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Introduction to U.S.-Mexico Transboundary Resource Issues

In the course of examining three transboundary resources at the United States-Mexico frontier, each of rather distinctive characteristics, this symposium issue makes several scholarly and practical contributions which are likely to provide genuine assistance for international land policy-makers in dealing with these and other natural resources in the future. Initially, two merit special notice.

First, the considerable efforts of the U.S.-Mexico Working Group, a binational and interdisciplinary research team consisting of geologists Carmen Pedrazzini of Mexico and Ross Shipman of the United States, and international lawyers Alberto Székely of Mexico and Albert Utton of the United States, have generated much land policy information essential for the responsible policymakers of both nations in their eventual negotiations respecting the significant problems which might impede efficient exploitation of the hydrocarbon resources underlying the international boundary in the Gulf between these two neighbors. Similarly, both the article discussing fishery resources authored by political scientists Biliana Cicin-Sain, Michael K. Orbach, Stephen J. Sellers, and Enrique Manzanilla, and the discussion of environmental cooperation at the border by Joseph Nalven provide useful information. All are valuable data.

Second, the contributions of the U.S.-Mexico Working Group suggest important concepts, directions, and techniques which can substantially aid in improving the foundations and methods supporting land policy-making both on and offshore: whether for baseline allocation of the land base, *sui generis*; for exploitation or reservation of specific oil and gas holdings; for conservation or development of other appurtenant natural resources; or, perhaps of most current importance, for dealing with the environmental consequences of the human use of any and all such land and appurtenant natural resources. Likewise, the contributions regarding fisheries and environmental problems also bring conceptual issues into sharper focus, particularly with respect to the importance of disparate "perceptual" factors on each side of the border. Again, these are also critical data, especially for policymakers.

The majority of this special issue is the work product of the U.S.-Mexico Working Group. The considerable utility of these rather prelim-

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inary investigations by a mere handful of practitioners and scholars results from a number of factors. However, it is largely a function of the decisions of authors Pedrazzini, Shipman, Székely, and Utton to focus substantially all of their limited resources on initially seeking out the two essential foundations of the specific land policy problems which would likely impede efficient exploitation of the potentially considerable hydrocarbon resources underlying the international boundary at issue, and to do so without regard to the economic feasibility or infeasibility of recovering these natural resources at any particular point in time.

Thus, such discipline has allowed this early research to put into place, with reasonable accuracy, two useful sets of fundamentals: One, the underlying geology and geophysics of the hydrocarbon resources within the submarine boundary area; and two, the underlying constitutional, institutional, and legal regimes of the two countries and their interactions at such interface. While neither the geological nor the institutional structure is fully static, of course, each is likely to remain relatively stable. Hence, the information generated by these preliminary investigations and set out in this volume will be of continuing use to future examinations of the land policy issues involved, whether done by these or other experts, in this, the next, or even the following century.

During the development and implementation of the Working Group's research project, on behalf of the Lincoln Institute of Land Policy as a cosponsor, on several occasions I frankly urged the potential utility of bringing economic analysis of the natural resources at issue into these investigations at the early stage concluded with the publication of this symposium. However, given limited financial resources, I was politely but effectively rebuffed by the principal investigators, particularly by Dr. Alberto Székely. As the price of oil fell from nearly forty dollars per barrel to below ten dollars during the relatively brief period of these investigations, and as this fall drastically changed the economics of recovering these submarine transboundary hydrocarbon resources in the process, the wisdom of allocating the limited financial resources supporting this initial research in order first to get the underlying physical and institutional bases firmly in place became increasingly apparent.

Clearly, Dr. Székely's considerable experience in negotiating international agreements on behalf of Mexico respecting various land, natural resource, and environmental issues has taught him some valuable lessons both about the dangers of engaging in international land policymaking with inadequate information *and* about the relative priorities and optimal sequencing of the diverse data needed for such international land policymaking through negotiation. Given the leading role of Dr. Székely in the design of the research project into submarine transboundary hydrocarbons set out in this symposium issue, the reader interested in international

negotiations can benefit substantially from the lessons which have obviously oriented Dr. Székely toward seeking out the best available geological, geophysical, and other "hard" scientific information in rather greater quantity than is often the case for lawyers, and in doing so sooner rather than later. Further, all students of land policy can probably benefit from a clearer understanding of the importance of accurately establishing, *early on*, the physical and institutional foundations needed for various aspects of land policymaking respecting any particular land or appurtenant natural resource. Finally, the fishery and environmental articles nicely illustrate the importance of perceptions which in part flow from and in fact shape such institutional structures in each country.

Once in place with reasonable reliability, of course, such factual bases also provide information critical for development of optimal economic analysis, *later on*. However, the utility of these factual bases certainly is not limited merely to providing data essential for meaningful economic investigations. On the other hand, attempting to undertake extensive economic analysis for land policymaking purposes before the relevant physical and institutional information is both gathered and reasonably well understood can—and, with unfortunate regularity, does—result in suboptimal analysis and other substantial inefficiencies for such policymaking, both economic and otherwise. Consequently, design of a land policy project's data gathering and sequencing is critical, and any substantial investment in suboptimal economic analysis or other related inefficiencies, whether implicit or explicit, carries with it serious dangers for the quality of the resultant policymaking. Likewise, failure to appreciate adequately perceptual issues necessarily creates serious problems. Thus, all aspects bear careful consideration for the conception and execution of investigations into many other major issues of current and future interest for land policymaking, both in international transboundary regions and domestically.

Moving from the general direction of this symposium issue toward the specific topics addressed within it, a few words should be said regarding Dr. Székely's overview essay, *Transboundary Resources: A View from Mexico*. This article was originally presented as a speech in December 1984 to the U.S.-Mexico Working Group in conjunction with its development of the Ixtapa Draft Agreement Relating to the Use of Transboundary Groundwaters.¹ However, this essay is as stimulating and relevant concerning transboundary environmental issues, fisheries or hydrocarbons as it was to discussion of transboundary groundwaters. In fact, Dr. Székely's comments in this paper are best appreciated in the broadest of land

1. For a more complete discussion of this effort and the text of the Model Treaty, see Rodgers & Utton, *The Ixtapa Draft Agreement Relating to the Use of Transboundary Groundwaters*, 25 NAT. RES. J. 713 (1985).

policy terms—given his articulations of “a more global and comprehensive approach” to, and of an “holistic” conception of, “the sort of general policy that could be expected from Mexico, regarding the whole array of issues pertaining to the utilization and conservation of the vast natural wealth in its northern border,” in light of what he characterizes as “the ever-expanding social needs in Mexico.” Thus, this overview essay provides a suitable and timely introduction to this issue by suggesting consideration of a still broader agenda of transboundary land policy issues of which groundwaters, environmental problems, marine fisheries, and submarine hydrocarbons are but four important subsets.

The particular articles of the investigators respecting submarine transboundary hydrocarbons in this symposium make a number of important contributions. In particular, *Hydrocarbon Deposits of the Border Region Between Mexico and the United States: A Preliminary Report*, Dr. Carmen Pedrazzini’s update of her past investigative efforts and geophysical summaries with Joaquin Teyssier for Petroleos Mexicanos (PEMEX), provides a practical and helpful outline of the geological formations and hydrocarbon resource estimates available to date. Collaboration in this update of her previous work by fellow geologist, Dr. Ross Shipman, recently retired from the University of Texas at Austin, and now President and Chief Executive Officer of Live Oak Energy, Inc., is evident and clearly has been of mutual benefit.

As suggested above, the work of these two geologists also assures that the two international lawyers who are the lead investigators for the project are dealing with reasonably “hard” facts, rather than with the softer or even hypothetical “facts” which are often the focus of legal analysis and commentary in many components of the land policymaking process, both domestically and internationally. Dr. Pedrazzini’s report also usefully identifies several important issues of baseline geology, geophysics, and engineering which are still in need of substantial attention before Mexican and U.S. land policymakers can be adequately informed for fully intelligent negotiations.

Albert Utton’s and Paul McHugh’s essay surveys comprehensively the treaties which have dealt with the issue of joint oil and gas exploitation along international boundaries throughout the world. This article, *On an Institutional Arrangement for Developing Oil and Gas in the Gulf of Mexico*, nicely complements the more theoretical efforts of Dr. Székely’s two essays. The Utton-McHugh paper usefully rounds out the project and maximizes its utility. Further, Professor Utton’s other contributions to the formation and functioning of the U.S.-Mexico Working Group are legion; and, frankly, neither the Ixtapa draft agreement respecting transboundary groundwaters nor the articles in this symposium issue regarding submarine

transboundary hydrocarbon resources would likely exist without his considerable and admirable efforts. In this regard, the support of the Instituto de Investigaciones Juridicas of the Universidad Nacional Autonoma de Mexico has also been strategically important to both of these projects.

Dr. Székely's analysis in his essay, *The International Law of Submarine Transboundary Hydrocarbon Resources: Legal Limits to Behavior and Experiences in the Gulf of Mexico*, is particularly useful for both Mexican and U.S. policymakers in its specific focus on the key constitutional, institutional, and legal differences in the basic regimes which operate in the two countries and, thus, on the resultant functionings of the private companies which predominate on the U.S. side of the border and of the single state institution which exclusively dominates on the Mexican side, namely, PEMEX. His careful attention to the importance of PEMEX in and to the national experience of Mexico is also most useful, particularly, one suspects, for U.S. readers.

The redaction of such history is also important in advancing understanding within the United States of the critical importance of the decision by Mexico to incorporate permanent sovereignty over natural resources by the nation into Mexico's modern Constitution in 1917. Thus, the careful reader should also come away with a considerably greater appreciation for the fact that sovereignty in Mexico means something rather different than the concept does in the United States, in that Mexico sees itself legislating its sovereignty day-in and day-out and, in the process, for the substantial institutional difficulties involved in any joint Mexican-U.S. exploitation of such natural resources as the hydrocarbons in the submarine transboundary areas between these two countries. Points made respecting both fisheries and environmental problems in this volume's other articles also nicely reinforce these critical data.

Dr. Székely's analysis, given its recurring focus, is perhaps best described as "geo-legal" rather than strictly legal. In emphasizing the "geo-legal" nature of these land policy problems, Dr. Székely specifically draws on the considerable experience of the International Court of Justice in the Hague, and its growing recognition of the interdisciplinary nature of many such issues within transboundary margins. This is natural for him, of course, for he serves as a member of the Permanent Court of International Arbitration at the Hague, but there is a real need for greater appreciation of this matter in land policymaking circles worldwide.

However, here again, Dr. Shipman merits specific notice, since his brief but pioneering article, *Energy on the U.S.-Mexico Border*, usefully suggests several of the difficult land policy issues resulting from the existence of drastically different constitutional, institutional, and legal regimes on the two sides of the Mexican-U.S. border. In so doing, Dr.

Shipman clearly was a major stimulant to Dr. Székely's "geo-legal" thinking and, thus, to the design and execution of much of the research in this volume. Also, Dr. Shipman's referenced article may provide evidence that geologists can, in general, play lawyer better than lawyers can, usually, play geologist.

Dr. Székely's research includes an extensive and excellent bibliography from which the reader will benefit considerably. Users of this special issue will also greatly benefit from his essay on the international law of submarine transboundary hydrocarbon resources. In particular, Dr. Székely's article is the first to appear since several land policy cases dealing with transboundary natural resources were recently decided by the International Court of Justice. In the process of these discussions, Dr. Székely makes clear that the "law of the sea" still has a rather full agenda of land policy issues remaining and largely unattended to by the world's land policymakers, even after adoption of the Law of the Sea Treaty and after the World Court's recent spate of land policy decisions.

My only substantial criticism of Dr. Székely's two articles in this symposium is that the clarity of his writing may tend to obscure the complexity of the transboundary land policy issues with which Dr. Székely's essays are dealing, and the subtlety of his "geo-legal" analyses of such transboundary land policy concerns. As an adjunct problem, it is easy for a lawyer or policymaker to read these essays without adequately appreciating the sophistication of the Mexican legal community in dealing with the genuine land policy constraints of the Mexican Constitution—and thus, for example, without understanding either the complexity or the full significance of the development by the Mexican bar of a highly functional approximation of fee ownership, through creative trust concepts, for foreign nationals desiring to enjoy real property in Mexico despite constitutional prohibitions against ownership in fee.

In short, as Dr. Székely's essays make clear, despite the constitutional, institutional, and legal barriers to be faced, Mexican land policymakers have demonstrated considerable intellectual resources and talent—both in formulating the major conceptual issues involved in optimal transboundary land policymaking, generally, and in solving the many kinds of specific problems involved, *inter alia*, in joint oil and gas development along the frontier, joint resolution of transboundary pollution, and other joint actions respecting the difficult land policy issues currently to be found within the border areas at the Mexico-U.S. interface. However, Dr. Székely's essays necessarily raise some questions about whether the United States is as well equipped currently to deal with both the conceptual and the on-the-ground tasks involved. Further, the articles on fisheries and environmental problems tend to heighten rather than to assuage such concerns.

In particular, Professor Cicin-Sain and her co-authors examine many factors influencing the relations of the United States and Mexico in dealing with migratory fishery resources. These factors include numerous variables related to each nation's specific context: its culture, history, and world position; its decisionmaking structures; its processes for managing marine resources; its style of bilateral negotiating behavior; and the cross-border interactions of marine industries on trade, labor exchange, and capital investment. The collaborators view greater recognition of these variables by policymakers in both countries as a prerequisite to any substantial improvement in bilateral relations. Joseph Nalven's article deals with several specific environmental problems which have accompanied economic development and population growth at the U.S.-Mexico border region. He reviews these elements within what he views as the binational context for environmental cooperation. Professor Nalven argues that the participants should engage in a process of "translating the border" in order to adjust for the differences in the capabilities and priorities of the two nations.

Ultimately, the efforts underlying all the contributions in this symposium issue are premised on an act of faith, if one is so inclined, or, if not, then on a kind of intuition. However one chooses to characterize the impetus for the preliminary investigations set out in this volume, it clearly is grounded on the view that nonpolemical research about difficult land policy issues and precrisis planning for their resolution are greatly preferable to the crisis negotiations so typical of many international affairs.

Whether rigorous *proof* can in fact be mustered to support any such vision, whether based on hope or intuition, I frankly am unsure. Nonetheless, one or the other clearly has motivated the admirable work set forth in this issue. If the adequacy of such motivations *vis-à-vis* formal methodological rigor proves intellectually uncomfortable when set out explicitly, then there may be a natural inclination to fall back by suggesting that when land policy negotiations between Mexico and the United States inevitably come respecting the resources at their common boundary, then the product of same will necessarily be better for the generation of reasonably reliable scientific, institutional, and perceptual analysis. Upon reflection, however, there again may well be no real *proof* to support even such a narrowed view, although it is more or less endemic to both most academic inquiry in the public policy field and to many "enlightened" governmental activities. Even to step back still further and merely to assert that the development of reasonably objective analysis at least can do no harm is probably not to take a position for which conclusive *proof* can be offered and, in fact, a reasonable number of counter examples can likely be advanced from the history of land policymaking.

In the final analysis, the able authors of this special issue are optimists

respecting important land policy issues. Mexicans and Americans by nationality, and geologists, lawyers, and political scientists by training, they all ultimately share a belief in the abilities of their respective countries to resolve difficult transboundary land policy problems through international negotiations—and of their disciplines to assist in dealing successfully with such important natural resource subsets of same as the three major issues investigated in this symposium. While such optimism regarding international land policymaking may finally violate methodological rigor extended *in extremis*, and while it may not prove correct in every instance, nonetheless, it is an optimism that is shared by the Lincoln Institute of Land Policy—and that, in fact, motivated its cosponsorship of much of the research contained herein. Further, it is a motivation quite consistent with both the nature and the practice of virtually all policymaking, including but certainly not limited to land policymaking.

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