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SALINITY IN THE COLORADO: AN INTERPRETATION OF THE MEXICAN-AMERICAN TREATY OF 1944

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It is frequently said that the Water Treaty of 1944 signed by the United States and Mexico does not specify the quality of the water that Mexico should receive. It is said, therefore, that the United States need only deliver 1,500,000 acre-feet of water annually, the amount agreed to in the treaty, without regard to quality in order to be in compliance with the agreement. This argument dates back to the hearings before the Senate Committee on Foreign Relations in the first months of 1945.

During the hearing of February 21, Senator Downey of California noted that one of the interpretations given the treaty by the Department of State was that, to the full extent of the return flow, Mexico had to take the water sent to her even though it was unusable. He asked Assistant Secretary of State Dean Acheson if it would not be possible to verify this fact, which might be so damaging to Mexico in the future, "so that we would know that Mexico knew just what we were delivering?" Mr. Acheson answered that he did not think there was the slightest doubt about the interpretation raised by the Senator. It seemed to him that in three places, the United States had made this fact abundantly clear. He then cited three sections of articles 10 and 11 and made a comment on each of them. "So, three times," he said, "it has been made clear in the treaty that what Mexico gets is 1,500,000 acre-feet of water from any and all sources, for any purpose whatsoever, and whatever the origin." Senator Downey asked: "Even though it comes from seepage and drainage water, and even though it becomes so saline that it is not usable by Mexico?" Mr. Acheson answered: "Those are the plain words of the treaty, Senator." Senator Downey then asked: "And you are here stating, as a representative of the State Department, that it is your understanding of the treaty, and you think it is the understanding of the Mexican Government; is that right?" "I state," answered Mr. Acheson, "that the plain language of the treaty means exactly what it says, and that there cannot be any question or doubt about it."

One of the questions asked Mr. Acheson by Senator Millikin of

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Colorado was the following: "Do you know of any international principle that should keep us from giving Mexico the water with the salinity that it may have as it has normally developed under our consumptive use?". The Assistant Secretary of State answered in the negative.

Can it be reasonably stated that the sole obligation of a State in an upper basin is to deliver a certain amount of water, regardless of its quality? Can it be held that the United States is entitled to provide Mexico with saline water because of the omission of a specific legal provision of the quality of water to be furnished? These questions can be answered by an analysis of the Treaty in context with certain norms of treaty interpretation.

Article 3 of the Treaty of 1944 states the order of preferences for the use of international waters as the following:

1. Domestic and municipal uses;
2. Agriculture and stock-raising;
3. Electric power;
4. Other industrial uses;
5. Navigation;
6. Fishing and hunting and
7. Any other beneficial uses which may be determined by the Commission.

It should be mentioned that, not withstanding the previous enumeration, the quantity of water received by Mexico is barely enough for the first two uses listed.

If the water given to Mexico is highly saline due to the introduction of the saline waters of Wellton-Mohawk into the river, then this act hampers and on occasions makes impossible the delivery to Mexico of that volume allotted for the uses established in Article 3. This logically constitutes a violation of the treaty. It is irrelevant that the quality of the water which Mexico should receive has not been established in the treaty. It is enough to have a provision that the volume is to be used for agriculture, since all contamination which prevents or hampers that use is a clear violation of the agreement.

In the Vienna Convention on the Law of Treaties a general rule of interpretation was laid down in Article 31. Its first paragraph states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

If the reference to the object and purpose constitutes an intrinsic element of interpretation, it is obvious that induced salinity constitutes a violation of the treaty in that it prevents the use of that water for the agricultural purposes contemplated in the instrument. To maintain the contrary clearly implies a violation of the principle that treaties should be interpreted in good faith. This is an essential aspect of the interpretation in that the failure to recognize good faith implies the exclusion of the principle of *pacta sunt servanda* that establishes the binding power of treaties and would mean ultimate nullification of all law of treaties.

The second paragraph of Article 31 of the Vienna Convention provides that, for the purpose of interpreting a treaty, the context shall comprise, in addition to the text, including its preamble and annexes, certain agreements and instruments made by one or more parties in connection with the conclusion of the treaty. In the preamble of the Treaty of 1944 it was stated in part that ". . . the utilization of these waters for other purposes [besides navigation] is desirable in the interest of both countries. . . ." It is logical that it cannot be in the interest of Mexico to receive waters which are of high salinity, that cannot be used properly for agricultural necessities and that generate an increasing salinity in the land. It is also set forth in the preamble that both countries have resolved to conclude a treaty for the purpose of obtaining a ". . . most complete and satisfactory utilization . . ." of these waters. Certainly Mexico cannot achieve a most complete utilization, much less a satisfactory one, if it receives saline water from the United States.

Furthermore, Article 32 of the Convention on the Law of Treaties establishes a supplementary means of interpretation. This provision points out that the preparatory work of the treaty can be utilized to confirm the meaning of Article 31.

There exist some important parts of the preparatory work of the Treaty of 1944 that confirm the interpretation that should be given it. In the memorandum of March 19, 1942, sent by the Mexican Ambassador in Washington, Francisco Castillo Najera, to the Department of State, it is stated:

> "The aforesaid volume of 2,000,000 acre-feet annually is the absolutely necessary volume for the irrigation of 200,000 net hectares, which may be cultivable. . . . The volume of 1,150,000 acre-feet offered in the memorandum of February 11, would be

> insufficient for the irrigation of a great area of cultivable lands in the Colorado delta, lands which constitute the only important agricultural zone in Lower California. . . .
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> . . . Acceptance of that volume would create in Lower California a situation similar to that existing in the Juarez Valley in which, as is well-known, the area of cultivable lands amounts to 17,000 hectares, of which only half are irrigated."

In a memorandum dated November 4, 1942, sent by the Department of State to Ambassador Castillo Najera, the following transcedental lines appear:

> "The quantity that was proposed to be delivered to Mexico by the United States, therefore, is more than sufficient to provide for the maximum area which Mexico had cultivated even before the construction of Boulder Dam. . . ."

These and other passages that could be quoted from the negotiations leave no doubt that it was expressly recognized by both parties that the water assigned to Mexico would be used for agricultural purposes, and that somehow Mexico would receive water suitable for cultivating. To affirm the contrary would signify accepting a new interpretation of the Harmon Doctrine, in that waters are legitimately allotted to another country in the territory downstream are being disposed of, in a manner which is a deliberate alteration, injurious to the water.

Not only the spirit, but the text itself of the Treaty is violated by the American attitude. This can be seen by reading Article 10, which refers to the Colorado River. The first part of the article establishes the following: "Of the waters of the Colorado River, from any and all sources, there are allotted to Mexico. . . ." What should we understand by "sources" of the river? It has been reasonably pointed out that sources are waters that proceed from rain and thaw produced at any point along the river basin, the waters from its tributaries and the volumes occurring from return flow of irrigated lands. The return flow should be understood, as it is stipulated in paragraph (h) of Article 1 of the Treaty to be that portion of diverted water that eventually finds its way back to the source from which it was diverted. Only these and secondary flows occurring in the main channel by natural means can be considered as sources.

Stating that the salty waters pumped from Wellton-Mohawk constitute a source, is a flagrant violation of the Treaty. Under this theory waters contaminated with industrial residues discharged in a river bed could also be classified as a source of a river.

Based on the applicable standards of international law, it is clear that under the Treaty of 1944 waters of the Colorado River allocated to Mexico should be delivered in their natural state. In addition, any contamination caused by an intentional act that affects the uses established in Article 3 constitutes a violation of the Treaty and a breach of international law which requires the responsible state to repair whatever damage it caused. This is an inevitable consequence as shown by doctrine and codifications on the matter, as well as by important judgments of international courts. A well-known author, Clyde Eagleton, has said that responsibility is simply a principle that establishes an obligation to repair any damage committed by the defendant State in violation of international law. The Permanent Court of International Justice stated in the *Chorzow Factory* case that it is a principle of international law that the violation of an obligation implies the duty to correct it adequately.

The notions of responsibility and of repairing the originating damages are inseparable; when the first arises, it will inevitably have the second as a consequence.

In view of the foregoing, it must be stated that the existing treaty between the United States and Mexico regarding the use of the Colorado River waters provides an ample basis for determining the quality of the water to be received by Mexico. The continuous violation of the Treaty and the harmful effects which have been caused by allowing individuals and corporations to continue to make alterations detrimental to Mexico's interests, seriously interfere with the spirit of cordial and friendly cooperation in which the Treaty was concluded. Therefore, the United States is under an obligation to take whatever measures are necessary to control this situation and to restore it eventually to the state that would have existed had the saline waters of the Wellton-Mohawk not been introduced into the Colorado. In addition, the United States must pay for the damage caused to the farmers of the Mexicali Valley whose crops have been increasingly affected by the salinity of the water received. These are the only conclusions that can be reached after an analysis of the Treaty and the norms of international law.