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Reflections on the Changing Nature of Firms and States

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Forthcoming in *Transboundary Harm: Lessons from  
the Trail Smelter Arbitration* (Russell Miller & Rebecca Bratspies eds.,  
Cambridge University Press 2006).

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**THE CONUNDRUM OF CORPORATE SOCIAL RESPONSIBILITY:  
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STATES**

**Abstract:** The Trail Smelter Arbitrations of 1938 and 1941 still figure as landmark cases in International Environmental law, despite the fact that the debate continues what lessons ought best to be drawn from these proceedings. In the context of contemporary work in the area of transnational corporate activity, wrongful corporate behaviour such as environmental harm or human rights abuses, Trail Smelter can serve as a starting point for the study of effective regulation of trans-territorialized conduct of private actors. The paper highlights the challenges faced by both the persisting attempts to sue multinational corporations before domestic courts and those hoping for efficient outcomes resulting from corporate self-regulation, predominantly under the heading of corporate social responsibility (CSR). The paper places both discussions against the background of an emerging transnational law of corporate regulation, which is characterized by a mixture of domestic and international, public and private regulatory instruments. It is against this background that the lessons from Trail Smelter for the regulation of corporate conduct must be drawn with respect to the transformation of state regulation and the increasing reliance on private self-regulation.

Keywords: Trail Smelter, corporate, public, private, self-regulation

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# THE CONUNDRUM OF CORPORATE SOCIAL RESPONSIBILITY: REFLECTIONS ON THE CHANGING NATURE OF FIRMS AND STATES

Peer Zumbansen

“We are fiddling, while Rome burns.”<sup>1</sup>

## A. INTRODUCTION

While its value as precedent, paradigm or standard-setter continues to be disputed<sup>2</sup> the Trail Smelter Arbitration<sup>3</sup> plays an important place in our contemporary search for adequate instruments and forms of international environmental regulation. Already the various contexts in which reference is made to *Trail Smelter* communicate its multifaceted messages.<sup>4</sup> Through the eyes of today, *Trail Smelter* might seem outdated or skewed, in particular its disputed construction of Canada’s responsibility for the transboundary harm that was brought about by a private

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<sup>1</sup> JULIET SCHOR, *A SUSTAINABLE ECONOMY FOR THE 21<sup>ST</sup> CENTURY* (1998), at 16.

<sup>2</sup> See Jaye Ellis, *Has International Law Outgrown Trail Smelter?*, in this volume.

<sup>3</sup> See the 1938 and 1941 decisions: *Trail Smelter Arbitral Decision*, 33 AM. J. INT’L L. 182 (1939) [hereinafter “Trail Smelter (1939)”]; *Trail Smelter Arbitral Decision*, 35 AM. J. INT’L L. 684 (1941) [hereinafter “Trail Smelter (1941)”].

<sup>4</sup> Alfred Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, 50 OR. L. REV. 259, 259 (1971): “Every discussion of the international law of pollution starts, and must end, with a mention of the *Trail Smelter Arbitration*...”; Alhaji B.M. Marong, *From Rio To Johannesburg: Reflections On The Role Of International Legal Norms In Sustainable Development*, 16 GEO. INT’L ENVTL. L. REV. 21, 71 (2003); see also Dinah Shelton, *Protecting Human Rights In A Globalized World*, 25 B.C. INT’L & COMP. L. REV. 273, 307 (2002), placing *Trail Smelter* in the context of the emerging international law of state responsibility for violations of other states’ rights even where these violations originate from private actors. But see, Ellis, *supra* n. \_\_.

enterprise.<sup>5</sup> And yet, while *Trail Smelter* stands apart from the later development of international law and the doctrine of state responsibility<sup>6</sup>, it continues to engage our imagination. *Trail Smelter* continues to resurface as a starting point for thinking about adequate ways to resolve border crossing environmental conflicts, but also other forms of transboundary harm.<sup>7</sup> It does so, precisely, by inspiring ongoing inquiries into the right balance between State *versus* Market based strategies of environmental regulation,<sup>8</sup> and by prompting many of the pertinent questions raised by de-territorialized corporate activities, highly diversified regulatory structures, and the limited enforcement competences of traditional political agencies.<sup>9</sup>

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<sup>5</sup> See *Trail Smelter* (1941), at 716: "...under the principles of international law, as well as of the law of the United States, 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."

<sup>6</sup> See Pierre-Marie Dupuy, *The International Law of State Responsibility: Revolution or Evolution?*, 11 MICH. J. INT'L L. 105 (1989).

<sup>7</sup> See the contributions by Holger Hestermeyer, Mark Anderson and Russell Miller in this volume. See already Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L. J. 675, 677 (1993): "...because the *Trail Smelter* arbitration is a rare example of international environmental adjudication [from an] early period, it has acquired an unusually important place in the jurisprudence of international environmental law."

<sup>8</sup> Eric Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1241 (1995): "The inadequacy of command-and-control regulation fuels the hottest growth industry in environmental law..."

<sup>9</sup> See Bruce Ackerman/Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985); id., *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENV'T L. (1988); Benedict Sheehy, *Corporations and Social Costs: The Wal-Mart Case Study*, 24 J.L. & COM. 1, 8-9 (2004), drawing attention to the focus on nuisances typical for cases of atmospheric pollution such as in the *Trail Smelter* cases. See also Michael

In this light, *Trail Smelter* must be read as inviting the following questions: Who bears responsibility for extraterritorial harm caused by transboundary pollution? Should state responsibility for privately-induced transboundary harm replace or accompany private responsibility? Does either concept of responsibility respond to the particularly complex challenge posed by a proliferation of decreasingly well-defined environmental harms, dangers and risks? Shifting, then, our focus away from the state as the exclusive author and enforcer of norms, and instead concentrating on the private actors themselves, leads to the next level of inquiry. What can these private or corporate actors contribute to a comprehensive program of environmental protection? How far can the state legitimately regulate corporate activity without infringing on the corporation's property rights? What is the best mixture of state regulation and corporate self-regulation? Can, and should there be trade-offs between a 'public' environmental protection agenda and the 'private' acquisition, sale and trading of pollution rights?

This paper cannot offer satisfying answers to all of these questions. Instead, it will explore the changing role of the state and private actors in environmental regulation. Hence, *Trail Smelter* is taken as starting point for a series of reflections on contemporary struggles over the right balance between public and private instruments in the field of environmental protection. The assignment of legal responsibility through the 1938 and 1941 arbitral decisions exposes two competing regulatory regimes that, in the post-*Trail Smelter* Era, have undergone dramatic

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Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L.J. 399, 399 (2002), referring to the "relatively straightforward" illustration by the Court of the issues at stake which made the Decisions "paradigmatic for international environmental lawyers"; for a foundational assessment of the emergence of risk-society, see ULRICH BECK, RISK SOCIETY [1986] (1992); a concise restatement is provided by Beck, *From Industrial Society to Risk Society: Questions of Survival, Social Structure and Ecological Enlightenment*, 9 THEORY, CULTURE & SOCIETY 97 (1992).

developments and further differentiations. *Trail Smelter's* focus on the responsibility of the state for environmental protection has been strongly-questioned. Through the important role that non-state actors played in the progress of the arbitral deliberations<sup>10</sup>, *Trail Smelter* also implicitly raises various questions about emerging alternative, private regimes of societal self-regulation. Furthermore, *Trail Smelter* invites us to consider the shift away from substantive standards of harm towards the adoption of processes that permit a constant refinement not only of the analytical frame, but also of the applied standards and the modes by which environmental goals are pursued.<sup>11</sup>

This paper, thus, addresses the other side of *Trail Smelter*, attempting to unfold its as-yet untold story of corporate responsibility. This latter story speaks the language of private, self-regulation of environmental protection, of corporate self-regulation through codes of conduct, of *soft law* and corporate social and environmental responsibility. These narratives emerge when we focus on the business corporation as the primary *locus* for the regulation of environmental harm. The private, self-regulatory challenge of corporate responsibility will thus be discussed in close connection with the changes of the public side of environmental law and the dramatic exhaustion of the state's regulatory capacities.<sup>12</sup> The paper argues that there is a striking

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<sup>10</sup> See Miller, in this volume.

<sup>11</sup> See hereto CHRISTOPHER D. STONE, *WHERE THE LAW ENDS. THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (1975), at 122-3, describing the process-oriented approach taken by the Environmental Protection Act.

<sup>12</sup> See Gunther Teubner, *Regulatory Law: Chronicle of a Death Foretold*, 1 *SOC & LEG STUD.* 451 (1992); see also Stepan Wood, *The Role of the International Organization for Standardization (ISO) in Governing Environmental Conflict and Corporate Social Responsibility in Developing Countries: Questions for Research*, in Beatriz Londoño Toro, ed., *Propiedad, Conflicto y Medio Ambiente* 15-56 (Bogotá, Colombia: Universidad del Rosario 2004), underlining the necessity to look beyond the traditional confines of environmental law and



parallel between the state's transformation into a collaborative, contracting and learning entity that remains dramatically dependent on private knowledge, and the modern business corporation's increasing assumption of public tasks as it grows in size and function, spanning its organization and activities across a seemingly borderless, global arena. Both, the state and the firm, depend on knowledge to inform their strategic choices in a regulatory environment that has ceased to lend itself to easy consensus, to meaningful deliberation or to an effective, top-down production and implementation of norms.<sup>13</sup> In this volatile strategic environment, the acquisition and administration of knowledge becomes a challenge for both the 'retreating' state<sup>14</sup> and the boundary-less firm.<sup>15</sup> For both the production of knowledge is characterized by the fragility of intermittently-accepted standards, recently-taken decisions and temporarily-reached agreements. Fittingly, the term risk society<sup>16</sup> has become common currency to identify the background for the emergence of 'knowledge management' as being the foremost challenge to knowledge-driven entities. This paper argues that this challenge is put to both the state and to the business corporation as the knowledge society moves the element of risk from the outside of management into its heart. Risks are no longer outside norm-production with regard to a norm's real-world consequences. Instead, risks are inherent to

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to recognize corporate codes as potentially powerful sources of effective environmental regulation.

<sup>13</sup> IAN AYRES/JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992).

<sup>14</sup> SUSAN STRANGE, *THE RETREAT OF THE STATE* (1996).

<sup>15</sup> Robert Boyer/J. Rogers Hollingsworth, *From National Embeddedness to Spatial and Institutional Nestedness*, in *CONTEMPORARY CAPITALISM. THE EMBEDDEDNESS OF INSTITUTIONS* 433 (Robert Boyer/J. Rogers Hollingsworth eds., 1997).

<sup>16</sup> See, e.g., Michael Power, *From Risk Society to Audit Society*, 3 *SOZIALE SYSTEME* 3, 5 (1997).

the decision-making process itself, as they originate in the social production of knowledge and norms rather than in nature itself.<sup>17</sup>

## **B. PUBLIC V. PRIVATE ORDERING: WHAT WE KNOW AND WHAT WE DON'T KNOW ABOUT REGULATORY LAW<sup>18</sup>**

The *Trail Smelter* decisions were already contemplating many of these issues. As Russell Miller argues in this volume, this contemplative legacy might outweigh the Tribunal's "correctness" in producing a doctrinally sound solution to every problem touched upon in the arbitration.<sup>19</sup> Although the Tribunal addressed the border-crossing dimension of the smelter's pollution, it ultimately took refuge in the construction of state responsibility without offering, in fact, a fully satisfactory justification for this holding.<sup>20</sup> The legacy of this holding is that it has no legacy. International environmental law has not embraced the Tribunal's construction of state responsibility<sup>21</sup>, but has instead embraced a 'movement from status to contract'.<sup>22</sup> Against the background of ever more, and ever *more detailed*, international environmental law treaties, the role of state responsibility "in addressing global

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<sup>17</sup> *Id.*

<sup>18</sup> The inspiration for this heading comes certainly from Ian Macneil's wonderful article, *Relational Contract: What We Know and What We Don't Know*, 1985 WISCONSIN L. REV. 483.

<sup>19</sup> See Miller, in this volume.

<sup>20</sup> *Trail Smelter* (1941), at 716-717.

<sup>21</sup> See Ellis, in this volume.

<sup>22</sup> See for the origin of this idea, HENRY SUMNER MAINE, *ANCIENT LAW* (1861).

environmental problems" has increasingly been questioned.<sup>23</sup> Meanwhile, the success of negotiation, contract and treaty is, itself, curtailed by the fundamental complexities of environmental damages and the resulting challenge of addressing and regulating them.<sup>24</sup> In this light, the law of environmental protection is a case in point for the challenge to regulatory law under conditions of extreme uncertainty.<sup>25</sup> We therefore need to sketch the context of regulatory state law in which environmental law has so long been conceptualized.

## I. LEGACIES AND LEGENDS OF TRAIL SMELTER IN INTERNATIONAL ENVIRONMENTAL LAW

The rise and proliferation of international environmental law has shifted the focus from the nation state to international regimes and international, treaty based conflict resolution.<sup>26</sup> It is against this background, that the failure of the United States to embrace

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<sup>23</sup> Jutta Brunée, *Of Sense and Sensibility: International Liability Regimes as a Tool for Environmental Protection*, in RECONCILING LAW, JUSTICE AND POLITICS IN THE INTERNATIONAL ARENA 110, 113-114 (CANADIAN COUNCIL ON INTERNATIONAL LAW ED., 2003); Thomas Gehring/Markus Jachtenfuchs, *Civil Liability for Transboundary Environmental Harm*, 4 EUR. J. INT'L L. 92, 93 (1993): "With continuing industrialization and increasing risks of transboundary environmental damage, there is a growing need to establish specific rules that are precise enough to be applicable and that are therefore apt to be 'effective'. However, a derivation of these specific rules in the area of transboundary environmental damage from the general law of state responsibility involves a number of fundamental problems."

<sup>24</sup> Brunnée, *supra*, at 114: "'Important aspects even of central international environmental norms remain opaque. To begin with, the legal status and content of several key norms, such as the precautionary principle, sustainable development, common concern, or common but differentiated responsibilities, remain contested."

<sup>25</sup> See Gehring/Jachtenfuchs, *supra*, at 93. Bratspies, elsewhere in this volume.

<sup>26</sup> Drumbl, elsewhere in this volume.

the Kyoto Protocol is a dramatic fall-back.<sup>27</sup> On a more conceptual level, the development of environmental law on the international plane has been propelled prominently by the rise of the precautionary principle that complements the traditional causation-based liability standard by a complex, scientifically open standard.<sup>28</sup> The precautionary principle's most important effect is its improved level of risk assessment with regard to unknown or, at least, difficult-to-assess environmental risks. Despite its disputed function as "precedent" for international environmental law, Trail Smelter can be read as addressing the same challenge that is met by the precautionary principle, including the procedural approach that led to the arbitration itself as well as to the bilateral resolution of the conflict.

In addition, international law makers have viewed the precautionary principle's flexibility as an incentive to engage in international cooperation in environmental risk assessment. Here we can see the valuable enrichment of nation-state based research programs and institutions by an irrevocable trend towards cooperation among states and non-state actors, eventually fueling further the transnational and global growth of norms and

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<sup>27</sup> See Miller, in this volume; see the discussion in W. Brande Chambers, *Towards an Improved Understanding of Legal Effectiveness of International Environmental Treaties*, 16 GEO. INT'L ENV'T'L L. REV. 501 (2004).

<sup>28</sup> Jon M. Van Dyke, *The Evolution and International Acceptance of the Precautionary Principle*, in: *Bringing the Law to Ocean Waters* 357, 357 (D.D. Caron/H.N. Schreiber eds., 2004), arguing that even with remaining skepticism as to its definitional boundaries, the precautionary principle, over the course of the last two decades, "can no longer be ignored." See also Carolin Hillemanns, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, 4 GERMAN LAW JOURNAL 1065, 1076 (2003), pointing out that the recently published UN Norms for Human Rights Obligations for transnational corporations explicitly command that corporations observe the precautionary principle.

standards, promoted by non-state-actors and international organizations.<sup>29</sup>

Meanwhile, this global development in norm-production<sup>30</sup> mirrors the dynamics of a changing regulatory regime within the nation-state. The political economy of the nation-state is most adequately described by the fragmentation of public arenas into specialized discourses and by the emergence of a comprehensive and increasingly de-territorialized knowledge economy.<sup>31</sup> The following section shall, albeit briefly, highlight a number of decisive elements of the transformed landscape of the regulatory state at the beginning of the 21<sup>st</sup> Century, and will measure the changing face of environmental risk regulation against a backdrop of larger transformations of the political economy of domestic and transnational regulation.

## II. REGULATION AND DISPERSED KNOWLEDGE

The exhaustion of the regulatory (welfare) state on the domestic level,<sup>32</sup> and the much-disputed demise of the state as sole actor on

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<sup>29</sup> See, e.g., NILS BRUNSSON/BENGT JACOBSSON, *A WORLD OF STANDARDS* (2000); Walter Mattli/Tim Büthe, *Setting International Standards: Technological Rationality or Primacy of Power?*, 56 *World Politics* 1 (2003); Peer Zumbansen, *Transnational Law*, in: *ENCYCLOPEDIA OF COMPARATIVE LAW* (JAN SMITS ED., 2005).

<sup>30</sup> See the account by Andreas Fischer-Lescano/Gunther Teubner, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 *MICH. J. INT'L L.* 999 (2004).

<sup>31</sup> See only NICO STEHR, *WISSEN UND WIRTSCHAFTEN* (2001); MICHAEL S. PIORE/CHARLES SABEL, *THE SECOND INDUSTRIAL DIVIDE* (1984); PETER BURKE, *A SOCIAL HISTORY OF KNOWLEDGE: FROM GUTENBERG TO DIDEROT* (2000).

<sup>32</sup> Jürgen Habermas, *The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies* [1985], in: *id.*, *THE NEW CONSERVATISM. CULTURAL CRITICISM AND THE HISTORIANS' DEBATE* [ED. AND TRANSL. BY SHERRY WEBER NICHOLSEN] 48 (1989).

the international legal and institutional plane,<sup>33</sup> constitute the fast-changing context of national, supranational and transnational regulatory experiments, networks and political hopes.<sup>34</sup> Environmental protection is a classic case of the 'regulatory state under siege', because it constantly faces the multifaceted challenge of identifying the problem, and designing the instruments to combat the problem, while at the same time defining the appropriate scope and direction of the state's response.<sup>35</sup> A clear expression of this normative and institutional challenge is the United States' 1984 *Chevron* decision, in which the United States' Supreme Court recognized the crucial role of agencies in interpreting statutes.<sup>36</sup> *Chevron* is rightly regarded as a paradigmatic case in transforming American administrative law into a responsive, knowledge-based regulatory regime.<sup>37</sup> The recognition of the knowledge-based, interpretative role of administrative agencies is particularly prevalent in the field of environmental law where expert knowledge has long been considered crucial.<sup>38</sup> *Chevron* forms part of a long-term

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<sup>33</sup> Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 487 (2005); Peer Zumbansen, *Die vergangene Zukunft des Völkerrechts*, 34 KRITISCHE JUSTIZ 46, 50-53 (2001).

<sup>34</sup> See the excellent overview by David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 12 (2004); Oren Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 IND. J. GLOB. LEG. STUD. 25 (2003).

<sup>35</sup> ERHARD DENNINGER, VERFASSUNGSRECHTLICHE ANFORDERUNGEN AN DIE NORMSETZUNG IM UMWELT- UND TECHNIKRECHT (1990); Ackerman/Stewart, *Reforming Environmental Law* (1988), *supra*.

<sup>36</sup> *Chevron, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)

<sup>37</sup> See, e.g., E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts, and Agencies in Environmental Law*, XVIU VILL. ENV. L.J. 1, 3 (2005).

<sup>38</sup> See *id.*, at 14-15.

transformation of a legalistic, functionalist understanding of the state into an “expertise-driven” regulatory regime.<sup>39</sup> This transformation is marked by the increased inclusion of private actors in public action, raising not only far-reaching questions as to its democratic accountability and legitimacy<sup>40</sup>, but also to the fundamental dilemma of how the state is to gain, produce, and process the necessary regulatory knowledge that is needed.

An essential feature of this contemporary transformation in regulatory theory concerns not only the institutional dimension of the regulatory response to transboundary harm, but its normative quality. Administrative agencies and other regulatory actors increasingly resort to procedural, experimental and, ultimately, *learning* forms of regulation when designing statutes, standards and sanctions targeted at polluters and other addressees of regulation.<sup>41</sup> The most remarkable feature of these new forms of regulation is the regulator’s recognition of its likely failure in designing an ultimately successful and effective regulatory instrument, in particular, when dealing with an unidentified polluter, a plurality of actors<sup>42</sup> or, more generally, when having to

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<sup>39</sup> See already JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

<sup>40</sup> Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000), referring to the prevailing “hierarchical, agency-centered conception of administrative power”.

<sup>41</sup> See Karl-Heinz Ladeur, *Coping with Uncertainty: Ecological Risks and the Proceduralization of Environmental Law*, in ENVIRONMENTAL LAW AND ECOLOGICAL RESPONSIBILITY: THE CONCEPT AND PRACTICE OF ECOLOGICAL SELF-ORGANIZATION 299 (GUNTHER TEUBNER/LINDSAY FARMER/DECLAN MURPHY EDS., 1994); *ID.*, *DAS UMWELTRECHT DER WISSENSGESELLSCHAFT* (1995); see also Liora Salter, *Institutional Learning in Standards Setting*, in INNOVATION AND SOCIAL LEARNING: INSTITUTIONAL ADAPTATION IN AN ERA OF TECHNOLOGICAL CHANGE 65 (MERIC S. GERTLER/DAVID A. WOLFE EDS., 2002).

<sup>42</sup> See only Gunther Teubner, *The Invisible Cupola: From Causal to Collective Attribution in Ecological Liability*, in ENVIRONMENTAL LAW AND ECOLOGICAL RESPONSIBILITY, *supra*, note 42, at 17.

base a regulatory response or program on constantly changing factual and technical data.<sup>43</sup>

The post-industrial, “contracting”<sup>44</sup> state no longer finds itself on top of a hierarchical order in which it can effectively set the direction of societal change. Instead, the state has become a label for the political system that forms a mere part of a more comprehensive, encompassing social arrangement that has neither center nor top, but is broken down into a multitude of social systems of autopoietic reproduction.<sup>45</sup> Likewise, the knowledge society knows no central regulator, but is made up of a multitude of decentralized, dramatically fragmented *loci* of knowledge production. This new structure has dramatic consequences for our understanding of law, which hitherto had been described in close association with the entity of the state and its political agencies of norm-creation.<sup>46</sup> In contrast, the law of the knowledge society is de-centered from the political system, it forms in communication with different social systems and, consequently, embraces constantly changing conditions of experimental, reflexive norm-production. In this light, the separation of “state and society”, the distinction between public and private law, must be seen as historical concepts used to describe law’s attachment to particular institutions of norm-creation. The determining characteristic of the ‘non-interventionist’, ‘post-regulatory’ law of the knowledge

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<sup>43</sup> See generally Ulrich Beck, *ECOLOGICAL POLITICS IN AN AGE OF RISK* (1995). We should remember that Trail Smelter in particular raised the problem of a known polluter but constantly changing technical data.

<sup>44</sup> IAN HARDEN, *THE CONTRACTING STATE* (1992); Jody Freeman, *The Contracting State*, 28 FLA. ST. L. REV. 155 (2000).

<sup>45</sup> See NIKLAS LUHMANN, *OBSERVATIONS ON MODERNITY* [1992] (William Whobrey transl., 1998); Gunther Teubner, *The King’s Many Bodies: the Self-Destruction of Law’s Hierarchy*, 34 LAW & SOC’TY REV. 753 (1997).

<sup>46</sup> This is striking, for example, in constitutional law: see hereto, Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002).



society is its *responsiveness*.<sup>47</sup> Incessantly adapting and changing, this newly responsive vision of law<sup>48</sup> can, at least in theory, assume the regulatory stance most appropriate at any given moment.

Against this background, then, how can we describe the state and the changing nature of the state in supervising these activities? Where the state formerly assumed legislative authority in regulating fields of corporate action with regard to environmental protection, the heavy reliance on scientific evidence and the standardization by private entities necessitates a thorough overhaul of the state's prerogative in regulating pollution and other environmental harm. A dense interwoven network of public and private action materializes. The changed nature of the supervision-state (or, the environmental, regulatory, prevention state<sup>49</sup>) is highly volatile, fragile, and dependent on fragmented knowledge, domestically and transnationally.<sup>50</sup> Success depends on the state being able to absorb private knowledge in an optimal manner. The state, therefore, is increasingly expected to engage in innovative cooperation with private parties in initiating, funding and generating scientific research. Enforcing an effective environmental protection scheme thus requires the state to transform itself from the regulatory interventionist state and to adopt new roles as a moderator of private, commercial self-regulation and public policy interests on the one hand, and tort law enforcer – both based on national and international law – on

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<sup>47</sup> See AYRES/BRAITHWAITE, *RESPONSIVE REGULATION*, *supra*, note 10.

<sup>48</sup> Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC'Y REV. 239 (1983).

<sup>49</sup> See for these categories, GERALF-PETER CALLIERS, *PROZEDURALES RECHT* (1999); HELMUT WILLKE, *SUPERVISION DES STAATES* (1997).

<sup>50</sup> See also ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004), describing worldwide communications between various regulatory agencies, and other state and non-state bodies.

the other. Facing constantly growing and differentiating governance problems, the state is pressed to rely on private self-organization in reaching its goals. While the state must constantly augment and update its working knowledge of these forms of public-private governance, it is necessary to gain a better understanding of the actor on the other, 'private' side of this relationship. It is against this background that the following section will attempt to unfold the conundrum of corporate social and environmental responsibility.

### **C. THE OTHER SIDE OF *TRAIL SMELTER*: TRACING NARRATIVES OF CORPORATE RESPONSIBILITIES**

While *Trail Smelter* clearly speaks to the public, state-oriented dimension of transnational responsibility, its other message is much quieter, less audible, discernible only in its conceptual, theoretical background. It is, in a nutshell, the story of the rise and fall and, eventually, the rebirth of a dramatically transformed regulatory private law.<sup>51</sup> On first impression, *Trail Smelter* seems silent on this private dimension of the conflict resolution. In the background, however, of the Tribunal's discussion of state responsibility, we can easily discern the potential and the promise of *private* responsibility. Hence, our focus on *Trail Smelter's* second, untold story, shall be on corporate responsibility. It is a story that we find in our contemporary reading of *Trail Smelter's* central focus on state responsibility. But, our focus will neither be that nor the often-discussed, substantive side of the corporation's

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<sup>51</sup> See Teubner, *Substantive and Reflexive Elements in Modern Law*, *supra*; see also Peer Zumbansen, *Quod Omnes Tangit: Globalization, Welfare Regimes and Entitlements*, in: *THE WELFARE STATE, GLOBALIZATION, AND INTERNATIONAL LAW* 135-173 (BENVENISTI/NOLTE EDS., 2003)

responsibility.<sup>52</sup> Instead, we are interested in the law-making dimension of corporate social and environmental responsibility (CSR)-- in the regulatory context and in the political economy of CSR to be precise. This section will argue that to understand the regulatory dimension of the firm's responsibilities to society at large, we must now, after our brief exploration of the changing dimensions of public, state-centred regulation, look to the corporation itself, to its role and function in a dramatically changing and globalizing socio-economic environment.

In studying the political economy of corporate (environmental, social) responsibility, we must place the CSR debate within the context of three connected discourses that indirectly speak to corporate social responsibility. These discourses concern the briefly sketched themes of environmental regulation through 'hard' and 'soft' law as well as the transformation of the regulatory state into a supervising and moderating state in the knowledge economy. The third discourse that we need to explore concerns the *political economy of the "embedded" corporation*, in other words, the domestic and transnational, regulatory framework and context of corporate activity, but also the norms internal to the organization and governance of the business corporation.<sup>53</sup> Taken together, these discourses inform any assessment of the corporation's larger social, political and environmental responsibilities. It is the central contention of this paper, that

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<sup>52</sup> See the famous debate between Berle and Dodd: Adolf Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick, Dodd, *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); see the overviews by Lord Wedderburn, *The Legal Development of Corporate Responsibility: For Whom Will Corporate Managers Be Trustees?*, in CORPORATE GOVERNANCE AND DIRECTORS' LIABILITIES 3 (Klaus J. Hopt/Gunther Teubner eds., 1985).

<sup>53</sup> See the brilliant exposition by Walter Powell, *The Capitalist Firm in the Twenty-First Century: Emerging Patterns in Western Enterprise*, in: THE TWENTY-FIRST-CENTURY FIRM. CHANGING ECONOMIC ORGANIZATION IN INTERNATIONAL PERSPECTIVE 33 (Paul Dimaggio ed., 2001).

unfolding the conundrum of corporate social responsibility (“*What is the scope and the content of the corporation’s responsibility/ies?*”; “*What are the adequate regulatory mechanisms to implant, consolidate and enforce these responsibilities?*”; “*Does this lead to an undue (public) intervention into (private) corporate law, in other words: Does ‘corporate law’ extend to the regulation of CSR?*”) against the just-described background of surrounding theoretical inquiry can help us to adequately address the wider conditions of any meaningful concept of CSR.

It is here, where we shall turn our focus away from the usual target, the state and its regulatory responses and, instead, *focus on the corporation itself*. Doing so will allow us to gain a better understanding of the social actor that is most often involved in dramatic cases of environmental harm and, increasingly, implicated in the continuing search for an appropriate regulatory response.<sup>54</sup>

## I. WHAT’S IN A FIRM? UNFOLDING THE CONUNDRUM OF STATE RESPONSIBILITY

The untiring discussion over scope and content, direction and aspirations of “Corporate Social Responsibility” (CSR) is a reminder of what we know and do not know about the very subject and object of our contemporary explorations of the social, environmental, in short: the larger societal, public obligations of the corporation.<sup>55</sup> Whether a corporation is merely a private, profit-oriented undertaking, or whether – perhaps in addition – it bears

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<sup>54</sup> See, e.g., Michael Power, *Constructing the Responsible Organization: Accounting and Environmental Representation*, in ENVIRONMENTAL LAW AND ECOLOGICAL RESPONSIBILITY, *supra*, note 42, at 369.

<sup>55</sup> See, recently, JOEL BAKAN, THE CORPORATION (2004), which in turn has been made into a multiple award-winning documentary film. See also LAWRENCE MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA’S LATEST EXPORT (2001).

non-contractual responsibilities to society at large, employees, creditors, the community and other stakeholders, has not ceased to occupy our minds.<sup>56</sup> This inquiry has certainly contributed to a far-reaching, societal discussion about the function and role of large corporations in society, in both the domestic and the transnational context. It has furthered and instigated a more popular awareness of corporate activities worldwide.<sup>57</sup> But, while case law and literature regarding the corporation's larger role in society abound, little knowledge apparently is advanced about the corporation *itself*. Surely, the corporation, the large publicly-held corporation, the multinational enterprise, the embedded corporation, are researched, analyzed and explored with great scholarly earnestness and policy interest. And yet, it seems that these many assessments of shareholder primacy or stakeholder theory actually contribute very little to a better understanding of the corporation. And with increasing contestation of the public and political role of corporations<sup>58</sup>, we risk losing sight of the very *locus* of ideological battles.

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<sup>56</sup> Simon Deakin, *Squaring the Circle? Shareholder value and corporate social responsibility in the UK*, 70 GEO. WASH. L. REV. 976-987 (2002); David Wheeler/David Grayson, *Business and Its Stakeholders*, J. BUS. ETH. 101-106 (2001).

<sup>57</sup> NAOMI KLEIN, *NO LOGO* (2000); SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS* (1998); Peter Cornelius/Bruce Kogut, *Creating the Responsible Firm: In Search for a New Corporate Governance Paradigm*, 4 GERMAN LAW JOURNAL 45-52 (2003); Ruth O. Kuras, *Corporate Social Responsibility: A Canada-U.S. Comparative Analysis*, 28 MANITOBA L. J. 303-319 (2002); Wesley Cragg/Alan Greenbaum, *Reasoning About Responsibilities: Mining Company Managers on What Stakeholders are Owed*, 39 J. BUS. ETH. 319-335 (2000).

<sup>58</sup> The seminal text is BERLE, *THE 20<sup>TH</sup> CENTURY CAPITALIST REVOLUTION* (1954); see for a contemporary assessment, Amar Bhatia, *Reading Corporate Law: The Fate of Berle's 20<sup>th</sup> Century Capitalist Revolution*, in: *THE CORPORATE GOVERNANCE MATRIX: UNFOLDING THE NEW AGENDA* (STUDIES IN COMPARATIVE LAW AND POLITICAL ECONOMY, VOL. 1, PEER ZUMBANSEN ED., 2005, *forthcoming*).

The “unknown firm” is surely not a promising starting point for our continued discussion over the corporation’s societal responsibilities. The corporation remains unknown, because neither the CSR debate nor the larger dispute over convergence or divergence of corporate governance systems<sup>59</sup> deliver a more concrete description of what actually goes on inside of the corporation, what the corporation *does*, how it *decides*, and how it *adapts to* a dramatically nervous economic and political environment. While an analysis of the socio-economic and regulatory context and environment in which corporations operate may be necessary to understand the embeddedness of the corporation, our inquiry must extend to the corporation itself. In other words, while we must focus on the ‘political economy of the corporation’<sup>60</sup>, its socio-economic, regulatory context in light of national path dependencies and international comparisons<sup>61</sup>, our other target must be the *corporation as a complex organizational entity of social learning*. With a focus on the organizational design of today’s corporation, we can begin to understand and to conceptualize the corporation as a complex and innovative institution of social learning in the context of building a sustainable economy. Does Trail Smelter offer any guidance or lesson?

The still governing corporate law theory that describes the firm as a nexus of contracts must be reread in light of the changes that

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<sup>59</sup> See the provocative contribution to the debate by Hansmann and Kraakman, *The End of History in Corporate Law*, 88 Geo. L.J 439 (2001); see also the *Habilitation* by Hansmann’s German student: MATHIAS SIEMS, *DIE KONVERGENZ DER RECHTSSYSTEME IM RECHT DER AKTIONÄRE* (2005).

<sup>60</sup> THE POLITICAL ECONOMY OF THE FIRM (JOHN PARKINSON/GAVIN KELLY/ANDREW GAMBLE EDS., 2000); John W. Cioffi, *Governing Globalization? The State, Law, and Structural Change in Corporate Governance*, 27 J. L. & SOC’Y 572-600 (2000).

<sup>61</sup> Cioffi, *supra*; Mary O’Sullivan, *The political economy of comparative corporate governance*, 10 REV. INT’L POL. ECON. 23-72 (2003).

affect both the state's and the business corporation's activity. Both operate under conditions of an eroding knowledge base and the ensuing demand for better and more adequate risk assessment. The firm becomes, especially as it assumes ever more public tasks in infrastructure provision and public service delivery, a hybrid actor – neither private nor public – at a crossroads of intertwining demands from the “state” and the “market”. The theory of the firm can thus be compared to contemporary theoretical enquiries into the theory of the state.

## II. POST-HEROIC MANAGEMENT

The key to understanding the contemporary corporation in the political economy of the de-territorialized knowledge economy is to focus on its capacity to remain innovative.<sup>62</sup> The firm's capacity to engage in innovative production depends on its ability to constantly grow, adapt and learn. This it can do by letting go of traditional modes of command and control, and, instead, embracing an ironical, distancing, reflecting and *post-heroic* attitude to corporate governance and management.<sup>63</sup> Our urgently-sought definition of corporate responsibilities, its public duties and obligations to society at large, especially in an era of scandalous corporate crime<sup>64</sup>, depends entirely on our understanding of the firm itself. It is here where we recognize the relevance for our theme of the fierce battle between shareholder-value oriented systems of corporate control and those that place a higher emphasis on workers' voice, participation, industrial relations, and a wider consideration of the firm's stakeholders.<sup>65</sup>

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<sup>62</sup> See Mary O'Sullivan, *The innovative enterprise and corporate governance*, 24 CAMBR. J. ECON. 393 (2000).

<sup>63</sup> DIRK BAECKER, *POSTHEROISCHES MANAGEMENT* (1994).

<sup>64</sup> See BAKAN and KLEIN, *supra*, notes 62 and 64.

<sup>65</sup> See Hansmann/Kraakman, *supra*, note 66, on the one hand, and William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275 (2002), on the other.

Whether we lay our emphasis on the shareholder or on the stakeholder dimension of the firm, will have a significant impact on our assignment of duties and obligations of the firm.<sup>66</sup> This is particularly prevalent with regard to disclosure. Where corporate governance reform is predominantly concerned with shareholders, the emphasis is likely to remain placed – at least for the time being – on improvements in the financial auditing schemes. In contrast, were our focus on an improved environmental accountability of the firm, we would indeed direct our initiatives at other areas in corporate organization. Environmental internal auditing, in fact, constitutes a prime example of the latter developments in environmental, corporate self-regulation.<sup>67</sup> Restated thus, the question of the firm's responsibilities cannot be separated from our foundational understanding of the firm.

However, this perspective on the connection between the *political economy of the firm* and the firm's environmental (or wider social) responsibilities, fails to account for our remaining lack of knowledge of the corporation *itself*. Today's large, publicly held and globally operating firms, escape clear definitions, both with regard to their core activities or 'competences'<sup>68</sup> and their organizational structure. Increasingly, firms have become unbounded, borderless and virtual, with activities that span multiple areas of industry, manufacture or soft products. Echoing many of the challenges that we identified for the state today in a complex society, the firm constitutes a highly complex organization that operates in a volatile regulatory and competitive environment. Rejecting thus, both overly simplistic categorizations of the firm as either shareholder or stakeholder

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<sup>66</sup> Simon Deakin, *supra*, note 63.

<sup>67</sup> See Orts, *Reflexive Environmental Law*, *supra*, note 8, at 1303-1304; Power, *From Risk Society to Audit Society*, *supra*, note 16.

<sup>68</sup> C.K. Prahalad/Gary Hamel, *The Core Competence of the Corporation*, 68 HARV. BUS. REV. 79 (1990)



oriented, the firm of the 21<sup>st</sup> Century challenges our learned ways of organizing social behaviour. Shifting the CSR debate away from the control-oriented images of the corporation, is an essential step in beginning to understand the question of the firm's social responsibilities. Instead, the firm must be viewed within a complex web made up of the socio-economic framework, the embeddedness of the corporation, the internal organization of corporate governance, and the organizational experiments of a constantly evolving, dynamic, multipolar business enterprise. While the latter two dimensions describe the corporation as a communicative, self-referential being, the first dimension speaks of the embeddedness of the firm, its socio-economic and political place in a dramatically changing local and global environment. With the corporation increasingly assuming formerly public functions (welfare, pensions, medical care), we must reconsider our understanding of the firm's allegedly exclusively private character. Where it has become increasingly difficult to assign to social activities the label public or private, this certainly extends to our conception of the business corporation. Understanding the firm is the first step towards understanding the challenge of corporate social responsibility.