINGTON IN OPPOSITION

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JURISDICTION

The court of appeals opinion was entered July 3, 2006. A petition for panel rehearing and rehearing en banc was denied October 30, 2006. On January 12, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 27, 2007, and the petition was filed February 27, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Factual Background[1]

Congress enacted the Comprehensive Environmental Response, Compensation And Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675, "in response to the serious environmental and health risks posed by industrial pollution." *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA "grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic*

[1] This case is in a preliminary procedural posture; its facts are therefore limited. The court below affirmed the district court's denial of Petitioner Teck Cominco Metals, Ltd.'s Rule 12(b)(6) motion to dismiss. Thus, the only facts before the Court are the well-pleaded allegations in Respondents' complaints, which the court must assume to be true. *Berkovitz v.United States*, 486 U.S. 531, 540 (1988). We address Teck's assertion of "facts" not properly before the Court in this Statement, and in responding to Teck's arguments that go beyond the preliminary record.

Corp. v. United States, 511 U.S. 809, 814 (1994). It both provides a mechanism for cleaning up hazardous waste sites and requires that such cleanups be paid for by those responsible for the contamination. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989), *overruled on other grounds*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Indeed, "[t]he remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous waste contamination may be forced to contribute to the costs of cleanup." *Bestfoods*, 524 U.S. at 56 n.1 (quoting *Union Gas Co.,* 491 U.S. at 21) (emphasis added).

CERCLA provides the President, acting through the Environmental Protection Agency (EPA),[2] with several alternatives for cleaning up contaminated sites. CERCLA § 106(a) gives the President authority to respond to releases of hazardous substances that "may be an imminent and substantial endangerment" to the environment by "issuing such orders as may be necessary" to liable parties directing them to clean up the site. 42 U.S.C. § 9606(a).

Petitioner Teck Cominco Metals, Ltd. (Teck) owns and operates the world's largest integrated lead/zinc smelter, in Trail, British Columbia on the banks of the Columbia River (the Trail Smelter). Pet. App. 4a–5a. Trail is just ten miles north of the border between the United States and Canada. Pet. App. 72a. Teck has operated the Trail Smelter for over 100 years, and for the majority of that time, Teck discharged both the solid and the liquid byproducts of its smelting operations (collectively known as slag) directly into the free-flowing

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[2] CERCLA grants authority to the President, who has delegated various powers to the EPA. *See* Exec. Order No. 12,580, 3 C.F.R. 193 (1988).

Columbia River.[3] Pet. App. 72a. The slag flowed with the river across the border, where it came to rest in the beds and banks of the Upper Columbia River and Lake Roosevelt in the United States.[4] Pet. App. 72a. Teck discharged 160,000 tons of slag annually (more than 13 million tons total) into the Columbia River from the turn of the century until 1995, when it ceased such discharges. Pet. App. 5a n.6.

The slag contains heavy metals, including arsenic, cadmium, copper, mercury, lead, and zinc, as well as other unspecified hazardous substances. Pet. App. 72a ¶ 12. A significant amount of slag accumulated in the Upper Columbia River and Lake Roosevelt and has contaminated the surface water, ground water, sediments, and biological resources there. Pet. App. 71a ¶¶ 6, 7. The slag continues to decay physically and chemically, releasing arsenic, cadmium, copper, zinc, and lead into the environment and causing harm to human health and the environment. Pet. App. 5a–6a. Technical evidence demonstrates the Trail Smelter is the predominant source of contamination in the Upper Columbia River and Lake Roosevelt. Pet. App. 5a–6a.

In 1999, the Environmental Protection Agency began an assessment of what it termed the Upper

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[3] Teck asserts that its slag disposal was in accordance with the laws of Canada. Pet. Question Presented 2. This assumes facts beyond the pleadings and the record. This case is before the Court on denial of Teck's motion to dismiss, which Teck filed before answering Respondents' complaints. Teck is not entitled to the benefit of "facts" that it has neither alleged nor proven. Teck similarly asserts that no second party was involved in the disposal of its hazardous wastes. This too is a factual assertion not properly before the Court.

[4] Franklin D. Roosevelt Lake (Lake Roosevelt) was created when the Columbia River was blocked by the construction of the Grand Coulee Dam in the early 1940s.

Columbia River Site (the Site), defined as "the areal extent of contamination in the United States associated with the Upper Columbia River." Pet. App. 69a. EPA's assessment found heavy metals contamination and slag throughout the area. Pet. App. 5a. EPA completed the assessment in 2003 and concluded the Site was eligible for the list of the most contaminated sites in the country, the National Priorities List (NPL). Pet. App. 6a, 72a. EPA determined the releases of hazardous substances at the Site "may present an imminent and substantial endangerment to public health or welfare or the environment." Pet. App. 75a ¶ 4.

When the EPA proposed listing the Site on the NPL, Teck Cominco American, Inc. (Teck American), a wholly owned American subsidiary of Teck, approached the EPA and proposed to conduct a limited human health study if the EPA would defer proposing listing the Site on the NPL. Pet. App. 6a. EPA and Teck American entered into negotiations, which ended when EPA concluded Teck American's proposed investigation would not meet CERCLA's requirements in at least five essential ways, and would not provide adequate information to allow the EPA to select an appropriate remedy for the contamination at the Site. Pet. App. 74a–75a ¶ 18. As a result, on December 11, 2003, the EPA issued a Unilateral Administrative Order (the EPA Order) to Teck under CERCLA § 106(a), which directed Teck to investigate the contamination at the Site under CERCLA and evaluate alternatives for cleaning up the Site. *See* Pet. App. 68a–99a (EPA Order), 6a. On January 12, 2004, Teck sent the EPA a letter stating that it would not comply with the Order. Pet. App. 102a–04a. The federal government did not bring an action to enforce the EPA Order. Pet. App. 6a.

B. Proceedings Below

On July 21, 2004, two members of the Confederated Tribes of the Colville Reservation, Joseph Pakootas and Donald R. Michell (collectively Pakootas), filed a complaint under CERCLA's citizen suit provision in the United States District Court for the Eastern District of Washington, seeking enforcement of the EPA Order. Pet. App. 6a, 105a–12a. Without filing an answer, on August 26, 2004, Teck filed a motion to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6). Teck argued the court lacked personal and subject matter jurisdiction and the complaint failed to state a claim upon which relief could be granted. While that motion was pending, the State of Washington (the State) moved to intervene as of right under 42 U.S.C. § 9659(g) and filed a complaint in intervention. Pet. App. 7a, 113a–19a. The court granted the State's motion and considered Teck's pending motion to dismiss to apply to both Pakootas' and the State's complaints. Pet. App. 7a.

The district court denied Teck's motion to dismiss, finding the court had subject matter jurisdiction over the action, the court had specific personal jurisdiction over Teck under Washington's long-arm statute, and Pakootas and the State had stated claims upon which relief could be granted. Pet. App. 59a. The district court recognized that the case involved applying a domestic law to clean up a site located entirely within the United States. Pet. App. 37a–38a. Nevertheless, the court assumed, for the sake of its analysis, that applying CERCLA to clean up pollutants discharged in Canada, but which came to rest in the United States, was an extraterritorial application of the statute. Pet. App. 37a–38a. The court ruled that, even if extraterritorial, the application of CERCLA in this case was nonetheless permissible, given CERCLA's focus on remedying domestic conditions and the significant harmful effects Teck's contamination caused within the

United States. Pet. App. 57a. The district court also held that it could not rule out Teck's liability as one who "arranged for disposal" of hazardous substances under 42 U.S.C. § 9607(a)(3). Pet. App. 49a.[5] The district court *sua sponte* certified its order for immediate appeal pursuant to 28 U.S.C. § 1292(b); the court of appeals granted permission to appeal. Pet. App. 59a, 9a.

On appeal, Teck did not challenge the district court's ruling that the court had personal jurisdiction over Teck and did not argue on appeal that the court lacked subject matter jurisdiction over the case. Pet. App. 59a, 9a. Accordingly, those claims are abandoned. Instead, Teck asserted that the district court erred when it denied Teck's Rule 12(b)(6) motion by (a) rejecting Teck's argument that the case involved an improper extraterritorial application of CERCLA, and (b) finding Teck could be held liable as a party who "arranged for disposal" under 42 U.S.C. § 9607(a)(3). Pet. App. 9a–10a.

A unanimous court of appeals affirmed the district court. Pet. App. 3a. The court concluded "this case involves a domestic application of CERCLA," and did not therefore trigger the presumption against extraterritorial application of United States law. Pet. App. 3a. The court also concluded that Teck could be held liable for having

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[5] In the district court, Teck submitted what purports to be a note from the Canadian Embassy. The district court granted the Respondents' motion to strike the note. Order Granting Motion To Strike Exhibits In Part, *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-040256-AAM (E.D. Wash. June 29, 2004). Teck did not challenge that ruling below, and the note is not properly part of the record in this case. Yet, nonetheless, Teck submitted it to the appellate court and has included the document in the petition appendix (Pet. App. 100a–01a), relying on it to support its petition (Pet. 4, 24). No facts beyond those pled in Respondents' complaints are properly before the Court, and Teck is not entitled to the benefit of one-sided, unlitigated, and unproven "facts."

"arranged for disposal" of hazardous substances and that the involvement of a second party is not a prerequisite to such liability. Pet. App. 3a.

The appellate court recognized that EPA's authority under CERCLA § 106(a) and CERCLA's liability provisions are triggered by disposals that subsequently cause releases or threatened releases of hazardous substances into the environment. Pet. App. 3a. The court of appeals concluded that the requisite releases occurred at the Site in the United States when the slag from Teck's smelter reached the Site and when the slag leached heavy metals and other contaminants into the surrounding environment. Pet. App. 14a–15a. Since the Site is specifically limited to the environment within the United States,[6] the court of appeals determined that applying CERCLA to remedy that contamination to be wholly domestic. Pet. App. 21a.

The court below also determined that holding Teck liable as having "arranged for disposal" of the slag would not involve an extraterritorial application of CERCLA. Pet. App. 20a. The court observed that CERCLA is a remedial statute that focuses on remedying the harmful effects of past conduct, and CERCLA does not regulate or prohibit any "arrangement" for disposal. Pet. App. 20a. The court recognized that liability arises when a disposal leads to hazardous substances being released at a Site in the United States, regardless of the method of disposal.

The appellate court also rejected Teck's argument that it can be held liable as having "arranged for disposal" of hazardous substances only if it involves a second party

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[6] CERCLA defines "environment" as waters, land, and air within the United States or under the jurisdiction of the United States. 42 U.S.C. § 9601(8). Accordingly, CERCLA liability is triggered only by a release of hazardous substance into the United States environment.

in the disposal. The court rejected Teck's argument that generators of hazardous wastes who arrange for the disposal of their wastes themselves are free from liability under § 9607(a)(3), rejecting an argument by Teck based on *American Cyanamid Co. v. Capuano*, 381 F.3d 6 (1st Cir. 2004). Pet. App. 25a–26a.

On June 2, 2006, one month before the appellate court issued its ruling, Teck and the EPA signed a settlement agreement that requires Teck to guarantee, and Teck American to conduct, (a) an investigation into the nature and extent of contamination at the Site that meets CERCLA requirements and (b) an evaluation of alternatives under CERCLA for cleaning up the Site. On the same day, the EPA sent a letter to Teck in which it withdrew its December 1993 Order. Pet. App. 120a. The appellate court took judicial notice of the settlement. It determined that the settlement did not moot the Respondents' claims for civil penalties and attorney fees, and left it to the district court on remand to determine whether the settlement mooted the Respondents' claims for declaratory and injunctive relief. Pet. App. 9a n.10.

Teck timely petitioned the court of appeals for rehearing and rehearing en banc. On October 30, 2006, the court of appeals denied the petition for rehearing and denied the petition for rehearing en banc, with no judge in the circuit requesting a vote on whether to hear the case en banc. Pet. App. 61a.

REASONS FOR DENYING THE WRIT

The Petition For Writ Of Certiorari should be denied for three reasons. First, the decision below creates no conflict in the circuits. The court of appeals correctly found—as have all other courts to address the issue—that a generator of hazardous waste who directly arranges for the disposal of its own waste may be liable for cleanup under Section 107(a)(3) of CERCLA. Teck's alleged circuit conflict is predicated entirely on dicta in a decision

of the First Circuit that resolved a different issue. *See American Cyanamid*, 381 F.3d 6 (finding parties liable even though they did not own or transport waste, but instead acted as "brokers" who constructively possessed the waste and arranged for its improper disposal).

Second, this case comes to the Court in the most preliminary of procedural postures—from denial of a Rule 12(b)(6) motion by Teck. Although Teck tries to put extra-record "facts" before the Court in order to support its claims, the only facts at this juncture are the allegations of the Respondents' complaints.[7] Teck also raises new issues in its petition, which were not raised or litigated below. Teck's new arguments and extra-record facts should not be litigated in the first instance before this Court.

Third, despite Teck's effort to create one, the court of appeals decision that there can be liability under CERCLA when a foreign corporation creates a hazardous waste site in the United States raises no issue of international law or comity.

A. There Is No Circuit Split Concerning Liability For Generators Who Dispose Of Their Waste

Teck's second Question Presented contests liability under CERCLA § 107(a)(3) and claims a circuit split on whether liability can attach if Teck did not involve "another party or entity" in its disposal of its slag. Pet. 9, 25–29. Section 107(a)(3) creates liability for persons who "arranged for disposal" of waste found at a contaminated site owned or operated by another party. CERCLA imposes liability on:

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[7] Such considerations explain in part why certiorari from interlocutory appeals is disfavored. *See, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari).

> "(3) any person who . . . arranged for disposal . . . of hazardous substances owned or possessed by such person . . . at any facility . . . owned or operated by another party or entity and containing such hazardous substances . . . ." 42 U.S.C. § 9607(a)(3).

Liability under CERCLA § 107(a)(3) is intended to apply to companies that generate waste and make the decision to dispose of it in such a way that it is released into the environment. *See* 1 Allan J. Topol & Rebecca Snow, *Superfund Law and Procedure* § 3:31 (2006) ("one thing about [§ 107(a)(3)] is clear: it makes generators of hazardous waste liable for cleanup . . . because they 'arrange' for the disposal of the wastes that they have created"). Congress has long recognized this purpose for this particular category of liability:

> "Generators create the hazardous wastes and . . . how to avoid them, and they determine whether and how to dispose of these wastes— on their own site or at locations controlled by others." S. Rep. No. 848, 96th Cong., 2d Sess. (1985), at 15.

The court of appeals, in affirming the denial of Teck's motion to dismiss, did not create any split among the circuits. Respondents' complaints satisfy CERCLA § 107(a)(3) by alleging that (a) Teck generated millions of tons of waste over the last century as a byproduct of smelting operations, (b) Teck disposed of the waste into the Columbia River, and (c) the waste has been released into the environment at the contaminated Site in the United States. Pet. App. 107–09a, 115–17a; *see also* Pet. App. 69a–76a (EPA findings about Teck's disposal of hazardous waste).

1. The First Circuit Decision In *American Cyanamid* Addresses A Different Issue In A Different Context And Presents No Conflict

When cases do not decide the same issue, they are not in "direct" conflict. Robert L. Stern et al., Supreme Court Practice 226 (8th ed. 2002) ("A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts."). *American Cyanamid*, 381 F.3d 6 (decided a different issue in a different context than the question presented by Teck).

In *American Cyanamid,* the trial court found the Capuanos liable as "operators" of a dump site under CERCLA § 107(a)(1) and as persons who had "arranged for disposal" of wastes at the site under Section § 107(a)(3). On appeal, the First Circuit addressed whether a dump operator could be liable as an "arranger" by acting as a middleman and "brokering" waste disposal at the dump. The Capuanos argued that they did not own or possess the waste they had arranged to dispose of at the dump and, therefore, arranger liability did not apply. *American Cyanamid*, 381 F.3d at 23. The First Circuit followed cases imposing liability on similar persons who did not own or possess waste but who "controlled" the disposal. *Id.* at 24–25. The court ultimately held that the term "owned or possessed" in Section 107(a)(3) could be read broadly to include "constructive" ownership or possession—a holding that is neither directly on point, nor directly in conflict with, the court of appeals decision below. *See id.* at 25.

In contrast, the appellate court below addressed factual allegations in complaints that bear no resemblance to the facts in *American Cyanamid*. Respondents did not allege that Teck brokered waste for

others. Instead, Respondents alleged that Teck generated, owned, controlled, and disposed of waste in the Columbia River, and the river carried the waste to the contaminated site. Because the facts and holdings of the two cases are different, the two rulings present no direct conflict. *See Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956) ("[I]t is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests."). Lacking any real conflict, Teck relies on dicta by the First Circuit to claim a conflict—but this does not create a circuit split or warrant review. *See Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from denial of cert) ("We sit, after all, not to correct errors in dicta; '[t]his Court reviews judgments . . . .'"). The First Circuit briefly parsed out two grammatical constructions of CERCLA § 107(a)(3), but did not rest its holding on this grammatical parsing. Its holding instead examines and relies on prior cases and the unique facts in that case. *American Cyanamid*, 381 F.3d at 23–24. Based on those facts, the court rejected a waste broker's attempt to create a loophole that would frustrate the purposes of CERCLA. *See American Cyanamid,* 381 F.3d at 25 (If "CERCLA [did] not . . . impose liability on a party that constructively possessed hazardous waste and arranged for its illegal disposal, then the statute would be subject to a loophole through which brokers and middlemen could escape liability . . .").[8]

[8] A subsequent decision saw no conflict between *American Cyanamid* and the decision below. *See Vine Street, LLC v. Keeling ex rel. Estate of Keeling*, 460 F. Supp. 2d 728, 748–50 (E.D. Tex. 2006) (corporate parent of a dry cleaning machine manufacturer liable for releases from a dry cleaning operation because the "thrust" of decisions like *Pakootas* and *American Cyanamid*, taken in tandem with the purposes of CERCLA, counseled against interpreting § 9607(a) "in any way that apparently frustrates the statute's goals").

Indeed, nothing in *American Cyanamid* indicates the First Circuit would allow Teck to avoid liability here.

As the court below recognized, if adopted in this case, Teck's argument "would leave a gaping and illogical hole in the statute's coverage, permitting argument that generators of hazardous waste might freely dispose of it themselves and stay outside the statute's cleanup liability provisions." Pet. App. 26a. Teck suggests any loophole would be covered by "operator" liability under CERCLA § 107(a)(1). Pet. 27 n6. Yet Teck fails to show how operator liability applies to a company that disposes of waste into a river, when the waste is carried away from land they own or operate and contaminates the riverbed or lakebed. In any event, there is no reason to strain to find liability under other sections of CERCLA, because a company that generates and disposes of waste is liable under Section 107(a)(3).

2. Teck Wrongly Claims Uniform Support In Other Circuits

Teck claims the "substantially uniform view of the Circuits" supports its position and cites numerous decisions to infer they uniformly applied "arranger" liability based on Teck's approach to the sentence structure of CERCLA § 107(a)(3). *See* Pet. 26. Teck incorrectly describes the circuit uniformity; most courts have not applied liability after parsing the sentence structure of Section 107(a)(3). *See Vine Street*, 460 F. Supp. 2d at 748 (so noting, upon analysis of recent cases). The courts instead have followed an intensely factual, case-by-case approach, under which liability hinges on a variety of facts examined to "determine whether a defendant was sufficiently responsible for

hazardous-waste contamination so that it can fairly be forced to contribute to the costs of cleanup."[9]

Teck fails to cite a single case holding that a generator of waste—like itself—is *not* liable if it did not first arrange for disposal with another party.[10] In fact, Respondents can find no case where a person disposing of waste has avoided liability using Teck's argument. When courts have addressed the liability of a company that generated waste and disposed of the waste itself, the courts have found that generator liable without requiring the disposal first be carried out by another party. *See, e.g.*, *Colorado v. Idarado Mining Co.*, 707 F. Supp. 1227, 1241 (D. Colo. 1989), *amended by* 735 F. Supp. 368 (D. Colo. 1990), *rev'd on other grounds*, 916 F.2d 1486

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[9] *See Morton Int'l, Inc. v. A.E. Staley Mfg.* Co., 343 F.3d 669, 677-78 (3d Cir. 2003); *see also Vine Street*, 460 F. Supp. 2d at 749–50 ("Federal courts have developed a sophisticated case-by-case approach" to fulfill Congressional intent that "those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created") (internal citation omitted); *see also Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317–18 (11th Cir. 1990) (rejecting reliance on any *per se* rule for arranger liability).

[10] None of the cases cited by Teck have exculpated a company that directly disposed of waste. *See GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433, 448 (6th Cir. 2004) (analyzing liability of company for waste disposed of by a separate company, from whom it had purchased chemical goods); *Morton Int'l, Inc.*, 343 F.3d at 679 (analyzing liability of company that shipped material to a separate company for processing into usable form for releases from second company's processing); *Raytheon Constructors, Inc. v. Asarco, Inc.*, 368 F.3d 1214 (10th Cir. 2003) (analyzing liability of minority shareholder in a mining company based on actions taken by the predecessor's president); *United States v. Vertac Chem. Corp.*, 46 F.3d 803, 811 (8th Cir. 1995) (analyzing liability of United States for waste released by a company with which it contracted).

(10th Cir. 1990) (finding a generator liable as an "arranger" for dumping wastes directly into a river); *see also Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 659 (6th Cir. 2000) (finding a generator would be liable as an "arranger" if it had discharged its waste into the Kalamazoo River).

3. An Appeal Of A Motion To Dismiss Is Not The Appropriate Vehicle To Examine Liability For Disposal

As outlined above, arranger liability is "a fact-sensitive inquiry that requires a multi-factor analysis." *Morton Int'l, Inc. v. A.E. Staley Mfg.* Co., 343 F.3d 669, 677 (3d Cir. 2003). The Rule 12(b)(6) record does not establish how disposal occurred, who carried it out, and what employees, contractors, or other persons were involved. Certiorari should therefore be denied for the separate reason that there is no factual record appropriate for examining liability and no final judgment on liability.

B. Teck's New Arguments Are Not Appropriate For Review By This Court

For the first time, Teck offers a new approach to CERCLA 107(a)(3), borrowing from subsection (a)(4) to argue that CERCLA cannot apply to it because it arranged to dispose of its pollution at a different "facility" than the one from which hazardous substances were released. Pet. 18–21. Teck's new argument does not merit review from this Court because it was not raised below, is based on facts not in the record, and has been rejected by all courts that have addressed similar arguments.

The district court, court of appeals, and parties have never had the opportunity to consider or respond to Teck's new argument. The argument reflects Teck's factual characterizations of matters that are outside the

record and are inappropriate for this Court to consider in the first instance. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168–69 (2004) (except in exceptional circumstances, the Court does not decide questions not raised or resolved in the lower court); *accord Yoakim v. Miller*, 425 U.S. 231, 234 (1976).

Moreover, Teck's new argument stretches statutory terms and mischaracterizes the pleaded facts. This is contrary to review under Rule 12(b)(6), where pleaded facts are taken as true and all inferences are construed in favor of the Respondents. While Teck may defend its potential liability on remand by developing a full factual record, the record at this stage is no basis for Teck's new arguments. For example, Teck asserts its Smelter is the relevant "facility" (Pet. 20), when the only "facility" alleged in the EPA Order and Respondents' complaints is the Upper Columbia River Site (Pet. App. 75a, 105a–19a). Teck further argues that its discharge of slag into the river in Canada constitutes actionable "releases" under CERCLA (Pet. 19–20[11]) when the only CERCLA "releases" alleged in the EPA Order and Respondents' complaints are releases of hazardous substances from the slag that has come to rest at the Site (Pet. App. 75a, 105a–19a). Teck's reliance on its

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[11] CERCLA defines "facility" as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, *or otherwise come to be located*." 42 U.S.C. § 9601(9)(B) (emphasis added). The court of appeals decision examined potential liability of a person who "arranged for disposal . . . of hazardous substances . . . at any facility . . . owned or operated by another party . . . and containing such hazardous substances. . . ." 42 U.S.C. § 9607(a)(3). "Disposal" means "the discharge, deposit, injection, dumping . . . or placing of any . . . hazardous waste into or on any land or water so that such . . . hazardous waste . . . may enter the environment." 42 U.S.C. § 6903(3).

characterization of the facts confirms why this argument should first be considered by a lower court.

Had Teck raised this issue below, the court of appeals would likely have followed other courts that have rejected similar arguments. *See United States v. Conserv. Chem. Co.*, 619 F. Supp. 162, 234 (W.D. Mo. 1985)[12] (rejecting argument that a generator cannot be liable under CERCLA if it initially disposed of its waste somewhere other than where the wastes ultimately came to rest); *accord United States v. Ward*, 618 F. Supp. 884, 895 (E.D. N.C. 1985) (same); *Violet v. Piciolo*, 648 F. Supp. 1283, 1291 (D. R.I. 1986) (same) (overruled on other grounds).

The fact-bound nature of Teck's new argument is further illustrated by Teck's citation to cases involving "passive migration." These cases involve completely different factual scenarios than anything alleged in Respondents' complaints. *See* Pet. 20 n.4 (citing *United States v. 150 Acres of Land*, 204 F.3d 698, 701 (6th Cir. 2000) (drums leaking hazardous liquids into the ground); *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 356 (2d Cir. 1997) (same); *United States v. CDMG Realty, Co.*, 96 F.3d 706, 710 (3d Cir. 1996) (contamination of soil)). Under the existing record, it is implausible for Teck to compare its disposal of tens of millions of tons of slag into a free-flowing river to these other factual scenarios involving contamination spilled on solid ground. Nor are the cases legally similar: each decides if a *former owner or operator* of a site contaminated by migration of contaminants owned or operated the site "'at the time of disposal' of a hazardous substance" for purposes of CERCLA § 107(a)(2). 42 U.S.C. § 9607(a)(2).

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[12] *Conservation Chemical* was superceded by statute on other grounds, as stated in *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90 (2d Cir. 2005).

C. The Court Of Appeals Decision Affirming Denial Of Teck's Rule 12(b)(6) Motion Raises No Substantial Issue Of International Law Or Comity

1. Optional Diplomatic Processes Do Not Preclude The Application Of CERCLA In This Case

Teck first argues that the "decision below upsets a century-old tradition of bilateral solutions to transboundary pollution problems." Pet. 10. Teck alleges that "[s]ince the Industrial Revolution, the United States and Canada have resolved their transboundary pollution problems bilaterally, including government-to-government diplomatic negotiations and, occasionally, arbitrations between the sovereigns." Pet. 10. Nothing in the record supports this sweeping factual proposition.

Of the various treaties Teck references, only the 1909 Boundary Waters Treaty even arguably applies to Teck's pollution of the Site.[13] Boundary Waters Treaty, Jan. 11, 1909, U.S.-Gr. Br., 36 Stat. 2448 (the Treaty). The Treaty's focus, however, is the equitable allocation of water resources between Canada and the United States. Jennifer Woodward, *International Pollution Control: the United States and Canada—the International Joint Commission*, 9 N.Y.L. Sch. J. Int'l & Comp. L. 325, 326 (1988) (Woodward); Treaty art. II. The only provision that

[13] Among other treaties, Teck refers to the Great Lakes Water Quality Agreement of 1978, the 1991 Agreement Between the Government of the United States of America and the Government of Canada on Air Quality, and the North American Free Trade Agreement. *See* Pet. 11–12. None of these treaties speak to remedying the effects of Teck's discharge of contaminants into the Columbia River. Indeed, the treaties Teck cites focus on issues related to the regulation of ongoing polluting activities in bordering countries; they do not address how to remedy the effects of historical transboundary pollution.

refers to transboundary pollution is Article IV, which provides that waters flowing across the U.S.-Canadian border "shall not be polluted on either side to the injury of health or property on the other." Treaty art. IV. During negotiations for the Treaty, Canada advocated for a provision "forbidding water pollution having transboundary consequences," and attempted to establish an agency that would enforce the prohibition. Woodward at 327. The United States refused to agree to either and only reluctantly accepted the language in Article IV. Woodward at 326.

In addition, the Treaty's mechanisms to address "differences" between the two countries are entirely optional. Treaty art. IX (allowing for nonbinding "recommendations"), art. X (allowing for binding dispute resolution).[14] Notably, the binding dispute resolution process in the Treaty has never been invoked in the Treaty's 98-year history. *Government of Province of Manitoba v. Norton*, 398 F. Supp. 2d 41, 56 (D. D.C. 2005); Woodward at 328.[15] At best, therefore, the Treaty provides a voluntary alternative for addressing issues related to transboundary pollution; it does not provide the exclusive means. Woodward at 328; *see also Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 506–08 (1971)

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[14] For the United States to invoke the binding dispute resolution process in the Treaty, the consent of the United States Senate is required. Treaty art. X

[15] Teck implies, erroneously, that the Trail Smelter Arbitration was conducted pursuant to the Treaty's binding dispute resolution provision. The initial proceeding was pursuant to Article IX's non-binding procedure, and only later did the United States and Canada agree to submit issues to arbitration under a separate convention entered into specifically for that purpose. Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue?* 14 N.Y.U. Envtl. L.J. 233, 251 (2006).

(Douglas, J., dissenting on other grounds) (nuisance suit for transboundary pollution was "not precluded by the Boundary Waters Treaty"). Justice Douglas recognized that the Treaty "does not evince a purpose on the part of the national governments of the United States and Canada to exclude . . . other remedies for water pollution." *Wyandotte Chem. Corp.*, 410 U.S. at 507.[16] Nothing in the record in this case suggests the United States or Canada sought to invoke either of the Treaty's dispute resolution procedures to address Teck's legacy of contamination at the Site.

In addition, numerous cases over the last century demonstrate that litigation has often been a means for addressing transboundary pollution between the United States and Canada. *See, e.g.*, *Wyandotte Chem. Corp.*, 410 U.S. at 506–08 (litigation over pollution by Dow Canada that eventually harmed Lake Erie); *Her Majesty the Queen in Right of Ontario v. United States Envtl. Prot. Agency*, 912 F.2d 1525 (D.C. Cir. 1990) (suit by Ontario to require EPA to reduce air emissions in the United States causing damage in Canada); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 975 (2d Cir. 1984) (Ontario suing to protect Canadian citizens harmed by U.S. company's pollution of Lake Ontario and the Niagara River); *Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213 (6th Cir. 1974) (suit by Canadian landowners against U.S. corporations, whose U.S. plants emitted noxious fumes); *Norton*, 398 F. Supp. 2d 41 (suit by Province of Manitoba against the U.S. Secretary of Interior over a water diversion project that could pollute Canadian waters).[17]

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[16] Indeed, the Treaty explicitly allows United States and Canadian citizens to go to court to redress harm caused by the diversion of water in the other country. Treaty art. II.

[17] These lawsuits involve transboundary air pollution and pollution in and around the Great Lakes, which are the

CERCLA was enacted against *this* backdrop, not a century of exclusively bilateral diplomacy, as Teck asserts.[18] Pet. 12. Further, notwithstanding Teck's implications to the contrary, nothing in international law or comity requires a court to defer to an optional diplomatic process. *See Fed. Trade Comm'n. v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980) (refusing to defer to optional processes in the Hague Convention). Teck's contention to the contrary provides no basis for review.

2. This Case Concerns Application Of CERCLA To A Hazardous Waste Site In The United States And The Presumption Against Extraterritorial Application Does Not Apply

Teck next tries to create a substantial question of international law or comity from the denial of its motion to dismiss by asserting that the decision below erroneously failed to apply the presumption against extraterritorial application of U.S. law. Teck's argument is unsound for two reasons. First, the presumption does not apply here. Second, even if it did, the purpose of the presumption is to avoid "unintended clashes between our laws and those of other nations." *E.E.O.C. v. Arabian Am. Oil Co.* (*Aramco*), 499 U.S. 244, 248 (1991). As the appellate court correctly found, there is no such clash in this case.

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subject of the other treaties Teck cites. These further dispel the notion that disputes involving transboundary pollution have been resolved by the United States and Canada only through bilateral diplomacy.

[18] Indeed, to the extent the Treaty and CERCLA can be said to conflict, CERCLA, as a later-enacted statute, "renders the treaty null." *Reid v. Covert*, 354 U.S. 1, 18 (1957).

The presumption against extraterritorial application applies only if a case actually involves an extraterritorial application of United States law. *In re Maxwell Commc'n Corp. plc*, 186 B.R. 807, 815–16 (S.D. N.Y. 1995) ("[f]irst, a court must determine if the presumption applies at all"); *accord Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993). For purposes of Rule 12(b)(6), the court of appeals correctly concluded the allegations in Respondents' complaints present a domestic application of CERCLA to the cleanup of the Upper Columbia River Site. The Site is in the United States; CERCLA dictates how pollution in the United States is cleaned up.

Teck bypasses the domestic focus of CERCLA, and instead argues that it cannot be held liable for activities "undertaken exclusively in Canada." Pet. 14. Even if Teck had established this alleged exclusivity in the limited Rule 12(b)(6) factual record—and it did not—and even if dumping a massive quantity of hazardous waste into the free flowing Columbia River ten miles north of the U.S.-Canada border could be considered an activity wholly within Canada, CERCLA does not regulate or prohibit that activity. It merely provides a remedy for the harm that activity caused in this country.[19] *Meghrig v.*

[19] CERCLA is a remedial law, like the tort law it was based upon. 126 Cong. Rec. 26,788 (1980) (statement of Rep. Jeffords) (indicating CERCLA was to codify the tort of strict liability for ultrahazardous activities); 126 Cong. Rec. 26,782 (1980) (statement of Rep. Gore) (same). In similar cases involving application of United States remedial laws to address domestic harm caused by foreign defendants, courts have considered those tort-based laws to be applied domestically; indeed, the presumption against extraterritoriality has not even been mentioned. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 525 (1987) (French airplane manufacturing companies owned by the French Government sued for negligent manufacture when plane crashed in Iowa); *Wyandotte Chem. Corp.*, 401 U.S. at 494 (Ohio

KFC W., Inc., 516 U.S. 479, 483 (1996) (noting CERCLA's character as a remedial, rather than regulatory, statute). No principle of international law or comity allows Teck to evade responsibility for the tens of millions of tons of pollution that it directed into the United States.

Teck correctly recognizes that the purpose behind the presumption against extraterritoriality is "to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248. However, Teck points to no law of Canada or British Columbia with which CERCLA conflicts. CERCLA did not and does not prohibit any action, or require Teck to take any action, related to the Smelter's operations. CERCLA therefore has no regulatory impact on Teck and presents no conflict with any regulation by Canada or British Columbia of the Smelter's operations and discharges.[20] Pet. App. 22a. Moreover, to the extent Teck's claim that its discharge of slag was in accordance with the laws of Canada (Pet. Question Presented 2) is intended to demonstrate a "clash of laws", it is not an established fact on Teck's Rule 12(b)(6) motion and is outside the scope of review in this case. The same is true of Teck's reliance on a diplomatic note that was stricken by the district court to support its "clash of laws" contention. Pet. 13.[21]

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sued Dow Canada in nuisance for the discharge of mercury into streams in Canada which ultimately harmed Lake Erie in the United States). CERCLA is no different in impact or scope than the tort laws applied to foreign defendants in the cases above.

[20] Even if CERCLA could somehow be said to regulate the discharge of slag from Teck's Smelter, there is nothing left to regulate, for Teck ceased discharging slag in 1995 (eight years before the EPA Order was issued).

[21] Both CERCLA and its Canadian counterpart impose liability even if a disposal was done in accordance with the applicable law at the time the disposal occurred. Indeed, the

The facts of this case are decidedly different from the circumstances in the cases Teck cites in support of its extraterritoriality argument, *Aramco* and *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).[22] In those cases, United States law was applied outside the territorial jurisdiction of the United States to regulate conduct in foreign countries. *Aramco*, 499 U.S. at 249–51 (applying Title VII of the Civil Rights Act to employment practices in Saudi Arabia); *Empagran,* 542 U.S. at 174 (applying the Sherman Act to anti-competitive conduct abroad). In both of those cases, the laws purported to proscribe specific conduct (discriminatory employment practices and price fixing) abroad. In contrast, here, CERCLA is applied within the territorial jurisdiction of the United States to the cleanup of a domestic site. CERCLA does not proscribe, or even regulate, any conduct in Canada. It is not, therefore, being applied

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applicable Canadian cleanup law is virtually identical to CERCLA, further disproving any clash of laws. In Canada, primary jurisdiction for addressing historical pollution rests with the Provinces. Canadian Constitution Act, 1867 (U.K.), 30, 31 Vict. C. 3. British Columbia's Environmental Management Act (EMA) holds the same categories of polluters "absolutely, retroactively and jointly and separately liable" for the costs of cleanup. EMA § 47(1). Liability attaches *regardless of whether the polluting activity was lawful at the time it occurred; and regardless of whether the liable party had a permit or other governmental approval allowing the polluting activity*. EMA § 47(4). Thus, Teck is subject to the same legal liability for pollution it caused on the Canadian side of the border as CERCLA imposes for pollution caused in the United States.

[22] The facts alleged in this case also differ from the facts in this Court's most recent decision addressing extraterritorial application of United States law. *See Microsoft Corp. v. AT&T Corp.*, No. 05-1056, WL 123838 (U.S. Apr. 30, 2007). *Microsoft* involved an attempt to apply United States patent law to purely foreign acts of infringement. *Id.* at *10.

extraterritorially and does not conflict with Canada's or British Columbia's regulatory authority or sovereignty.

A Canadian court recently recognized that CERCLA poses no threat to Canadian or provincial sovereignty. *United States v. Ivey*, 30 O.R.3d 370 (Ontario Ct. App. 1996). When enforcing a CERCLA judgment against Canadians for costs EPA incurred to clean up a site in the United States, the court concluded:

> "The United States did not seek to enforce any laws against extraterritorial conduct. It simply sought financial compensation for actual costs incurred in the United States in remedying environmental damage inflicted in the United States on property in the United States. It is no extension of U.S. sovereign jurisdiction to enforce its domestic judgments against those legally accountable for an environmental mess in the United States[.]" *Id*. at 374 ¶ 19.

The United States has also taken the position that applying CERCLA to remediate pollution coming into the United States from a foreign country is a permissible application of the statute. EPA took that position when it issued the Order in this case directing Teck to investigate the contamination at the Site under CERCLA. Pet. App. 68a–99a (the Order). The United States took the same position in *ARC Ecology v. United States Department of the Air Force*, 411 F.3d 1092 (9th Cir. 2005). In that case, Philippine nationals tried to apply CERCLA outside the territorial jurisdiction of the United States, to the cleanup of former military bases in the Philippines. The United States informed the court:

> "A different analysis applies when a hazardous substance is released or there is a threat of such a release from another country into the United States—for instance, across the Canadian border. EPA has responded to such releases under

> CERCLA. ER 42. EPA's response in such a case is *not an extraterritorial application of CERCLA* because EPA is addressing a release into the environment in the United States."[23] Brief For The Federal Appellees at 19 n.2, *ARC Ecology v. United States Dep't of the Air Force*, No. 04-15031 (9th Cir. Aug. 4, 2004), 2004 WL 1935956 (emphasis added).

These cases demonstrate that both Canadian courts and the United States recognize that applying CERCLA to remedy transboundary pollution that comes to rest in the United States is no threat to Canadian sovereignty.[24]

Teck misapplies cases stating that statutes are to be interpreted to avoid "unreasonable interference with the sovereign authority of other nations." *See* Pet. 17–18. The proposition is true, but courts must first be satisfied that interference with the sovereign authority of another nation will occur. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993) (noting the "only substantial question" was "whether 'there is in fact a true conflict between domestic and foreign law'").[25] As shown above,

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[23] The district court in *ARC Ecology* agreed, finding "[i]n situations where a hazardous substance . . . is released . . . into the U.S. from a bordering country, such as Mexico or Canada, EPA could respond under CERCLA." *ARC Ecology v. United States Department of the Air Force*, 294 F. Supp. 2d 1152, 1158 (N.D. Cal. 2003).

[24] *See also Canron, Inc. v. Fed. Ins. Co.*, 82 Wash. App. 480, 482, 918 P.2d 937 (1996) (the insured, a Canadian company that EPA held liable for wastes the company trucked to a United States facility for disposal, sought insurance coverage for that environmental claim). Teck's case is no different from *Canron*, except the mode of transportation was a river instead of a truck.

[25] In *Hartford Fire*, the Court concluded that there was no foreign law impediment, notwithstanding that the British

applying CERCLA poses no conflict with Canadian law or threat to Canadian sovereignty. The canon of construction does not, therefore, apply.[26]

Moreover, even if applying CERCLA to Teck constituted an extraterritorial application of the law — and it does not—Teck erroneously characterizes the "effects doctrine." Pet. 16–17. That doctrine provides that the presumption against extraterritoriality does not apply when foreign conduct causes significant adverse effects in the United States. *Hartford Fire*, 509 U.S. at 796. Teck implies that the effects doctrine only justifies applying United States law if the defendant is a United States citizen who "commits acts" in the United States. Pet. 17. Teck is incorrect. *Empagran*, 542 U.S. at 165 (finding "wholly foreign" price-fixing to violate the Sherman Act if it results in domestic injury); *Hartford Fire*, 509 U.S. at 796 (addressing price-fixing in London by London insurers). No court has limited the effects doctrine in the manner Teck suggests. *Empagran,* 542 U.S. at 165 ("application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress

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Government filed a brief contending the United States law conflicted "significantly" with British law. *Hartford Fire*, 509 U.S. at 798. The Court noted a "true conflict" only arises when compliance with both the domestic and foreign laws is impossible. *Id.* at 799.

[26] Teck also misquotes *Empagran* and the canon of construction in that case. Pet. 14 (stating *Empagran* instructs that "as long as a 'statute's language reasonably permits an interpretation' that avoids extraterritorial application, a court 'should adopt it.'"). *Empagran* actually states: "If the statute's language reasonably permits an interpretation consistent with that intent [the intent of the Foreign Trade Antitrust Improvements Act of 1982], we should adopt it." *Empagran*, 542 U.S. at 174.

domestic antitrust injury that foreign anticompetitive conduct has caused").

Further, the effects doctrine is wholly consistent with international law. It is well-established that a country can apply its law to foreign conduct that takes place outside its territory when the conduct causes adverse effects within its territory. *Restatement (Third) of the Foreign Relations of the United States Restatement* § 402(1)(c) (1987). International law also specifically contemplates that suits for damages are available "in the state where the injury occurred." *Restatement* § 602(2) cmt. c.

Applying CERCLA to Teck is not an extraterritorial application of the law and is consistent with international law and comity. Teck's assertions to the contrary do not merit review by this Court.

3. Denial Of Teck's Rule 12(b)(6) Motion Does Not Disrupt Foreign Relations Powers

Teck asserts that the decision below will "usurp the foreign-relations powers of the political branches" and "threatens to disrupt the foreign policy of the United States." Pet. 21. Apart from dubious speculation, Teck's argument relies on the propositions that (1) all transboundary pollution causing significant harm in the United States historically has been and must be addressed through bilateralism and (2) EPA's Order should be presumed to be contrary to the authority and will of the President. Pet. 21.[27]

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[27] Teck implies that applying CERCLA here will violate international law. Pet. 21. As is the case throughout its petition, Teck points to no international law or principle that would be violated. In contrast, Teck's position (that it should not be held liable for harm it caused in the United States) is contrary to principles of international law. *See Restatement*

As to Teck's first proposition that CERCLA liability is contrary to "elegant bilateralism," Teck's claim is overstated. As indicated above, diplomacy-based bilateralism has long coexisted with other means for addressing transboundary harms in the United States, including litigation in United States courts.

As to the President's foreign affairs powers, this case poses no more a foreign policy threat than any other case in which United States law has been used to redress harm caused by a foreign defendant in the United States. *E.g.*, *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 525 (1987) (French airplane manufacturer sued for negligent manufacture when one of its planes crashed in Iowa); *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 494 (1971) (Ohio sued Dow Canada in nuisance for Dow's discharge of mercury into streams in Canada which ultimately harmed Lake Erie in the United States); *Durham v. Herbert Olbrich GMBH & Co.*, 404 F.3d 1249 (10th Cir. 2005) (a product liability suit against a German manufacturer of a component that injured a worker in Oklahoma); *First Nat'l Bank & Trust Corp. v. American Eurocopter Corp.*, 378 F.3d 682 (7th Cir. 2004) (product liability suit against French manufacturer of helicopter that caused injury in Indiana).

Moreover, Teck overlooks that it was the President (acting through EPA) who issued the Order at the center of this case in the first place. Pet. App. 68a–99a (the Order). Courts presume "the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States." *United States v. Corey*, 232 F.3d 1166, 1179 (9th

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§ 602(2) cmt. c. (specifically contemplating private remedies for harm caused by transboundary pollution).

Cir. 2000).[28] Nothing in the record indicates that the same presumption should not also apply to the President's issuance of the Order in this case.

Finally, the argument that Teck makes here—that the President's foreign policy goals can take precedence over, and justify not enforcing, applicable domestic laws (Pet. 22)—was recently rejected by this Court. *Massachusetts v. Envtl. Prot.* Agency, 127 S. Ct. 1438, 1463 (2007) ("while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws").

CONCLUSION

The Court should deny the petition for writ of certiorari.

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[28] The effect of the EPA's withdrawal of the EPA Order following a Settlement Agreement between EPA and Teck after this suit was commenced remains to be litigated. Pet. App. 9a n.10. It is notable that the Settlement nonetheless requires an investigation of the Site that meets CERCLA requirements. (The settlement agreement can be found on Teck's website at http://www.teckcominco.com/articles/roosevelt/index.htm.)