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## ***Do you know about the Teck Cominco case?***

In a dramatic shift in U.S. environmental policy, the Environmental Protection Agency (EPA) would apply U.S. environmental law to Mexican and Canadian companies, imposing full liability for any contamination that might cross the border, without regard for the fact that the companies could be in full compliance with all environmental laws in their respective countries.

Teck Cominco Metals, Ltd. is a mining company with operations since 1892 in Trail, British Columbia, along the Columbia River, just north of the Canada-U.S. border. Today, thanks to heavy investment in environmental protection, the Trail facility has been converted into a model of clean industry and produces a variety of metals, such as zinc and lead.

In 1999, the Confederated Tribes of the Colville Indian Reservation, concerned about pollution in Lake Roosevelt in the U.S. state of Washington, petitioned the EPA to include Lake Roosevelt as a cleanup site under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, also known as the "Superfund" law).

In 2001 and 2003, the EPA undertook studies that indicated that the Teck Cominco smelter in Trail was one of the probable sources of metal sediments in the lake. Other probable sources include other companies, both U.S. and Canadian.

On December 11, 2003, the EPA issued a Unilateral Administrative Order to Teck Cominco Metals requiring the Canadian company to submit to CERCLA. The EPA action is based on past practices that occurred between 1906 and 1995, but not on current practices or operations at the Trail facility. Since 1994 Teck Cominco has not dumped any slag into the Columbia River, and has spent more than one billion dollars to make the facility safe for the environment. It has reduced air emissions by 90 percent and water discharges by 99 percent.

CERCLA assesses full liability for the discharge or emission—or the potential discharge or emission—of any hazardous substance, without regard to the concentration, amount, date of discharge, or whether at the time of occurrence the discharge was legal.

In published articles in environmental law journals EPA officials have indicated a strong interest in applying CERCLA to Mexican companies, and even condone coming into Mexico to look for evidence to convict Mexican companies in U.S. courts.

Cross-border enforcement of CERCLA could impose liability on any Mexican entity—whether that be a company, municipality or state—for the entire cost of all cleanup, regardless of its proportional involvement in the contamination or whether or not it complies with current Mexican environmental law. The consequences could be catastrophic for Mexican industry along the border as well as local state and federal government entities.

In the case of Teck Cominco Metals, Ltd., its operations in Trail should be subject only to Canadian laws and permits—certainly not to U.S. laws or the jurisdiction of the EPA.

### ***Teck Cominco offered funding and a solution***

The EPA has taken steps to impose U.S. laws on a Canadian company, so early in 2003 Teck Cominco contacted the EPA to determine what kinds of studies would be necessary to evaluate the health risks presented in Lake Roosevelt. In October of that year, Teck Cominco offered to enter into a cooperative agreement with the EPA that would require Teck Cominco to pay for human health and environmental studies (estimated to cost up to US\$ 13 million) under the supervision and oversight of the EPA, and to pay for and perform any cleanup attributable to Teck Cominco's historical practices (from 1892 to 1994).

Teck Cominco's offer was based on studies recommended by two respected scientists, Drs. Bill Williams y Richard Cardwell, with more than 50 years of environmental evaluation and risk assessment experience between them. The studies would comply with EPA technical requirements.

In November of 2003 the EPA rejected Teck Cominco's offer and walked away from negotiations with the company. Much later after abandoning the negotiations, the EPA alleged that the studies Teck Cominco offered to pay for did not meet EPA standards, and insisted that the company sign an agreement that would mean tacitly agreeing to submit to U.S. jurisdiction.

According to a Teck Cominco press release, The EPA rejected the studies for procedural reasons and that the EPA's contention that the company's proposal was not up to EPA standards "is false." In a letter to the EPA dated February 20, 2004, and cited in the press release the scientists state that "This program of studies was credible, rigorous and science based and is similar to what would be used at a typical CERCLA site."

On December 11, 2003, the EPA issued a Unilateral Administrative Order to Teck Cominco Metals, Ltd., ordering the company to undertake an investigation and feasibility study under CERCLA, with the threat of substantial daily fines and, in addition, would impose a penalty of three times the cost to the EPA of any cleanup costs if Teck Cominco did not comply.

The government of Canada requested that the EPA rescind the unilateral order that simply imposes U.S. law on a Canadian Company.

The transnational enforcement of CERCLA could have consequences that are illogical and incongruent with international law, and which could be catastrophic for Mexican businesses. For example, CERCLA contains exceptions to its strict liability provisions, but these exceptions only apply to U.S. companies. As a result, a situation could arise in which a U.S. facility near the Mexican border operating under a federal permit contributes to the contamination of a site inside the United States, but would not be liable under CERCLA if the discharge complies with the federal permit. However, if a Mexican plant operating entirely on the Mexican side of the border, and operating legally and in compliance with all Mexican environmental permits and authorizations required of it, is the source of a lesser amount of the same contaminating materials that by natural forces find their way to the same U.S. site, the Mexican company could be held liable under CERCLA for the entire amount of all remediation undertaken (in some circumstances up to three times the cost as punitive damages), plus damages to natural resources, plus costs of any health studies carried out as the U.S. administration determines necessary, plus interest charges—while the bigger U.S. polluter avoids liability because it has a U.S. federal permit.

May, Cruz Consultores became involved in this case in 2004, when it became clear that if the EPA prevailed against the Canadian company, the door would be opened to liability lawsuits inside the United States against any number of Mexican companies, municipalities, states, government-owned industries and individuals all along Mexico's northern border.

In multiple conversations over several years with high-level government officials in the Fox and Calderón administrations, it became clear to us that Mexico considers other bilateral issues to be more important and it does not want to enter into a dispute regarding an environmental issue. Mexico had several opportunities to influence the process, but in each instance decided not to do anything.

The case was litigated in the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit is the largest of the 13 federal appellate courts and its jurisdiction covers all federal courts in the states of California, Arizona (both of which border Mexico), Washington, Oregon, Montana, Idaho (these four border Canada), Nevada, Alaska, Hawaii, Guam and the Mariana Islands. Mexico had the opportunity to file an *amicus curiae* brief as a "friend of the court" to present its point of view, but decided to do nothing.

The Ninth Circuit Court of Appeals handed down an opinion on July 3, 2006, against Teck Cominco. The opinion does not address international law principles and the U.S. legal principle that require respect of the institutions and laws of other sovereign countries, and goes contrary to other case law established in another federal circuit. Also, the opinion interprets CERCLA so narrowly that it comes to the conclusion that the application of CERCLA to a Canadian company is not really the transnational application of U.S. law, and therefore the court does not even consider, analyze or decide this vital question.

Teck Cominco appealed the decision to the U.S. Supreme Court. The first step of the Supreme Court was to decide whether to hear the case. The government of Canada, the government of the province of British Columbia and various other organizations filed *amicus curiae* briefs asking the Supreme Court to hear the case for its importance to international law and the bilateral relations of the United States and Canada. Mexico had the opportunity to file an *amicus curiae* brief to ask the Court to hear the case and present Mexico's view that this case is important for the Supreme Court to review because of the implications the lower court decision could have:

- 1) On the sovereign institutions of Mexico that regulate the environmental policies of the country and apply Mexican law within its territory, and its ability to act, sanction, commute sanctions or develop environmental policies;
- 2) On the bilateral relations and institutions of each country that have always worked through collaboration rather than confrontation; and
- 3) On international law principles.

Asking for the intervention of the Supreme Court would not be contrary to the policies of the United States and in no way would have offended Mexico's northern neighbor. Ironically, according to international law principles, this action shows the due respect of the sovereign institutions of another country, which the transnational application of U.S. law in Canada fails to do.

But again Mexico decided not to do anything, and never filed any brief.

On January 7, 2008, the Supreme Court of the United States refused to hear the case, leaving the judgment of the Ninth Circuit as the legal precedent that now can be applied to Mexican entities.

