Transboundary Harm in International Law

Lessons from the Trail Smelter Arbitration

Edited by

Rebecca M. Bratspies
CUNY School of Law

Russell A. Miller
University of Idaho College of Law
Contents

Contributors  
page xi

Acknowledgments  
 xvii

Foreword by David D. Caron  
xix

Introduction  
Rebecca M. Bratspies and Russell A. Miller  
 1

PART ONE. THE TRAIL SMELTER ARBITRATION – HISTORY, LEGACY, AND REVIVAL

History

1 “An Outcrop of Hell”: History, Environment, and the Politics of the Trail Smelter Dispute  
James R. Allum  
 13

2 The Trail Smelter Dispute [Abridged]  
John E. Read  
 27

Roots and Legacy

3 Of Paradoxes, Precedents, and Progeny: The Trail Smelter Arbitration 65 Years Later  
Stephen C. McCaffrey  
 34

4 Pollution by Analogy: The Trail Smelter Arbitration [Abridged]  
Alfred P. Rubin  
 46

5 Has International Law Outgrown Trail Smelter?  
Jaye Ellis  
 56

6 The Flawed Trail Smelter Procedure: The Wrong Tribunal, the Wrong Parties, and the Wrong Law  
John H. Knox  
 66
Contents

7 Rereading *Trail Smelter* [Abridged] .............................................. 79
   Karin Mickelson

8 *Trail Smelter* and the International Law Commission's
   Work on State Responsibility for Internationally Wrongful Acts
   and State Liability .......................................................... 85
   Mark A. Drumbl

9 Derivative versus Direct Liability as a Basis
   for State Liability for Transboundary Harms .......................... 99
   Mark Anderson

Return to Trail

10 Transboundary Pollution, Unilateralism, and the Limits
   of Extraterritorial Jurisdiction: The Second *Trail Smelter*
   Dispute ................................................................. 109
   Neil Craik

PART TWO. TRAIL SMELTER AND CONTEMPORARY
TRANSBOUNDARY HARM – THE ENVIRONMENT

11 *Trail Smelter* in Contemporary International Environmental
   Law: Its Relevance in the Nuclear Energy Context .................. 125
   Günther Handl

12 Through the Looking Glass: Sustainable Development and Other
   Emerging Concepts of International Environmental Law in the
   *Gabčíkovo-Nagymaros* Case and the *Trail Smelter* Arbitration .... 140
   James F. Jacobson

13 *Trail Smelter*’s (Semi) Precautionary Legacy .......................... 153
   Rebecca M. Bratspies

14 Surprising Parallels between *Trail Smelter* and the Global
   Climate Change Regime .................................................. 167
   Russell A. Miller

15 Sovereignty’s Continuing Importance: Traces of *Trail Smelter*
   in the International Law Governing Hazardous Waste Transport .... 181
   Austen L. Parrish

16 The Legacy of *Trail Smelter* in the Field of Transboundary
   Air Pollution ............................................................. 195
   Phoebe Okowa

17 The Impact of the *Trail Smelter* Arbitration
   on the Law of the Sea .................................................... 209
   Stuart B. Kaye
PART THREE. TRAIL SMELTER AND CONTEMPORARY TRANSBOUNDARY HARM – BEYOND THE ENVIRONMENT

18 Trail Smelter and Terrorism: International Mechanisms to Combat Transboundary Harm .................................................. 225
Pierre-Marie Dupuy and Cristina Hoss

19 The Conundrum of Corporate Social Responsibility: Reflections on the Changing Nature of Firms and States ....................... 240
Peer Zumbansen

20 A Pyrrhic Victory: Applying the Trail Smelter Principle to State Creation of Refugees ..................................................... 254
Jennifer Peavey-Joanis

21 Transboundary Harm: Internet Torts .................................................. 268
Holger P. Hestermeyer

22 International Drug Pollution? Reflections on Trail Smelter and Latin American Drug Trafficking ................................. 281
Judith Wise and Eric L. Jensen

23 Application of International Human Rights Conventions to Transboundary State Acts .................................................... 295
Nicola Vennemann

Annex A. Convention Between the United States of America and the Dominion of Canada Relative to the Establishment of a Tribunal to Decide Questions of Indemnity and Future Regime Arising from the Operation of Smelter at Trail, British Columbia ................................. 309

Annex B. Trail Smelter Arbitral Tribunal Decision, April 16, 1938 .......... 314
Annex C. Trail Smelter Arbitral Tribunal March 11, 1941, Decision ......... 326

Index 337