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LUCIO CABRERA*

Commentary

THE NATURE AND POWERS OF THE IJC AND THE IBWC

Professor Caldwell has expressed several important remarks on the Canadian/United States environmental challenges and the IJC. He concludes that in lieu of a Court for the Great Lakes, the Treaty provides for an Office of Legal Affairs for fact finding and advisory opinions on points of law, and for mediation and arbitration services. "Thus conflict resolution was emphasized in preference to litigation" and also "This office is similar as the Swedish ombudsman" and no new large bureaucracy was created.

Alberto Szekely's paper is very complex and considers that the two present institutions, the traditional IBWC and the recent La Paz National Coordinators, need possible involvement into a global body as they are separate and independent from each other and foreign ministries exercise some sort of general supervisory role of their work. (I wish to observe that the IBWC has more powers and is stronger than the La Paz National Coordinators, who have coordinating and recommending functions only.)

Szekely remarks that the visit to Mexico by the Prime Minister of Canada in March 1990, when both countries agreed to cooperate in "the identification and treatment of environmental issues which affect or may affect the region to which the parties belong." This will be the first step toward North American trilateral cooperation.

It is possible to observe that the IBWC has more powers than the IJC and more than the new coordinators of La Paz. IBWC has a large bureaucracy and has had executive, legislative and quasi-judicial functions. That is possible to see in the Minute 242 and others. Minute 242 of 1973 deals with the solution of salinity of Rio Colorado and shows the strong powers of the IBWC.

Possible strengthening of the regional international environmental regime would have to deal with serious problems, such as:

1. **Nature and powers of a new agency that is administrative.** Planning laws such as environmental are of a very open and vague char-

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acter and usually give too much discretion to administrative agencies. It is dangerous and contrary to western democratic traditions to give wide discretionary powers to executive agencies if they are not well specified.

2. Mediation, arbitration, standing to judicial review and other group or class actions. The United States, Canada, and Mexico are used to litigation and to bring cases to the courts or to arbitration. Mexican lawyers are a very important factor in building Mexican public and political opinion and are increasingly interested in the field of environmental litigation.

3. Protection of national and sovereign interests of the countries. The constitutions and sovereignty of each country must be respected. Nationalism is a universal trend all over the world.

4. The United States as a "key country" in the environmental field. Canada and Mexico cannot play the same role as the United States. Mexico is a developing country with very limited financial means to protect its environment. The United States is the most important country of the "key countries" of the world in potential pollution, warming of the land, greenhouse effect (actually contributes 21 percent to that), affecting the ozone.

5. A new agency must not have powers to legislate. A regional agency must be reduced to an office similar to the Swedish ombudsman, with advisory powers, recommending and mediation services. No legislative powers should have a new agency, explicit or implied, as they belong to the sovereign assemblies or congresses of each country.

Possible Creation of a Trilateral Commission

The five annexes of the La Paz Agreement might show the necessity of strengthening regional institutions. Discharge of dangerous substances, illegal movement of hazardous wastes and substances, air pollution, exportation of pesticides and toxic materials are issues that might be the ground of creating a trilateral commission. Prohibitions made in Canada and United States need to be notified to Mexico and toxic materials should be forbidden to trade.

Trilateral action has already been done since 1960 through agencies of the UNO on forestry. For the protection of plants and transboundary flora and fauna, through special agreements. These issues and other similar may be amplified in a trilateral commission.

International Environmental Problems Must Be Addressed at the Appropriate Level

The Carlsson-Ramphal-Pronk group in Stockholm, Sweden has observed the importance of levels in environmental problems. Also, Williamson has written a very important article on this subject. According to this writer there are four levels:

1. Problems affecting the global commons, such as global warming, ozone depletion (and, I may add, bringing water to Mexico from the Canadian Rockies). They should be handled through series of conventions, understandings and common actions. "Key governments," such as the United States, are very important, and possibly this government is doing very little. No nation alone or three nations can do something about global problems. It makes no sense to include this problem in a trilateral agreement. The United States alone can do something as the most important "key country" of the world.

2. Regional problems. Acid rain, pollution of some ocean and rivers, waste hazards, air pollution can be in this level. Interested regional countries must participate. Having more participants than is needed can yield unfortunate results. The possible Canada, United States and Mexico agreement has to be very careful not to involve global problems, bilateral ones or national. A trilateral agreement should involve just the three nations' regional environmental problems. It is necessary "bringing to a halt misguided efforts to find regional solutions when none are needed."

3. Bilateral issues. IBWC may continue to work as it has traditionally done, facing the new problems: underground water, sewage, salinity of Colorado River, lack of water, et cetera. "International environmental negotiating strategy frequently suffers from diplomatic dilettantism. There are strong pressures to regionalize or globalize problems which are inherently national or bilateral in scope, in the mistaken belief that doing so will accelerate progress."

4. National problems. Most environmental problems are domestic and most pollutant releases have only local consequences. Global or regional approach is not possible to national issues "given strong nationalistic sentiments in nearly all countries."

Of course, international agreements are incorporated into the national law. Also, national efforts for protecting the environment will produce benefits to regional, neighbors and to all the world. Actually, Williamson's four levels of international environmental problems are interrelated. But they are a perfect method to clarify the enormous amount of ecological damages and the needed institutions to deal with. A regional agreement between Canada, the United States and Mexico must avoid "diplomatic dilettantism" and just to deal with the normal and common sense problems.