No. 06-1188

IN THE

Supreme Court of the United States

TECK COMINCO METALS, LTD.,
a Canadian corporation,

Petitioner,

v.

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation;
DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation;
STATE OF WASHINGTON,

Respondents.

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

AMICUS CURIAE BRIEF OF CONSUMER ELECTRONICS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Amicus curiae Consumer Electronics Association ("CEA") is the preeminent trade association of the United States consumer electronics industry. It has more than 2000 members, the overwhelming majority located in the United States, involved in all aspects of the consumer electronics industry in North America and overseas. CEA members are involved in the design, development, manufacturing, distribution and integration of audio, video, in-vehicle electronics, wireless and landline communication, information technology, home networking, multimedia and accessory products, as well as related services that are sold through consumer channels. CEA's members contribute over $125 billion to the US economy annually.[1]

For many years, CEA and its member companies have supported responsible recycling of used electronics products. That policy requires that safe and reliable methods of recycling "e-waste" be available. The petitioner here, Teck Cominco Metals, Ltd., is in the early stages of development of a program to use its existing facilities at the Trail Smelter in British Columbia (the facility at issue in this case) to recycle e-waste, using shredded electronics components in one of Teck Cominco's smelters. The plastic and wood components of the waste burn, generating heat recovered in steam boilers. The metals are recovered through the

1. No counsel for any party authored this brief. No person or entity, other than amicus curiae Consumer Electronics Association, made a monetary contribution to the preparation or submission of this brief. Amicus curiae has previously submitted letters from counsel for the respondents consenting to the filing of this brief. A letter consenting to the filing of all amicus curiae briefs by counsel for the petitioner is on file with the Court.

metallurgical processes in the furnace, while the residual material is blended with the ferrous granules that result from other smelting processes and are used in the production of cement.

CEA has a keen interest in the success of Teck Cominco's e-waste recycling project, as well as in the development of other environmentally responsible e-waste disposal methods. By imposing CERCLA liability for activities conducted outside the United States, however, the Ninth Circuit's decision in this matter directly threatens the viability of Teck Cominco's pilot project. Indeed, the decision, if allowed to stand, may well shut down Teck Cominco's recycling project. Such a shutdown could divert more and more e-waste away from beneficial reuse and into landfills, where it may present environmental problems if not properly managed.

Equally important, CEA is concerned that the Ninth Circuit's approach will spark "tit for tat" retaliation. If this country's environmental laws are applied to conduct that takes place outside its borders, it is reasonable to assume that other countries will enact or enforce laws that hold American companies liable for pollution that takes place entirely in this country but travels through the air, earth or water to other countries. Indeed, the Canadian government has already warned the Environmental Protection Agency of the potential for retaliatory action in its response to EPA's issuance of a CERCLA order to Teck Cominco. Pet. App. 100a.

Since the United States is a net exporter of pollution, this means that businesses in this country might be forced to divert resources from ameliorating the pollution they produce inside the United States to complying with "extraterritorial"

pollution laws outside the United States, notwithstanding that these businesses are fully compliant with American environmental law. The possibility of "extraterritorial" pollution liability may well threaten the economic viability of the activities of many CEA members, particularly those located in border states.

CEA believes that cross-border pollution issues are better dealt with by intergovernmental negotiation than by private litigation, and believes this Court should consider the adverse consequences resulting from the Ninth Circuit's decision.

Further, CEA has for many years advocated that policymakers attempt to set a national recycling and waste-disposal policy for e-waste, rather than relying on the current inefficient patchwork of state-by-state regulation. The Ninth Circuit's decision will in effect impose a similar patchwork regulatory scheme for the regulation of cross-border pollution, with judicial decisionmaking in private litigation dictating transboundary waste management policy for both the U.S. and neighboring sovereigns. That approach has not been sanctioned by Congress and should not be adopted by judicial fiat.

The CEA thus urges this Court to grant the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Disposal of used electronic components, or "e-waste," is a serious problem in the United States. When e-waste is not recycled, it ends up in landfills, where it can pollute groundwater if not managed properly. As the largest trade organization for the consumer electronics industry in the United States, CEA supports responsible recycling of e-waste. Unfortunately, the decision at issue here threatens the viability of a promising method for recycling e-waste.

Teck Cominco, the petitioner, is currently testing a pilot program to recycle e-waste in one of the smelters at its Trail, British Columbia plant. The experimental process recycles the metals found in e-waste and completely disposes of non-metal components. The pilot program has been developed in consultation with and is permitted by the British Columbia government.

By imposing CERCLA liability on Teck Cominco for activities taking place entirely outside the United States, the Ninth Circuit decision at issue here threatens the viability of the Teck Cominco experimental recycling project. If the decision stands, Teck Cominco may well be forced to cancel or suspend its e-waste recycling project. The result, ironically, will be more potential pollution problems in the United States, as e-waste is sent to landfills rather than recycled.

Moreover, the Ninth Circuit decision threatens retaliation by other countries. If a business can be held liable in the United States for "polluting" conduct that occurred wholly outside the United States and was in compliance with environmental laws in the country where the conduct took place, American-based businesses can equally be held liable

in other countries for the environmental consequences of their acts inside the United States. If such "tit for tat" environmental regulation should become common, CEA's members and other American-based businesses will suffer, as will the environment in the United States.

The best solution to transboundary pollution problems is diplomacy. The Ninth Circuit decision commits such problems to the vagaries of private litigation and should be reversed.

ARGUMENT

I. The Ninth Circuit Decision Imperils A Promising Method of Recycling E-Waste.

The U.S. Environmental Protection Agency estimates that over 2 million tons of waste from discarded electronics components is generated each year in the United States. U.S. EPA Report, "Electronics Waste Management In the U.S." (May 1, 2006).[2] This "e-waste" may contain appreciable levels of lead, mercury, cadmium, arsenic and other compounds which, if not disposed of properly, can create environmental problems.[3] Moreover, e-waste is a valuable source for secondary raw materials. *See*, Maj. George J.

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2. This report can be found at http://www.epa.gov/ecycling/manage.htm.

3. For example, the Environmental Protection Agency has noted that "[t]elevisions and color computer monitors contain an average of 4 pounds of lead," as well as other constituents such as mercury, cadmium and arsenic. "Hazardous Waste Management System; Modification of the Hazardous Waste Program; Cathode Ray Tubes," 71 Fed.Reg. 42928-01, 42930, 42931 (July 28, 2006).

Konoval, *"Electronic Waste Control Legislation: Observations on a New Dimension in State Environmental Regulation*, 58 Air Force L. Rev. 147, 152-53 (2006) (noting that one metric tonne of computer scrap contains between 50 and 800 times the concentration of gold in gold ore and 30 to 40 times the concentration of copper in copper ore). The vast majority of this waste currently is not recycled, and in many instances, ends up in landfills. If not managed properly in landfills, metals and possibly harmful chemicals can leach from e-waste into the soil or groundwater. *Id.* at 150-51.

Amicus curiae CEA has long advocated for responsible solutions to the problem of e-waste. Indeed, CEA believes that a consistent, environmentally-responsible policy for disposing of e-waste is vital to the economic health of the consumer electronics industry. CEA has generally supported market-based solutions to the problem and strongly supports efforts to create recycling programs in the United States. CEA has long advocated a national solution to the issue of e-waste, and in particular has sought a uniform national policy, to prevent a welter of possibly-inconsistent state regulations.

Consistent with this approach, CEA has a special interest in a pilot program now being implemented at the Teck Cominco smelter in Trail, British Columbia. Teck Cominco has designed an innovative process that allows complete destruction or recovery of e-waste. In Teck Cominco's process, shredded electronic components are placed in an existing smelter, where the combustible wood and plastic materials burn at high temperatures as fuel, generating heat that is recovered in steam boilers. The metals present, including copper, iron, nickel, palladium, platinum, silver and gold, are recovered through metallurgical processes.

Residual material is blended with ferrous granules that are the end product of re-refining the "slag" produced by zinc smelting; these granules are then used in the manufacture of cement. Throughout the process, resulting gases are scrubbed and cleaned.[4]

Teck Cominco's pilot project will recycle up to 3000 metric tonnes of e-waste per year. *See*, South Kootenay Interview. Teck Cominco is hopeful that, if the pilot project is successful, it will be able to "scale-up" to 20,000 tonnes per year, an amount equal to 10% of the e-waste annually produced in Canada. *Id.* Depending upon economies of scale, Teck Cominco may ultimately be able to recycle as much as 60,000 tonnes of e-waste annually.

The pilot e-waste recycling project has been conducted in cooperation with and is fully permitted by the British Columbia government.

If the pilot project succeeds, CEA is hopeful that other metal refiners in North America will follow Teck Cominco's lead, thus making it possible to recycle e-waste throughout the continent without the potential adverse environmental effects caused by improper disposal of e-waste. At present, however, only two other such metal-refining recycling projects exist, one in Québec and another in Sweden. *See* South Kootenay Interview.

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4. Teck Cominco's e-waste recycling process is described in an interview with Susan Knoerr, Manager, Technical and Business Development, and David Goosen, Business Development Superintendent, Teck Cominco, published at *http://www.southkootenay.com/cms/Teck_Cominco_Q_A.400.0.html* (hereafter, "South Kootenay Interview").

CEA thus has a keen interest in the success of Teck Cominco's pilot recycling project. CEA believes that the Ninth Circuit decision that is the subject of the petition for certiorari imperils that project. The Ninth Circuit essentially held that a foreign business operating entirely outside the United States can be held liable for violations of United States environmental laws if *any* pollutants discharged by that business enter the United States. Because there is no such thing as a "zero discharge facility," the practical effect of such a ruling is that foreign businesses concerned that any pollution they produce might migrate to the United States—through the atmosphere, freshwater or coastal seawater—will have to shut down production. Thus, even though Teck Cominco is discharging whatever waste it may produce at its Trail Smelter in compliance with environmental permits from the Province of British Columbia, there is a very real danger that Teck Cominco will have to discontinue its pilot e-waste recycling project if the Ninth Circuit's decision stands.

If Teck Cominco cannot continue its pilot project, CEA's members—and the American public—will have lost one of the most promising avenues for the disposal of the increasing quantities of e-waste. The result, ironically, will be *more* potential pollution problems, in the form of landfill waste in North America that must be managed and monitored.

The issue here is not a matter of allowing unchecked "offshore" pollution; as noted, the Teck Cominco pilot project has been developed in consultation with and conducted under a permit from the British Columbia government. But under the Ninth Circuit's reasoning, Teck Cominco may be held liable in the United States for conduct that is fully consistent with the environmental laws of the country in which that

conduct took place.[5] The result will be *more* landfill waste and *more* potential environmental problems in the United States than would be the case if this country's environmental laws had not been applied to Teck Cominco. Such a result is perverse.

II. The Ninth Circuit Decision Threatens "Tit for Tat" Retaliation From Other Countries.

Leaving aside its impact on Teck Cominco's pilot e-waste recycling project, CEA is concerned about the broader impact of the Ninth Circuit ruling on its members caused by the likely response of other governments to the Ninth Circuit's overreaching. When a court in the United States applies this country's environmental statutes to conduct that occurs outside the country's borders, it invites "tit for tat" retaliation by other countries.

If American environmental laws can be applied to make foreign corporations operating entirely outside the United States liable for the American effects of their foreign conduct, other nations may soon enact or interpret their laws to make

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5. Indeed, Teck Cominco is in a *worse* situation concerning potential CERCLA liability than an American manufacturer. While an American manufacturer might be able to receive a permit under the Clean Water Act or the Clean Air Act that would exempt it from liability under CERCLA (*see* 42 U.S.C. § 9607(j), exempting any "federally permitted release"), such a permit would not be available to Teck Cominco for operations in Canada (*see*, *e.g.*, 33 U.S.C. § 1342, allowing permits for discharges of pollutants into "navigable waters," which are defined in 33 U.S.C. § 1362(7) as "waters of the United States"). Thus, Teck Cominco might be held liable under CERCLA for conduct in Canada that would not be actionable if that conduct took place in the United States.

manufacturers based in the United States liable for the foreign effects of their activities inside this country. Indeed, the record in this case demonstrates precisely this danger. The Canadian government warned in a diplomatic note responding to the EPA's administrative order requiring Teck Cominco to begin a CERCLA assessment that the EPA order "may set an unfortunate precedent, by causing transboundary environmental liability cases to be initiated *in both Canada and the United States.*" Pet. Appx. 100a, emphasis added. The obvious import of the emphasized language is that, absent diplomatic resolution, transboundary pollution disputes might well embroil manufacturers based in the United States in private litigation in Canada and elsewhere.

The danger of this sort of action is that even if a business is operating in full compliance with American environmental laws, it remains potentially liable for "offshore" pollution caused by its permitted conduct. Such offshore liability might well have devastating effects on the members of CEA. The American consumer electronics industry is the largest in the world and its members are proud of their record of compliance with United States environmental law. However, because of its sheer size, the American electronics industry is vulnerable to claims by foreigners that conduct in the United States violated environmental laws elsewhere.

If the Ninth Circuit's ruling stands, foreign plaintiffs might well sue U.S. businesses for purported environmental wrongs occurring outside the United States, even if the "polluting" conduct took place entirely inside the United States in compliance with American environmental laws. Such a result would not only be unfair, it would divert resources that businesses in the United States devote to pollution control in this country to pay for environmental amelioration or compliance overseas.

CEA believes that disputes over transboundary pollution are best resolved by government-to-government negotiation, rather than through private litigation. Indeed, the record of bilateral negotiation between the United States and Canada over environmental issues, discussed in detail in Teck Cominco's petition for certiorari, is admirable. The Ninth Circuit decision threatens to upset this established regime. The decision is not only potentially counterproductive from an environmental point of view, but destructive from a foreign policy perspective.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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