

*TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION*, EDITED BY REBECCA M. BRATSPIES & RUSSELL A. MILLER (NEW YORK: CAMBRIDGE UNIVERSITY PRESS, 2006) 347 pages.<sup>1</sup>

BY STEPAN WOOD<sup>2</sup>

In most fields of law there is an old case, or a handful of cases, that everyone recognizes as the foundation of an entire edifice of legal doctrine yet almost no one remembers in any detail: cases whose names are intoned like mantras by students, professors, practitioners, and judges; cases that have been reduced to a formulaic statement of principle and a few stylized facts; cases that have been stripped of their content, their context, their specificity. *Trail Smelter* is just such a case in the field international environmental law.<sup>3</sup>

*Trail Smelter* is revered in that young field as the germ from which the entire law of transboundary environmental harm sprang. It is remembered as the earliest articulation of two core principles of international environmental law: that states have a duty to prevent transboundary environmental harm, and that they have an obligation to pay compensation for the harm they cause. *Trail Smelter* is also remembered for establishing the first international pollution control regime, or at least one of the first.

Almost every student of international environmental law is able to recite the arbitral tribunal's famous conclusion:

[N]o 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, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>4</sup>

Most would also recall that the tribunal ordered Canada to compensate the United States for damage caused by transboundary air pollution

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<sup>1</sup> [*Transboundary Harm*].

<sup>2</sup> Associate Professor, Osgoode Hall Law School.

<sup>3</sup> "Trail Smelter Arbitral Tribunal" (1939) 33 Am. J. Int'l L. 182, reprinted in Bratspies & Miller, *supra* note 1, 314 ["Trail Smelter I"]; Trail Smelter Arbitral Decision (US v. Can.) (1941) 35 Am. J. Int'l L. 684, reprinted in Bratspies & Miller, *supra* note 1, 326 ["Trail Smelter II"].

<sup>4</sup> "Trail Smelter II," *ibid.* at 331.

from the smelter,<sup>5</sup> and established an international “regime ... of control”<sup>6</sup> to attempt to limit the transboundary movement and deposition of fumes. As for the facts, most teachers, students, and practitioners would not recall much more than that smoke emissions from a smelter in Canada were damaging farmland across the border in the United States.

The case, in short, has been reduced to a few simplified facts and abstract legal propositions about transboundary air pollution damage and an early experiment in international air pollution control. Lost is the historical specificity of the events giving rise to the case, and with it the opportunity for a genuine understanding of the case’s continuing significance. As so often happens with prominent legal decisions, the case has been transformed from a complex of facts, norms, social relations, and historical contingencies into a legal icon.

Rebecca Bratspies and Russell Miller’s excellent new edited volume, *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration*, is a welcome antidote to this oversimplification, abstraction, and distortion. The book brings the *Trail Smelter* episode to life in all its uniqueness and complexity and explores its enduring legacy with an unprecedented level of nuance and sophistication. The volume collects twenty-three separately authored chapters, most of which were prepared for a 2003 conference organized by the editors. While the chapters present diverse—and sharply divergent—perspectives on the meaning and the value of the *Trail Smelter* arbitration, each is brief, concise, and tightly argued. The whole collection is held together by strong thematic links and a clear, logical structure. The chapters prepared specially for this collection are supplemented by abridged reprints of three famous articles on *Trail Smelter*: one from the early 1960s by John Read, the Canadian agent in the dispute and later a member of the International Court of Justice; another from the early 1970s by Alfred Rubin; and one from the 1990s by Karin Mickelson. Finally, the book’s appendices reproduce the arbitral convention creating the tribunal and lengthy excerpts from the tribunal’s two decisions.

*Transboundary Harm* proceeds in three parts. Part One examines the historical foundations of the case, its influence on

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<sup>5</sup>“Trail Smelter I,” *supra* note 3 at 324; “Trail Smelter II,” *supra* note 3 at 334-35.

<sup>6</sup>“Trail Smelter II,” *ibid.* at 332.

international environmental law, and the smelter's continuing yet largely unknown toxic legacy. Part Two examines the case's contemporary significance for the law of transboundary environmental harm. Part Three looks beyond environmental law to examine the significance of the *Trail Smelter* arbitration for legal responses to other transboundary harms, from international terrorism to Internet torts.

Part One is the crowning achievement of the book, and James Allum's historical account of the *Trail Smelter* dispute (Chapter One) is the jewel in the crown.<sup>7</sup> Allum's brief, eye-opening history questions the canonical reading of the case as a triumph of international law, diplomacy, and environmental protection (a reading represented, *inter alia*, by Stephen McCaffrey<sup>8</sup> and Günther Handl<sup>9</sup> in this volume), and retells it as a story of "class subordination rooted in environmental domination."<sup>10</sup> Allum paints a vivid picture of the stark social and environmental conditions of the smelter and its environs, along with the social struggle they provoked. This struggle pitted an economically strategic Canadian mining company (Consolidated Mining and Smelting Company, or Cominco), the mining industry as a whole, and their government supporters in both countries against the farmers living in the smelter's toxic fallout zone along the Columbia River valley. Allum traces how the struggle escalated from the local to the transnational level as the smelter increased production and erected taller smoke stacks, pushing the toxic plume farther down the valley. He also shows how common law principles were transformed in the first third of the twentieth century to authorize the so-called "smoke zones," in which industrial polluters had an effective power of eminent domain to condemn property to permanent ecological degradation in return for payment of compensation, and how the tribunal enshrined this approach in its decision. Thus Canada was not required to impose emission standards that might reduce the smelter's production levels (something Cominco continued to resist for years until it discovered a way to reprocess waste sulphur into fertilizer). Instead,

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<sup>7</sup> James R. Allum, "An Outcrop of Hell: History, Environment, and the Politics of the *Trail Smelter* Dispute" in Bratspies & Miller, *supra* note 1, 13.

<sup>8</sup> Stephen C. McCaffrey, "Of Paradoxes, Precedents, and Progeny: The *Trail Smelter* Arbitration 65 Years Later" in Bratspies & Miller, *supra* note 1, 34.

<sup>9</sup> Günther Handl, "*Trail Smelter* in Contemporary International Environmental Law: Its Relevance in the Nuclear Energy Context" in Bratspies & Miller, *supra* note 1, 125.

<sup>10</sup> Allum in Bratspies & Miller, *supra* note 7 at 14.

Canada was required to adjust the timing of emissions so that weather and seasonal conditions directed the emissions away from the American farmers' land. Canada was also required to compensate the farmers for serious damage that might occur despite these controls. The ruling effectively normalized "smoke eating" as a sanctioned consequence of industrial capitalism within this transboundary region.

To the extent that the tribunal's ruling did reflect a triumph of diplomacy in the pursuit of environmental protection, Allum points out that any credit for this rests with the farmers who waged a long and ultimately unsuccessful battle to stop the pollution at its source. Neither of the two governments, let alone the smelter company, pursued this objective. The Canadian government effectively acted as Cominco's agent in the dispute, and the American government, under pressure from its own mining industry and fearful of a ruling that might come back to haunt domestic industry, gave only lukewarm support to the farmers' cause at critical junctures. "Far from being an expansive declaration of state liability," Allum concludes ominously, "the Tribunal ultimately constructed an extraordinarily narrow doctrine on transnational air pollution that erased national borders to protect the sovereignty of industrial production in North America."<sup>11</sup> Whether one accepts this characterization or not, Allum does an excellent job of ripping away the veil of complacency implicit in the iconic reading of the case as the wellspring of international environmental law—the same kind of complacency that led to the nickname "smoke eaters" becoming a badge of community honour and prosperity in the city of Trail, rather than a symbol of subordination.

The rest of Part One demonstrates the variety of opinions on *Trail Smelter's* legacy in international environmental law. In sharp contrast to Allum, Stephen McCaffrey, in Chapter Three, celebrates the *Trail Smelter* arbitration as the "wellspring" and "fountainhead" of international environmental law, and the arbitrators as "trail-blazing," and "courageous and creative."<sup>12</sup> He traces the decision's progeny in the political (*e.g.*, the Stockholm and Rio Declarations); judicial (*e.g.*, the International Court of Justice's *Nuclear Weapons* advisory opinion and the *Gabčíkovo-Nagymaros Project* decision); and expert realms (*e.g.*, the

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<sup>11</sup> *Ibid.* at 26.

<sup>12</sup> McCaffrey in Bratspies & Miller, *supra* note 8 at 34, 39, 45.

International Law Commission's draft articles on liability for non-prohibited acts). In Chapter Five, Jaye Ellis argues that *Trail Smelter's* ringing endorsement of state responsibility for transboundary harm is inconsistent with international rules of state responsibility. It is reflected only weakly in the International Law Commission (ILC) draft articles on liability for non-prohibited acts, and it has been ignored altogether in most international environmental conventions (which focus on prevention and control rather than *ex post* liability or responsibility).<sup>13</sup> Yet, from *Trail Smelter's* ashes, she salvages the useful reminder that international law is "dynamic, often contradictory, sometimes incoherent, and far from comprehensive," and adds that international legal scholars should strive to "give it qualities of comprehensiveness, coherence, and completeness"—a task which, I might add, is always necessarily incomplete.<sup>14</sup>

John Knox joins the chorus of skeptics by arguing that the *Trail Smelter* arbitration is instructive primarily as an example of how not to resolve transboundary environmental disputes involving private parties.<sup>15</sup> Had the governments of Canada and the United States chosen to submit the dispute to an appropriately constituted domestic court rather than an international tribunal (for instance, by resolving the obstacles to jurisdiction in British Columbia); had they done away with the legal fiction that governments were the real parties in interest and allowed the private parties to represent themselves; and had they laid down some substantive legal standards for resolving the dispute, rather than leaving the Tribunal to apply the domestic law of nuisance, Knox argues that we might have seen the emergence of a genuine transnational law of private nuisance. Instead, we were left with the roadblocks to justice still faced by victims of transnational environmental harm today. He leaves us with the intriguing but barely developed suggestion of treating the conventions on civil liability for oil pollution, nuclear accidents, and hazardous substances as models for resolving private transboundary environmental disputes.

Mark Drumbl picks up the case for the defence in Chapter Eight, by tracing *Trail Smelter's* lasting influence on both the ILC's *Draft Articles on State Responsibility* and its *Draft Articles on the*

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<sup>13</sup> Jaye Ellis, "Has International Law Outgrown *Trail Smelter*?" in Bratspies & Miller, *supra* note 1, 56.

<sup>14</sup> *Ibid.* at 65.

<sup>15</sup> John H. Knox, "The Flawed *Trail Smelter* Procedure: The Wrong Tribunal, the Wrong Parties, and the Wrong Law" in Bratspies & Miller, *supra* note 1, 66.

*Prevention of Transboundary Harm from Hazardous Activities*.<sup>16</sup> What is most remarkable about the chapter is that it brings into view a tension found throughout the volume, namely the question of whether *Trail Smelter* stands for state responsibility for internationally wrongful acts, or state liability for injurious consequences arising out of non-prohibited acts. Some authors treat it as an example of the former, others of the latter, some definitely *not* the former, and some—such as Drumbl—as both. Drumbl’s chapter illustrates very well how the ILC’s work on both these subjects has drawn upon *Trail Smelter*, but fails to explain how the case can stand simultaneously for state responsibility for internationally wrongful acts and state liability for non-wrongful acts. While useful as an alternative way to conceptualize the legal position, Mark Anderson’s chapter on derivative versus direct liability as a basis for state liability for transboundary harms (Chapter Nine)<sup>17</sup> only adds to the confusion by suggesting that state liability and state responsibility are both about wrongful acts. These two otherwise excellent chapters serve mainly to reinforce the ultimate incoherence of the state responsibility/state liability distinction.

Part One closes with an excellent chapter by Neil Craik on the smelter’s continuing toxic legacy.<sup>18</sup> This legacy persists with the contemporary transnational legal dispute that has arisen around the US Environmental Protection Agency’s efforts to hold the smelter’s Canadian owner responsible under the *Comprehensive Environmental Response, Compensation and Liability Act*<sup>19</sup> for cleanup of toxic contamination of the Columbia River on the American side of the border. The chapter is a poignant reminder that the history of a dispute does not end with a tribunal or court decision. The smelter is still in operation. Pollution from the smelter has continued for decades, and continues to this day—at much lower levels—under air emission and water effluent permits. While the air pollution problem is much

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<sup>16</sup> Mark A. Drumbl, “*Trail Smelter* and the International Law Commission’s Work on State Responsibility for Internationally Wrongful Acts and State Liability” in Bratspies & Miller, *supra* note 1, 85.

<sup>17</sup> Mark Anderson, “Derivative versus Direct Liability as a Basis for State Liability for Transboundary Harms” in Bratspies & Miller, *supra* note 1, 99.

<sup>18</sup> Neil Craik, “Transboundary Pollution, Unilateralism, and the Limits of Extraterritorial Jurisdiction: The Second *Trail Smelter* Dispute” in Bratspies & Miller, *supra* note 1, 109.

<sup>19</sup> *Comprehensive Environmental Response, Compensation, and Liability Act*, 42 U.S.C. §§ 9601-9675 (2000).

reduced, decades of dumping toxic slag into the Columbia River has left a legacy of contaminated sediment downstream in the United States. Craik compares the past and present *Trail Smelter* disputes, contrasting their approaches to liability and yet finding some underlying commonalities that might point the way to a resolution of the current dispute.

Parts Two and Three make some important contributions to our understanding of *Trail Smelter's* contemporary significance in the environmental field and beyond. Part Two focuses on transboundary environmental harm. Günther Handl contributes a chapter on the relevance of the decision in the context of nuclear energy;<sup>20</sup> James Jacobson on its influence on sustainable development and other emerging concepts;<sup>21</sup> Rebecca Bratspies on its impact on the precautionary principle;<sup>22</sup> Russell Miller on global climate change law;<sup>23</sup> Austen Parrish on the transboundary movement of hazardous waste;<sup>24</sup> Phoebe Okowa on transboundary air pollution;<sup>25</sup> and Stuart Kaye on the law of the sea.<sup>26</sup> By bringing together so many different topics, this part allows comparison of *Trail Smelter's* peculiarities, generalities, legacies, and limitations across diverse subject matters, geopolitical settings, and international regimes.

Part Three extends the inquiry to transboundary harm outside the environmental context: terrorism, corporate social responsibility, refugees, Internet torts, narco-trafficking, and human rights. Within this part, the chapter by Peer Zumbansen on corporate social responsibility merits special attention.<sup>27</sup> Zumbansen tells *Trail Smelter's* "as-yet

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<sup>20</sup> *Supra* note 9.

<sup>21</sup> James F. Jacobson, "Through the Looking Glass: Sustainable Development and Other Emerging Concepts of International Environmental Law in the *Gabčíkovo-Nagymaros* Case and the *Trail Smelter* Arbitration" in Bratspies & Miller, *supra* note 1, 140.

<sup>22</sup> Rebecca M. Bratspies, "*Trail Smelter's* (Semi) Precautionary Legacy" in Bratspies & Miller, *supra* note 1, 153.

<sup>23</sup> Russell A. Miller, "Surprising Parallels between *Trail Smelter* and the Global Climate Change Regime" in Bratspies & Miller, *supra* note 1, 167.

<sup>24</sup> Austen L. Parrish, "Sovereignty's Continuing Importance: Traces of *Trail Smelter* in the International Law Governing Hazardous Waste Transport" in Bratspies & Miller, *supra* note 1, 181.

<sup>25</sup> Phoebe Okowa, "The Legacy of *Trail Smelter* in the Field of Transboundary Air Pollution" in Bratspies & Miller, *supra* note 1, 195.

<sup>26</sup> Stuart B. Kaye, "The Impact of the *Trail Smelter* Arbitration on the Law of the Sea" in Bratspies & Miller, *supra* note 1, 209.

<sup>27</sup> Peer Zumbansen, "The Conundrum of Corporate Social Responsibility: Reflections on the Changing Nature of Firms and States" in Bratspies & Miller, *supra* note 1, 240.

untold story of corporate responsibility,”<sup>28</sup> arguing that we can discern in the arbitration the stirrings of contemporary transformations in both the state and business. Using *Trail Smelter* as an unlikely but imaginative starting point, he draws a convincing yet largely unremarked parallel between the transformation of the state “into a collaborative, contracting, and learning entity that remains dramatically dependent on private knowledge,”<sup>29</sup> and the transformation of the modern corporation into an ever-expanding network that increasingly assumes formerly “public” tasks in a seemingly borderless global arena.

The contributors to Part Three are generally skeptical of *Trail Smelter’s* applicability beyond the environmental context and share many of the reservations of the authors of the earlier chapters. Pierre-Marie Dupuy and Cristina Hoss draw some parallels between *Trail Smelter* and the law of international terrorism, especially in terms of the emergence of a general obligation of due diligence, while decrying the confusion of post-*Trail Smelter* doctrinal developments.<sup>30</sup> Jennifer Peavey-Joanis warns against equating transnational flows of refugees with transboundary air pollution, arguing that to apply *Trail Smelter’s* liability principle to allow a state that accepts refugees to claim compensation from the source state would contravene the humanitarian premise of refugee law.<sup>31</sup> What is more, to hold a state liable for the creation of refugees “would only further a downward economic and social spiral in the refugee-creating society.”<sup>32</sup> Holger Hestermeyer shows that the law of transboundary Internet torts (where the act is committed in one jurisdiction and the harm felt in another) could not be more different from the approach taken to transboundary harm in *Trail Smelter*; he then points to several reasons for the failure of private international law in the latter case.<sup>33</sup> Judith Wise and Eric Jensen, for their part, flatly reject *Trail Smelter’s* application to the variety of

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<sup>28</sup> *Ibid.* at 242

<sup>29</sup> *Ibid.*

<sup>30</sup> Pierre-Marie Dupuy & Cristina Hoss, “*Trail Smelter* and Terrorism: International Mechanisms to Combat Transboundary Harm” in Bratspies & Miller, *supra* note 1, 225.

<sup>31</sup> Jennifer Peavey-Joanis, “A Pyrrhic Victory: Applying the *Trail Smelter* Principle to State Creation of Refugees” in Bratspies & Miller, *supra* note 1, 254.

<sup>32</sup> *Ibid.* at 265

<sup>33</sup> Holger P. Hestermeyer, “Transboundary Harm: Internet Torts” in Bratspies & Miller, *supra* note 1, 268.

transboundary harms stemming from Latin-American narco-trafficking, because the harms are more complex and diffuse, causation is more attenuated, and states' powers are markedly unequal vis-à-vis each other and their own populations.<sup>34</sup> Finally, Nicola Vennemann argues that *Trail Smelter* can only have limited application to international law's response to transboundary human rights violations.<sup>35</sup>

Many of the reservations about *Trail Smelter* in Part Three revolve around the decision's excessively narrow definition of "harm," its high threshold of proof, and the voluntary character of Canada's assumption of liability in the case, all of which are more problematic the farther one ventures outside the environmental realm.

In their introductory essay, the editors describe the objectives of the book:

More than just an historical accounting of the *Trail Smelter* arbitration, this book seeks to reengage with the *Trail Smelter* arbitration and to reinvigorate discussions of its influence on international law. We were resolved to test *Trail Smelter's* legacy against today's transboundary challenges, fully embracing the possibility that doing so might unravel the arbitration's mythological hold over international environmental law.<sup>36</sup>

The book fulfills these objectives admirably. It is not just an exercise in iconoclasm. It is a thoughtful reconstruction of the history and legacy of the arbitration, full of provocative insights into the meaning of sovereignty, boundaries, and harm in a world in which all three concepts are increasingly unstable and contested.

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<sup>34</sup> Judith Wise & Eric L. Jensen, "International Drug Pollution? Reflections on *Trail Smelter* and Latin American Drug Trafficking" in Bratspies & Miller, *supra* note 1, 281.

<sup>35</sup> Nicola Vennemann, "Application of International Human Rights Conventions to Transboundary State Acts" in Bratspies & Miller, *supra* note 1, 295.

<sup>36</sup> Rebecca M. Bratspies & Russell A. Miller, "Introduction" in Bratspies & Miller, *supra* note 1, 1 at 10.