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FEDERAL, STATE AND PROVINCIAL INTERPLAY REGARDING CROSS- BORDER ENVIRONMENTAL POLLUTION

*John Knox**

I think one result of having a five-thousand-mile border is that the United States and Canada have a lot of trans-boundary environmental problems. By trans-boundary, I mean problems caused on one side of the border, whose effects are felt at least partially on the other side of the border.

The most famous case in this area I think remains the pollution from sulfur dioxide emissions from the smelter in Trail, British Columbia, which resulted in the famous Trail Smelter arbitration in 1941.¹ The result of the arbitration was a decision that has often been interpreted as saying that neither country has the right to use its territory or to allow its territory to be used in a way that causes serious injury to the territory of the other, at least where the evidence of the injury is "clear and convincing."

This sounds great, right? It would mean that we do not have any trans-boundary pollution anymore, but, of course, despite this noble principle trans-boundary pollution happens all the time. Mr. Elgie mentioned that Ontario thinks about fifty percent of its smog comes from mid-western power plants. Just in the interest of equal time, I should point out that New York thinks that some of its smog comes from Ontario. They may both, of course, be right.

I actually want to focus on a different instance, another British Columbia instance of trans-boundary pollution. (I do not want to be thought by that to be implying that British Columbia is a particular problem.) It is a striking example of potential, rather than actual, pollution.

There is a mine called the Tulsequah Chief mine; proposed to be re-established on the Taku River in northwest British Columbia. The Taku River flows west into the Pacific Ocean, emptying into it near Juneau, Alaska. The mine would be about twelve miles upstream from the Alaska border. The mine is not currently underway. There has been a proposal to reopen it, which, in the last several years, has received quite a bit of attention because of its potential environmental consequences. Alaska, as you would

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¹ Trail Smelter Arbitration (U.S. v. Canada) (1941).

expect, is concerned about potential downstream pollution from tailings. Environmentalists in Alaska and British Columbia are concerned about the possibility that a one-hundred-mile access road that would need to be built to this mine would cause various, long-term environmental problems, such as opening up the development of the area to other miners and logging companies and perhaps to poachers.

This kind of problem in both countries has often been the subject of environmental impact assessment. None of these problems are obvious or certain and the consequences are not clear. In both countries we have a long tradition of undertaking an assessment of the environmental effects of proposed projects, in light of their alternatives and mitigating factors, before the projects go ahead. So it is not too surprising that British Columbia has undertaken a lengthy process of environmental assessment.

It has also been clear since the 1970s that for projects with trans-boundary effects or with potential trans-boundary effects, domestic environmental impact assessment is not going to be enough. You have to also look at the trans-boundary effects. That is just common sense.

It is perhaps not too surprising that British Columbia invited the government of the United States, specifically the Environmental Protection Agency (EPA), to participate in its process of environmental impact assessment to bring in the point of view of those affected by the trans-boundary effects of the mine.

This sounds great, right? I mean, so far this sounds wonderful. In fact, I think it was heading in a good direction, but from the U.S. point of view, the process was cut short in March of 1998 when the British Columbia Office of Environmental Assessment drafted a report assessing of the mine and gave the United States only forty-eight hours to respond. The United States felt this was not enough time, and protested. The mine was approved anyway the next week, and this has led to various disputes between the two countries over the consequences of the mine.

I do not really want to take a position on whether the mine is a good or bad thing. I do not know enough about it. I want to point out instead that this dispute really highlights the importance of international agreement. There is no international agreement between the two countries on trans-boundary environmental impact assessment. If there had been, it certainly would not have necessarily prevented all disputes over this mine. What it would have done is give Alaska and EPA, the U.S. generally, a clear right rather than a just granted-by-grace privilege to participate in the environmental assessment and the right to have their views taken into account.

Disputes clearly could have arisen anyway, had there been an agreement, but had there been an agreement, at least the disputes would have taken place

within a framework of international law, rather than a framework of, essentially, unilateral British Columbia actions, which, however well intentioned, could have been changed at any time by British Columbia without violating the United States' international rights.

Why is there not an agreement on trans-boundary environmental impact assessment? I think the simplest answer is that the problem is federalism; that is, specifically, the fact that in both countries environmental impact assessment at the federal level is required only for federal projects: projects that are either carried out, funded or authorized by the federal government. Other projects, any project that does not fit within that federal box, can be subject to environmental impact assessment if the state or province decides that it should. And many states, and virtually all provinces, have enacted some type of environmental impact assessment legislation.

The problem has been this federal divide in responsibility has made it more difficult for the two countries to enter into an effective international agreement. This is not for want of effort. In fact, the two countries have started twice to negotiate an agreement on trans-boundary environmental impact assessment. I would like to briefly describe why both of those agreements have run into problems over federalism issues.

The first agreement was the Convention on Environmental Impact Assessment in a Trans-boundary Context negotiated by the Economic Commission for Europe, to which both Canada and the United States belong. Canada and the United States participated in the negotiations and signed the agreement, but the United States has never ratified it. Canada ratified the agreement seven years later, in 1998, with a very powerful federalism reservation. Canada, in its reservation, said that "under the Canadian constitutional system, legislative jurisdiction of environmental assessment is divided between the provinces and the federal government," and it reserved from taking on any commitment to assess projects that "fall outside of federal legislative jurisdiction exercised in respect of environmental assessment." That is, projects that fall outside exercised federal jurisdiction, not just potential federal jurisdiction.

This reservation has met with a great deal of objection from European parties to the convention. I think there are about ten objections from the Europeans, all of which say pretty much the same thing, which is: "We do not know what you are agreeing to if you carve out this kind of exception and, it seems to us, carving out this kind of exception has the effect of undermining the object and purpose of the agreement."

The U.S. has not explained publicly why it has not ratified the Espoo Convention.

(I should I say it is called the Espoo Convention for two reasons. First, the real name is so long people get tired of repeating it over and over. Second, the agreement was signed in Espoo, Finland, so, like the Vienna Convention or the Montreal Convention, it has taken on the name of its city.)

The United States has not explained why it has not ratified the Espoo Convention after signing it. I think it is fairly clear the U.S. feels it would have to make a reservation very similar to the Canadian reservation, and the U.S. may just feel it is not worth the grief it would get from the other parties from entering into that kind of reservation.

The second attempt involving the two countries to enter into a trans-boundary environmental impact assessment agreement started in 1993 with the environmental side agreement to the North American Free Trade Agreement (NAFTA), which includes a provision suggesting that three North American countries negotiate a trans-boundary environmental impact assessment agreement within three years. It has been seven years since then, and there is still no agreement. The reason, again, is federalism.

Mexico insisted in the negotiations that the United States commit to assess projects that go beyond just the existing box of federal jurisdiction. Mexico's reason is that it is concerned about a series of recent proposals to put a low-level radioactive waste disposal facility in Texas near the Mexico border. This facility would not be subject to federal EIA requirements, only Texas law. Mexico says, "Unless we have an agreement that covers facilities like this, the agreement is no good to us."

The U.S. has absolutely refused to consider extending its EIA requirements beyond the federal level. Why has it done this? The reasons are political rather than legal. I do not think there is any doubt that constitutionally the U.S. government could decide to require an environmental impact assessment for virtually any project that has trans-boundary effects. But the federal government has absolutely no interest in ramming down the states' throats an agreement that would require environmental impact assessments for projects within state jurisdiction.

One response to all of this might be, so what. This does not sound like a federalism problem; that is, the U.S. and Canadian federal systems seem to match up here. Certainly to a certain extent that is true. You can imagine a U.S./Canada bilateral agreement on trans-boundary EIA, which avoids the whole question of state and provincial coverage by saying, "We are only going to cover the federal projects." The federal governments would be able to enter into an agreement like that in about six hours.

The problem with that, I think, is from an environmental point of view. An agreement like that, which is limited purely to federal projects, leaves out many of the projects that might cause significant trans-boundary harm. To

reemphasize the original problem the Tulsequah Chief mine project underwent a British Columbia provincial assessment procedure, pursuant to provincial law, not a federal assessment pursuant to the Canadian Environmental Assessment Act.

The bottom line is that federalism creates a kind of dilemma for the federal governments in dealing with international problems. The dilemma is this: Either the federal governments decide to enter into an agreement they know they can implement ourselves, pursuant to their own existing, exercised federal jurisdiction (that is the easy approach) or they really try to address the whole international environmental problem at the risk of running into state and provincial opposition. To date the approach has nearly always been the first, I think, rather than the second.

Assuming that the political obstacles here really are insuperable, what can be done to bring states and provinces more on board to these agreements? I do not know that there is a clear answer to that question. Let me give you three examples that have been tried recently.

One possibility is to not require the provinces to join an agreement or to be covered by it, but to leave open the possibility that they would join later, and put an incentive in the agreement that would encourage them to do that. That was tried in the environmental side agreement to NAFTA: The provinces were essentially encouraged to accept the environmental side agreement. A few incentives were built into the agreement to encourage them to do. I think the result has been not really satisfactory. Only three or four provinces now, seven years later, have actually signed on to the environmental side agreement.

Another possibility is to try to include more representatives of states and provinces in the federal-to-federal negotiations. This is happening more and more often. In the North American trans-boundary EIA agreements, state representatives were on the state delegation, and in the Ozone Annex negotiations last year, I know that provincial representatives were on the Canadian federal delegation.

The problem seems to be that, for whatever reason, the states and provinces do not buy into the agreement as a result of being involved in the negotiations. Instead, I think they see their role as more insuring that the negotiations do not get out of control and start actually affecting state and provincial interests.

The third possibility would be to have the federal government say, "You know, states and provinces, why don't you try and work out your own agreements since you don't like it when we interfere?" To a certain extent, this is happening as well. British Columbia, for example, has an environmental cooperation agreement with the State of Washington. It has proposed

a similar agreement with the State of Alaska. This approach may have some benefits, but it also has obvious problems such as the risk of inconsistency between different state/provincial agreements and more importantly the risk of inconsistency with overarching or underlying federal policies.

Let me close with this: I think the lesson here is that the federal governments cannot abdicate or ignore international problems by saying that they are solely within state or provincial jurisdiction. I do not mean they cannot do it in the sense that they should not do it. I mean that they really cannot get away from the fact that these are international problems. Whether they like it or not, international problems are within the purview of the federal government and they tend to end up in the federal government's lap.

The Tulsequah mine dispute has ended up in the federal government's lap because the governor of Alaska immediately, after the mine was approved, wrote a letter to Ms. Albright saying this is outrageous, we think you should do something about it. We think you should go refer this problem to the International Joint Commission. Ms. Albright or the State Department had talks with their counterparts at the federal level in Canada, talks which have continued to this day, without resolution, over whether this project, whether this issue, should be referred to the International Joint Commission.

In other words, this is not an area in which the federal governments can simply wash their hands and leave it up to the states and provinces. The federal government whether they like it or not, have the responsibility to figure out what they want to do in this area. I will close on that.