Foreword to in TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION xix-xxi (Cambridge University Press, Russell A. Miller & Rebecca Bratspies, eds.).

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Transboundary Harm in International Law

Lessons from the Trail Smelter Arbitration

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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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