

The Trail Smelter Case Re-examined: Examining the Development of National Procedural Mechanisms to Resolve a Trail Smelter Type Dispute

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Keywords

Trail Smelter, Procedural Mechanisms, Transboundary Pollution, Dispute Settlement.

Abstract

This article re-examines the iconic Trail Smelter dispute. The article discusses the way a modern day Trail Smelter type dispute would be dealt with in the current time. The article examines the opportunities of resolving such a dispute using national mechanisms. Consequently, the United States and Canadian courts are examined in terms of their applicability to a modern day Trail Smelter type dispute. The classic obstacles that prevented access to these courts in the original Trail Smelter dispute are described, subsequently the current status of these obstacles is assessed.

The evaluation indicates that the national mechanisms to deal with a Trail Smelter type dispute have gone through a pronounced development. Whereas Canadian courts are still reluctant to exercise their jurisdiction extraterritorially, recent legislation seems to indicate that in the present day a Trail Smelter dispute could potentially fall within the jurisdiction of a United States court.

Overall the thesis indicates that national mechanisms have started to fill the void that is left by the lack of decisive action that can be taken using international mechanisms. The current situation shows an increasing willingness to provide opportunities for resolving transboundary disputes at the private party level.

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I. Introduction

To study international environmental law without being confronted with the Trail Smelter case is like studying literature without ever coming across the works of William Shakespeare. The drawn-out dispute¹ between the United States and Canada, concerning the damage caused to property in the former by air pollution originating in the latter, has played an important role in the shaping and developing of international environmental law. Some scholars have even gone so far as to apply lessons learned from the Trail Smelter case to issues beyond the scope of international environmental law, such as terrorism² and internet torts.³

The brunt of the attention paid to the Trail Smelter dispute has focused on the role it has played in the substantive development of international environmental law. The groundwork laid by the arbitral tribunal in establishing the principle that a State shall not ‘(...) permit the use of its territory in such a manner as to cause injury in or to the territory of another (...)’⁴ is a commended achievement of the Trail Smelter dispute. However, the remarkable fact that an arbitral tribunal was granted the power to lay this groundwork is an equally formidable achievement. A dispute that originated between two private parties ‘(...) quickly escalated to the highest levels of the Canadian and US government’.⁵ These governments in turn granted binding decision making power to an ad-hoc tribunal. This marked the first and only time such a procedure was followed to resolve a private dispute concerning international environmental damage.⁶ Thus, although the substantive achievements of the Trail Smelter case tend to outshine the procedural ones, to underestimate the worth of the procedural issues in the Trail Smelter dispute would be a mistake.

The unique nature of the procedural resolution to the Trail Smelter dispute raises the issue of how a similar dispute would be dealt with today. Industry has developed greatly in the 70 odd years since the resolution of the Trail Smelter dispute. Fortunately, awareness of the potential damage of air pollution as well as the realization that it must be remedied has also risen. The quickest and most obvious method to deal with a Trail Smelter type dispute between private parties would be to allow national courts to exercise jurisdiction over such a dispute. This article examines which obstacles prevented national courts from exercising jurisdiction during the original Trail Smelter dispute. Subsequently, it is determined whether a contemporary Trail Smelter type dispute would still face these barriers or if recourse to a national court is in the present day a real possibility.

In taking the Trail Smelter dispute as an anchor to compare the availability of access to national courts at the time of the dispute and today, it becomes possible to concretely determine relevant changes and developments. For this comparison to be accurate it is vital to accurately determine the steps that were taken in the classic Trail Smelter dispute to turn a dispute between private parties into an international issue. These steps will be listed and explained in section 2 of this article. Section 3 will assess the dispute settlement procedures available in the national courts of the United States and Canada respectively. Finally, section 4 will give an answer to the question: How has access to private party litigation in cases of transboundary air pollution evolved since the Trail Smelter dispute?

II. The procedural progression of the original Trail Smelter dispute

The central issue in the Trail Smelter case was pollution originating at the Cominco Smelter (at the time it was called the Consolidated Mining and Smelting Company) at Trail, British Columbia (Canada) causing damage to farms in Steven’s County, Washington (United States). The total distance between the affected farms and the Smelter was less than 30 kilometers. Unfortunately, within this 30 kilometer stretch lies the US/Canadian border. The presence of this border complicated the case significantly and provided the initial impetus to the unique procedural progression of the Trail Smelter dispute.

The first significant development in the Trail Smelter dispute was its transition from a dispute between two private parties into a dispute between two states. One of the circumstances that led to the internationalizing of the dispute is the above mentioned US/Canadian border. In the past the activities at the Cominco Smelter had affected Canadian property. Cominco

1 It lasted 13 years, from 1928 to 1941.

2 P Dupuy and C Hoss, ‘Trail Smelter and Terrorism: International Mechanisms to Combat Transboundary Harm’ in RM Bratspies and RA Miller (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge University Press 2006) 225-239.

3 HP Hestermeyer, ‘Transboundary Harm: Internet Torts’ in RM Bratspies and RA Miller (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge University Press 2006) 268-280.

4 CPR Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (Kluwer Law International 2000) 261.

5 JD Wirth, *Smelter Smoke in North America: The Politics of Transborder Pollution* (University Press of Kansas 2000) 1.

6 JH Knox, ‘The Flawed Trail Smelter Procedure: The Wrong Tribunal, the Wrong Parties, and the Wrong Law’ in RM Bratspies and RA Miller (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge University Press 2006) 66.

had settled such claims ‘(...)by entering into smoke easements on the properties affected, or by outright purchase’.⁷ However, because of the 1921 Alien Land Law, foreigners were not allowed to own land in Washington. Consequently, Cominco could not purchase the land of the affected farmers in Stevens County. Some of the Stevens County farmers were persuaded with monetary settlements to drop their claims but the majority was not and attempted to move forward with the dispute. Further, direct negotiation between the farmers and Cominco was unsuccessful and therefore the dispute would have had to enter a more litigious phase.

An ostensibly logical consequence of the failure of direct negotiations would have been for the farmers to take Cominco to court. Professor Caron succinctly summed up the difficulty faced in the Trail Smelter dispute with respect to taking such action:

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.⁸

This statement refers to the legal and, to some extent, political barriers that made it impossible to settle the dispute at the national level. The most relevant problem from the perspective of the farmers was that it was legally impossible to have the Cominco Smelter, a Canadian company, appear before a Washington court. In addition, the farmers were understandably unwilling to bring their case before a Canadian court (in fact this would have been impossible even if they had been willing to do so). With no means of personally engaging in a dispute settlement procedure the Stevens County farmers turned to their congressmen for help. These in turn did not wish to get involved in the complexities of a transboundary issue and brought the dispute to the attention of the federal government. Finally, in 1927 the US Government took up the case and in doing so transformed a private dispute into a public international one.⁹

For the purpose of this article it will not be necessary to consider the subsequent developments in the Trail Smelter dispute. Suffice it to say that the dispute finally reached a mutually acceptable resolution in 1941. The great length of time it took to resolve the Trail Smelter dispute is one of the reasons why resolution on the national level would be preferable.

III. Proceedings before national courts

III.1. Introduction

At first glance it seems no more than logical that the issue at hand in the Trail Smelter arbitration, being a private dispute, should be put before a national court. As John E. Read put it, to do otherwise would even seem unwarranted as:

[t]he subject matter of the dispute did not directly concern the two governments; nor did it involve claims by US citizens against the Canadian government. It did not seem to come within any of the ordinary categories of arbitrable international disputes.¹⁰

On the surface it seems there were two conceivable scenarios in which national jurisdiction could have played a role. The first scenario involved accessing the courts in the state where the damage of the pollution was felt, ie the US farmers bringing a claim in a US court. This would mean that a foreign company was sued for damages in a US court. The second scenario involved bringing a claim in the court of the state where the pollution originated, ie the US farmers bringing a claim in a Canadian court. In this case foreign nationals would be bringing a case against a national company in a Canadian court.

It has already been established in the previous section that, at the time of the dispute, the first scenario was legally unviable while the second scenario was both legally unviable as well as undesirable from the standpoint of the US farmers. Since the Trail Smelter dispute there has been a strong movement towards granting those affected by environmental issues a voice in relevant proceedings. One of the more globally significant examples of this can be found in principle 10 of the 1992 Rio Declaration on public participation. This principle states:

7 Wirth (n 5) 3.
 8 DD Caron, ‘Foreword’ in RM Bratspies and RA Miller (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge University Press 2006) xxi.
 9 Romano (n 4) 263.
 10 JE Read, ‘The Trail Smelter Dispute [Abridged]’ in RM Bratspies and RA Miller (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge University Press 2006) 27.

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.¹¹

In the last sentence of the principle specific reference is made to the provision of '[e]ffective access to judicial and administrative proceedings (...)'¹² The principle thus seems to advocate a removal of barriers that would prevent such effective access. However, it should be noted that the principle speaks specifically of these provisions '[a]t the national level (...)'¹³ Therefore, it is somewhat controversial whether principle 10 can be interpreted as providing for access to justice on a transnational level.

Principle 10 of the Rio Declaration is far from being the only recent push towards more involvement of private citizens in environmental issues.¹⁴ Besides the push for more effective access to justice of private citizens in general, there has also been a notable improvement in the provision of equal access to justice specifically in cases of transboundary harm. To some extent these equal access initiatives have occurred on the global level, for example in the form of the recommendation of the Organization for Economic Co-operation and Development (hereinafter: OECD) on the Implementation of a Regime of Equal Right of Access and Non-Discrimination in relation to Transfrontier Pollution.¹⁵ In addition to initiatives on the global level, the US and Canada have engaged in bilateral initiatives specifically geared towards lowering or removing legal barriers preventing access to justice in cases of transboundary air pollution. Examples of this are the American Bar Association (ABA) and Canadian Bar Association's (CBA) joint draft treaty as well as the Transboundary Pollution Reciprocal Access Act, which are dealt with below. Consequently, it would appear that in the modern time a Trail Smelter dispute would have a greater chance of finding resolution on the level of a private dispute than it did at the time of the Trail Smelter dispute. This is precisely what will be examined in the present section.

The possibility of access to justice in a US court as well as the possibility of access to a Canadian court will be dealt with respectively. The legal barriers that prevented national jurisdiction at the time of the Trail Smelter dispute will be established and for each barrier it will be determined whether it persists today or whether it has been remedied by the development of novel legal instruments.

III.2. United States court

As mentioned above one possible approach to resolving the Trail Smelter dispute was for the US farmers to bring their case in front of a US court. At the time the Trail Smelter dispute took place the farmers did not succeed in following this course of action. Several obstacles, both legal and political, explain the inability of the farmers to have their claim heard by a US court. However, these obstacles have not remained static in the last 70 years; some have disappeared while others have changed.

III.2.A. Political reciprocity

One relevant issue at the time was of a political nature. This is the issue of reciprocity. At the time the dispute took place, the US was engaged in activities in Detroit, Buffalo and Niagara falls that were of a similar nature to the activities at Trail Smelter.¹⁶ Thus, assuming jurisdiction over a case involving pollution by a Canadian company created a real risk since '[i]f the United States can apply its law extraterritorially, and such application is reasonable and appropriate, then presumably Canada can do the same'.¹⁷ This issue, aptly described by Austen L. Parrish as the 'glass house' concern, inspired the US to approach the Trail Smelter dispute cautiously. It should be noted that, while the issue of reciprocity was certainly of influence on the

11 Rio Declaration on Environment and Development 1992, principle 10.

12 *ibid.*

13 *ibid.*

14 Another significant example is the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entered into force 10 September 1997) 1989 UNTS 309. However, since neither Canada nor the US is a party to this Convention it is beyond the scope of the present article.

15 Organisation for Economic Co-operation and Development 'Recommendation on the Implementation of a Regime of Equal Right of Access and Non-Discrimination in relation to Transfrontier Pollution' (17 May 1977) C(77)28.

16 AP Rubin, 'Pollution by Analogy: The Trail Smelter Arbitration [Abridged]' in RM Bratspies and RA Miller (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge University Press 2006) 52.

17 AL Parrish, 'Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-US Transboundary Water Pollution Disputes' (2005) 85 Boston University Law Review 363, 409-410.

way the Trail Smelter dispute played out, it was most definitely not a key issue. Legal barriers that prevented a US court from exercising jurisdiction over the case were firmly in place at the time and even without the added issue of reciprocity it is highly unlikely that the Trail Smelter dispute could have been resolved in front of a US court. In the contemporary time these legal barriers are not as formidable as they once were. Consequently, the reciprocity issue is more relevant nowadays as it can influence a judiciary in its decision to take either a progressive or conservative approach.

In the present day political reciprocity can potentially have a more influential role than it did at the time of the Trail Smelter dispute. One notable difference between the situation back then as compared to today is that currently the US could face more substantial consequences if Canada chose to reciprocate any assertion of jurisdiction over a case involving transboundary air pollution. At the time of the Trail Smelter dispute the damage caused in Stevens County was rare in that it could be traced back to its source with considerable accuracy. In the present day even relatively long-range transboundary air pollution can be linked to a source with reasonable accuracy.¹⁸ A prime example of this is the transboundary air pollution in the province of Ontario, Canada. Research has shown that more than half of all air pollution in Ontario stems from US sources.¹⁹ The damage caused by transboundary air pollution in Ontario amounts to \$5.2 billion every year.²⁰ Thus if national courts in the US assert jurisdiction over a Trail Smelter type dispute there is a significant chance that courts in Ontario would reciprocate. This would then have far-reaching consequences for the US based industry causing the pollution. It should be noted that in the US and Canada, as in any well functioning democracy, the judiciary functions independently from the legislative and executive powers. As such the above mentioned political motivation cannot serve as the sole reason to discard the option of US national jurisdiction. However, it would be naïve to assume that political considerations such as the threat of reciprocity do not play a role in judicial proceedings. Clearly the knowledge that Canadian courts could reciprocate an assertion of jurisdiction by a US court does provide a strong argument for a conservative look at the legal barriers that are in place so as not to endanger US interests. It is thus the legal barriers themselves that are of most relevance in determining the possibility of US jurisdiction in the end.

III.2.B. Personal jurisdiction

One important legal barrier that prevented a US court from hearing the Trail Smelter case was the issue of asserting personal jurisdiction over a foreign company. At the time of the dispute a US court would have been unlikely to assert such jurisdiction. As Professor Parrish explained, '[j]urisdiction, for the longest of times, ended at the border'.²¹ However, this certainly is an issue around which clearer and more permissive laws have developed since then.

Today a US court is more likely to claim personal jurisdiction over a foreign company causing damage in the US. The rule of thumb here is that there must be some form of minimum contact between the defendant and the forum state which would result in the defendant being able to reasonably foresee being called to court in that state. This rule was established in the case of *World-Wide Volkswagen*²² to make sure that one state would not violate the sovereignty of another. The case involved a couple living in Oklahoma bringing a case against an automobile retailer in New York. The couple had purchased a car from this retailer in New York but the couple had since moved to Oklahoma. They had then gotten in an accident in Oklahoma and wished to hold the retailer liable for the injuries they suffered. As the retailer did not do business in the state of Oklahoma the court found that it could not exercise jurisdiction over the defendant as minimum contact between the state and the defendant was absent.²³ In the *Calder v Jones* case the criteria for a minimum connection were elaborated upon. In this case the plaintiff was an actress who sued a magazine that wrote a libelous article about her. A relevant fact of the case was that although the magazine was produced in Florida it was widely distributed in California (the state where the case was brought to court).²⁴ It was explained in this case that the minimum connection could be said to exist where the conduct by the defendant is intentional and the brunt of the damage is suffered in the forum state.²⁵ At the time of the Trail Smelter dispute it might have been problematic to argue any form of intent on the part of Cominco, considering the lack of knowledge concerning the precise effects of emissions. However, in the present day, with the current knowledge that exists

18 MJ Robinson-Dorn, 'The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail for CERCLA' (2006) 14 New York University Environmental Law Journal 233, 235-236.

19 Press release by the Ontario Ministry of the Environment (June 2005) 1 <http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/std01_079137.pdf> accessed 23 May 2011.

20 *ibid.*

21 Parrish (n 17) 387.

22 *World-Wide Volkswagen Corp v Woodson* 444 US 297 (1980).

23 *ibid.*

24 *Calder v Jones* 465 US 783 (1984).

25 *ibid.*

concerning air currents and the damaging effect of sulfur fumes, it would be difficult for Cominco to argue that the pollution in Stevens County was unintentional. Cominco would thus have been reasonably aware that damage would be suffered in the US. In addition, it would be in the interest of the Stevens County farmers to have recourse to a forum for damage done by a foreign company.²⁶ It is important to note that the above two cases concerned disputes between parties residing in different US states rather than parties residing in different countries. However, the minimum contact rule established in these cases is also relevant for issues between parties from different countries. This is evidenced by the reference of the minimum contacts rule and the *World-Wide Volkswagen* case in the *Omi Holdings Inc v Royal Ins Co of Canada* case,²⁷ which will be discussed below.

Not all recent cases have shown a willingness to assert jurisdiction over foreign defendants. An example of a decision by a US court being reluctant to claim personal jurisdiction exists in the case of *Omi Holdings Inc v Royal Ins Co of Canada*.²⁸ In this case, a US company brought a claim in the district court of Kansas. The claim was against a Canadian insurance company that had refused to award the US company insurance coverage for a legal dispute the US company was engaged in with a third party. The court did find that the minimum contacts requirement was met by the fact that the insurance company specifically covered claims in, amongst others, the state of Kansas. However, the court decided that the burden placed upon the Canadian company to defend itself in a US court, where it would be unfamiliar with the legal system, outweighed the level of contact that existed between the Canadian company and the forum state.²⁹ This seems to indicate that the decision to claim personal jurisdiction can, in some cases, depend heavily on the balancing of interests done by the relevant court.

In general it can be said that it is now easier for US courts to establish personal jurisdiction over a foreign defendant based on the minimum contacts threshold. Catherine Cooper pointed out that:

In the United States, the mere occurrence of a harmful effect (sometimes in conjunction with some other connecting factor) may constitute a sufficient nexus with the forum(...).³⁰

The presence of a harmful effect in the forum state is covered by so-called 'long-arm' statutes which then allow the forum state to exercise personal jurisdiction over the entity causing the harmful effect. A prime example of a 'long-arm' statute that allows for a claim of personal jurisdiction based on the presence of a harmful effect is the Minnesota Environmental Rights Act.³¹ This act allows the state of Minnesota to exercise personal jurisdiction over a foreign corporation or a nonresident when he or it:

Commits or threatens to commit any act outside the state which would impair, pollute or destroy the air, water, land, or other natural resources located within the state(...).³²

This particular Act would clearly be applicable to a Trail Smelter type dispute. Consequently, if such a dispute were to arise between Minnesota and a Canadian province, a Minnesota court could certainly exercise jurisdiction over the Canadian company based on this act. While some other US states do have similar provisions in their statutes,³³ others, including Washington State, have less far reaching 'long-arm' statutes. In an exact replica of the Trail Smelter Dispute, a Washington court would thus not be able to refer to a clear cut long-arm statute, instead, it would have to assess whether the minimum contacts threshold is met and then determine whether having a Canadian company appear in front of a Washington court is reasonable under the circumstances.

In light of the above, it appears a reasonable deduction that the chance of an American court asserting personal jurisdiction over a foreign entity in a Trail Smelter type dispute is now significantly higher than at the time of the Trail Smelter dispute. The likelihood of a court claiming such personal jurisdiction still differs from state to state. While in some states (eg Minnesota)

26 *Burger King Corp v Rudzewicz* 471 US 462 (1985). In this case it was established that offering a forum for residents in legal disputes is a legitimate interest.

27 *OMI Holdings Inc v Royal Ins Co of Canada* 149 F3d 1086 (10th Cir 1998).

28 *ibid.*

29 *ibid.*

30 CA Cooper, 'The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques and Mechanisms' (1986) 24 *Canadian Yearbook of International Law* 247, 275.

31 Minnesota Statutes, para 116B.01-.14 (1971).

32 *ibid* para 116B.11(b) (2009).

33 Examples include Virginia: Virginia Statutes para 8.01-328.1 (2003) and Pennsylvania: Pennsylvania Statutes para 5322.5(d). For a complete list of all long-arm statutes see DL Doyle, 'Long-Arm Statutes: A Fifty-State Survey' (Vedder, Price, Kaufman & Kammholz PC 2003) <<http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/LongArmSurvey.pdf>> accessed 22 May 2011.

the exercising of personal jurisdiction in a Trail Smelter type dispute is practically guaranteed by 'long-arm' statutes, in other states (eg Washington) much will still be left to the discretion of the court and its application of the minimum contacts rule. However, it can be concluded that the exercise of personal jurisdiction in a Trail Smelter type dispute lies firmly in the realm of the possible. Yet if a US court is to jump the hurdle of asserting personal jurisdiction over a foreign entity it must then deal with the issue of extraterritorial application of national law.

III.2.C. Extraterritorial application of national law

Gerald Hess listed three situations in which the extraterritorial application of national law can be relevant. He did so specifically in relation to the application of the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter: CERCLA). However, his list is relevant to any extraterritorial application of national law. He states that extraterritorial application is relevant:

(...)if the potentially responsible party (...) is not a US citizen, the conduct does not take place in the United States, or the effects do not occur in the United States.³⁴

The classic Trail Smelter case involved the first and second item on the list as the Cominco Smelter was not a US citizen nor did it conduct its operations on US soil. It will be seen below that US courts are typically hesitant to assert extraterritorial jurisdiction. Consequently, the more issues on the above lists apply to a particular case the less likely it becomes that the extraterritorial application of national law will be asserted.

Historically there has been a deep and strong presumption against the extraterritorial application of national law. This presumption was made apparent, amongst others, in the *American Banana Company* case. The *American Banana Company* case involved a dispute where a corporation in the state of Alabama brought a claim against a corporation based in New Jersey. The claim concerned damage caused to a plantation of the plaintiff located in Panama. The damage was not directly caused by the defendant but the defendant allegedly incited the government of Costa Rica to appropriate parts of the plantation. With respect to the case the US Supreme Court stated:

(...)the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.³⁵

At the time the damage was done, Panama had already become an independent country and therefore the Supreme Court deemed US law inapplicable to the dispute.

In the Trail Smelter case the act that caused the damage took place in Canada, and US law would thus be inapplicable. Considering that the *American Banana* case was also relatively current at the time of the Trail Smelter dispute, it would have been surprising had US jurisdiction been claimed. In addition, there was the issue that the running of a smelter was not prohibited by law nor was the negative externality that was caused by the pollution. Indeed litigation pertaining to damage produced by lawful operation was still a novel notion at the time.

The presumption against extraterritoriality remains an important concern in modern-day cases involving the issue of extraterritorial application of laws. The presumption was and still is explained by referring to congressional intent.³⁶ In the case of *Foley Brothers v Filardo* it was argued by the court that Congress is primarily concerned with establishing legislation to cover domestic affairs. Consequently, the court stated that '(...)legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States(...)'.³⁷ The burden of proof thus rests firmly on those trying to argue for extraterritorial application of a national law. They must demonstrate that Congress intended for the relevant legislation to apply extraterritorially and in case the language used in the legislation proves ambiguous or indeterminate the presumption against extraterritoriality prevails and extraterritorial application must be rejected. Clearly this reasoning establishes a firm barrier against extraterritorial application of national laws. Fortunately, around the same time as the *Foley Brothers* case took place another court decision established what Michael Robinson-Dorn described as a '(...)

34 GF Hess, 'The Trail Smelter, the Columbia River, and the Extraterritorial Application of CERCLA' (2005) 18 Georgetown International Environmental Law Review 1, 25.

35 *American Banana Co v United Fruit Co* 213 US 347 (1909).

36 Hess (n 34) 26-27.

37 *Foley Bros v Filardo* 336 US 282 (1949).

counterbalance to, or proxy for, the presumption against extraterritoriality'.³⁸

Shortly after the Trail Smelter dispute was concluded a case which provided an exception to the prohibition on extraterritorial application of national law took place. This is the *US v Aluminum Co of America* case.³⁹ The case involved an anti-trust claim against an American company that had acquired an Italian Company. In this case it was stated that:

(...)any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.⁴⁰

This created the so called 'effects doctrine' where the US could claim jurisdiction over intentional acts that had an effect on US territory. The US is particularly notorious for exercising this 'effects doctrine' and from its original conception onwards protests by other countries about the legality of the doctrine have been plentiful.⁴¹ It should be noted that cases where the 'effects doctrine' was successful typically involve anti-trust legislation rather than environmental law. In fact the Environmental Law Institute has rightly pointed out that '(...) the presumption against extraterritoriality has been applied with greater force to environmental laws'.⁴² Jonathan Turley even went so far as to claim that the presumption against the extraterritorial application of environmental laws constitutes an all but complete barrier for those suffering from transboundary pollution to seek justice.⁴³ However, he has pointed out that this stricter application of the presumption against extraterritoriality concerning environmental law is not the result of a bias against environmental issues '(...)but rather a bias in favor of market interests'.⁴⁴

Even in the field of market interests, perhaps as a response to the above mentioned international objection to the 'effects doctrine', the 'effects doctrine' has become more and more limited in scope.⁴⁵ Furthermore, the general presumption against extraterritorial application of national laws was reiterated authoritatively by the US Supreme Court in the *Aramco* case.⁴⁶ The case involved a claim brought against the Arabian American Oil Company, which is a Delaware corporation, by the plaintiff who worked for the company in Saudi Arabia but was fired. The plaintiff claimed he was fired due to his race, religion and national origin. Therefore, he sought to bring a discrimination claim in the Texas district court. The Supreme Court upheld the earlier dismissal of the claim since US law did not apply to Americans employed abroad by American companies. The Supreme Court made it clear that they '(...)assume that Congress legislates against the backdrop of the presumption against extraterritoriality'.⁴⁷ This statement indicates that US courts are unwilling to go out on a limb in interpreting legislation to apply extraterritorially unless the legislation stipulates that it does. Michael Robinson-Dorn was critical of this conservative attitude concerning environmental legislation in general and CERCLA in particular.⁴⁸

He seemed to argue for an increased reliance on the effects doctrine to overcome the presumption against extraterritorial application of national laws.⁴⁹ The *Pakootas* case dealt with below was argued by Robinson-Dorn to provide a prime example of a case where the relevant legislation, in this case CERCLA, shows a clear congressional intent and thus warrants extraterritorial application.⁵⁰ As will be seen below, the court found another way to deal with the issue of extraterritorial application of national laws.

A recent and particularly relevant example of the reluctance of US courts to ignore the presumption against the extraterritorial application of laws is evident in the *Pakootas v Teck Cominco Metals Ltd* case.⁵¹ The case actually involved the same Cominco smelter that was the subject of the Trail Smelter dispute. However, instead of air pollution, this particular case dealt with the

38 Robinson-Dorn (n 18) 296.

39 *US v Aluminum Co of America* 148 F2d 416 (1945).

40 *ibid.*

41 MN Shaw, *International Law* (Cambridge University Press 2008) 689.

42 T Bernstein, *Strengthening US-Mexico Transboundary Environmental Enforcement: Legal Strategies for Preventing the Use of the Border as a Shield Against Liability* (Environmental Law Institute 2002) 37.

43 J Turley, 'When in Rome: Multinational Misconduct and the Presumption Against Extraterritoriality' (1990) 84 *Northwestern University Law Review* 598, 600; K McDonald, 'Note: *Pakootas v Teck Cominco Metals Ltd*: Finding a Sustainable Solution to Transboundary Pollution' (2006) 41 *Georgia Law Review* 311, 321.

44 Turley (n 43).

45 Shaw (n 41) 689.

46 *EEOC v Arabian American Oil Company and Aramco Services* 499 US 244 (1991).

47 *ibid.*

48 Robinson-Dorn (n 18).

49 *ibid* 296-299.

50 *ibid.*

51 *Pakootas v Teck Cominco Metals Ltd* F3d 1066 (9th Cir 2006).

dumping of pollutants in the Columbia River which caused damage to be suffered in the US. A confederation of American Indian tribes known as the Colville tribes first petitioned the Environmental Protection Agency (hereinafter: EPA) with a complaint about the pollution. EPA then issued a Unilateral Administrative Order (hereinafter: UAO) which required Teck Cominco Metals, Ltd. (hereinafter: Teck Company) to investigate the pollution. However, Teck Company failed to follow the UAO and EPA did not seek to enforce it. This moved the Colville tribes to bring a claim to the district court of Washington to enforce the UAO. They claimed that Teck Company had engaged in long-term dumping in the Columbia River and that Teck Company was well aware of the likely damage such dumping could cause. They accordingly argued that Teck Company was liable under CERCLA. Teck Company disputed that CERCLA could be applied to a Canadian company concerning actions it had taken in Canada. They were strongly supported by the Canadian government in this claim. The Canadian government pushed heavily for a diplomatic resolution to the conflict and contested the applicability of CERCLA to the Cominco Smelter.⁵² It is this last element that makes the case particularly relevant to the issue of extraterritorial application of environmental law. It seems that applying CERCLA to the present case would indeed involve such extraterritorial application. This is precisely what the Washington district court decided. Quite remarkably they found that such extraterritorial application was in fact possible. The court stated:

CERCLA affirmatively expresses a clear intent by Congress to remedy “domestic conditions” within the territorial jurisdiction of the US (...) [and] that the presumption [against extraterritoriality] is not applied where failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States.⁵³

Obviously this is not an example of a US court stringently adhering to the presumption against the extraterritorial application of laws as hinted at above. The decision by the Washington district court actually seems to establish a relatively low threshold for the extraterritorial application of law. The court merely referred to the presence of ‘(...)adverse effects within the United States(...)’⁵⁴ to justify such application. The above alluded to example of a court’s reluctance to engage in extraterritorial application did not refer to the decision by the Washington district court but rather to the subsequent decision by the Ninth Circuit court. The Ninth Circuit court also claimed that Teck Company was liable in the present case. However, this court ruled that to establish this liability the extraterritorial application of CERCLA was not necessary. Under CERCLA a ‘facility’ is defined as follows:

Any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, *or otherwise come to be located*; but does not include any consumer product in consumer use or any vessel.⁵⁵

The Ninth Circuit court used the phrase ‘(...)or otherwise come to be located(...)’ as an excuse to define the place where the Teck Company pollution washed up as a part of the ‘facility’. Thus it was able to argue that the relevant facility was located in the US and that CERCLA was therefore not applied extraterritorially. With respect to professor Hess’s list discussed above, the reasoning of the court means there is only one issue of extraterritoriality in this case, namely, the nationality of the potentially responsible party. Conduct taking place outside of the US would typically also be a factor in this case, however, the reasoning of the court removes this issue from the present case, thus lowering the barrier to extraterritorially apply CERCLA. The creative approach by the Ninth Circuit court led to the same result as the approach by the Washington district court. The only difference was that the former approach ostensibly does not involve the extraterritorial application of CERCLA. This illustrates that US courts are willing to go to great lengths to employ creative reasoning to avoid dealing with the tricky issue of extraterritorial application of laws. In his paper on this case, Libin Zhang rightly pointed out that the reasoning followed by the Ninth Circuit court does little to change the repercussions of the decision. He stated:

Despite the Court’s assertions to the contrary, the *Pakootas* decision is essentially an extraterritorial application of CERCLA to the foreign facility of a foreign party.⁵⁶

Therefore, the decision set a meaningful precedent that severely weakens the barrier to the extraterritorial application of, at least, CERCLA. In the conclusion of his paper, professor Hess noted that the *Pakootas* case signified a new way of approaching the extraterritorial application of CERCLA.⁵⁷ Kate McDonald even went as far as claiming that the *Pakootas* decision will

52 Diplomatic Note, ‘Embassy of Can to US Dep’t of State’ (8 January 2004) <<http://www.teckcominco.com/articles/roosevelt/motionattach-c-040102.pdf>> accessed 22 May 2011.

53 *Pakootas v Teck Cominco Metals Ltd* 2004 WL 2578982 [9].

54 *ibid.*

55 42 USC, s 9601 (2006) (emphasis added).

56 L Zhang, ‘*Pakootas v Teck Cominco Metals Ltd*’ (2007) 31 *Harvard Environmental Law Review* 545, 551-552.

57 Hess (n 34) 56.

open the door for numerous similar cases. She stated that:

Whether CERCLA is interpreted to apply extraterritorially or interpreted to apply to domestic sites where pollutants react, the end result is that the reach of CERCLA has been interpreted to potentially apply to numerous foreign parties.⁵⁸

The fact that the court did not qualify the application of CERCLA in this case as extraterritorial, does leave some room for divergent decisions on similar cases in the future. It should also be noted that in a Trail Smelter type dispute involving air pollution it might be significantly more difficult to determine a specific 'location' where air pollution '(...)come[s] to be located(...)'.⁵⁹ Nevertheless, if a modern Trail Smelter dispute was to arise and an attempt was made to bring it before a US court, a reference to the *Pakootas* case would certainly help the plaintiff get around the barrier of the presumption against the extraterritorial application of law.

III.2.D. Extraterritorial enforcement of court judgments

In case applicants in a Trail Smelter type dispute succeed in overcoming the above mentioned barriers of personal jurisdiction and extraterritorial application of law, there is a third issue that might still prevent them from obtaining any potential compensation awarded them. This is the extraterritorial enforcement of the court's decision. Although a US court can potentially exercise jurisdiction over a Canadian company and even apply its laws to it extraterritorially, this is where its influence ends. If the company has no assets in the US there is no way for a US court to directly enforce a reward of monetary compensation. Therefore, the plaintiff must rely on a Canadian court to enforce the US court's decision.

At the time of the Trail Smelter dispute, a Canadian court would not have been able to enforce the decision of a US court. The rule at the time, and long thereafter, was established in the case of *Emanuel v Symon*⁶⁰ The case involved enforcing a decision by an Australian court in England. Initially the trial court agreed to execute the judgment. However, the English Court of Appeals overturned this ruling and refused to enforce the decision. In addition, the Court of Appeals established a list of circumstances in which a foreign judgment would be enforced:

(1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained.⁶¹

In the Trail Smelter dispute none of these situations apply. Consequently, a Canadian court would not have enforced a US court's decision on the dispute. A modern day Trail Smelter dispute would also fail to qualify as one of the situations described in the old rule. However, in the year 1990 the Canadian Supreme Court ruled on the case of *Morguard Investments Ltd v De Savoye* and established a new rule to decide if a Canadian court could enforce a foreign court's decision.⁶² It should be noted that the case itself did not involve different countries but rather different provinces of Canada. The claim was brought by mortgagees in Alberta against their mortgager who had once operated in Alberta but had since moved to British Columbia. The mortgagees had started and won a lawsuit in Alberta and now wished to have the decision enforced in British Columbia.⁶³ The Canadian Supreme court found that the courts in one territory should enforce decisions made by a court in another territory provided that court has rightly exercised its jurisdiction.⁶⁴

The *Morguard* case left the scope of its decision rather ambiguous. From the judgment itself it was not clear whether it concerned only Canadian court decisions or whether decisions of a foreign court were also covered by the Morguard rule. This ambiguity did not stop Canadian courts from rapidly employing the Morguard rule to justify the enforcement of foreign court judgments. In fact Joost Blom has pointed out that, apart from one exception,⁶⁵ no subsequent judgment exists where

58 McDonald (n 43) 338.

59 42 USC, s 9601 (2006).

60 *Emanuel v Symon* 1 IKB 302 (1908).

61 *ibid.*

62 *Morguard Investments Ltd v De Savoye* 3 SCR 1077, 76 DLR (4th) 256 (1990).

63 *ibid.*

64 J Blom, 'The Enforcement of Foreign Judgments: Morguard Goes Forth Into the World' (1997) 28 Canadian Business Law Journal 373, 376.

65 *Evans Dodd v Gambin Associates* 17 OR (3d) 803, 26 CPC (3d) 189 (1994).

it has been claimed that the *Morguard* rule is inapplicable to decisions by foreign courts.⁶⁶

The *Morguard* judgment did not provide a detailed test to determine if a court had rightly exercised its jurisdiction. In a subsequent judgment⁶⁷ judge La Forest, who had presided over the *Morguard* case, explained that:

The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these.⁶⁸

Although judge La Forest himself stated that no exact test was and can be defined, the general test employed in the *Morguard* case, namely the real and substantial connection test,⁶⁹ is often used to determine whether exercising jurisdiction was reasonable.

This test broadly stated that:

(...)there must be a real and substantial connection between the state, the dispute and the parties, with the rights of the defendant being an important part of the analysis.⁷⁰

Due to the fact that what exactly makes a connection 'real' or 'substantial' is undefined, a court has relatively broad discretion in making a decision on the merits of a case. Therefore, it can be debated whether a Trail Smelter type dispute might meet the threshold of a real and substantial connection.

A relatively recent decision has certainly made it more likely that a Canadian court will enforce a US court's decision in a Trail Smelter type dispute. In the case of *United States of America v Ivey*,⁷¹ Canadian defendants were held liable under CERCLA because they had an ownership interest in an American company dealing with waste disposal outside of Detroit.⁷² The Ontario Court of Appeals found that CERCLA was similar in nature to the Ontario Environmental Protection Act.⁷³ This similarity then warranted enforcement of the CERCLA based US court decision. Libin Zhang pointed out that CERCLA and the environmental statutes of British Columbia are also similar.⁷⁴ Consequently, if in a present day Trail Smelter dispute a claimant succeeds in bringing a claim under CERCLA, the corresponding decision is not unlikely to be enforced by a Canadian court. The issue of enforcing the decision of a foreign court could be avoided if it were possible to adjudicate a Trail Smelter type dispute in a Canadian court in the first place. Whether this is possible or not will be examined below.

III.3. Canadian court

The US farmers bringing their claim before a Canadian court is the second manner in which this dispute could reach a resolution in a national court. Above it has been demonstrated that, for a victim of a Trail Smelter type dispute, to bring a claim in his or her own country raises several difficult issues. The barriers provided by the issue of personal jurisdiction, extraterritorial application of laws and finally finding enforcement of a jurisdiction in the court of the defendant, although they are not insurmountable, are certainly not to be taken lightly. In fact, the difficulties associated with bringing a transfrontier pollution case before the court where the injury occurred led professor Lammers to state, specifically with respect to the enforcement issue, that:

Indeed the obstacles may be such that instead of having resort to its own courts and all the practical advantages which such a resort would imply, the plaintiff would still be better off instituting proceedings against the defendant in the courts of the country of origin of the interference.⁷⁵

The biggest benefit of bringing a Trail Smelter type case before a court in the country of origin is that the defendant is a

66 Blom (n 64) 380.

67 *Hunt v T&N plc* 4 SCR 289 (1993).

68 *ibid.*

69 *Morguard Investments Ltd v De Savoye* 3 SCR 1077, 76 DLR (4th) 256 (1990) [1108].

70 KMK Matthews, 'Comment: The Recent Trend of Canadian Enforcement of United States Judgments and the Future of the Trend Under a Proposed Private International Law Treaty' (2000) 19 Journal of Law and Commerce 309, 313.

71 *United States of America v Ivey* 26 OR (3d) 533 (1995).

72 Zhang (n 56) 558.

73 *United States of America v Ivey* 26 OR (3d) 533 (1995).

74 Zhang (n 56) 551-552.

75 JG Lammers, *Pollution of International Watercourses* (Martinus Nijhoff Publishers 1984) 49.

Canadian company and is operating in Canada. The issue of extraterritorial application of laws thus does not enter into the matter nor does asserting personal jurisdiction over the defendant. In addition, the enforcement issue is not problematic in this scenario as the relevant court actually has enforcement jurisdiction over the territory the defendant resides in. Toby Kruger, like professor Lammers, has been a strong proponent of resolving transboundary pollution issues in this matter. Specifically in relation to the above mentioned *Pakootas* case, he made the argument that referring the case to a Canadian court would be ‘(...)more consistent with international environmental law(...)’⁷⁶ and would be possible in light of the principle of non-discrimination.⁷⁷

Recourse to a Canadian court in Trail Smelter type dispute is not without problems though. A major barrier at the time of the Trail Smelter dispute was the local action rule, examined in detail below. Although this rule persists to this day, there have recently been initiatives to remedy the blocking power of the local action rule in cases involving transboundary pollution. Beside the local action rule there is also the possibility that a Canadian court might resort to a *forum non conveniens* claim to avoid exercising jurisdiction over a Trail Smelter type issue. These two issues and the modern day remedies to the barriers they create are dealt with below.

III.3.A. *Forum non conveniens*

One obstacle to a Canadian court exercising jurisdiction could be the principle of *forum non conveniens*. This involves the notion that a case is better served by being heard in an alternative forum. At the time the Trail Smelter dispute took place the whole notion of dealing with the case in a national court was relatively quickly dismissed, therefore, a real discussion over which countries’ national court would be more suitable did not materialize. Since claiming jurisdiction over the Trail Smelter case would have been a diplomatically sensitive issue at the time it can certainly be said that resorting to the principle of *forum non conveniens* would have been a viable option for a Canadian court.

Nowadays resorting to the principle of *forum non conveniens* has become much more unlikely. With the ever increasing awareness of human rights in the past several decades, the principle of *forum non conveniens* has become quite controversial. The principle of *forum non conveniens* quite clearly conflicts with principles of non-discrimination and equal access to courts. The United Nations International Covenant on Civil and Political Rights (hereinafter: ICCPR) is one of the most authoritative examples of a human rights instrument that demands equality with respect to judicial proceedings. Article 14 of the ICCPR states ‘[a]ll persons shall be equal before the courts and tribunals’.⁷⁸ The principle of *forum non conveniens* by definition applies to potential plaintiffs who are non-native to the jurisdiction where a remedy is sought. Therefore, application of the principle must necessarily involve courts treating foreigners differently from nationals. Hence, the principle runs counter to the notion of equality before the courts. In light of the prominent position human rights principles of equality currently occupy it is unlikely that a Canadian court will be quick to shy away from exercising jurisdiction based on the principle of *forum non conveniens*. A much more potent barrier to a plaintiff in a Trail Smelter type dispute bringing a case in a Canadian court is the local action rule. This rule is examined next.

III.3.B. *Local action rule*

The local action rule stipulates that plaintiffs who wish to bring a case relating to their land, do so in the country where that land is located.⁷⁹ At the time of the dispute this was one of the reasons that the notion of a national court exercising jurisdiction over the case was quickly dismissed,

[i]t was general opinion of the lawyers concerned at the time that the British Columbia courts, on the basis of the rule laid down by the House of Lords in *British South Africa Company v Companhia de Mocambique*, would be compelled to refuse to accept jurisdiction in suits based on damage to land situated outside of the province.⁸⁰

The case of *British South Africa Company v Companhia de Mocambique*⁸¹ established this rule as early as 1893. The case

76 T Kruger, ‘Trail Smelter II: A Prudent Approach? From Extraterritoriality to Nondiscrimination’ (2010) 43 University of British Columbia Law Review 109, 112.

77 *ibid.*

78 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 14.

79 Commission for Environmental Cooperation, ‘North American Environmental Law and Policy 2000’ 227 <http://www.cec.org/Storage/41/3376_Naelp4e_EN.pdf> accessed 25 May 2011.

80 Romano (n 4) 278.

81 *British South Africa Company v Companhia de Mocambique*, UKHL [1893] Ac 602.

involved a claim by the British South Africa Company that land, owned by this company in South Africa, had been illegally and forcefully taken by Companhia de Mocambique. The court refused to assert jurisdiction over the case because it involved land located outside the territory of the United Kingdom.⁸² Somewhat remarkably Canada has stringently stuck with this rule. This is remarkable since in English common law an exception to the local action rule exists, stemming from the *Bulwer* case.⁸³ This exception was specifically created because '[t]he English common law recognized that the local action rule is particularly inequitable when an action in one jurisdiction injures land located in another'.⁸⁴ Obviously this situation applies to the Trail Smelter case. While the United States courts have embraced the Bulwer exception, Canadian courts have chosen not to accept this exception and have gone as far as to explicitly reject it in their case law, most notably in the case of *Albert v Fraser Cos.*⁸⁵ This case is interesting as it bears some notable similarities to the Trail Smelter case. In the *Albert v. Fraser Cos* case the plaintiff, who resided in the Quebec province, claimed compensation for flood damage from the defendant, who resided in the New Brunswick province. By letting logs clog up a river in New Brunswick the defendant had allowed damage to be caused to the plaintiff's property in Quebec. Apart from the fact that this particular case concerns different provinces rather than different countries, the fact that the plaintiff is claiming damages in the court of the territory where the damage originated is similar to a Trail Smelter type dispute where the plaintiffs would appeal to a Canadian court. A further parallel exists in that the damage is caused completely in a jurisdiction other than where the plaintiff resides. In his dissenting opinion on the case, judge Harrison actually referred to the relevance of the *Bulwer* case exception.⁸⁶ However, the majority of the court disagreed with his approach and claimed the court could not exercise jurisdiction in light of the local action rule that was established in the *British South Africa Company v Companhia de Mocambique* case.

Stephen McCaffrey drew the following conclusion based on Canada's reliance on the *British South Africa Company v Companhia de Mocambique* case:

[i]t appears therefore, that although it is by no means on all fours with a hypothetical action by an American plaintiff against a Canadian polluter, this case would constitute a formidable obstacle to such an action in view of its parallel facts(...).⁸⁷

In light of Canada's strict adherence to the local action rule it would be difficult to succeed in having a Canadian court exercise jurisdiction over a Trail Smelter type dispute. However, it should be noted that if a plaintiff in a Trail Smelter type case can demonstrate that the pollution has caused personal injury, the local action rule can be overcome.⁸⁸

In recent years there have been some multilateral and bilateral initiatives to improve the accessibility of courts in transboundary pollution issues. One of these initiatives is the OECD's⁸⁹ recommendation on the Implementation of a Regime of Equal Right of Access and Non-Discrimination in relation to Transfrontier Pollution.⁹⁰ The relevant part of this recommendation to the present issue is stated in article 4:

4. a) Countries of origin should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant risk of transfrontier pollution, shall at least receive equivalent treatment to that afforded in the country of origin in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition or status.

b) From a procedural standpoint, this treatment includes the right to take part in, or have resort to, all administrative and judicial procedures existing within the country of origin, in order to prevent domestic pollution, to have it abated and/or to obtain compensation for the damage caused.⁹¹

82 *ibid.*

83 *Bulwer's Case* [1584], 7 Coke 1a, 77 ER 411 (Lord Coke).

84 Commission for Environmental Cooperation, 'North American Environmental Law and Policy 2000' 228 <http://www.cec.org/Storage/41/3376_Naelp4e_EN.pdf> accessed 25 May 2011.

85 *Albert v Fraser Cos* [1937] 1 DLR 39.

86 *ibid* 52.

87 SC McCaffrey, 'Transboundary Pollution Injuries: Jurisdictional Considerations in Private Litigation between Canada and the United States' (1972) 3 California Western International Law Journal 191, 227.

88 Commission for Environmental Cooperation, 'North American Environmental Law and Policy 2000' 229 <http://www.cec.org/Storage/41/3376_Naelp4e_EN.pdf> accessed 25 May 2011.

89 Organisation for Economic Co-operation and Development.

90 Organisation for Economic Co-operation and Development, 'Recommendation on the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution' (17 May 1977) C(77) 28.

91 *ibid* art 4.

In a Trail Smelter type dispute application of this recommendation would result in US citizens being able to resort to Canadian courts for damage suffered from transboundary pollution as long as the pollution is covered by Canadian legislation that would apply if the applicant was Canadian. Unfortunately, OECD recommendations do not have a legally binding status.⁹² Despite the fact that the OECD recommendation is not legally binding, serious attention is definitely being paid to it by the US and Canadian judiciaries. Clear evidence of this is provided by the draft treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution, written jointly by the ABA and the CBA.⁹³ This draft treaty has almost literally incorporated the above mentioned OECD recommendation.⁹⁴ This illustrates that the prominent legal associations of both countries are aware that the law needs to accommodate the reality of transboundary pollution issues. Regrettably, neither the Canadian nor the US government has adopted the treaty.

The most recent and most successful step in the movement for better access to courts in cases of transboundary pollution is the Uniform Transboundary Pollution Reciprocal Access Act⁹⁵ (hereinafter: Reciprocal Access Act). Section 3 of this act states:

A person who suffers or is threatened with injury to his person or property in a reciprocating jurisdiction caused by pollution originating, or that may originate, in this jurisdiction has the same rights to relief with respect to the injury or threatened injury, and may enforce those rights in this jurisdiction, as if the injury or threatened injury occurred in this jurisdiction.⁹⁶

The Reciprocal Access Act thus has the same effect as the OECD recommendation and the ABA-CBA draft treaty. It removes the local action rule barrier from disputes concerning transboundary pollution. Canada and the US have not incorporated the Reciprocal Access Act into national law. However, some Canadian provinces and US states have incorporated the act in their legislation.⁹⁷ The Reciprocal Access Act is only applicable when the state or province where harm originates and the state or province where harm occurs have both incorporated the Act in their legislation. A modern day Trail Smelter dispute between any of these states or provinces could be resolved on the private party level. It should be noted that the province of British Columbia and the state of Washington, which were involved in the original Trail Smelter dispute, have not incorporated the Reciprocal Access Act. Consequently, if the exact Trail Smelter circumstances were to cause a dispute again, the Reciprocal Access Act would be unhelpful in enabling a resolution on the private party level. The potential of the Reciprocal Access Act to become a long term tool of removing barriers to jurisdiction in transboundary pollution cases is also somewhat questionable because since 1992 no additional US state or Canadian province has adopted it into its legislation.⁹⁸

IV. Conclusion

From the previous it becomes clear that the path towards national jurisdiction over the Trail Smelter dispute is still, after more than half a century, far from smooth. On the US side there is the political concern of the ramifications that claiming jurisdiction could have if Canada were to reciprocate such claims. In addition, there are the legal issues of assuming personal jurisdiction over the defendant and applying national law extraterritorially. If these two barriers can be overcome, there is still the issue of having the US court's judgment enforced in Canada. Nevertheless, in recent times US courts have shown a willingness to overcome these barriers. On the Canadian side there is, at least in theory, the principle of forum non conveniens which a Canadian court could employ to avoid exercising jurisdiction. However, in light of the modern day emphasis on human rights principles of non-discrimination and equal access to courts, resort to this principle in a contemporary case is at least questionable and at most highly unlikely. Besides the principle of forum non-conveniens, there remains perhaps the most formidable blockade to national jurisdiction in the form of the local action rule. Several modern initiatives have demonstrated a willingness to overcome this barrier in cases of transboundary pollution but overall the success of these initiatives has been limited. Toby Kruger made a strong argument for the resolution of Trail Smelter type disputes in the source state.⁹⁹ However, in his idealism he took too little notice of the formidable barrier that is the local action rule.

92 J Ebbesson, 'Public Participation: National Contexts, Institutions, and Decision Making' in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 697.

93 Joint American Bar Association and Canadian Bar Association Resolution, 'Settlement of International Disputes Between Canada and the USA' 27 (1979).

94 CA Cooper, 'The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques and Mechanisms' (1986) 24 Canadian Yearbook of International Law 247, 279.

95 Uniform Transboundary Pollution Reciprocal Access Act 1982.

96 *ibid* s 3.

97 These states are: Colorado, Connecticut, Michigan, Montana, New Jersey, Oregon, Wisconsin in the United States and Manitoba, Nova Scotia, Ontario and Prince Edward Island in Canada.

98 Knox (n 6) 76.

99 Kruger (n 76) 109.

John H. Knox, who has held a very critical view on the resolution of the Trail Smelter dispute, claimed that the Trail Smelter dispute would have been particularly suitable for private litigation:

Trail Smelter was the kind of case that many scholars agree might usefully be addressed through privately enforced private rights: it involved only one polluter, a limited number of individuals alleging harm, and relatively clear causation. In the US and Canada, domestic cases like it were and still are subject to a private-rights approach(...).¹⁰⁰

Recent developments in the national courts' approach to some of the classical barriers, have made it more likely that in the contemporary time a Trail Smelter type dispute would indeed be resolved at the level of a private dispute. Particularly the US has made some strides in allowing for a private-rights approach. An increased willingness to exercise personal jurisdiction over a foreign national and the allowance of extraterritorial application of national laws based on the 'effects doctrine' has created an opening in the barrier blocking national jurisdiction in the Trail Smelter case. The most convincing evidence of this was given in the *Pakootas v Teck Cominco Metals Ltd* case. Although, the court attempted to downplay the significance of its decision by claiming an extraterritorial application of national laws was not involved, the case has still set a groundbreaking precedent for future transboundary pollution cases. Some authors even go so far as to claim that it '(...) may be the most important transboundary environmental case in decades'.¹⁰¹ In addition, since the *Morguard* case, Canadian courts are much more likely to enforce decisions made by US courts concerning Canadian defendants.

On the Canadian side, traditional barriers appear to be more resilient. The fact that a Canadian court would be applying national law to a violation by a national company makes it much less controversial than adjudication by an American court. It is therefore highly regrettable that, whereas the barriers to national jurisdiction in the US have largely diminished, the Canadian barrier in the form of the local action rule remains relatively solid. The OECD recommendation, the ABA-CBA draft treaty and, most recently, the Reciprocal Access Act do indicate that there is a willingness to overcome this barrier. Thanks to the Reciprocal Access Act there are already some US States and Canadian Provinces between which a resolution of a transboundary pollution issue on the level of private parties would be possible. However, in light of the limited number of states and provinces that have incorporated the Reciprocal Access Act and the fact that no new adaptations of the act have occurred since 1992, it seems likely that the local action rule will remain a sturdy barrier for some time to come.

In conclusion, a word with respect to the questions posed at the beginning of this article: How has access to private party litigation in cases of transboundary air pollution evolved since the Trail Smelter dispute? It can be said that resort to national jurisdiction in the Trail Smelter case provides a more likely path to resolution in the present day. Yet, John H. Knox rightly stated that:

[t]he absence of an effective way of imposing private limits on private international environmental harm is still felt today. Victims of such harm continue to face obstacles to domestic remedies, just as the Washington farmers did.¹⁰²

It has been demonstrated above that these obstacles are certainly not as daunting as they once were. In fact, the recent *Pakootas v Teck Cominco Metals Ltd* case indicates that US courts might well serve as appropriate forums to resolve a Trail Smelter type dispute on the private level. The general assessment of the availability of national court remedies to a Trail Smelter dispute can thus be carefully optimistic. It is interesting to observe that recent developments in national procedures are filling the gaps left by international procedures. Where traditionally the border between the US and Canada was impermeable to national legislation, this barrier is slowly but steadily withering away. The *Pakootas v Teck Cominco Metals Ltd* case in combination with the *Morguard* case appear to have created the first real breach in this legal barrier. It is certainly conceivable that, given this precedent, future Trail Smelter type disputes will, at least as a first step, be referred to national courts. Kate McDonald argued that dealing with Trail Smelter type disputes through national courts is undesirable and that international law in the form of established treaties should be employed.¹⁰³ Michael Robinson-Dorn on the other hand claimed that the Pakootas decision was a step in the right direction and that national jurisdictions can and sometimes should play a role in transboundary pollution cases.¹⁰⁴ It is this author's contention that, until international mechanisms provide a useful forum for private parties to resolve Trail Smelter type disputes, transboundary private litigation could provide a meaningful way to handle such

100 Knox (n 6) 68.

101 S Hsu and AL Parrish, 'Litigating Canada-US Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity' (2007) 48 Virginia Journal of International Law 1, 18.

102 Knox (n 6) 69.

103 McDonald (n 43) 311.

104 Robinson-Dorn (n 18) 233.

disputes. In addition, Hsu and Parrish rightly pointed out that such legislation could serve as ‘(...) a catalyst for bilateral negotiations’.¹⁰⁵ Indeed, the fear of reciprocal transboundary litigation could provide the pressure to reach bilateral solution. This pressure is necessary since, despite the great strides that have been made since the Trail Smelter dispute, transboundary air pollution is still a pressing issue between the two countries involved. ■

105 Hsu and Parrish (n 101) 58.