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## Long Rang Trans-Boundary Air Pollution Smelter Case Arbitration Outcome Negesse Asnake AYALEW

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### Abstract:

The purpose of the investment is to bring benefits to the owners and sustainable development for the local community and for future generations. Arbitration is the process of resolving legal disputes between individuals, groups and countries. Every investment activity must ensure sustainable development to respect the rights of future generations. However; Canadian zinc smelting companies emit sulfur dioxide and cause air pollution in the United States. This created a dispute between Canada and the United States, then they agreed to settle it through a neutral arbitration court. As a result, this arbitration court ruling creates two principles of international environmental law primarily; the polluter pays the principle and obligation of the state not to damage the environment outside its jurisdiction. This arbitration award establishes the concept of Harm across borders and the principle of polluter pays to ensure the sovereignty of international environmental law. Therefore; if disputes arise between countries, they can resolve them through peaceful dispute resolution mechanisms such as negotiation, mediation and arbitration.

### Keywords:

Arbitration; Air Pollution; polluter pay principle; peaceful dispute resolution



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## INTRODUCTION

Everybody has the right to live in clean and health environment. So any development project has to balance boosting its profit with protecting the environment from pollution, which means profit at the cost of the local community and future generation is prohibited. A conflict was started between two small towns and one smelting factory, which is Northport town in United States and Trail town in Canada are sit along the Columbia River. A smelting factory in Trail was means of income for its citizens but pollute the Northport land, imposing damage on the local farmers land. In early 20<sup>th</sup> this created conflict among investor for profit and the surrounding community health. In other word; it is a conflict between two sovereign states over a Tran's boundary river. The conflict between these two countries was resolved through arbitration tribunal, which created the two principles of International environmental law such as the polluter pays and states have a duty to prevent trans-boundary harm.

In this paper the writer attempt at recognizing the sources of international environmental law principles. It deals with principles of international environmental law, air pollution and resolution of trans-bounder air pollution through arbitration.

## METHOD

### Air Pollution

Pollution means any condition which is hazardous or potentially hazardous to human health, safety, or welfare or to living things created by altering any physical, radioactive, thermal, chemical, biological or other property of any part of the environment in contravention. Air pollution can be defined as the introduction by man, directly or indirectly, of substances or energy into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment. Major source of pollution are inefficient modes of transportation, coal-fired power plants, agricultural sector and waste burning. These company realized into the environment polluted substances such as nitrogen oxides (NO<sub>x</sub>), sulphur oxides (SO<sub>x</sub>), particulate matter (PM) and heavy metals, particularly mercury and lead.

The traditional legal approaches currently available under international law do not provide a comprehensive response to air pollution and also the current legal landscape has developed on an ad hoc basis and as a result there are serious gaps in geographical and pollutant/pollution source coverage.

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Furthermore, international law does not address the global impacts of air pollution. At the same time, developing a global treaty on air pollution seems unlikely in the near future.

## Arbitration of Trans- boundary air pollution

Arbitration is about settling a legal dispute in which parties conclude arbitration agreement called Arbitration Clause or submission and where the parties appoint arbitrator(s), who under a private service contract render(s) judicial services by hearing and handling the case and make arbitration award, which will be recognized and enforced by the state according to the existing laws on arbitration. Disputing parties choose arbitration than court litigation in order to get the benefit of arbitration such as speed, choice and expertise of impartial neutrals, informality and flexibility, privacy and confidentiality, economy, finality, savings in public expenditure, private savings in time and energy, retention of beneficial business and personal relationships, shortening of court dockets, more efficient legal systems, and qualitative improvement in the delivery of justice. So if dispute rose between sovereign states, arbitration is best option.

The process of arbitration is different based on national and institution arbitration law and also freedom of parties to determined the process of arbitration. However; the UNCITRAL model arbitration rules have got worldwide consensus on the principles and important issues of arbitration practice are: the existence of arbitration agreement; constitution of arbitration tribunal; determination of jurisdiction of arbitral tribunal jurisdiction; the conduct of proceeding; making of award and other decisions; challenging arbitration award and recognition and enforcement of award. Arbitration has similar procedure with court except its flexibility.

Sovereign states do not respect any court of law to rule over them. So sovereign states only submit to arbitration on a voluntary basis. The Permanent Court of Arbitration (PCA) in Den Haag is an intergovernmental organization with over 100 member states. Established in 1899 to facilitate arbitration and other forms of dispute resolution between states, the PCA has developed into a modern, multi-faceted arbitral institution that is now perfectly situated at the juncture between public and private international law to meet the rapidly evolving dispute resolution needs of the international community. PCA provides services for the resolution of disputes involving various combinations of states, state entities, intergovernmental organizations, and private parties. The PCA can assist in the selection of arbitrators, and may be called upon to designate or act as appointing authority. International organizations like World Trade Organization (WTO), World Bank and others are also acting on an international scale. Disputes are settled by arbitration according to rules.

Environment refers to natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape. Environmental problems arising from development activities (investment) and the indiscriminate bombardment of cities, towns and countryside areas in effect which renders the civilian population to a military target of a new form of warfare-environmental warfare. This irreparable alteration to the environment may threaten the entire population, and it is tantamount to a crime against humanity, perhaps to a greater extent than genocide which may be limited only to a given ethnic minority in a specified area. Environmental damage can affect the territory of the state where the activity causing the harm occurs, the territory of a different state, or the global commons that is, territories that do not fall under the national jurisdiction of any state such as the high seas. In the case of trans frontier pollution defined by OECD that any intentional or unintentional pollution whose physical origin is subject to, and situated wholly or in part within the area under the national jurisdiction of one state and which has effects in the area under the national jurisdiction of another state. It can result from the violation of conventional or customary rules, and therefore impair the rights of the state in which the effects occur. Whereas; In the case of pollution affecting areas not subject to the jurisdiction of any state commonly known as pollution of the global commons and in this case no state is directly entitled to react unless the state responsible for the pollution harm has violated an obligation erga omnes.

In early 20<sup>th</sup> in Trail factory was means of income for citizens' rather than harm for community. Smelting is the process of heating an ore and chemically extracting the metal and Sulfur dioxide in order to reprocess it into products like rods, sheets, wires, etc., which emits pollutants in the form of smoke, particulate matter, and slag. The smelting was the sign of industrialization and development. Its operations had been small but emitted approximately seventy tons of sulfur dioxide a day, which polluted the surrounding environment. The first people to bring suit against the smelter at Trail were Local Canadian farmers. The Trail smelter had reacted to charges of pollution as bought lands within five miles of the factory and purchased smoke easements with the local citizens in order to prevent future litigation, failure of the farmer's crops was a result of either bad farming techniques or the natural environment. However; this objection is unsuccessful.

The American farmers would later form a committee to protest the invasion of their rights and homes by this rich foreign corporation, but they require absolutely prove the effect of pollution on their cropland. One case brought up by local Canadian farmers made it all the way up to the Canadian Supreme Court, which is awarded sixty farmers \$60,000 in damages without not put any restrictions or regulations on how much the smelter could emit. The American farmer were formed the Citizens Protective Association with the purpose of fighting Consolidated Mining and Smelting together as a powerful, united force, but they dissolved the

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association by offering money to individual farmers. The CPA grew in numbers and power and by 1927 their complaints were no longer being ignored and the factory could not buy land easements from the Americans. Its law stated that British Columbia courts were prevented from seeing suits for damage to foreign lands and the CPA could not directly sue factory. This prevented Consolidated from fulfilling its plan of buying local land and establishing its eminent domain, creating an industrial zone dominated by the company rather than the citizens. This law gave was forced to go to local congressional government who petitioned the federal government for assistance.

In 1927 a United States Department of Agriculture (USDA) plant pathologist surveyed the land and found no evidence of damage due to the smoke rather other causes. The CPA is rejected it then requested four neutral USDA scientists to investigate the area. This marked the United States government entry into the conflict. In 1927 the state department proposed to Canada that the case be referred to the International Joint Commission (IJC), which became international issues.

The IJC was founded in 1909 as a bilateral treaty between Canada and the United States in order to prevent boundary disputes, specifically concerning waters, in order to establish sovereignty among the two nations. The smelter dispute was referred to the IJC under Article V that states that disputes along the common frontier shall be referred from time to time to the International Joint Commission is marked the Balfour Declaration that made Canada independent of Great Britain. Therefore; the IJC was hearing statements from Canada who was embarking on an international case alone for the first time and America, whose argument was characterized by local farmers with little credibility like lack of capable of executing an enforceable decision. Article IX states that reports from the IJC should not be regarded as decisions or arbitral awards, focus on compensation rather than future control methods much to the farmers dismay.

In 1935 the IJC held a convention and hearings showcased complaints from the farmers, testimonies from four groups of scientists, arguments delivered by lawyers representing Consolidated and the farmers and counsel from both the Canadian and United States government. The hearings provided experts from both the United States and Canada who were highly politicized based on what country they represented in order to provide on the damage of smelter smoke was shaped by the interests of their country. Both are observed damaged crops but they disagreed on the extent and the cause of the damage. After reviewing the case the IJC was recommended Canada pay to the United States \$350,000 for damages but the United States rejected these recommendations.

Therefore; the IJC established an arbitration Tribunal in which was to consist of three members, one Canadian, one American, and one Belgium, including two scientists to make decisions on the key questions of the case. The questions of the case were whether the plant had caused damage and how this damage should be paid for, whether or not the plant should refrain from causing damage and to what extent, what measures should be adopted by the plant to reduce emissions, and what compensation should be paid? The Tribunal would use international law practices, American law, and American courts to analyze the facts and evidence. Disputing parties were given their statements, evidence and arguments would be presented, and investigators would be appointed on behalf of each government.

Finally, the Tribunal would rule the following award on sovereignty and established principles international environmental law. On April 16, 1938 the Tribunal Award was the factor promised to technological methods to reduce the harmful sulfur dioxide emissions proved to be false. Then it Consolidated installed two reduction units for the absorption of sulfur from the zinc smelter and gases from the lead roaster and a new system of control of the emission during growing seasons from 1936 and 1937. However; the impact is increasing. Witnesses representing the United States associated the damage to the smelter fumigations whereas witness representing Canada attributed the damage to other causes, such as damaging logging techniques and fires. Consequently; the tribunal appointed two technical consultants and a meteorologist to focus on how to improve the operation of the plant based on weather and seasonal conditions. The Tribunal establishes that there was damage to reproduction in trees and that some extent of this damage was due to fumigations but it does not identify that extent. The award sets up the precedent that the Trail smelter will be responsible for regulating its pollution and it will not be responsible for halting pollution all together.

On March 11, 1941 the Tribunal claimed that the smelter had caused no damage since 1937 and would not need to pay the farmers any more compensation. The Tribunal attempted at finding a balanced solution that the smelter was able to continue operations and the farmers were no longer harmed by the smoke and received appropriate compensation. The final decision of the Tribunal held that the Dominion of Canada is responsible in international law for the actions of the smelter since 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. This means that state can pollute its own land as much as it wants as long as it abides by law and once that pollution crosses an international boundary though, and is of serious consequence, the state has violated the sovereignty principle of international law. The Tribunal focused on the extent of the economic loss due to the noxious smoke in order to identify whether or not it was of serious consequence. It is established that the injury to cleared and unclear lands was serious enough to warrant compensation, which did not find that the damage on livestock

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and the property in the town of Northport was serious enough to be compensated for. Therefore; proving damage was caused by the pollutant and it is seriousness.

Therefore; the arbitration awards bring two international environmental law principles. The obligation of the State comprise activities carried out by or on behalf of the State itself and also includes actions by any subject under the state's jurisdiction (citizens, companies, municipalities etc). Polluters should pay for the cost of pollution control measures, such as the construction and operation of anti-pollution installations, investment in anti-pollution equipment and new processes, so that a necessary environmental quality objective is achieved. Other means of ensuring the polluter pays principle are through taxes and charges. Application of the principle may be difficult in practice where identifying the polluter proves impracticable because the pollution arises from several simultaneous causes or from several consecutive causes, or where the polluter has become financially insolvent. In such instances, there may be no alternative to community assumption of the costs of remediation.

Before this arbitration award, disputes over air pollution between two countries had never been settled through arbitration and the polluter pays principle had never been applied in an international context. When the Tribunal dealt with the details of the Trail Smelter Arbitration, there was no existing international law that dealt with air pollution. Therefore; a law dealing with international air pollution was modeled after America laws with the Tribunal referring to a number of cases in the U.S. that involved air pollution between multiple states. The arbitration Tribunal's frame issue what is the different between damage and damages? The award was damage to mean damages as in the monetary value lost by smoke pollution instead of as direct damage to the land then Canada's responsibility for the conduct of the smelter became making sure that the smelter did not cause any more smoke damage to American. Therefore; states has an obligation to prevent Trans- boundary harm. Arbitration process participants were non- sovereign states such as business organization. Although Canada accepted responsibility for the actions of the smelting plant, arbitration put the onus on Canada to compensate for the factor past pollution rather than forcing factory to prevent future harm to American soil. The legacy of this decision includes the eventual creation of regulatory regimes to prevent environmental degradation, which allow nations to put states in charge of taking positive steps to control pollution and the failure by states to meet these responsibilities means they are breaching international law.

## **Principles' of Environmental law**

Law emerges from the cultural traditions and moral and religious values of each society. These traditions and values continue to impact the development of legal norms. No legal order can regulate with specific rules any possible conduct of legal subjects. Gaps are bound to exist in the normative network of any community. Hence, the need to resort to general principles, that is, sweeping and rather loose standards of conduct that can be deduced from the various rules by extracting and generalizing some of the most significant common points. General principles constitute both the backbone of the body of law governing international dealings and the potent cement that binds together the various and often disparate cogs and wheels of the normative framework of the community. Normally principles are spelled out by courts, when adjudicating cases that are not entirely regulated by treaty or customary rules. It cannot be denied that by so acting courts fulfill a meritorious function very close to, and almost verging on, the creation of law. The two distinct classes of general principles are; First, there are general principles of international law, namely those principles which can be inferred or extracted by way of induction and generalization from conventional and customary rule of international law. Second, there are principles that are peculiar to particular branch of international law.

In the context of environmental protection, cultures, religions and legal systems throughout the world contain elements that respect and seek to conserve the natural bases of life, maintaining concepts that can enhance and enrich the development of modern environmental law. Environmental law can be generally defined as the body of law that contains elements to control the human impact on the Earth and on public health. It is development during the past three decades has led to the emergence of an increasing number of concepts, principles and norms since it is linked to the origin and development of international environmental law, which developed mainly in a piecemeal fashion, not in a structured orderly way, as ad hoc responses to environmental threats and challenges.

There are many international arenas and many international instruments dealing with specific environmental problem, these principles and concepts included in international legal instruments reinforces them and together with state practice will continue to contribute to the creation of a global framework for international environmental law. The principles established at two important United Nations conferences, the 1972 Conference on the Human Environment ("Stockholm Conference") and the 1992 United Nations Conference on Environment and Development ("UNCED") in Rio de Janeiro are produced declarations of principles the 1972 Stockholm Declaration and the 1992 Rio Declaration respectively, which were adopted by the United Nations General Assembly. For instances; the Rio Declaration contains a preamble and twenty-seven international environmental law principles that guide the international community in its efforts to achieve sustainable development.

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International environmental law is an element of public international law, which has principles of duty to negotiate in good faith, the principle of good neighborliness' and notification, and the duty to settle disputes peacefully. Similarly; the principles of international environmental law are sustainable development, integration and interdependence; inter-generational and intra-generational equity; responsibility for trans-boundary harm ; transparency, public participation and access to information and remedies; cooperation, and common but differentiated responsibilities; precaution, prevention, polluter pays principle, access and benefit sharing regarding natural resources, common heritage and common concern of humankind, good governance.

## CONCLUSION

The purpose of investment is to bring profit for owner and lasting development to the local community and for future generation. During the early 20<sup>th</sup> century a Canadian smelter company was operating in Trail, British Columbia along the Columbia River which flows from Canada across the border to Washington State in the United States of American. The local farmers claimed damages from the waste emitted by the smelter but the Canadian company that smelted zinc and lead was emitting sulfur dioxide which caused injury to plant life, forest trees, soil, and crop yields in Washington State. Consequently; the United States charged Canada for these injuries and the case was referred to arbitration tribunal. The award of this arbitration tribunal established the concept of Trans-boundary Harm and the principle of the polluter pays to ensure sovereignty for international environmental law. Therefore; if dispute arise between states, they may resolve it through peaceful dispute resolution mechanisms such as negotiation, mediation and arbitration.

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