**Transnational Environmental Law**

**Case No. 8: Trail Smelter**


**BACKGROUND**: The arbitration arose from claims involving transfrontier air pollution by a smelter factory located in Trail (Province of British Columbia, Canada) about 20 kilometers north of the US boundary. The factory – owned by the private Consolidated Mining & Smelting Co. of Canada Ltd. – roasted sulphur-bearing ores and emitted sulphur dioxide fumes into the air, which between 1926 and 1937 caused damage to privately owned agricultural and forest lands near the township of Northport (State of Washington, USA). On 7 August 1928, the issue was initially referred to the International Joint Commission established by the 1909 US-Canadian Boundary Waters Treaty, which submitted a report on 28 February 1931 recommending compensation and remedial measures.

After further representations by the United States in 1933, the two countries concluded a *compromis* convention on 15 April 1935, whereby Canada agreed to pay $350,000 for damage caused up to 1932, while the question of subsequent liability and prevention was submitted to an arbitral tribunal (Jan Frans Hostie, Belgium; Robert A.E. Greenshields, Canada; Charles Warren, USA). In its first decision on 16 April 1938, the tribunal evaluated the further damage between 1932 and 1937 at $78,000 dollars, and prescribed provisional remedial measures.


‘Claim of the United States for amount of money expended in the investigation, preparation and proof of its case denied as they were in the nature of expenses of the presentation of the case, which, according to the Arbitration Convention, are to be paid by each government; nor are such costs claimable under the heading of damages. When a state espouses a private claim on behalf of one of its nationals, expenses which the latter may have incurred in establishing or prosecuting his claim prior to espousal by the government may, under appropriate conditions, be legitimately included in the claim, but the Tribunal knew of no case in which a government has sought or been allowed indemnity for expenses incurred in preparing the proof or presenting a national or private claim before an international tribunal.

In the absence of international cases on the subject, there are certain decisions of the Supreme Court of the United States dealing with both air pollution and water pollution which may legitimately be taken as a guide in this field of international law where no contrary rule prevails in international law and no reason for rejecting such precedents can be induced from the limitation of sovereignty inherent in the Constitution of the United States.
The Tribunal finds that under the principles of international law, as well as the law of the United States, 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, when the case is of serious consequence and the injury is established by clear and convincing evidence.

The Tribunal therefore holds that the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter and that it is the duty of the Government of the Dominion of Canada to see to it that this conduct is in conformity with the obligation of the Dominion under international law as herein determined.

No damage has occurred since the previous award of the Tribunal.

The Trail Smelter shall be required to refrain in the future from causing any damage through fumes in the State of Washington. To avoid such damage, the operations of the Smelter shall be subject to a regime or measure of control as provided in the present decision. Should such damage occur, indemnity to the United States shall be fixed in such manner as the Governments acting under the convention may agree upon.'