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The Problem of Maritime Boundaries in U.S.-Mexican Relations

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By Alberto Szekely*

A Commentary With the Mexican View on the Problem of Maritime Boundaries in U.S.-Mexican Relations

On May 4, 1978, Mexico and the United States signed in Mexico City a Treaty on Maritime Boundaries. This bilateral international instrument was submitted by President Carter to the U.S. Senate for its advice and consent on 19 January 1979.¹ The Senate has not taken action on the matter; therefore the Treaty has not come into force. The purpose of this paper is to analyze the Mexican view on the matter, as well as the views expressed by Karl Schmitt in his article being jointly published with this one.

On the basis of the consensus which emerged in 1976 at the Third United Nations Conference on the Law of the Sea, the United States proceeded to establish a 200-mile Fishery Conservation and Management Zone.² Almost simultaneously, Mexico established an Exclusive Economic Zone with the same breadth.³ Up to that moment, the two countries had only established maritime boundaries up to 12 miles from the coast, through a 1970 Treaty.⁴ It was thus necessary to proceed to the delimitation of the new boundaries up to 200 miles. The effort was undertaken jointly with the negotiation of a fisheries agreement between the two neighbors, to give access to U.S. fishing vessels to some surpluses of Mexican marine living stocks.⁵

Mexico and the United States have a long and rather sad history of territorial delimitation disputes.⁶ Some of them, such as the one over the El Chamizal, lasted for over a century. Others, which arose from U.S. policies of territorial expansion, ended in the loss for Mexico of substantial portions of its territory to the United States. However, maritime boundaries have been set rather easily, through quick negotiations.

At least that was the surprising initial impression given by the rap-

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1. Ex. F. 96-1, "Three Treaties Establishing Maritime Boundaries Between the United States and Mexico, Cuba and Venezuela" (U.S. Government Printing Office: Washington), 1979.

2. Public Law 94-265 (90 Stat. 331).

3. *Diario Oficial*, 6 and 13 February, 1976.

4. See U.N. Legislative Series (ST/LEG/SER.B/18, p. 417).

5. See U.N. Legislative Series (ST/LEG/SER.B/19, p. 420).

6. C. SEPULVEDA, *LA FRONTERA NORTE DE MEXICO* (1976).

idity and easiness with which the two negotiating teams reached an agreement on 24 November 1976, through an Exchange of Notes regarding the delimitation of the boundaries between the two 200-mile zones, and which was subsequently made permanent and formalized through the above-mentioned 1978 Treaty.

The negotiators met in April of 1976 for two short sessions. They immediately agreed that they would negotiate on the basis of the provisions of the Informal Single Negotiating Text,⁷ which was the instrument emerging from the Third Session of the referred to Law of the Sea Conference which, so far, was the best evidence of the agreements reached there. The Text provided in its Article 61 for the delimitation of adjacent or opposite 200 mile zones on the basis of equitable principles and with the use of the median or equidistant line. The meetings were suspended in order to give time to identify the points which would constitute the said line.

Two weeks later the negotiations resumed, and the identified points were provisionally agreed upon. This provisional agreement was embodied on the Exchange of Notes of 24 November 1976. In sum, it all was a mere technical exercise, where no political or legal difficulties arose, despite the fact that Mexico had been the victim of a grave translation mistake on the part of those employees of the U.N. Secretariat entrusted with producing the Spanish version of the Informal Single Negotiating Text (ISNT). This version varied considerably from the original English, on a matter directly related to the delimitation of the two zones. Article 132 of that instrument provided that "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone. . . ." The Spanish version, however, read that "Islands which cannot sustain human habitation or which do not have economic life of their own, shall have no exclusive economic zone. . . ."

The mistake was literally embodied in the Mexican Decree which created the Exclusive Economic Zone.⁸ Obviously, the meaning of the two versions was completely different. Under the erroneous Spanish version, not only rocks, but islands, were subjected to such limiting rules. Also, it precluded those islands which did not have an economic life of their own, but which were capable of eventually attaining it, from having an Exclusive Economic Zone.

Mexico became aware of this lamentable mistake only shortly before the beginning of the delimitation talks with the United States. It was the English text which was used during the negotiations, which

7. A/CONF. 62/WP.8.

8. See *supra* note 3.

means that no detrimental effects were suffered by the United States as a result of this situation.

Therefore, the U.S. side accepted the delimitation of the Mexican Exclusive Economic Zone from certain *islands* in the Gulf of Mexico (not *rocks* which cannot sustain human habitation or economic life of their own), just as much as the United States itself had delimited its 200-mile zone from certain islands both in the Gulf and in the Pacific. In both cases, there are islands which are not inhabited or which do not have an economic life of their own, but which are not only capable of attaining both requirements but, also, are not subject to the regime described above anyway, simply because they are not mere rocks. Moreover, the first proposal of a chart containing the drawing of the dividing line was made by the U.S. side, a chart which was merely confirmed by Mexico. This line was drawn from the said Mexican islands. No discussion was sustained during the talks on the subject of the islands. The agreed line was only simplified practically in order to straighten it as much as possible, care being taken, of course, of mutually compensating for the small affected areas in each side of the line.

When hearings were conducted at the Senate Foreign Relations Committee on 12 June 1980, a problem developed as a result of a statement made by a Professor of Geology at Princeton University, Dr. Hollis D. Hedberg.⁹ According to him, the Senate should not ratify the Treaty because it was not in the best interest of the United States. His arguments were the following: The drawing of the line from certain Mexican islands off the Yucatan Peninsula is inappropriate, as it gives Mexico an important chunk in the central Gulf of Mexico which has great potential in the way of deposits of minerals or hydrocarbons. The Mexican Zone should be measured from the continental coast. Then, the area left between the U.S. line and the Mexican line should be divided between the two countries. The result of this exercise is that much of the part that belonged to Mexico under the drawing of the line from Mexican islands would pass to the United States side.

In response to that statement, the representative from the United States Department of State, Mark B. Feldman (Deputy Legal Adviser), stated that Hedberg was completely wrong, since it was not only an internationally accepted principle that States are entitled to draw the lines from islands, but the United States itself has proceeded to do so to its advantage, for instance, in the Florida Keys or in the Alexander Archipelago in southeastern Alaska. This, however, did

9. Executive Report No. 96-49 (August 5, 1980).

not refute the proposal being made by Professor Hedberg. Instead, Feldman embarked on a baseless explanation of the alleged *quid-pro-quo* built in the Treaty, stating that Mexico had been given the central part of the Gulf of Mexico, whose resources are under such deep waters that their exploitation is many years away, in exchange for a much larger area for the United States in the Pacific, an area which is rich in fishery resources. There was absolutely no such bargaining at all. The lines drawn were exclusively the result of strict application of the criterion of the median or equidistant line. Mexico would have absolutely opposed such a trade-off. In order to respond properly to Hedberg's daring proposal, it was not necessary to resort to a misrepresentation of facts.

Still, Mexico should not be overly concerned with the situation provoked by Hedberg, and by Feldman's lack of an answer. It is not encouraging to see the Treaty stuck in the Senate as the result of a misguided proposal which found an audience among the Senators because it sounded nationalistic and, thus, attractive in a time of great xenophobia in the United States. There is absolutely no legal issue involved, no possibility of a dispute detrimental to Mexico, because what Hedberg has proposed is not only wrong, but illegal as well. Mexico should be patient and wait for this situation to be cleared domestically in the Senate by more lucid brains. In the meantime, the Exchange of Notes continues fully in force.

If the Hedberg proposal for the drawing of the Mexican line only from the continental coast was attempted, and then the marine space situated between the outer limits of the two 200-mile zones was divided between the two countries, they would be appropriating for themselves, as for the waters, a part of the High Seas, and in regards to the soil and subsoil, they could also be taking a part of the International Sea-Bed area which has been declared as the Common Heritage of Mankind.¹⁰

In either case, the division would constitute a clear violation of international law, and the community of States would be wronged. President F. D. Roosevelt once proposed to his Secretary of State the division of the Gulf between Mexico and the United States (he forgot Cuba), but abandoned his plans when told of the highly illegal nature of such an act.¹¹

On the other hand, if the United States rejected the Treaty on the basis that it could not accept the drawing of the line from the Mexican islands involved, the application of such criterion (which in itself

10. General Assembly Resolution 2749/XXV (December 1970).

11. 4 WHITEMAN DIGEST OF INT'L. L. (1975).

would be contrary to international law, as the said islands are not rocks and, in any case, can easily sustain human habitation and attain an economic life of their own, say, with the establishment of a fishing community or, if necessary, a desalting plant) to itself would gravely affect the delimitation of its maritime boundaries in several corners of the globe.¹²

It is, then, a non-issue.

In his paper, Karl Schmitt makes some statements which require some brief comment. First of all, he merely notes that a boundary treaty was proposed, and that the Senate has not ratified it, but fails to make an analysis of the reasons for such a situation, as done herein above. Moreover, only a very small part of his paper is devoted to the boundaries question.

He asserts that when Mexico created its Exclusive Economic Zone, it declared the waters of the Gulf of California as "internal waters." This simply never happened.¹³ Also, he states that the negotiation of the line between the two 200-mile zones entailed "technical complications such as islands and, in the eastern Gulf of Mexico, overlapping boundaries caused by claims of third countries, such as Cuba. No such complications ever arose during the negotiation, and no overlapping exists with any boundary of the only possible third State, that is, Cuba.

Schmitt states that, in the Law of the Sea Conference, Mexico argued for international control over the resources of the high seas, whereas the U.S. favored open access. There is a clear error here, as those two conflicting positions were indeed held by the two countries but as applied to a totally different marine zone, that is, the international sea-bed area, and not to the High Seas, where both States recognize the sanctity of the traditional freedoms under international law.

Finally, Schmitt suggests the possibility of U.S.-Mexican joint ventures for the exploitation of the rich deposits of polymetallic nodules in the floor of the Mexican Exclusive Economic Zone. It must be pointed out, in this respect, that Mexican legislation in force now would not allow for such joint ventures, and that they would in any case be highly improbable given the poor record of the two countries in the field of the exploitation of the natural resources of Mexico.

12. Feldman and Colson, *The Maritime Boundaries of the United States*, 75 AJIL No. 4 729-63 (October 1981).

13. A. SZEKELY, *MEXICO Y EL DERECHO INTERNACIONAL DEL MAR*, Ch. IV (1979).