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Mexican-American International Water Quality Problems: Prospects and Perspectives

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MEXICAN-AMERICAN INTERNATIONAL WATER QUALITY PROBLEMS: PROSPECTS AND PERSPECTIVES

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The two treaties now governing the control of international waters between the United States and Mexico—those of 1906 and 1944—do not allude to the quality of the water supplied the other country.[1] Consequently, they do not make reference to the pollution of those waters. These pacts reflect the existing thought at the moment of their inception at a time when such problems did not cause concern. At that time, there was no systematic treatment of these matters in national and international legal literature. Jurisprudence had not applied itself to the problem in any apparent way. There had been no attempts to regulate the pollution of water courses; and, at the time the 1944 treaty was concluded, there was not even a precise notion of what pollution, from a legal and technical viewpoint, was.[2]

From the lack of foresight in these instruments arose the dispute over the quality of waters of the Colorado River that are delivered to Mexico. This dispute, which began in 1961, has the distinction of being the first of its kind in the world, and constituted a clarion call for the specialists. It can be said that with it began the problems of water quality in international watercourses and of pollution of non-maritime waters.[3]

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1. Convention between the United States of America and Mexico concerning the Equitable Distributing of the Waters of the Rio Grande for Irrigation Purposes, signed at Washington, D.C., May 21, 1906 (effective Jan. 16, 1907). May be seen in De Martens, 35 Nouveau Recueil General des Traités 2nd 461. Treaty between the United States of America and Mexico relating the Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico, signed at Washington on Feb. 3, 1944, and Supplementary Protocol, signed at Washington in Nov. 14, 1944 (Came into force on Nov. 2, 1945). 3 U.N.T.S. 314.

2. It may be said that the preoccupation with international river law, in general, started with Sauser-Hall, G. Sauser-Hall; *Utilisation Industrielle des fleuves Internationaux*, Recueil des cours, Hague Academy 83 (1953), but it was Berber's book, J. Berber, *Rivers in International Law* (1954), that definitively created the interest for these topics.

3. *See*, Hundley, *The Colorado Waters Dispute*, 42 Foreign Affaigs 495 (1964). N. Hundley, Dividing the Waters, A Century of Controversy between the United States and Mexico, 172-80 (1966). *See also* J. Rojas Garcidueñas, *El Caso Internacional de la Salinidad de las Aguas entregadas a México en el Rio Colorado*, 54 Revista de la Facultad de Derecho de México 443 (1964).

There are those who insist that the Water Treaty of 1944 gave consideration to the quality of the waters to be delivered to Mexico.[4] However, this is not the case. This topic does not appear in any of the documents preparatory to the Treaty. Had degradation of water quality been mentioned when negotiating the pact, Mexico would have immediately objected, and would have demanded that it receive water similar to that furnished the lower Colorado Basin in the United States. The statements that there existed a memorandum, initialed by the negotiators, which made mention of water quality, is only a fiction.[5]

As noted before, the text of the Treaty of 1944 makes no reference to the water quality. Articles 10 and 11 do not even make any reference to water quality, as some have asserted. However, Article 27 clearly indicates that the Treaty is concerned with water suitable for irrigation. The Preamble and Article 3 are sufficiently explicit in their reference to water for beneficial uses. There is evidence that the American proponents of the Treaty deliberately evaded the issue of water quality.

It is true that in the discussions of the Treaty in the respective Senates for the purpose of ratification, there was some allusion to water quality, but this certainly does not lead to the conclusion that the water to be distributed could be of inappropriate quality. Had this been so, the Mexican Senate would never have given its approval to the instrument.[6]

It is inconceivable that a treaty would be drawn so as to contain in its text the possibility of causing damage to the territory of another state through the allocation of polluted or harmful waters. It runs contrary to common sense and to the principle that treaties must be concluded in good faith. Let us further recall, that this compact was celebrated within the Good Neighbor spirit.

It is probable that later conflicts would have been prevented if

4. *E.g.*, R. Tipton's testimony in *Hearing on Water Treaty with Mexico*, 79th Cong. 1st Sess., at 331-342 (1945); *see also*, Sobarzo, *The Salinity of the Colorado River and the Interpretation of Treaties*, 12 Natural Resources J. 510 (1972). The first is an extreme interpretation, stating that any sort of water, even unusable water, could be delivered to Mexico. The second maintains implicitly that the water must be of "natural state." The truth is that except that the water must be usable, there is no mention of the appropriate quality of the water, so as not to enter into interpretation problems.

5. *See Hearings, id.*, at 230, 322.

6. The official Mexican point of view, as well as a synthesis of the discussion in the Mexican Senate appears in Secretaria de Relaciones Exteriores, El Tratado de Aguas Internacionales, Mexico (1947). *See especially*, the interpretation of water quality at 81.

the quality had been stipulated. On the other hand, it can also be surmised that if there had been insistence by either side with respect to water quality, there would have been no treaty.

The controversy that began between the two countries on the salinity of the waters of the Colorado River confirmed the shortcomings of the Treaty of 1944 with respect to the formula of water quality. It has not yet been possible to thoroughly examine this controversy since some official documents have not been made public. It is probable that some external factors did exert an influence towards finding a provisional solution after four long years of uneasiness.

The agreement that put a transitory end to the dispute consisted of a resolution of the International Boundary and Water Commission established by Articles 24 and 25 of the Water Treaty of 1944.[7] This agreement is contained in Minute

7. Article 24.—The International Boundary and Water Commission shall have, in addition to the powers and duties otherwise specifically provided in this Treaty, the following powers and duties:

(a) To initiate and carry on investigations and develop plans for the works which are to be constructed or established in accordance with the provisions of this and other treaties or agreements in force between the two Governments dealing with boundaries and international waters, to determine, as to such works, their location, kind and characteristic specifications; to estimate the cost of such works; and to recommend the division of such costs between the two Governments, the arrangements for the furnishing of the necessary funds, and the dates for the beginning of the works, to the extent that the matters mentioned in this subparagraph are not otherwise covered by specific provisions of this or any other Treaty.

(b) To construct the works agreed upon or to supervise their construction and to operate and maintain, in accordance with the respective domestic laws of each country. Each Section shall have, to the extent necessary to give effect to the provisions of this Treaty, jurisdiction over the work constructed exclusively in the territory of its country whenever such works shall be connected with or shall directly affect the execution of the provisions of this Treaty.

(c) In general to exercise and discharge the specific powers and duties entrusted to the Commission by this and other treaties and agreements in force between the two countries, and to carry into execution and prevent the violation of the provisions of those treaties and agreements. The authorities of each country shall aid and support the exercise and discharge of these powers and duties, and each Commissioner shall invoke when necessary the jurisdiction of the courts or other appropriate agencies of this country to aid in the execution and enforcement of these powers and duties.

(d) To settle all differences that may arise between the two Governments with respect to the interpretation or application of this Treaty, subject to the approval of the two Governments. In any case in which the Commissioners do not reach an agreement, they shall so inform their respective governments reporting their respective opinions and the grounds therefor and the point upon which they differ, for discussion and adjustment of the difference through diplomatic channels and for application where proper of the general or special agreements which the two Governments have concluded the settlement of controversies.

(e) To furnish the information requested of the Commissioners jointly by the two Governments on matters within their jurisdiction. In the event that the request is made by one Government alone, the Commissioner or the other Government must have the express authorization of his Government in order to comply with such request.

(f) The Commission shall construct, operate and maintain upon the limitrophe parts of the international streams, and each Section shall severally construct, operate and maintain upon the parts of the international streams and their tributaries within the boundaries of its own country,

218, of March 22, 1965.[8] This resolution provides that the United States build a drainage channel of some 13 miles at its own expense, to keep polluted water originating in the Wellton-Mohawk project from reaching the Morelos Dam in Mexico by diverting it into the Gulf of California. That water may still be used by Mexico, who may dilute it with her other allocations of water. With the object of assuring Mexico reasonably good water, the resolution provides that the pumping of ground water from the Wellton-Mohawk project be coordinated with deliveries of water to Mexico during the winter, the period of lowest water requirements.

In Minute 218 the quality of water turned over to Mexico is not mentioned; that is, there is no mention of the content of particles of salt. However, it was understood that salinity would not be more than 1,500 parts per million during the life of the Minute. It was calculated that the Wellton-Mohawk farmers would finish lowering the level of salinity in the ground water table during this period.

The Minute was first in force for five years. In November of 1970, and again in 1971, it was renewed for another year. In a sense, the Minute has been a satisfactory measure. Until now no

such stream gauging stations as may be needed to provide the hydrographic data necessary or convenient for the proper functioning of this Treaty. The data so obtained shall be compiled and periodically exchanged between the two Sections.

(g) The Commission shall submit annually a joint report to the two Governments on the matters in its charge. The Commission shall also submit to the two Governments joint reports on general or any particular matters at such other times as it may deem necessary or as may be requested by the two Governments.

Article 25.—Except as otherwise specifically provided in this Treaty, Articles III and VII of the Convention of March 1, 1889 shall govern the proceedings of the Commission in carrying out the provisions of this Treaty. Supplementary thereto the Commission shall establish a body of rules and regulations to govern its procedure, consistent with the provisions of this Treaty and of Articles III and VII of the Convention of March 1, 1889 and subject to the approval of both Governments.

Decisions of the Commission shall be recorded in the form of Minutes done in duplicate in the English and Spanish languages, signed by each Commissioner and attested by the Secretaries, and copies thereof forwarded to each Government within three days after being signed. Except where the specific approval of the two Governments is required by any provisions of this Treaty, if one of the Governments fails to communicate to the Commission its approval or disapproval of a decision of the Commission within thirty days reckoned from the date of the Minute in which it shall have been pronounced, the Minute in question and the decisions which it contains shall be considered to be approved by that Government. The Commissioners, within the limits of their respective jurisdiction, shall execute the decisions of the Commission that are approved by both Governments.

If either Government disapproves a decision of the Commission the two Governments shall take cognizance of the matter, and if an agreement regarding such matter is reached between the two Governments, the agreement shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement.

8. IV International Legal Materials 545 (1965).

complaint has been entered in regard to the quality of the water received. Nevertheless, the agreement is only a transitory measure and does not solve the question of water quality. The Minute deliberately does not interpret any of the provisions of the Treaty of 1944. It established with great care that what was contained therein did not constitute a precedent, recognition or acceptance affecting the rights of either country as derived from the Treaty of 1944, nor "general principles of law."[9]

Nevertheless, the Minute does constitute an admission of the responsibility of the United States with respect to the quality of the water to be delivered to Mexico. For example, the United States accepted the expense of the diversion channel. In addition, the water delivered to Mexico has not exceeded 1,500 parts of salt per million since the agreement of 1965. Nevertheless, a more stable and formal agreement is required. It seems the time has come for both countries to reach a protocol or an agreement supplementary to the pact of 1944, or some other less formal mechanism, on what is "usable water" or "good water." This will eliminate the ambiguities of the Treaty and correct the omission of a quarter century ago. Most important, it will avoid any other incident that might end in a bitter and inopportune dispute. As will be seen, there exist general principles, practices, precedents and norms that would facilitate such an agreement. The question of determining what is acceptable water quality is technically possible in our day. In the meantime, international relations between both countries concerning international waters are very uncertain and uncomfortable. The latent dispute may sharpen, with the risk that the controversy will pass to international jurisdiction, a possibility which is not attractive to either of the two nations. Such a dispute would also involve the chance of affecting other areas of mutual relations.

The lacunae of the Treaty of 1944 and Minute 218 and the refusal to determine what is meant by "water for beneficial use" necessarily leads to the general application of international law of fluvial currents. The chapter on pollution of international waters, which is applicable in the absence of a conventional regime, is especially important.

The question of pollution, and consequently that of water quality, still has not been regulated on an international level.[10]

9. Section 11 of the Minute.

10. In connection with pollution, *see*, M. Wolfrom, L'Utilisation a des fines autres que la

On the other hand, it should be recognized that considerable steps have been taken in this direction in recent years. This progress has been accelerated by the knowledge of the gravity of the matter and of the implicit responsibility of the state initially polluting the water.

There are, for example, the resolutions and declarations of international scientific legal associations which have restated the norms relative to international water currents, including pollution. Such resolutions and declarations are equivalent to private codifications, since they only consolidate customs and principles in use between States. The 1966 Rules of Helsinki formulated by the International Law Association, are an eloquent example.[11]

There are national and international analogies that contribute principles and rules to the problems of pollution of international waters: the Trail Smelter Case;[12] the Arbitration of Lake Lanoux;[13] and the adjudications between states of the United States. There are also treaties, many of them recent, that contain clauses relative to the pollution of common interest water currents. In addition, some European nations have entered into pacts that are directed towards preventing the pollution of international streams.[14]

We should also take into account the basic principles derived from the territorial rights of states in the international order. Such principles hold that a state has no right to cause damage to other states through measures taken in its own territory. The principle *sic utere tuo ut alienum non laedas,* in use since Coke, and the rules that emerge from the international responsibility of states, result in a useful method of determining objective responsibility of the state that causes harmful pollution of the international fluvial current.[15]

navegation des eaux des fleuves, lacs et canaux internationaux, Pedone, Paris, 234-49 (1964); L. Anthony, *Pollution*, in A. H. Garretson, The Law of International Drainage Basins 89-114 (1967).

11. *See* Helsinki Conference Report of the International Law Association of the Committee on the Uses of the Waters of International Rivers (1966).

12. In Recueil des Sentences Arbitrales, Nations Unies, Vol. III, 1905-1982.

13. Lake Lanoux Arbitration (France vs. Spain) (1959)—International Law Reports, 101.

14. *E.g.*, Convention of Oct. 27, 1956 between Luxembourg, West Germany and France, relating the canalization of the Moselle, Art. 55; in 3 Whiteman, Digest of International Law 1045 (1964); Annex to The Treaty concerning Settlement of the Saar Problem between France & Germany, Dec. 20, 1961; Agreement of Apr. 29, 1963, between Germany, France, Luxembourg, The Netherlands and Switzerland for the Protection of the Rhine against Pollution; Agreement of Nov. 16, 1962, between France and Switzerland, concerning the protection of the water of Lake Lanoux against pollution.

15. *See* Lester, *River Pollution in International Law*, 57 Am. J. Int'l L. 828 (1963). *See also*, O. Rabasa, El Problema de la Salinidad de las Aguas Entregadas a México en el Rio Colorado, México, Secretaria de Relaciones Exteriores (1968).

We are in the presence of a cumulative and persuasive corpus of principles, customs, analogies, practices, judicial decisions, and treaties that form a basis for showing that the water of an international current should be of an acceptable quality, without alterations that make it inadequate for use. In addition, this corpus produces responsibility when there exists an action incompatible with the general principle *sic utere tuo.* It is a matter of an international legal fluvial system *in fieri.*

These precepts then find application in case of a dispute. They can be used by an international tribunal or arbitrator when adjusting a claim by one state when the other state does not agree to put an end to the pollution, or fails in delivering usable water. However, in the case of fluvial currents between Mexico and the United States, as noted above, litigation could result in damage to the whole context of international relations between the two neighboring states. A more practical solution must be found with respect to the quality of water delivered to each country. This is only to be expected in light of the good neighbor relations that have been established for half a century. Mexico and the United States must proceed with the spirit of looking to remove any cause of friction in a friendly and determined manner.

The precedents of how other international differences between the two countries have been solved demonstrate that the matter of water quality can be settled with elegance and efficiency. There is also the element of mutual convenience, given that Mexico distributes, from the waters of the Rio Bravo, 70 percent of all the international water the United States receives from that country. A lack of understanding with respect to the Colorado would not fail to affect the regulation of the other international river.[16] In other words, the simple lack of definition of this concept could jeopardize the entire application of the Water Treaty of 1944.

There is naturally the problem of the instrument needed to solve the question of pollution. The possibility of a new treaty for adjusting this matter should be contemplated with some anguish. As is well known, negotiation of the pact of 1944 resulted in such turbulence that a happy ending could not be guaranteed for a

16. It should be borne in mind that in the Rio Bravo, the Morillo Drain that flows from Mexico sometimes carries water with a salt content of more than 11,000 parts per million, and that it can become a problem when water uses increase in the future.

similar instrument. It seems advisable to utilize less formal procedures, less subject to interference and lobbying, and with a lesser emotional charge.

The precedent represented by the Agreement contained in Minute 218 of the International Boundary and Water Commission could well serve as the basis for entrusting this body with the task of making adequate rulings about the quality of the waters that are to be supplied to Mexico. In fact, ample powers are given this body for solving conflicts that originate with the compliance and execution of the Water Treaty. Its resolutions, as in the case of Minute 218, can implement the Treaty. In this case, the Treaty acts as a framework for the Commission; and, according to Article 2, it has the character of an international and intergovernmental body. Its function is to duly integrate the law that emanates from the pact itself. That is to say, the proper dynamics of the Treaty flow through the decisions of the Commission. It could be said that the decisions of the Commission, when accepted by the two governments, take the place of an executive agreement. Moreover, the Commission deserves full praise since it has acted efficiently at all times and has solved many problems.

The role that international water commissions can play as bodies for reducing or preventing conflicts among riparian states, or as an administrative apparatus for adjusting water problems, has not been explored extensively in international literature. These commissions could rapidly create consuetudinary law, and, for this reason, they should be furthered. The work of the International Joint Commission between Canada and the United States is illustrative enough of the considerable possibilities of such bodies.

Up to now, the present pollution problem has been one of geological origin. However, it can be foreseen that the situation might become complicated as a result of pollution by industrial and other wastes. If we reflect that it has been the United States and Mexico that have contributed most to the formation of international river law, we can conclude that both nations can surely find a remedy for preventing future pollution and the damage that this causes.

EPILOGUE

After this article was written, a meeting was held in Washington, on the 15th and 16th of June, between Presidents Richard Nixon of the United States and Luis Echeverría of Mexico. Of this meeting a joint communique was issued on June 17, 1972, in which reference is made to the salinity problem. The result of that negotiation was Minute No. 241 of the International Boundaries and Waters Commission, of July 14, 1972, "Recommendations for Immediately Improving the Quality of the Waters of the Colorado River delivered to Mexico," approved by both governments. A temporary solution is contained, valid until December 31, 1972, providing that the saline waters coming from the Wellton-Mohawk area will be left to run, without being used, to the Gulf of California, through a canal built by the U.S. in 1965 and that will continue to be operated and maintained by that country. Half of the volume of unusable will be substituted by equal quantities of useful water, supplied in the course of the Colorado River. This confirms the idea, sustained in the preceding article, that Mexico and the United States, who in 1944 found a graceful and elegant solution to the problem of the distribution of international waters, could, if determined, find a measure for putting an end to the conflict.