No. 24-601

In the Supreme Court of the United States

THE DOE RUN RESOURCES CORPORATION, ET AL.,
Petitioners,

v.

KATE REID, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL MINING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Mining Association (NMA) is a national trade association representing over 350 companies and organizations involved in every aspect of mining, from producers and equipment manufacturers to service providers. The NMA's members produce most of America's coal, metals, and industrial and agricultural minerals. America's mining industry supplies the essential materials necessary for nearly every sector of our economy—from technology and healthcare to energy, transportation, infrastructure, and national security—all delivered under world-leading environmental, safety, and labor standards. The NMA is the only national trade association that serves as the voice of the U.S. mining industry and the thousands of American workers it employs before Congress, the federal agencies, and the judiciary, advocating for public policies that will help America fully and responsibly utilize its vast natural resources.

The NMA and its members have important interests at stake in this case. Its members own and operate facilities across Missouri and the United States. Many of its members also operate internationally. If lawsuits like Respondents' are allowed to proceed without proper consideration of the determinations embodied in trade agreements and their implementing legislation, such as the Eighth Circuit's ruling here, then the NMA's members could well face similar

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days before the due date of the intention to file this brief.

lawsuits in the United States seeking to apply U.S. tort law to the operation of facilities around the world. And they could face lawsuits in foreign nations seeking to regulate facilities located in the United States. Other nations' courts can—and will—rely on the decision below to open the doors to such lawsuits.

These actions will be expensive to defend, and the resulting cost and uncertainty will discourage international investment, directly undercutting the purpose of free trade agreements such as the United States-Peru Trade Promotion Agreement. The NMA therefore files this brief to explain the flaws in the lower court's interpretation of that Agreement, which led to its erroneous determination allowing this case to proceed.

INTRODUCTION AND SUMMARY OF ARGUMENT

The NMA agrees with the Eighth Circuit in one respect: "Th[is] litigation * * * does not follow customary pleading practices." Pet. App. 8a. Respondents are Peruvian citizens alleging injuries from a Peruvian company at a Peruvian facility subject to Peru's environmental laws. And Respondents do not seek to enforce Peruvian law. Instead, they seek to impose Missouri's laws on a facility located wholly outside Missouri's, and the United States', borders.

International comity requires abstention when a court risks intruding on another sovereign's legitimate jurisdiction. In determining whether to dismiss an action under principles of international comity, courts assess the interests of the United States and those of the other Nation.

The United States-Peru Trade Promotion Agreement (TPA) guides the comity analysis here. Even

without the TPA, settled international comity principles would require dismissal of this wholly extraterritorial lawsuit. But the TPA eliminates any need for judicial balancing of relative national interests. The Agreement embodies the U.S. government's determination regarding the appropriate balance—and it expressly and repeatedly reaffirms each Nation's sovereign authority to establish and enforce the environmental standards governing facilities within its borders. That determination controls the comity analysis.

The TPA was the culmination of a years-long negotiation between the United States and Peru and between the United States' Executive and Legislative Branches. The Agreement's text is clear that each Nation's environmental standards apply exclusively within that Nation's borders, and any enforcement of that Nation's standards must occur in its own courts. The legislative history confirms this understanding of the TPA.

The Eighth Circuit's contrary conclusion turns the TPA and comity analysis on their heads. The court acknowledged that the TPA "contemplates more traditional mechanisms for environmental enforcement." Pet. App. 8a. But the court read those "traditional enforcement mechanisms" as an opening to enforce Missouri tort law in Peru via Missouri courts—and, logically, Peruvian law in the United States via Peruvian courts. Nothing in the TPA, its implementing legislation, or their negotiating history supports that bizarre result.

If left unreviewed, the Eighth Circuit's reasoning would allow litigants across the world to impose foreign nations' environmental standards on facilities located in the United States that are owned by foreign

companies—through lawsuits filed in non-U.S. courts. And it will inspire copycat suits seeking to impose U.S. states' laws to facilities located in foreign jurisdictions. The Court should grant certiorari.

ARGUMENT

"The extent to which the law of one nation * * * shall be allowed to operate within the dominion of another nation, depends upon * * * 'the comity of nations.'" *Hilton* v. *Guyot*, 159 U.S. 113, 163 (1895). The question in this case is whether a U.S. court should entertain an action brought by Peruvian citizens relating to the operation of a facility operating in Peru under Peruvian law. Because the issue involves the potential "operat[ion]" of U.S. law "within the dominion of" Peru, it is governed by international comity principles. *Ibid.*

Comity analysis turns on judicial balancing of "the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum." *Ungaro-Benages* v. *Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004).

The TPA guides the comity analysis here. It embodies the determination of both the Executive Branch and Congress regarding which environmental standards should govern and where enforcement of those standards should take place. That determination, resulting from a lengthy and intense treaty negotiation process, is that each party to the TPA has exclusive responsibility for setting *and* enforcing the environmental standards governing the facilities within its boundaries. Courts should defer to the political Branches' determination. *Ungaro-Benages*, 379 F.3d at 1239-1240; see also *Medellín* v. *Texas*, 552 U.S.

491, 511 (2008) (reaffirming "the principle that '[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments'" (quoting *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918))).

Moreover, the adverse consequences of the lower court's decision cannot be confined to the TPA. Other trade agreements, such as the United States-Mexico-Canada Agreement (USMCA), contain analogous provisions. The failure to accord them proper respect in comity analysis will open the door to lawsuits in U.S. courts seeking to apply state law to facilities in nations such as Canada, Mexico, and beyond.

I. The TPA's Text, Implementing Legislation, And History Make Clear That Each Nation Sets And Enforces The Environmental Standards For Facilities Located In Its Territory.

The TPA's text leaves no doubt that each Nation is responsible for facilities within its territory. And that conclusion is further confirmed by Congress's implementation of the TPA, the TPA's negotiating history, and the dramatic intrusion on U.S. and Peruvian sovereignty that would result from the Eighth Circuit's erroneous view.

A. The TPA's Text Clearly Affirms Each Nation's Exclusive Authority To Establish, And Adjudicate Compliance With, Environmental Standards.

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *GE Energy Power Conversion France SAS, Corp.* v. *Outokumpu*

Stainless USA, LLC, 590 U.S. 432, 439 (2020) (internal quotation marks omitted). And "[i]n treaty interpretation as in statutory interpretation, particular provisions may not be divorced from the document as a whole." *Sea Hunt, Inc.* v. *Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 646 (4th Cir. 2000); *Pielage* v. *McConnell*, 516 F.3d 1282, 1288 (11th Cir. 2008). The TPA's text, read as a whole, clearly embodies the parties' determination that a U.S. court should not adjudicate claims by Peruvian plaintiffs alleging injuries caused by emissions from a Peruvian facility, and such a facility is subject only to Peruvian environmental laws.

First, Chapter 18 of the TPA, which contains the agreement's environmental provisions, begins by specifically affirming each Nation's sovereign authority within its borders. It "[r]ecogniz[es] that each Party has sovereign rights and responsibilities with respect to its natural resources," and "[r]ecogniz[es] the sovereign right of each Party to establish its own levels of domestic environmental protection and environmental development priorities." TPA art. 18 & 18.1, Pet. App. 99a.

These provisions expressly recognize, and reaffirm, the United States' and Peru's authority over their own "domestic" territory. Setting the standards governing facilities located within a Nation's borders and enforcing those standards are critical elements of that sovereign authority. And it is difficult to imagine a greater intrusion on sovereignty than a Nation applying its laws and enforcement processes extraterritorially to control the operation of a facility in another Nation's territory. "It is a longstanding principle of our jurisprudence that '[t]he jurisdiction of [a] nation, within its own territory, is necessarily exclusive and

absolute.'" *Kiyemba* v. *Obama*, 561 F.3d 509, 515 (D.C. Cir. 2009) (quoting *Schooner Exch.* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812)).

Second, the TPA goes on to make clear that each Nation is obligated to establish the environmental standards governing facilities within its territory. It states that "each Party shall strive to ensure that those laws and policies"—*i.e.*, its own laws and policies addressing environmental threats within its territory—"provide for and encourage high levels of environmental protection." TPA art. 18.1, Pet. App. 99a. Similarly, Article 18.2 states that each "Party shall adopt, maintain, and implement laws, regulations, and all other measures to fulfill its obligations" under the TPA. *Id.* art. 18.2, Pet. App. 100a.

The TPA's emphasis on each Nation's obligation to adopt laws providing for "high levels of environmental protection" further confirms the Parties' determination that each country has exclusive responsibility for the standards governing facilities within its territory. Otherwise, each Nation could supplement the other's standards through extraterritorial application of its own laws.

Third, Article 18.3 addresses the enforcement of each country's environmental laws—making clear that each Party is responsible for enforcing environmental standards for the facilities within its territory. It provides that each "Party shall not fail to effectively enforce its environmental laws * * * in a manner affecting trade or investment between the Parties." TPA art. 18.3.1(a), Pet. App. 100a. But it also preserves enforcement discretion, stating that "[t]he Parties recognize that each Party retains the right to exercise prosecutorial discretion and to make decisions regarding

the allocation of environmental enforcement resources." *Id.* art. 18.3.1(b)(i), Pet. App. 100a-101a.

Importantly, this section of the agreement specifically affirms that "[n]othing in this Chapter shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party other than as specifically provided in Annex 18.3.4." TPA art. 18.3.5, Pet. App. 102a. The exception—which relates to a specific requirement that Peru adopt new environmental standards in logging[2]—further confirms the Parties' agreement that each Nation enforces the standards governing facilities within its territory.

Fourth, the TPA's only exceptions to its repeated recognition of territorial sovereignty are provisions allowing one Nation to commence an arbitration against the other to resolve disputes under the TPA's environmental provisions. TPA art. 18.12.6, Pet. App. 119a. This arbitration process is governed by Chapter 21, the general dispute-resolution mechanism of the TPA. If a Party is found to have violated the environmental chapter, the non-violating Party may suspend the preferential tariff treatment for the affected industry. *Id.* art. 21.16.4, https://bit.ly/3VYsehl.[3]

For private citizens, the only enforcement process the TPA provides is a narrow mechanism for seeking

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[2] Annex 18.3.4 sets forth procedures allowing the United States to undertake certain actions to enforce the new logging requirements in Peru on a State-to-State basis.

[3] Chapter 21 of the TPA further clarifies that "[n]o Party may provide for a right of action under its law against any other Party on the ground that the other Party has failed to conform with its obligations under" the TPA. TPA art. 21.20.

non-binding recommendations to enforce environmental laws. Under Articles 18.8 and 18.9, "[a]ny person of a Party may file a submission [with the Secretariat appointed by the two Parties] asserting that a Party is failing to effectively enforce its environmental laws." TPA art. 18.8.1, Pet. App. 110a. If the complaint is deemed to be meritorious, the Environmental Affairs Council, which oversees implementation of the TPA and associated agreements, may provide "recommendations related to the further development of the Party's mechanisms for monitoring its environmental enforcement." *Id.* art. 18.9.8, Pet. App. 115a.[4]

The TPA thus creates a mechanism by which aggrieved citizens of either country may solicit recommendations to improve either country's enforcement of its own environmental standards. Citizens of Peru have invoked this process with respect to the Peruvian government's enforcement of environmental standards. See, *e.g.*, Secretariat for Submissions on Environmental Enforcement Matters, *Air Quality and Climate Emergency* (May 10, 2023), https://bit.ly/448FQcb. The existence of that mechanism—and the Parties' determination to limit it to nonbinding recommendations—further confirms the Parties' intent to preserve their sovereign power to establish and enforce the standards governing facilities within their borders.

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[4] The only binding private right of action in the TPA is Chapter 10, Section B, Investor-State Dispute Settlement. TPA art. 10.15-.27. This chapter is "designed to protect foreign investors and their investments." U.S. State Dep't, *U.S.-Peru TPA Investor-State Arbitrations*, https://bit.ly/44hHWqg. All other binding dispute settlement for violations of the TPA's qualifying obligations, including for environmental obligations, is State-to-State.

The Eighth Circuit's decision gives a Party's citizens access to a more expansive extraterritorial remedy for environmental disputes than the one created for the States that are parties to the TPA. Article 18.12 allows a State to initiate binding arbitration if it believes the other State is shirking its "obligations under a covered agreement." TPA art. 18.12.5-.6, Pet. App. 118a-119a. But before a State may resort to arbitration, it must engage in a mediation process. See *id.* art. 18.12.1-.5, Pet. App. 117a-119a. The aggrieved State may then begin arbitration proceedings 60 days after this mediation has failed. *Id.* art. 18.12.6, Pet. App. 119a.

Contrary to the TPA's framework, the Eighth Circuit's decision allows private citizens to be the first movers, enabling them to bring their grievances to foreign courts faster than the State parties could even begin arbitration. Moreover, private citizens would get the benefit of expansive judicial remedies while the Parties would be limited to the remedies (*e.g.*, imposition of tariffs) specified in the TPA.

Fifth, the Eighth Circuit's ruling rested on a misreading of Article 18.4.4. The court conceded that Respondents' "specific claims and methods for relief are not explicitly addressed by the TPA, which contemplates more traditional mechanisms for environmental enforcement." Pet. App. 8a. But despite that acknowledgment, the court went on to reach the atextual conclusion that Article 18.4.4's "plain language * * * does provide a pathway for the plaintiffs to sue the defendants." *Ibid.* That interpretation is incorrect and, in addition, is precluded by the other TPA provisions just discussed.

Article 18.4.4 states:

> "[e]ach Party shall provide persons with a legally recognized interest under its law in a particular matter appropriate and effective access to remedies for violations of that Party's environmental laws or for violations of a legal duty under that Party's law relating to the environment or environmental conditions affecting human health, which may include rights such as: (a) to sue another person under that Party's jurisdiction for damages under that Party's laws."

Pet. App. 103a.

Even read in isolation, this provision does not authorize suits in the United States with respect to the environmental standards applicable to facilities in Peru. Instead, it obligates each country to allow persons to sue others "under that Party's jurisdiction," *i.e.*, operators of facilities within that Nation; in a local forum; and "under that Party's laws." It thereby ensures the "adequacy of" each Nation's adjudicative forum. See *Ungaro-Benages*, 379 F.3d at 1238.

In addition, the Eighth Circuit's construction violates the cardinal principle that "[i]n treaty interpretation as in statutory interpretation, particular provisions may not be divorced from the document as a whole." *Sea Hunt*, 221 F.3d at 646.

As just discussed, the TPA at every turn reaffirms the Parties' sovereignty over their own territory's environmental standards—including (1) expressly recognizing the Parties' territorial sovereignty in broad

terms; (2) imposing obligations that would be unnecessary if a Party could apply its law and enforcement mechanisms extraterritorially; (3) incorporating tailored enforcement mechanisms both for the Parties and their citizens; and (4) expressly stating that the agreement does not "empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party." TPA art. 18.3.5, Pet. App. 102a.

Moreover, the Eighth Circuit's decision violates the principle that "[t]reaties, like statutes, should be construed so that no words are treated as being meaningless, redundant, or mere surplusage." *Pielage*, 516 F.3d at 1288 (quotation marks omitted). As explained above, the TPA allows private citizens to lodge complaints, which, if meritorious, can result in the issuance of non-binding recommendations. See pp. 8-9, *supra*. But the court of appeals' construction undermines those mechanisms. If the TPA permits private citizens simply to file lawsuits and obtain binding orders in the other Party's courts, its private citizen complaint process would be rendered a dead letter.

In sum, the TPA's text unambiguously embodies the Parties' determination that each Nation should set and enforce its own environmental standards with respect to facilities within its borders.

B. The TPA's Implementing Legislation Confirms The Political Branches' Judgment Rejecting Suits Like Respondents' Action.

The Eighth Circuit found support for its erroneous reading in the TPA's implementing legislation. But Congress's implementation of the TPA instead further confirms that the agreement preserves each Nation's

sovereignty, subject to the express enforcement mechanisms contained in the agreement.

The implementing legislation prohibits any "person other than the United States" from "hav[ing a] cause of action or defense under the" TPA or "challeng[ing], * * * under any provision of law, any action * * * of the United States [or] any State * * * on the ground that such action * * * is inconsistent with the" TPA. United States – Peru Trade Promotion Agreement Implementation Act, Pub. L. No. 110-138 § 102(c), 121 Stat. 1455, 1457 (2007). As the Congressional Research Service, a nonpartisan, analytical arm of Congress, explained, the TPA amendments commit "both parties to effectively enforce *their own* domestic environmental laws," which "would be enforceable through the [TPA's] dispute settlement procedures." CRS, RL34108, *U.S.-Peru Economic Relations and the U.S.-Peru Trade Promotion Agreement* 10-11 (2009) (emphasis added), https://bit.ly/4gwgQBw.

The Eighth Circuit did not address this provision of the implementing legislation. Instead, it focused on a provision stating that "No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the [TPA]." Pub. L. No. 110-138 § 102(b)(1), 121 Stat. at 1457. In fixating on this provision and ignoring the section discussed above, the court disregarded the principle that "statutes must be read as a whole." *Territory of Guam* v. *United States*, 593 U.S. 310, 316 (2021) (internal quotation marks and alterations omitted). Its construction also disregards the text of the TPA that Congress was implementing by enacting that statute. And in any event, the preservation-of-state-law provision is

inapposite here. Missouri law is not rendered "invalid" by the TPA; Respondents' attempt to invoke Missouri law in this particular case simply is precluded by the comity principle.

The legislative history of the implementing legislation further undermines the Eighth Circuit's interpretation. The report of the Senate Finance Committee (the Senate committee with jurisdiction over approval and implementation of trade agreements such as the TPA) states, in summarizing Article 18.4.4, that "[e]ach Party commits to make judicial, quasi-judicial, or administrative proceedings available to sanction or remedy violations of *its* environmental laws." S. Rep. No. 110-249, at 32 (2007) (emphasis added). And the report defined the United States' "environmental laws" as "environmental statutes and regulations enforceable by the federal government." *Ibid.*

Similarly, the House Ways and Means Committee (the House committee with jurisdiction over approval and implementation of agreements like the TPA) reiterated that under the TPA, "[t]he United States and Peru commit to enforce *their own* domestic environmental laws." H.R. Rep. No. 110-421, at 38 (2007) (emphasis added). Given that "federal laws will be construed to have only domestic application" "[a]bsent clearly expressed congressional intent to the contrary," *RJR Nabisco, Inc.* v. *European Cmty.*, 579 U.S. 325, 335 (2016), it is clear that the Senate and House committees of jurisdiction understood Article 18.4.4 not to create a private extraterritorial enforcement mechanism, but instead as a guarantee that private citizens aggrieved by facilities in their country would have recourse to their own country's courts to ensure compliance with their country's environmental laws.

The Committees' descriptions of the TPA make clear that Congress understood the TPA to allow a Nation's courts to be the forum for adjudicating environmental claims relating to facilities within that Nation. The absence of any mention of the drastic departure from the traditional principle of territorial sovereignty represented by suits such as this one further demonstrates that the TPA's allocation of responsibility, and reaffirmation of the Parties' sovereignty, precludes such a private extraterritorial enforcement mechanism.

C. The TPA's Negotiating History Confirms Each Party's Exclusive Authority Over Facilities Within Its Territory.

The TPA's negotiating history confirms that the Parties ruled out suits in the courts of one Nation regarding facilities located in the territory of the other Nation.

"Because a treaty ratified by the United States is 'an agreement among sovereign powers,'" this Court also considers "as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations." *Medellín*, 552 U.S. at 507 (quoting *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)). This Court thus looks to "the negotiating and drafting history (*travaux préparatoires*)" of the treaty to understand its meaning. *Zicherman*, 516 U.S. at 226; see also *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431-432 (1943) (courts "look beyond the written words" more often when interpreting a treaty than when interpreting a contract); *Rodriguez* v. *Pan Am. Health Org.*, 29 F.4th 706, 717-718 (D.C. Cir. 2022).

Here, the negotiating history of the TPA confirms that the TPA reflects a commitment by the United States and Peru that each Party would enforce its own standards with respect to facilities within its territory.

1. Executive-Congressional Negotiations. The negotiations between the Executive and Legislative Branches confirm that the TPA affirms each Party's sovereign authority within its borders, with one exception not applicable here.

After control of Congress switched parties in the 2006 elections (from Republicans to Democrats), members of Congress raised concerns over certain labor and environmental standards in the TPA and other trade agreements. See I.M. Destler, *American Trade Politics in 2007: Building Bipartisan Compromise*, Peterson Inst. For Int'l Econ. 8-9 (May 2007).

Following months of negotiation, lawmakers and the U.S. Trade Representative reached a bipartisan agreement on these concerns—the "May 10 Agreement." See Office of the U.S. Trade Representative, *Bipartisan Trade Deal* (May 2007), https://bit.ly/3ptfm67.

Under the May 10 Agreement, the Executive and Legislative Branches agreed to a first-of-its-kind enforcement mechanism for environmental standards. The agreement provided that "all of our [Free Trade Agreement] environmental obligations will be enforced on the same basis as the commercial provisions of our agreements," meaning they would be subject to the "same remedies, procedures, and sanctions." May 10 Agreement 2. In lieu of the previously agreed-upon "environmental dispute settlement procedures,"

which "focused on the use of fines," the May 10 Agreement provided that the United States for the first time would be willing to employ trade sanctions (*e.g.*, tariffs) to enforce the environmental obligations. *Id.* at 2-3.

The May 10 Agreement confirms that the TPA recognized the limits on one Nation's ability to dispute the environmental standards applied by the other Nation to facilities within that Nation's territory. Congressional leaders had voiced concerns that the environmental enforcement mechanisms in the TPA were not sufficiently expansive, but the compromise was to create a State-to-State dispute-resolution procedure. See Press Release, House Ways & Means Committee, FTA to Include Stronger Labor, Environmental Provisions (June 25, 2007), https://bit.ly/4iPQ6xB. In other words, a narrow exception to the general rule that each Nation would enforce its own environmental laws. Thus, by limiting the enforcement mechanism to a State-to-State procedure, Congressional leaders and the Executive Branch rejected private citizens' ability to seek extraterritorial application and enforcement of their laws to facilities located in the other Nation.

2. U.S.-Peru Negotiations. Pursuant to the May 10 Agreement, the United States reopened negotiations with Peru over the TPA. In June 2007, the U.S. government announced an agreement with the Peruvians to enact "legally binding amendments to the agreement's provisions on labor [and] the environment * * * reflect[ing] the bipartisan" May 10 Agreement. Office of the U.S. Trade Rep., Schwab Statement on Amendments to U.S.-Peru Trade Promotion Agreement (June 25, 2007), https://bit.ly/46xiiz9.

That State-to-State enforcement mechanism was the only means by which one State could seek enforcement of any environmental laws in another state. Compare Draft U.S.-Peru Trade Promotion Agreement (June 25, 2007), https://bit.ly/44gzjfp (including Article 18.12), with Draft U.S.-Peru Trade Promotion Agreement (Jan. 6, 2006), https://bit.ly/46xahdB (lacking any binding State-to-State dispute-resolution provision for environmental obligations).

Also added in these negotiations was the mechanism for private parties to seek nonbinding recommendations regarding enforcement of environmental laws. See pp. 8-9, *supra*.

The negotiating history thus provides further evidence that the Parties rejected extraterritorial judicial enforcement of environmental standards by private parties. Rather, the TPA's specification of enforcement mechanisms, and the addition of one available to private parties, is consistent with the text—allocating to each Party the responsibility for promulgating and enforcing its own environmental standards with respect to the facilities within its borders, subject to the enforcement mechanisms expressly specified in the TPA.

* * * *

In sum, the TPA's text, its implementing legislating, and its negotiating history confirm the Parties' determination that each Nation would promulgate and enforce the environmental standards governing facilities within its borders.

That determination controls the comity analysis. See *Ungaro-Benages*, 379 F.3d at 1239-1240. The TPA was the culmination of a years-long negotiation in which the two Parties codified "the strength of the

United States' interest[s]" and "the strength of [Peru's] interests" with respect to setting and enforcing environmental standards. *Id.* at 1238. The TPA also obligated both Nations to take affirmative steps to guarantee that each country's citizens would have access to fair procedures and internal judicial remedies with respect to facilities within its borders. International comity principles therefore require dismissal of this action.

II. The Eighth Circuit's Ruling Would Significantly Expand Transnational Litigation, Infringing Upon Both The United States' And Its Treaty Partners' Sovereignty.

If left unreviewed, the Eighth Circuit's rationale will open the door to a significant expansion in extraterritorial litigation—with U.S. courts applying U.S. law to facilities located in, and conduct occurring within, those nations' sovereign territory. And U.S. citizens could commence actions in foreign courts seeking to apply foreign law to facilities within the United States.

That is because other U.S. trade agreements contain language virtually identical to Article 18.4.4, the provision relied upon by the Eighth Circuit.[5] The

[5] Other free trade agreements have similar or identical language to Article 18.4.4. See Dominican Republic-Central America Free Trade Agreement art. 17.3.4, https://bit.ly/3D1pqpP; U.S.-Oman Free Trade Agreement art. 17.3.4, https://bit.ly/3raEAX7; U.S.-Australia Free Trade Agreement art. 19.3, https://bit.ly/3XGgYWt; U.S.-Bahrain Free Trade Agreement art. 16.3, https://bit.ly/3rhM6Qh; U.S.-Chile Free Trade Agreement art. 19.8, https://bit.ly/44dEiNT; U.S.-Colombia Trade Promotion Agreement art. 18.4, https://bit.ly/437SZkk; U.S.-Korea Free Trade Agreement art. 20.4, https://bit.ly/3pBNDjv; U.S.-Morocco Free Trade Agreement art.

Eighth Circuit's construction of the TPA could also be invoked to guide the comity analysis for those agreements.

For example, when the United States negotiated the USMCA, it agreed to a provision similar to Article 18.4.4. USMCA Article 24.6.2 requires each Party to "ensure that persons with a recognized interest under its law * * * have appropriate access to administrative, quasi-judicial, or judicial proceedings for the enforcement of the Party's environmental laws, and the right to seek appropriate remedies or sanctions for violations of those laws." USMCA, art. 24.6.2, https://bit.ly/46BhclV.

Under the Eighth Circuit's view, the USMCA would allow a U.S. court to impose state-law standards on a facility in Canada or Mexico. And a Canadian or Mexican court could assert jurisdiction over a Canadian or Mexican company with facilities in the United States, hold that the facility was obligated to comply with Canadian or Mexican environmental standards, and impose liability for failure to comply with those standards.[6]

That result is not merely theoretical. Numerous NMA member mining companies that have a U.S.

17.4, https://bit.ly/3rfvwAt; U.S.-Panama Trade Promotion Agreement art. 17.4, https://bit.ly/44cAqgc.

[6] Nor does the legislative text relied on by the Eighth Circuit offer a limiting principle. The same language exists in other trade agreements, including the USMCA. 19 U.S.C. 4512(b)(1); see also, *e.g.*, Pub. L. No. 112-43 § 102(b)(1), 125 Stat. 497, 499 (2007) (U.S.-Panama Trade Promotion Agreement); 19 U.S.C. 4012(b)(1) (Dominican Republic-Central America Free Trade Agreement).

nexus also have subsidiaries with operations or facilities in Canada or Mexico. That means the Eighth Circuit's decision creates a significant risk of lawsuits in the United States seeking to apply U.S. environmental standards to those facilities and operations.

The Eighth Circuit's decision is especially troubling in light of the proliferation of claims based on extraterritorial application of state law in the wake of this Court's decisions in *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), and *Nestlé USA, Inc.* v. *Doe*, 593 U.S. 628 (2021), limiting the extraterritorial application of the Alien Tort Statute. See, *e.g.*, *Coubaly* v. *Cargill, Inc.*, 610 F. Supp. 3d 173, 179 (D.D.C. 2022); First Amended Compl. ¶¶ 222-246, *F.C.* v. *Jacobs Sols. Inc.*, No. 23-cv-02660 (D. Colo. Mar. 18, 2024), ECF No. 52; Compl. ¶¶ 229-246, *Ali* v. *Nahyan*, No. 23-cv-00576 (D.D.C. Mar. 2, 2023), ECF No. 1.

These cases raise serious foreign-policy concerns. As one legal expert has noted, "the potential applicability of state law to primarily foreign disputes * * * may prove troubling for U.S. policy and interests" in ways that exceed even those that exist when a federal statute is applied extraterritorially. Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of* Morrison v. National Australia Bank, 92 B.U. L. Rev. 535, 539 (2012). And "given that the Constitution entrusts foreign affairs to the federal political branches, limits state power over foreign affairs, and establishes the supremacy of federal enactments over state law, the presumption against extraterritorial application is even stronger in the context of state tort law." *Al Shimari* v. *CACI Int'l, Inc.*, 679 F.3d 205, 231 (4th Cir. 2012) (Wilkinson, J., dissenting).

To prevent this circumvention of the Court's decisions, the Court should grant review to make clear that comity principles require deference to the political branches' determinations embodied in international agreements.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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