

# Trail Smelter Arbitration Offers Little Guidance for COVID-19 Suits against China

by **Rebecca Bratspies**

July 14, 2020

On June 23, the Senate Committee on the Judiciary held an [extraordinary hearing](#) on whether to amend the [Foreign Sovereign Immunities Act](#) (FSIA) in order to permit domestic lawsuits against China for its role in the coronavirus pandemic. Senator Lindsay Graham opened the proceedings by stating that he could not think of “a more compelling idea for protecting American health and property” than to allow individual Americans or groups of Americans to bring lawsuits against China in domestic legal courts. Senator Blackburn ended the hearing by endorsing the international law obligation of states to maintain effective regulatory regimes. In between, Senator Grassley spoke the important accountability function tort litigation can perform. If the coronavirus pandemic persuaded these ardent regulatory foes that effective government oversight and vigorous enforcement plays a critical role in protecting public health and welfare, that would be a welcome outcome.

Part of the hearing focused on the canonical *Trail Smelter Arbitration* and its role in international law. Many *Just Security* readers will be familiar with the arbitration, which resolved a dispute between Canada and the United States over air pollution from a privately-owned Canadian smelter that caused harm on the U.S. side of the border. The *Trail Smelter Arbitration* established important international legal principles about transboundary harm.

As the co-editor of a book on the [international law legacy](#) of the *Trail Smelter Arbitration*, it was frankly heartwarming to see so much time devoted to the contours of customary international law and how that law might influence and shape U.S. responses to the global pandemic. My co-editor Professor Russell Miller was one of the witnesses. He testified in favor of the proposed FSIA amendment along the lines of his earlier *Just Security* [analysis](#) on this topic (with William Starshak).

There are a few places where I feel moved to weigh in. In particular, I would like to make three points of in the wake of the Senate Hearing: 1) while Canada ultimately paid damages to the United States, the *Trail Smelter Arbitration* did not decide that Canada was responsible for the actions of its smelter; 2) the *Trail Smelter Arbitration* did not authorize private actors to bring a tort claim against a foreign sovereign in a domestic court; and 3) the *Trail Smelter Arbitration* heavily weighed the claimants' participatory conduct in making its damages determination.

### ***Trail Smelter* Does Not Answer the Question of State Responsibility**

The *Trail Smelter* tribunal declared that “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.” I have [elsewhere](#) argued that this “*no harm* principle provides a foundation for asserting a state’s obligation to regulate effectively within its territories.” However, it is important to remember that the tribunal [did not decide](#) Canada’s responsibility for harms caused by the smelter. Instead, as a predicate to the arbitration, Canada expressly assumed responsibility for any damage suffered in the United States. The arbitration thus failed to clarify whether Canada was directly liable for all conduct in its territory, or vicariously liable because it failed to adequately regulate the conduct of the smelter.

As customary international law, the *Trail Smelter* “no harm” principle has been established as a [conceptual anchor](#) for international environmental law, referenced in many key international declarations, [confirmed](#) by the International Court of Justice, and codified in the United Nations [Convention on the Law of the Sea](#) and the [Convention on Biological Diversity](#) (the United States is not a party to either treaty).

The International Law Commission detailed the contours of this customary law “no harm” duty in its [Draft Articles on State Responsibility](#). Article 1 affirmed that every internationally wrongful State action or omission gives rise to State responsibility. While no state has ratified these Draft Articles, it is indeed encouraging to see so many voices, including the Republican witness [Professor Miller](#), suggesting their binding nature. Given the United States’ historic skepticism of this project, it was particularly encouraging to see Senators Lindsay Graham, Ted Cruz, and others taking positions that seem to embrace the core of these Draft Articles.

Of course, before there can be an internationally wrongful act giving rise to state responsibility, there must be an international obligation. In the case of whether China has an obligation relating to the coronavirus pandemic, the World Health Organization's 2005 [International Health Regulations](#) might be a candidate. China is a WHO member, and thus bound by the obligation to promptly notify the WHO of events which might constitute a public health emergency of international concern. As David Fidler [noted](#), these regulations were directed at precisely this sort of outbreak and were intended to “to prevent, protect against, control and provide a public health response to the international spread of disease.”

Even if allegations that China's actions in December 2019 and January 2020 breached this duty prove to be true, *Trail Smelter* and the Draft Articles still would not offer support for tort actions in U.S. domestic courts. The WHO regulations themselves provide no remedy for State breach. More fundamentally, it is not clear that they constitute law for purposes of creating a state duty under the Draft Articles, which generally focus on treaty obligations. Even if a breach of the WHO regulations does give rise to state responsibility, taking this approach the United States would find itself in the ironic position of simultaneously rejecting and invoking the WHO. It is unclear how the Trump administration, [which just purported to withdraw from the WHO](#), would be in a position to claim that China's purported breach of the regulations should be justiciable in its domestic courts. [Article 76](#) of the WHO Constitution does authorize the WHO to seek an advisory opinion from the International Court of Justice. But, again, having purported to withdraw from the WHO, and with its uneasy relationship to the ICJ, the United States is in no position to make such a demand.

More generally, Article 12 of the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR) recognizes the right to “the enjoyment of the highest attainable standard” of health, and obligates each state to take steps toward the full realization of this right. While it is possible that the Senate hearing signaled a new U.S. stance that the Convention creates a justiciable right and that the current tort lawsuits in U.S. courts against China are in fact vindicating the human right to health, this seems highly unlikely given the United States is not a party to the Convention and Senators Graham, Grassley, Blackburn, and others have long touted their opposition to U.S. domestic health care legislation. Moreover, any such cause of action would more logically be a claim that U.S. citizens could bring against their own government for failing to take the requisite appropriate steps to promote the right to health during the pandemic.

## ***Trail Smelter* Is Not Precedent for Private Claims in U.S. Courts**

Instead of pressing the Trump administration to keep the United States in the WHO or participate in the ICESCR, the Senate is considering amending the FSIA to allow private litigants to bring tort claims in U.S. courts against China. *Trail Smelter* has nothing to say on this point. The arbitration is emphatically not precedent for allowing private claims against a foreign government in U.S. domestic court.

The dispute that gave rise to the *Trail Smelter Arbitration* involved private nuisance claims made by one private actor against another private actor. The United States and Canada got involved only because, due to the vagaries of civil procedure at the time, there was no possibility of private litigation. Any suggestion that *Trail Smelter* demonstrates that the threat of private domestic litigation can help bring a foreign power to the negotiating table is therefore ahistoric. *Trail Smelter* provides no information whatsoever about how Canada (or China) might have reacted to the prospect of such litigation. Moreover, once the dispute was elevated to a state-to-state level, both states explicitly rejected the possibility of opening their domestic courts to the claims at issue, opting instead for a *sui generis* process that had the parties meeting as equals in a neutral forum.

*Trail Smelter* might provide legal support for an international or government-to-government panel to resolve disputes arising from the global pandemic. However, it is difficult to imagine the U.S. Senate embracing this outcome as a desirable one, particularly given the size of the U.S. epidemic and the likelihood that such an inquiry would backfire against U.S. interests for all the reasons Professor Chimene Keitner indicated in her [testimony](#). No doubt, many climate activists in the United States and around the world are carefully monitoring the possibility that the United States will set a precedent of waiving sovereign immunity for state actions that fail to prevent grave global public health concerns so that the precedent can be used to hold the U.S. government accountable.

## ***Trail Smelter* Paid Close Attention to Contributory Conduct in Defining Injury**

There is yet another reason that *Trail Smelter* does not support domestic tort litigation against China over responsibility for coronavirus. The full *Trail Smelter* rule is that “no State has the right to use or permit the use of its territory in such a manner as to cause

injury by fumes in or to the territory of another or the properties or persons therein, **when the case is of serious consequence and the injury is established by clear and convincing evidence**” (emphasis added).

The global pandemic is obviously a case of serious consequence, but the requirement that the injury be established by “clear and convincing evidence” should offer prospective tort litigants pause. Indeed, despite a relatively clear causal chain, the U.S. claims in *Trail Smelter* foundered on proof of injury. There was only one smelter, and the U.S. farmers began experiencing problems only after the smelter built a 200+ foot high smokestack to “solve” its local Canadian pollution problem. Nevertheless, the tribunal concluded that the United States failed to establish the farmers’ main injury claim — that emissions from the smelter stunted the growth of their crops and trees. Instead, the tribunal accepted Canadian suggestions that the area was not well-suited for farming, and that the farmers were not very good farmers.

The *Trail Smelter* proximate cause question was relatively linear. It is hard to imagine a situation less analogous to the coronavirus pandemic, where the lines of causation are complex and intertwined, with numerous failures on multiple fronts combining to create the current situation. That alone makes *Trail Smelter* a poor precedent for justifying domestic litigation over responsibility for COVID-19.

The Chinese government clearly did many things wrong. Yet, it staggers the imagination to suggest that but-for China’s prevarication and concealment, the United States would have leapt into action. It was not China that **disbanded** the U.S. pandemic response team in 2018. It was not China that **withdrew** CDC experts from Beijing in 2019. It was not China that **failed to maintain** the U.S. national stockpile of PPE. It was not China that **assured the American public** that the virus would go away, or that **failed to implement** wide-spread testing as the pandemic took hold across the country, or that refuses to require sensible public health precautions like **masks**.

*Trail Smelter* teaches us that these self-inflicted wounds, which compounded the scope and scale of the coronavirus epidemic in the United States, would feature prominently in any assignment of state responsibility. Along those lines, it is worth noting that the U.S. Senate held its hearing on the same day that the **European Union** floated a possible ban of American visitors because the botched U.S. pandemic response makes Americans too high a risk for their recovering communities. It is hard to see that move as anything other

than a vote of no confidence in the U.S. pandemic response and a clear signal that waiving sovereign immunity for pandemic response failures is likely to redound to the disadvantage of the United States. Those advocating for this course of conduct might consider re-reading Judge Manley O. Hudson’s separate opinion in the *River Meuse Case*, which cautions that “where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.”

*Image: (Photo by KTSDESIGN/SCIENCE PHOTO LIBRARY via Getty Images)*

---

#### **About the Author(s)**

#### **Rebecca Bratspies**

Professor, CUNY School of Law. Director, Center for Urban Environmental Reform.