Title:
Trail smelter case (United States, Canada), 3 UNRIAA, p. 1905, 1952

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TRAIL SMELTER CASE

PARTIES: United States of America, Canada.

SPECIAL AGREEMENT: Convention of Ottawa, April 15, 1935.

ARBITRATORS: Charles Warren (U.S.A.), Robert A. E. Greenshields (Canada), Jan Frans Hostie (Belgium).
AWARD: April 16, 1938, and March 11, 1941.

Canadian company.—Smelter operated in Canada.—Fumes.—Damages caused on United States territory.—Recourse to arbitration.—Date of damages.—Evidence.—Cause.—Effect.—Indirect and remote damage.—Violation of Sovereignty.—Interpretation of Special Agreement as to scope.—Preliminary correspondence.—Interest.—Future régime applicable.—Appointment of technical consultants.—Law applicable.—National law.—Matters of procedure.—Convention, Article IV.—Reference to American law.—Provisional decision.—Certain questions finally settled.—Res judicata.—Error in law.—Admissibility of revision.—Powers of tribunal.—Discovery of new facts.—Denial.—Costs of investigation.—Claim for indemnity.—Such costs no part of damage.—Claim for request to stop the nuisance.—Law applicable.—Coincidence of national and international laws.—Responsibility of States.—Air and water pollution.—Protection of sovereignty.—Institution of régime to prevent future damages.—Indemnity or compensation on account of decision or decisions rendered.

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Special agreement.

CONVENTION FOR SETTLEMENT OF DIFFICULTIES ARISING FROM OPERATION OF SMELTER AT TRAIL, B.C.¹

Signed at Ottawa, April 15, 1935; ratifications exchanged Aug. 3, 1935

The President of the United States of America, and His Majesty the King of Great Britain, Ireland and the British dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada,
Considering that the Government of the United States has complained to the Government of Canada that fumes discharged from the smelter of the Consolidated Mining and Smelting Company at Trail, British Columbia, have been causing damage in the State of Washington, and
Considering further that the International Joint Commission, established pursuant to the Boundary Waters Treaty of 1909, investigated problems arising from the operation of the smelter at Trail and rendered a report and recommendations thereon, dated February 28, 1931, and
Recognizing the desirability and necessity of effecting a permanent settlement,
Have decided to conclude a convention for the purposes aforesaid, and to that end have named as their respective plenipotentiaries:

The President of the United States of America:
PIERRE DE L. BOAL, Chargé d’Affaires ad interim of the United States of America at Ottawa;

His Majesty the King of Great Britain, Ireland and the British dominions beyond the Seas, Emperor of India, for the Dominion of Canada:
The Right Honorable RICHARD BEDFORD BENNETT, Prime Minister, President of the Privy Council and Secretary of State for External Affairs;

Who, after having communicated to each other their full powers, found in good and due form, have agreed upon the following Articles:

ARTICLE I.

The Government of Canada will cause to be paid to the Secretary of State of the United States, to be deposited in the United States Treasury, within three months after ratifications of this convention have been exchanged, the sum of three hundred and fifty thousand dollars, United States currency, in payment of all damage which occurred in the United States, prior to the first day of January, 1932, as a result of the operation of the Trail Smelter.
ARTICLE II.

The Governments of the United States and of Canada, hereinafter referred to as "the Governments", mutually agree to constitute a tribunal hereinafter referred to as "the Tribunal", for the purpose of deciding the questions referred to it under the provisions of Article III. The Tribunal shall consist of a chairman and two national members. The chairman shall be a jurist of repute who is neither a British subject nor a citizen of the United States. He shall be chosen by the Governments, or, in the event of failure to reach agreement within nine months after the exchange of ratifications of this convention, by the President of the Permanent Administrative Council of the Permanent Court of Arbitration at The Hague described in Article 49 of the Convention for the Pacific Settlement of International Disputes concluded at The Hague on October 18, 1907. The two national members shall be jurists of repute who have not been associated, directly or indirectly, in the present controversy. One member shall be chosen by each of the Governments. The Governments may each designate a scientist to assist the Tribunal.

ARTICLE III.

The Tribunal shall finally decide the questions, hereinafter referred to as "the Questions", set forth hereunder, namely:

1. Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?
2. In the event of the answer to the first part of the preceding Question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?
3. In the light of the answer to the preceding Question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?
4. What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?

ARTICLE IV.

The Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice, and shall give consideration to the desire of the high contracting parties to reach a solution just to all parties concerned.

ARTICLE V.

The procedure in this adjudication shall be as follows:

1. Within nine months from the date of the exchange of ratifications of this agreement, the Agent for the Government of the United States shall present to the Agent for the Government of Canada a statement of the facts, together with the supporting evidence, on which the Government of the United States rests its complaint and petition.
2. Within a like period of nine months from the date on which this agreement becomes effective, as aforesaid, the Agent for the Government of Canada shall present to the Agent for the Government of the United States a statement of the facts, together with the supporting evidence, relied upon by the Government of Canada.
3. Referring Principles:
   - XIII.4.5 - Conclusive and preclusive effects of awards; res judicata