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INTERNATIONAL LEGAL IMPLICATIONS OF INDUSTRIAL DEVELOPMENT ALONG THE MEXICAN-U.S. BORDER

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Mankind is crisis oriented. We do not act or react towards a situation until the situation reaches critical proportions. Needless to say, this attitude allows problems to arise and causes hardship to one party or another. The objective of this paper is to discuss a problem facing the border area, in the hopes that we will act on that problem before we have to react to it. At this time, air pollution on the border is not a problem that has reached the critical point.

Presently, air pollution on the United States-Mexican border has not been recognized as a problem. Both countries have moved on separate tracks without taking into consideration their common air supply. The United States has enacted legislation that is designated to control environmental quality. The several states in this country have gone their separate ways and enacted statutes for environmental protection. Even though legislatures have enacted statutes, they have failed to recognize the realities of air pollution. Their parochial approach is based on the premise that air pollution can be controlled in the same manner that morals or commerce are controlled. Each state can set up its own controls without concerning itself with control in the neighboring jurisdiction. It is the present belief that the problem of air quality can be adequately controlled by an individual state, and that whatever occurs in the surrounding states will not affect air quality at home. The analogical fallacy is quite obvious.

It ought to be recognized that since all of us must share one body of air, all of us ought to decide what the quality of air will be. Likewise, on the international level, neighboring countries such as Mexico and the United States ought to draft agreements protecting the air that moves freely across boundaries. Enactment of air quality control legislation only on one side of the border will not be enough. If air were a static element, then unilateral action might suffice.

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History proves that it is not impossible for the two bordering countries, the United States and Mexico, to reach agreement on mutual problems. For example, there is the Treaty of Guadalupe Hidalgo which set the boundaries between the two countries. There have also been negotiations on the quantity and quality of water that Mexico is to receive from the Colorado River.

DESCRIPTION OF THE BORDER

The United States-Mexico border stretches for over 1,600 miles. The Mexican side is comprised of six states, thirty-five municipalities and thirty-five neighboring communities.¹ On the American side, there are four states and numerous cities, most of them smaller than that of their Mexican counterparts. The states on the American side from east to west are Texas, New Mexico, Arizona and California. On the Mexican side, in the same direction, there are the six states of Tamaulipas, Nuevo León, Coahuila, Chihuahua, Sonora and Baja California. Except for New Mexico, the bordering American states have more than one community of significance on the border. The largest border city on the American side is El Paso, Texas—population around 500,000. On the Mexican side, there are at least five cities over 100,000—Matamoros, Nuevo Laredo, Ciudad Juárez, Mexicali and Tijuana. Three of them are close to 500,000. The four American states totaled about 16 million people in 1966. The six Mexican states totaled around six million.² Most of the population in the Mexican states is located on the border. The same is not true of the bordering American states. The Mexican border population in 1966 comprised about one-eighth of the total national population. The American population was not nearly as proportionately high.

DEVELOPMENT OF MEXICO

The Mexican population and economy suffered great losses during the Revolution between 1910 and 1920. However, Mexico has come a long way from the days following the civil war. Today, Mexico is the second largest nation in South America. The gross national product has grown in recent years at a rate of over seven percent. Between 1945 and 1960, electrical output

1. Bermúdez, *El Rescate del Mercado Fronterizo* 17 (1966).

2. *Id.*

increased 300 percent, petroleum refining 444 percent, construction 300 percent and manufacturing 218 percent.³

Notwithstanding Mexico's progress and optimistic gains, the nation has some pressing needs and shortcomings not unlike other countries. Jorge Jiménez Cantú, Secretary of the Department of Health and Public Assistance, pointed out some of the problems facing the nation such as population growth, income level, housing and sanitation.

In the last 60 years population has tripled and it is probable that by 1980 population will have reached 70,000,000. 75% of the population in the nation have incomes that don't attain \$1,000 (pesos) monthly. 40% of the population live thrown together in groups of five or six in a single home and 29% of the living units in the country consist of two rooms. 38% of all living units lack potable water and 60% do not have sewers or adequate means by which to dispose liquid effluents.⁴

Unemployment is quite high. The 1970 census reports that 41.84 percent of the population over twelve years were unemployed in the past year.⁵ Strides in industry, health and social services have nonetheless failed to offset a rapidly growing and urban oriented population which creates new demands and augments existing problems.

DEVELOPMENT OF THE BORDERING CITIES

The disillusionment of war with Texas, and later with the United States, encouraged Mexico to leave the border area relatively undeveloped. The philosophy that reigned was to create a desert between both countries, thereby affording the interior and the capitol some protection from the clutches of the American manifest destiny. Porforio Díaz capsulized his nation's fate: "Pity poor Mexico, so close to the United States and so far from God." For several years, industry and governmental attention ignored the northern-most provinces.

The attitude that Mexico maintained towards the U. S. following the Mexican-American War has long since changed, and Mexico is undergoing an about face in its previous lack of development in the North. In respect to population concentration, the move from rural areas to urban areas has been rather

3. Samora, *Los Mojados: The Wetback Story* 131 (1971).

4. *Salubridad*, 60 *Hispano Americano* 10 (1972).

5. *Mexico Today: Information Guide for Doing Business in Mexico* 3 (1968).

accelerated. Consequently, the cities throughout Mexico have experienced rapid growth. The shift has not only been one from rural to urban but, also, one of a regional nature.

The internal migrations reveal that large percentages of the rural poor are moving into the urban areas. The destinations of these migrants appears to be in large proportion the Federal District or Mexico City and the northern border cities adjacent to the United States.⁶

Currently, the northern cities and states are growing very rapidly. Mexicali and Tijuana are two of the world's fastest growing cities. The table below indicates state growth and future projections.

TABLE 1
Population Change in the Mexican Border States
(1950 to 1960 and projections to 1980)

| State | 1950 | 1960 | % | Projection 1980 |
|-----------------|-----------|-----------|-------|--------------------|
| Baja California | 226,965 | 520,165 | 129.1 | 2,408,100 |
| Chihuahua | 846,414 | 1,226,793 | 44.9 | 1,620,000 |
| Coahuila | 720,619 | 907,734 | 25.9 | 2,870,700 |
| Nuevo León | 740,191 | 1,024,182 | 42.6 | 2,657,600 |
| Sonora | 510,607 | 783,378 | 53.3 | 2,085,400 |
| Tamaulipas | 718,167 | 1,024,182 | 42.6 | 2,219,000 |
| Total | 3,762,963 | 5,486,434 | | 13,860,800 |

Source: Mexican Census 1960 and Benitez and Cabrera, 1966: 123-175.⁷

Likewise, the bordering cities have shown tremendous gains in the last 20 years.

TABLE 2
Population Increase of Mexican Border Municipios

| Municipio | 1940 | Years 1960 | | Per- centage of Change |
|------------------------------------|---------|---------------|-----------|---------------------------------|
| Tijuana | 21,977 | 165,690 | 347,501 | 1,481% |
| Mexicali | 44,399 | 281,362 | 540,300 | 1,117% |
| Juárez | 55,024 | 276,995 | 501,416 | 811% |
| Nuevo Laredo | 31,502 | 96,043 | 140,818 | 347% |
| Total Mexican Border Municipios | 976,693 | 2,363,728 | 2,709,136 | |

Source: Unpublished figures U.S. Department of Labor⁸

The factors which have influenced northern migrations are not completely known. Some of the known factors are lack of

6. Samora, *supra* note 3, at 132.

7. Samora, *supra* note 3, at 133.

8. Samora, *supra* note 3, at 134.

employment in the interior, higher wages in the North, and the proximity to the United States. Under-employment and unemployment are not exclusive to the interior. The border cities and states also have problems in keeping people employed. The following figures give an indication as to the size of the problem in six border cities: Tijuana 19.7 percent, Mexicali 18.5 percent, Nogales 42.1 percent, Ciudad Juarez 20-26.7 percent, Nuevo Laredo 22.9 percent, and Matamoros 11.6-13.3 percent.⁹ Income levels in the North are on the whole higher than the national levels. Tijuana has the nation's highest per capita income. As far as regions go, the Federal District offers the highest wages. However, the northern border states offer the nation's second highest income level. In 1964, annual cash income amounted to \$475 U.S. dollars per capita in the District while per capita income in the northern states amounted to \$234.¹⁰

The third factor influencing the exodus to the North has been its proximity to the United States. Many people move up to the border hoping that they will be able to enter the United States, obtain employment and change their life styles. Stories of success in the United States attract many.

In 1969, 201,000 wetbacks were apprehended and sent back to Mexico by the United States Immigration and Naturalization Service. It is estimated that the number apprehended represents as little as one tenth of the total. In Los Angeles alone, in a 1969 drive, more than 4,000 of them a month were apprehended.¹¹

A Mexican study points out the reason for the North's rapid expansion, both in population and economic activity.

The acceleration factor has been very important in the region bordering the United States where at least four factors are combined 1. the influence of the interior population seeking employment and urban growth in general 2. the development of irrigation districts, which in turn provokes development and progress in the total economic infrastructure 3. intense commercial activity between the two countries which generates specialization in the fields of export cattle, tourism, and services 4. an incipient industrialization financed with foreign capital for the most part, that is constantly diversifying production even though it forces specialization on a greater scale. The border belt has an advantage over the interior of the country, which consists in the introduction

9. Ericson, *An Analysis of Mexico's Border Industrialization Program*, 93 Monthly Labor Rev., 33 (1970).

10. Mexico Today, *supra* note 5, at 1.

11. Ortega, *Plight of the Mexican Wetback*, 58 A.B.A.J. 251 (1972).

of modern influence and technology from the neighboring nation.¹²

The Mexican government recognized the problems in the border area and in an attempt to curtail unemployment and cash outflow, a program was instituted in 1961. Programa Nacional Fronterizo (PRONAF) or the National Border Program was launched in the hopes that more revenue would stay in Mexico and, at the same time, provide new jobs for the area residents. At first, the program was aimed principally at attracting more American tourists. PRONAF demonstrated some results in generating more revenue; however, unemployment was not alleviated. As a consequence, in 1965, the Minister of Industry and Commerce, Octaviano Campos Salas, presented a program which would provide for border industrialization, thereby relieving unemployment.

Under the border industrialization program, as it is called, approved enterprizes are permitted to import, free of duty and under bond, machinery and equipment to establish their plants and raw materials and semi-fabricated components for further processing or assembly. All goods produced from such raw materials and components must be exported, though not necessarily to the country of origin of the raw materials.¹³

It appears that the industrialization, widely referred to as the twin plant concept, has failed in relieving unemployment in that it has introduced a new worker, women, into the labor pool. Women had, for the most part, been excluded from the labor market; now, they have taken most of the positions created by the new industry. Furthermore, there is evidence that the program has become a lure for the unemployed in the interior. To date, there are about fourteen Mexican municipalities actively involved in the program.

Most of the man-made pollution sources are on the American side. That is to say, Americans today are producing most of the pollution associated with industry. Most of the Mexican pollution at this time is coming from activity incidental to living, such as garbage burning, cooking fires and dust generated by vehicular traffic on unpaved streets. The twin plant concept has attracted mostly clean industry, for example, garment assembly, electronics

12. B. Batalla, *La División Económica Regional de México* 177 (1967).

13. Wright, *Foreign Enterprise in México* 193 (1971).

assembly and other occupations which utilize prefabricated components. Indirectly, however, the twin plant concept has created demands on electrical energy, transportation and promoted population growth. The Mexican consumer's expectations have increased, thereby adding to increased consumption of natural resources.

There are two exceptions to the general statement that Mexico currently does not have heavy industry close enough to the border that might contribute contaminants. Monterey, Nuevo León is Mexico's major iron and steel producer. It is located more than one-hundred miles from the Texas border. Whether or not emissions from the iron and steel mills reach Texas in significant amounts is unknown to the author.

The second exception is the reduction works in Cananea, Sonora, located about thirty-five miles from the Arizona border and producer of 56.7 percent of the nation's copper.¹⁴ Smoke from the reduction works can be seen moving along the San Pedro River which crosses the border from Mexico into the United States. Upon entering the United States, the Mexican emissions join smoke produced by other copper smelters in Arizona.

The copper industry in the Southwest has located two copper smelters right on the border. There is no doubt that the El Paso smelter and the Douglas, Arizona smelter share their contaminants with their Mexican neighbors. El Paso spews clouds of smoke into Ciudad Juarez and Douglas dumps smoke on Agua Prieta.

Although today there is relatively little heavy industry on either side of the border, the situation will be changing in the future. The American states will be growing rapidly in the coming years; the Mexican border states will be growing at a faster pace. Mexico has become aware of the potential economic forces on its northern border and has now moved to develop it. Socio-economic conditions of our southern neighbor will be instrumental in the eventual industrialization of the border.

Priorities for both governments will be shaped by the needs of their citizens. The United States has chosen to place industrialization and economic gain above environmental protection. It appears that Mexico may follow the same path in light of

14. *Copper: A Metal with a Future*, 68 Rev. of the Economic Situation in Mexico 333 (1971).

Mexico's needs. The following statement appears to be the rule, rather than the exception:

In the short run it is apparent that nations will give a higher priority to current health and food shortage problems than to the prevention of prospective environmental damage.¹⁵

LEGAL IMPLICATIONS

Legal implications of air pollution caused by industrialization and population concentration on the United States-Mexico border will be of an international nature. Currently, the two countries do not have the legal means by which to resolve problems that may later arise as a result of air pollution generation.

The two nations are of course sovereign and as a result of this fact either country may carry on any activity within its own boundaries that is not precluded either by treaty or general principle of international law.¹⁶ A principle of international law that is recognized by the United States and also by Mexico is that a country may not carry on activity that may be deleterious to its neighbors.¹⁷ This principle has already been recognized by the United States in the Trail Smelter Case.

Discussion of the Trail Smelter Case is particularly relevant at this point since it is one of the few cases that have been settled by nations who disputed activity which resulted in damage to a passive neighboring nation. Trail Smelter is located in Canada, directly across from the state of Washington. The dispute arose over damage caused to American crops and land by sulphur dioxide emissions from the Trail Smelter.¹⁸ American and Canadian authorities submitted the question of damages to arbitration, as was previously agreed by treaty. The Canadians were ordered to pay damages on the grounds that the injury was serious and the evidence was clear and convincing. Relief for the Americans arrived many years after their complaints were registered.

Mexico and the United States have both unilaterally enacted legislation for the protection of the environment. American

15. Vasek, *International Environmental Damage Control: Some Proposals for the Second Best of all Possible Worlds*, 59 Ky. L. J. 671 (1971).

16. Vasek, *supra* note 15, at 681.

17. Recursos Hidraulicos: El Problema de la Salinidad, 60 *Hispano Americano* 38 (1972) (translated by the author).

18. P. Corbett, *The Settlement of Canadian-American Disputes* 70-71 (1970).

efforts, on the national level, to control air pollution have been around for many years. However, legislation per se does not remove problems. It is only through enforcement that legislation may become effective.

Mexico has faced the problem of protecting the environment through legislation only recently. Luis Echeverría Álvarez, President of Mexico, presented to the National Congress a law on March 23, 1971, which is aimed at control and prevention of environmental pollution. This law authorizes departments within the national government to effectuate the law in accord with their recognized sphere of activity. For example, the Department of Water Resources will be in charge of controlling water pollution, the Department of Health and Assistance will be in charge of controlling air pollution.¹⁹

Last September 17, 1971 the President and the Secretary of the Department of Health and Assistance presented to the Congress another law—*Reglamento para la Prevención y Control de la Contaminación Atmosférica Originada por la Emisión de Humos y Polvos*—regulations for the prevention and control of air pollution caused by the emission of smoke and dust.²⁰ The first law sets out what pollution is, and who is responsible for its execution. The second law specifically applies to air pollution by defining what air pollution consists of and what agency will be in charge of abatement. How effective the laws will be at this time is unknown; however, the Department of Health, charged with the protection of air quality, has currently moved to establish a sub-department which will be in charge of atmospheric protection.²¹ This recent development resulted from the fact that the department originally charged is already overburdened with other duties. How effective the fight for environmental protection will be in Mexico is unknown at this time.

Mexican legislation and the establishment of national standards on air might imply that both countries will move faster to an understanding as to the quality of air that traverses Mexico's northern frontier. Pressure and complaints established by Mexican nationals on their government could accelerate the drafting

19. *Ley Federal Para Prevenir y Controlar la Contaminación Ambiental*, Diario Oficial, (Mar. 23, 1971).

20. *Reglamento Para la Prevención y Controlar la Contaminación Atmosférica Originada por la Emisión de Humos y Polvos*, Diario Oficial, (Sept. 17, 1971).

21. *Acuerdo por el que se crea en la Secretaría de Salubridad y Asistencia la Subsecretaría de Mejoramiento del Ambiente*, Diario Oficial, (Jan. 29, 1972).

of a treaty or agreement by the two neighboring countries. On the other hand, it is not unlikely that Mexican nationals will assess the economic implications of attacks on air pollution producing industry, on both sides of the line and refuse to file complaints. This has already resulted in the United States. Economic realities outweigh the long term goals of a cleaner environment. Even if both countries faced the problem today, they lack the procedure to solve the problem. The problem has not as yet occurred between the two countries. However, it may be that the Trail Smelter Case may offer some suggestions as to how the problem of international air pollution may be solved.

The results of the Trail Smelter dispute were reached through arbitration. A condition precedent to arbitration requires that countries have an agreement which will allow for resolution of problems. At this time, Mexico and the United States, unlike Canada and the United States, do not have the mechanics for resolving international air pollution disputes. The states adjacent to Mexico cannot reach accord with the Mexican national government. The present International Boundary and Water Commission is only concerned with the border and the rivers which cross it. Settlement of air pollution disputes would hinge on the factor that pollution sources and damage could be pinpointed. In other words, as was the result in the Trail Smelter Case, the damage must be shown by clear and convincing evidence.²² This was relatively easy in the Canadian incident because the Trail emissions were the only source that could have caused the injury. On the United States-Mexico border, this may be very difficult to conclude when two polluting activities may face each other across the border. For example, if Douglas were to continue producing copper and a smelter were located in Agua Prieta, the damage causing pollutants might be very difficult to determine.

Industrialization on the border will necessitate an international accord in order to preserve air quality on both sides of the border. Our governments ought to face the fact that by 1980 there will be well over 30 million people on the border strip. People on both sides of the border will generate air pollution just by their presence and daily activities. Mexico's side of the border is growing very rapidly.

22. Lee, *International Legal Aspects of Pollution of the Atmosphere*, 21 U. of Toronto L.J. 203 (1971).

When Mexico does begin exploiting its resources in the North, the United States should make sure that Mexico will start production with the latest technology available so that our environment will be protected. Our knowledge of the environment ought to be extended freely across the border to avoid delays in air protection. Independent air pollution control by the two countries will be self-defeating because there is no way to maintain the air over both borders free from the air of the other. The failure to employ mutual efforts or maintain equal standards will render pollution control of both countries meaningless.