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IMPLICATIONS FOR THE FUTURE: DESIGN OF VIABLE INTERNATIONAL INSTITUTIONS*

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Upon approval by both governments, Minute 242 of the International Boundary & Water Commission of August 30, 1973, became an executive agreement which represents a rather satisfactory arrangement concerning a delicate matter that arose through the use of the waters of the Colorado River.¹ This instrument reveals the possibility of reaching agreement in other conflicting areas which sooner or later will present themselves between Mexico and the United States because of the waters of that river. We are dealing with a catalyzing instrument of great importance.²

One can mention, for example, the concept of "extraordinary drought" that did not receive a very clear definition in the Treaty of Waters of 1944 (Article 10(b)).³ The growing scarcity of waters throughout the course of the Colorado River, the constant increase in use of the upstream waters, the tendency towards aridity and the natural erosion of various areas, the continuous absence of rains, and, above all, the overestimation of the flow of the river at the time the Treaty was made, all indicate that a problem could arise with regard to the interpretation of this concept, to the detriment of Mexico.

The underground waters⁴ along the border may also be pointed out as a future problem which will have to be the object of a treaty between the two countries. For the first time this problem appears in the international literature and offers difficulties in its management. I sincerely believe that this matter of the underground water in the San Luis-Yuma will generate more than just a few technical, juridical, and political problems.

Thus, adequate international institutions should be provided for

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1. See *Excelsior*, August 31, 1973, at 1.

2. Sepúlveda, *Salinidad del Río Colorado; Negociación concluida con éxito*, *Excelsior*, September 18, 1973, at 7.

3. See N. Hundley, *Dividing the Waters: A Century of Controversy Between the United States & Mexico* 167 (1966).

4. See Minute 242, para. 5. Reprinted in this issue at p. 2.

the administration of discrepancies, and for the avoidance of conflict, or, if conflict occurs, to resolve it in a just and equitable manner with the least friction possible.

There exist between the United States and Mexico sufficient bilateral and multilateral instruments for the pacific adjustment of controversies, especially through arbitral means.⁵ Anyone would think that, given the problem, it would be easy to find a method of settlement similar to one of those already in existence. However, arbitration by itself is already considered an antiquated method,⁶ lacking the ability to deal with eminently technical matters such as all of these matters concerning the waters of the Colorado River. Also, technical institutions have been proposed that would deal with technical problems;⁷ however, the prior creation of one of these institutions could seem to mean that a conflict is expected. Furthermore, it is not customary to establish such institutions beforehand, since if they are instituted prior to the conflict, difficulties arise over their constitution, their jurisdiction, the scope of the decision, and the manner of implementing the decision.

We believe, therefore, that the solution lies somewhere else. The opinion of the author is that there already exist methods that have proven their effectiveness, and that, through refinement, or through adequate restructuring, can be very useful for the prevention and solution of conflict. I am referring in this case to the International Boundary & Waters Commission created by the United States and Mexico and about which I am going to give a little history.

The International Boundary Commission—prior to the organ which now exists—was established by a convention on March 1, 1889,⁸ and came into being on December 27, 1890, with a commis-

5. See, e.g., Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico [Treaty of Guadalupe-Hidalgo], Feb. 2, 1848, art. XXI, 9 Stat. 922 (1848-51), T.S. No. 207, where the obligation of utilizing arbitration before resorting to violence is established; Treaty to Avoid or Prevent Conflicts Between the American States, May 23, 1923, 44 Stat. 2547 (1925-27), T.S. No. 752, 33 L.N.T.S. 25; General Treaty of Inter-American Arbitration and Protocol of Progressive Arbitration, Jan. 5, 1929, 49 Stat. 3153 (1935-36), T.S. No. 886, 130 L.N.T.S. 135.

6. See J. Stone, *Legal Controls of International Conflict* 97-99, 103-105 (1973).

7. See Metzger, *The Settlement of International Disputes by Non-Judicial Methods*, 48 Am. J. Int'l L. 408 (1954).

8. Convention with Mexico to Facilitate the Carrying Out of the Principles Contained in the Treaty of November 12, 1884, and to Avoid the Difficulties Occasioned by Reason of the Changes Which Take Place in the Beds of the Rio Grande and Colorado River, Mar. 1, 1889, 26 Stat. 1512 (1889-91), T.S. No. 232; Convención con los Estados Unidos de América para Facilitar la Ejecución de los Principios Contenidos en el Tratado de doce de noviembre de mil ochocientos ochenta y cuatro, y Evitar las Dificultades Ocasionadas con Motivo de los Cambios que Tienen Lugar en el Cause de los Ríos Bravo del Norte y Colorado, 1 de marzo de 1889, 1 Secretaría de Relaciones Exteriores de México, *Tratados y*

sioner from each country, two consulting engineers, and the necessary interpreters and secretaries. (Article II).

In accord with Article I of the Convention, the Boundary Commission had exclusive jurisdiction to resolve

[a]ll differences or questions that may arise on that portion of the frontier . . . where the Rio Grande and the Colorado Rivers form the boundary line, whether such differences or questions grow out of alterations or changes in the bed[s] of the aforesaid . . . [rivers], or of works that may be constructed in said rivers, or of any other cause affecting the boundary line. . . .⁹

Article VIII established that

[i]f both Commissioners shall agree to a decision, their judgment shall be considered binding upon both Governments, unless one of them shall disapprove it within one month reckoned from the day on which it shall have been pronounced.¹⁰

The Commission was extended from year to year, and on November 21, 1900, a convention extended it indefinitely.¹¹

The first test for the Commission was the Chamizal matter. It is probable that the Boundary Commission would have been able to satisfactorily resolve the conflict over the ownership of that territory, consisting of 156 hectares, but for some reason there was no agreement among the commissioners. As later events confirmed, the American commissioner, General Mills, held an unacceptable viewpoint which in part caused the disagreement. The matter had to be resolved by arbitration.¹²

Nevertheless, it is worthy of mention that this body can function, with the addition of a few changes, in resolving border conflicts like that of the Chamizal. The arbitration court that decided the Chamizal matter was formed by adding a third commissioner, or president arbitrator, to the existing commission.

Retrospectively, it is plausible that if there had been more trust, the Boundary Commission would have found some reasonable solu-

Convenciones entre México y Otros Países 173 (1930-46) [hereinafter cited as *Tratados y Convenciones*].

9. 26 Stat. at 1513.

10. 26 Stat. at 1516.

11. Convention with Mexico Extending for an Indefinite Period the Treaty of March 1, 1889, between the Two Governments, Known as the Water Boundary Convention, Nov. 21, 1900, 31 Stat. 1936 (1899-1901), T.S. No. 244; Convención con los Estados Unidos de América para Prorrogar Indefinidamente el Tratado de uno de marzo de mil ochocientos ochenta y nueve, entre los dos Gobiernos, 1 *Tratados y Convenciones* 183.

12. *Award, Before the International Boundary Commission, Enlarged by the Convention between the United States and Mexico of June 24, 1910, In the Matter of the International Title to the Chamizal Tract*, 5 Am. J. Int'l L. 785 (1911).

tion for Chamizal which would have avoided the long controversy which was just settled in 1962.¹³

The Boundary Commission has also suggested vigorous measures for settling disputes, as for example its decision of October 24, 1926, in which it decided that the Rio Grande Land and Irrigation Company had, by cutting the current, changed the natural channel of the river. Nevertheless, it was feared that the Commission would acquire too broad a jurisdiction. That is why the authority of the Commission was limited solely to determining border problems.

The role of the Commission in stabilizing the banks of the Rio Grande eliminated many reasons for controversy which were generally politically inspired.

In accord with the Convention for the Rectification of the course of the northern Rio Grande,¹⁴ of February 1, 1933, the Boundary Commission successfully resolved the problems relative to the change of course of the northern Rio Grande.

It is interesting to observe how the Boundary Commission continued growing and expanding its duties. Since 1924, certain functions had been entrusted to it for cooperative studies on the Colorado and Tijuana Rivers. Also, at that time, the United States Government created a North American Commission on Waters, but in 1932 it resolved that all of that Commission's powers, duties and functions be transferred to the Boundary Commission.

In 1935 studies related to the equitable use of the Lower Rio Grande and the Lower Colorado and the Rio Tijuana were delegated to this Commission, in order to obtain information for a treaty related to the use of the waters of these rivers. In 1944, as a natural development of the functions of the Commission, certain duties were given to the Commission by virtue of the Treaty on Waters. For example, the Commission was given the task of the preparation of research and plans for the works necessary to implement the Treaty, the exercise of jurisdiction for the management of all of the works, and the completion of other tasks conferred upon the Commission by the 1944 Treaty. Also, the prevention of any violation of the terms of the Treaty is implicitly conferred upon the Commission. From the text of the Treaty comes the Commission's power to adjust

13. Convention with Mexico for the Solution of the Problem of the Chamizal, Aug. 29, 1963, 15 U.S.T. 21, T.I.A.S. No. 5515; Convención con los Estados Unidos de América para la Solución de la Problema del Chamizal, 29 de agosto de 1963, Diario Oficial, 20 de febrero de 1964.

14. Convention with Mexico for the Rectification of the Rio Grande in the El Paso-Juarez Valley, Feb. 1, 1933, 48 Stat. 1621 (1933-34), T.S. No. 864; Convención con los Estados Unidos de América para la Rectificación del Río Bravo del Norte en el Valle de Juárez-El Paso, 1 de febrero de 1933, 5 Tratados y Convenciones 79.

all of the differences that may arise in relation to the Treaty itself by the preparation of reports and the making of recommendations to the respective governments. Finally, the Commission is charged with the construction, operation and maintenance of all of the necessary measuring stations. One can see how the Commission grew in size by virtue of the Treaty of 1944.¹⁵

The Commission was also instrumental in preparing the text of the Treaty for Resolving the Pending Border Differences, etc., of November 23, 1970.¹⁶ In that Treaty, new and important functions are assigned to this binational body.¹⁷

It is true that the Commission still does not have the authority to operate on the entire course of the Colorado River because a state of development had not been reached that would permit such ample delegation of power. Yet, this body, by its operation, is capable of making new power flow from the Treaty itself. Furthermore, as can be seen from its workings, the Commission offers the advantage that its recommendations are equivalent to the decisions of a third party which each government feels more comfortable in approving, especially since its recommendations are founded on technical bases.

When the work of the Commission is observed, it can be noted that it has served to channel differences that arise by the operation of the Treaty of 1944 into technical means of solution. Minutes 218, 241, and 242 are excellent evidence of that. The Commission, whose fine labor has not yet been systematically and comparatively analyzed in the international literature, is a body that offers considerable possibilities, since it can suggest technical solutions—not contaminated by politics—to the governments. These are expert solutions that permit the leaders of each country to avoid complicated diplomatic negotiations and political pressures. The problems of the international rivers are eminently technical, and by the same token, obviously require apolitical, technical solutions. It is obvious that a technical and specialized institution is better fitted for that task than the departments of foreign relations, especially since the Commission

15. Treaty with Mexico Relating to the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, arts. 24 & 25, 59 Stat. 1219 (1945), T.S. No. 994; Artículos 24 y 25, Tratado con los Estados Unidos de América para la Distribución de Aguas Internacionales de los Ríos Bravo, Colorado y Tijuana, 3 de febrero de 1944, Diario Oficial, 30 de enero de 1946.

16. Treaty with Mexico to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary between the United States and Mexico, Nov. 23, 1970, 23 U.S.T. 371, T.I.A.S. No. 7313; Tratada con los Estados Unidos de América para Resolver las Diferencias Fronterizas Pendientes y para Mantener a los Ríos Bravo y Colorado como la Frontera Internacional entre los Estados Unidos Mexicanos y los Estados Unidos de América, 23 de noviembre de 1970, Diario Oficial, 12 de julio de 1972.

17. *See id.*, especially arts. II C, III B, III C, IV A, IV B, & V.

has been operating for such a long time and with recognized efficacy.

Also, such technical intergovernmental bodies ordinarily share and compare experiences, and, because of their technical, nonpolitical approach to problems, they look at a problem from the point of view of a possible technical adjustment.

Due to the particular functions which, according to the Treaty of 1944, the Commission has, its resolutions, when approved, are practically equal to executive agreements which do not need ratification by the legislative power. Or, seen from another angle, those decisions become juridical norms by virtue of constitutional "abstract consent" that is conferred upon the Commission by the Treaty of 1944, since the definition of the Commission's functions pursuant to the Treaty includes not only the power to implement the Treaty, but also the power to define and interpret it.

Therefore, as the Commission grows, accepts new tasks, develops new management strategies, applies measures used in controversies between other pairs of countries, etc., the Commission could enlarge its powers to include some aspects of regulation of the entire basin. In my opinion, then, it is not necessary to create new mechanisms, nor to refer disputes to the respective departments of foreign relations, but rather, it would suffice to use and develop the existing Commission to perform any tasks that become necessary.

I believe, furthermore, that there should be another consideration involved in the treatment of an international matter like the waters of the Colorado River. In dealing with the Colorado River, with the concept of the entire basin as an indivisible entity, we should understand that its waters should produce the maximum possible benefit to the human communities that are found along its basin, irrespective of political boundaries. Since, in reality there exists an interdependence that nature has created and that has been absurdly separated by the creation of political barriers, those barriers should be surpassed in solving these problems. The Commission could play a very important role in restoring an integral treatment of the basin.

The Mexico-United States International Boundary and Water Commission could be strengthened in structure and functions. For example, it could be more fully staffed with researchers, data collectors, and economists. Its jurisdiction could also be extended to include pollution and the use and conservation of the waters of the basin in order to propose measures for their optimum distribution and use.

The Commission has been good, but it needs to be better in order to face imperatives and serious conditions, in order to avoid conflicts or to solve them where they arise.

It is true that the internal political considerations that impede conferring on the Commission a wider role are formidable. Furthermore, there is still fear of an intergovernmental body which may have or appear to have supranational powers, even though the body's powers were delegated by the governments themselves. Yet, such an extension of power and of structure will have to be considered in the near future as the urgency of problems requires increasingly imaginative solutions. That which appears utopia now may be a common thing in a few years. The evolution of the Commission since 1889 is good testimony of that.