TRANSBOUNDARY HARM IN INTERNATIONAL LAW

Many harms flow across the ever-more porous sovereign borders of a globalizing world. These harms expose weaknesses in the international legal regime built on sovereignty of nation states. Using the *Trail Smelter* arbitration, one of the most cited cases in international environmental law, this book explores the changing nature of state responses to transboundary harm. Taking a critical approach, the book examines the arbitration's influence on international law generally and international environmental law specifically. In particular, the book explores whether there are lessons from *Trail Smelter* that are useful for resolving transboundary challenges currently confronting the international community. The book collects the commentary of a distinguished set of international law scholars who consider the history of the *Trail Smelter* arbitration, its significance for international environmental law, its broader relationship to international law, and its resonance in fields beyond the environment.

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Transboundary Harm in International Law

Lessons from the *Trail Smelter* Arbitration

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org
Information on this title: www.cambridge.org/9780521856430

First published 2006

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Transboundary harm in international law : lessons from the Trail Smelter arbitration / edited by Rebecca Bratspies and Russell Miller.
p. cm.
Includes index.
ISBN-13: 978-0-521-85643-0 (hardback : alk. paper)
ISBN-10: 0-521-85643-4 (hardback : alk. paper)
1. Jurisdiction (International law) 2. State responsibility. 3. Transboundary pollution – Law and legislation. 4. Consolidated Mining and Smelting Company of Canada Ltd. 5. United States – Claims vs. Canada. I. Bratspies, Rebecca, 1965– II. Miller, Russell (Russell A.)
III. Title.
KZ6148.T73 2006
341.4–dc22 2005028952

ISBN-13 978-0-521-85643-0 hardback
ISBN-10 0-521-85643-4 hardback

For my uncle Dennis Replansky –
who loved the law

Rebecca M. Bratspies

* * *

To my parents, for giving me the gift of the breathtaking rivers of the American northwest. Who would have thought those rivers might one day flow out into the world like this?

It pleases me, loving rivers.
Loving them all the way back
to their source.

Raymond Carver,
Where Water Comes Together with Other Water,
Where Water Comes Together with Other Water: Poems 17 (1986).

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Acknowledgments

Producing this volume has left us with a large debt to many who have contributed in a number of ways. First and foremost, we thank Dean Don Burnett of the University of Idaho College of Law for giving two young scholars his unqualified support as we put together a symposium and later a book. This project would never have happened without his confidence and generous support.

For support of our research on and the development of this project, thanks are also owed to the directors (Prof. Dr. Armin von Bogdandy and Prof. Dr. Rüdiger Wolfrum) of the Max Planck Institute for Comparative Public Law and Public International Law, Heidelberg, Germany, and Dean Kristen Booth Glen and Acting Dean MaryLu Bilek of the CUNY School of Law.

We owe a special word of thanks to three individuals: Finola O'Sullivan, our editor at Cambridge University Press, who extended us valuable support, patience, and good will in measures above-and-beyond the call of duty; Jane Edwards, Head of Research Services at Michigan State University College of Law, who put her research staff at our disposal; and Jennifer Peavey-Joanis, whose dedication, initiative, and persistence were vital in organizing the symposium that made this volume possible. We owe much to the reviewers of the original book proposal, whose comments enriched our thinking. Many friends, colleagues, and students have helped us with the project that became this book, listening patiently to our ideas and providing constant inspiration as we pursued this project.

Finally, we acknowledge the understanding, patience, and support of our families as we labored in the editing of this book.

With gratitude, we acknowledge the permission granted to republish excerpts of the following articles:

John E. Read, *The Trail Smelter Dispute*, 1 CANADIAN YEARBOOK OF INTERNATIONAL LAW 213 (1963). Reprinted with permission of the Publisher from *The Canadian Yearbook of International Law, Volume 1* edited by C.B. Bourne © University of British Columbia Press 1963. All rights reserved by the Publisher.

Karin Mickelson, *Rereading Trail Smelter*, 31 CANADIAN YEARBOOK OF INTERNATIONAL LAW 219 (1993). Reprinted with permission of the Publisher from *The Canadian Yearbook of International Law, Volume 31* edited by D.M. McRae © University of British Columbia Press 1993. All rights reserved by the Publisher.

Alfred P. Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, 50 OREGON LAW REVIEW 259–282 (1971). Publication by permission of Oregon Law Review.

The contributors wish to make the following acknowledgments and thanks for support with their individual chapters.

Rebecca Bratspies – I am grateful for research assistance by Vivian Villegas, for research support from Jonathan Saxon, and for comments and suggestions from B. Allen Schulz and Judith Wise.

Neil Craik – An earlier draft of this paper was presented at the first annual *Journal of Environmental Law and Practice* Conference held in Saskatoon, Saskatchewan, June 4–5, 2004.

Mark Drumbl – I thank the Frances Lewis Law Center, Washington & Lee University, for its support.

Jaye Ellis – I am grateful for the research assistance of Alison Fitzgerald and Jared Will, and for comments and suggestions from Jared Will and John Knox.

Russell Miller – Warm thanks to Bradley Richardson (University of Idaho College of Law Class of 2004) for excellent research assistance.

Austen Parrish – I am grateful to James A. Kushner and Robert E. Lutz for their guidance and thoughtful comments on earlier drafts. Thanks also to Andrea G. Duckworth for her research assistance.

Nicola Vennemann – My thanks to Dr. Anja Seibert-Fohr and Prof. Dr. Christian Walter, who critically reviewed earlier drafts of this article and offered helpful comments and suggestions.

Eric Jensen and Judith Wise – We are grateful for the substantial assistance of Daniel K. Sheckler and Vivian Villegas.

Foreword

Some years ago, I began work on a history of international environmental law and policy. A central, iconic event in that history is the *Trail Smelter* arbitration. I decided to visit Trail, British Columbia, and the towns and environs across the border in the United States that were alleged to have been damaged by fumes from the smelter in Trail. The path from Trail down to Northport, Washington, follows the valley of the upper Columbia River. It occurred to me that the trip to the region would be scenic and something the family would enjoy so I consulted a well-known travel guide to the area. It contained a map that highlighted in green the roads in the region that were recommended as particularly scenic. The stretch from Northport to Trail – unlike the roads in adjoining valleys – was not colored green. There, in that absence of color, was proof of the enduring ecological legacy associated with the Trail smelter and the international arbitration it spawned.

It is my pleasure to provide the Foreword to this study of the *Trail Smelter* arbitration: its history, its current relevance to environmental law and policy, and its possible application to transboundary issues beyond the environmental arena. I regret that other matters prevented me from participating in the inaugural Idaho International Law Symposium that is the foundation of this book. It is thus doubly my pleasure that the writing of the Foreword allowed me early access to the richness of this volume.

Any book about an icon, such as the *Trail Smelter* arbitration, runs the great risk that the icon will use the editors and contributors. Icons, by definition, do not reflect objective reality, but are instead people and events that have grown in stature to fill some human need for legend. Perhaps reality has been intentionally appropriated to support an ideological agenda. These forces, often accumulating their own momentum, can overtake even the best-intentioned scholars, leading them to do willing, or sometimes unwitting, service to the agenda of those who regularly polish the icon. But the attraction of wrestling with an icon can be understood. After all, the *Trail Smelter* arbitration became iconic for a reason, and in this case, as is often the case, that reason is that the event was extraordinary. Icons, thus are not only exaggerated or twisted, they often are also a grossly simplified

version of what really occurred. That simplification can strip the icon of the complex forces that made the underlying event so extraordinary. These problems represent the great risk that can only be overcome if the book: (1) acknowledges the fact that an event has been transformed into an icon; (2) seeks to recapture the significance of, and choices implicit in, the *event* by returning to its historic details; (3) seeks to identify and critique the power of the *icon* in contemporary events; and, finally, (4) seeks to blend an appreciation of the complexity and contingency of the event into the continuing influence of the icon.

This volume, even confronting an icon as powerful as the *Trail Smelter* arbitration, marvelously fulfills each of these mandates. In my estimation, this book makes a major contribution to our understanding of the events surrounding the Trail smelter in the early 1900s and what those events, and the icon they spawned, might mean today.

The *Trail Smelter* arbitration did not become an icon immediately. It certainly was an important arbitration. But its iconic status came only later in the 1960s and 1970s with the birth of the international environmental movement. The statement of the tribunal in its 1941 award that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein" provided the authority and pedigree necessary for the legitimacy of a central aspect of the international environmental movement – the duty of states to respect the environment. Jaye Ellis and John Knox, in their chapters in the book, very ably challenge the precedential authority of this statement, whereas Steve McCaffrey and Günther Handl rise to its defense.

What is the twisting involved in this iconic creation? The *Trail Smelter* arbitration was not about the environment, as James Allum so vigorously relates in his contribution to the book. There is no doubt that Canada and the United States could have, by legislation, allowed damage by fumes to persons and property in their own territory. Indeed, they did. There is no doubt that the United States could have agreed with Canada to mutually allow each other to pollute the other to some degree. Indeed, they implicitly did. Rather, the *Trail Smelter* arbitration was about financial responsibility for damage to property where the vector for the infliction of the harm was transport through the air of a noxious fume and the measure of damage was the commercial value of the damaged property.

Recently, I served as a Commissioner with the United Nations Compensation Commission (UNCC) for claims arising out of the 1990 Gulf War. That Commission helps us reflect on what is truly a claim involving the environment. On the one hand, the oil spills and oil well fires raise a number of public claims for the monies necessary to restore the health of aspects of the local environment. On the other hand, other claims brought by individuals or corporations sought, for example, the costs of repainting a building soiled by oily smoke from the fires. At its core, the *Trail Smelter* claims are much more like the latter case. Yet, paradoxically, the fact that true environmental claims also were part of the docket of

the UNCC must be seen as a part of the legacy of the international environmental movement and the *Trail Smelter* icon which is at its center.

What of the exaggeration involved in creating this icon? Should we take this event as a success for this set of claimants, or is it iconic in the sense that we should aspire to such dispute resolution generally? Extending the observation about true environmental claims noted earlier, there also are few controversies that are truly international disputes; that is, disputes actually between two states. The vast majority of disputes, rather, are between individuals, and they often become international because a boundary is inserted in the mix. The problem in the *Trail Smelter* incident was that the boundary between Canada and the United States was not as porous to private litigation as it was to the winds that carried the fumes. Both nations had dealt with the local controversies internally. Local claims in British Columbia against the smelter in Trail were resolved. Local claims in Washington State against a smaller smelter in Northport (closed down decades before the arbitration) also were resolved. The controversies not resolvable (meaning other than via dismissal) at the time were the transboundary claims. Thus, today, after decades of improving cross-border judicial cooperation, one should not expect the current further row over the pollution by the smelter of the Columbia River to give rise to yet another interstate arbitration. Rather, as Neil Craik analyzes in a chapter in the book, it seems destined to proceed in the national courts of one or both of the countries. In this sense, an interstate arbitration *à la Trail Smelter* might be seen as a failure of more efficient private transnational litigation arrangements. Yet, paradoxically, *Trail Smelter* also should be seen as a success in terms of allocating responsibility on the basis of legal principles rather than the all-too-common international response of letting such harm rest simply where it is suffered. Indeed, it is the relevance of the *Trail Smelter* arbitration to a wider variety of transboundary environmental issues that is at the core of a number of contributions to this volume.

Event and icon, decision and precedent, responsibility and complicity – the *Trail Smelter* arbitration raises all these possibilities and complexities. It is a lens through which many of the issues confronting the world of boundaries may be viewed. The contributors look honestly through this lens and in doing so make a singularly significant contribution to our understanding of the event, the icon, and the continuing relevance of both.

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