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NOTE

A HISTORY AND INTERPRETATION OF THE WATER TREATY OF 1944 *

In a recent conference on environmental problems common to the United States and Mexico,¹ the 1944 Water Utilization Treaty between the United States and Mexico received extensive consideration, primarily with reference to the salinity problems in the Lower Colorado River area. One question which emerged from the discussion, but was never satisfactorily answered, is how and why the Treaty came into being. Considering its apparent failure to materially assist in the resolution of serious conflicts over water utilization, such as the salinity problem, the agreement does not seem to be in the best interests of Mexico—the party currently encountering difficulties over the Treaty's implementation. And the terms themselves are markedly one-sided in favor of the United States. Moreover, the Treaty could be judged defective by reference to a technical definition of treaties, in that its inefficacy may indicate the lack of "mutual declarations of will . . . which coincide as to the desired effects of the instrument."²

This note is an attempt to discover why Mexico signed this agreement, despite all its flaws. An answer can be found, it is submitted, in the records of the negotiations leading up to the drafting of the Treaty; these records indicate a strong possibility that Mexico had virtually no choice but to sign.³

HISTORICAL BACKGROUND OF THE TREATY

The Treaty was the product of over twenty years of negotiations consisting of informal diplomatic discussions as well as

*Treaty with Mexico Relating to the Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, 59 Stat. 1219 (1946), T.S. No. 994 (effective Nov. 8, 1945) [hereinafter cited as TREATY].

1. Pollution and Political Boundaries: United States - Mexican Environmental Problems, Conference of April 29, 1972, U. of New Mexico School of Law, Albuquerque, New Mexico. [Conference papers reprinted in this volume].

2. I. Detter, *Essays on the Law of Treaties* 14 (1967).

3. See, e.g., Letter from the Ambassador in Mexico to the Under Secretary of State, [1943] 6 Foreign Rel. U.S. 611-12 (1965); Letter from Mr. Charles A. Timm of the Division of the American Republics to the Advisor on Political Relations, [1943] 6 Foreign Rel. U.S. 628 (1965), "[A]ll things considered, they need a treaty more than we do." [Hereinafter cited as Letters].

meetings and studies pursuant to acts of the United States Congress.⁴ To a certain extent it also appears to have descended from the Rio Grande Convention of 1906,⁵ a similar but more limited agreement between the United States and Mexico. The historical setting at the time of the enactment of the 1944 Treaty can be fairly described as tense or even critical as a result of a protracted period of confrontation between the two nations over a number of problems, not the least of which was the expropriation of American oil properties in Mexico.⁶ Thus, apart from the inherent difficulties in the subject matter of the Water Treaty, it is understandable that agreement could not easily be reached even after years of maneuvering, notwithstanding all references to the Good Neighbor policy and cooperation between Mexico and the United States.⁷ In addition, the strength of the competing interests in the use of the international river waters made settlement of the controversy nearly impossible.

Clearly, if there were to be a treaty at all, there would have to be some compromise; both nations desired to continue their agricultural development in the Southwest by irrigation, and the water supply was definitely limited. However, when the breakthrough finally came there was no question about who was the victor. The full measure of the sacrifice Mexico was forced to make has only recently come to light in the context of the Colorado River salinity problem, as Mexico has discovered just how ephemeral are the few rights and remedies thought to have been acquired by her under this Treaty. These remedies, theoretically enforceable by a good faith interpretation of the Treaty,⁸ have been regarded as purely voluntary and gratuitous

4. Statement by the United States Commissioner (Lawson), United States Section, International Boundary Commission, United States and Mexico, Jan. 25, 1945, Before the Senate Committee on Foreign Relations, *Hearings on the Water Treaty with Mexico Before the Senate Committee on Foreign Relations*, 79th Cong., 1st Sess., pt. 1, at 155-56 (1945) [Reprinted in 3 M. Whiteman, *Digest of International Law* 945-47 (1964) [hereinafter cited as Statement by Lawson]; International Boundary and Water Commission Act, 22 U.S.C. 277-77d; Act of May 13, 1924, ch. 153, 43 Stat. 118; Act of March 3, 1927, ch. 381, 44 Stat. 1403; Act of Aug. 19, 1935, ch. 561, 49 Stat. 660; Act of June 28, 1941, ch. 259, 55 Stat. 303, 338.

5. Convention with Mexico Concerning the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, 34 Stat. 2953 (1907), T.S. No. 455 (effective Jan. 16 1907).

6. See, e.g., Letter from the Ambassador in Mexico to the Secretary of State, [1940] 5 Foreign Rel. U.S. 1040 (1961).

7. See, e.g., Memorandum from the Mexican Ambassador to the Department of State, [1941] 7 Foreign Rel. U.S. 376 (1962).

8. Sobarzo, *The Salinity of the Colorado River and the Interpretation of Treaties*, 12 Natural Resources J. 510 (Oct., 1972) [hereinafter cited as Sobarzo].

measures, to the extent that they have been acknowledged at all by the United States.⁹

CONTROVERSIAL PROVISIONS OF THE TREATY AND THEIR INTERPRETATION

There are relatively few sections of the Treaty which have given rise to most of the difficulties encountered in its implementation. In order to understand their significance, it is necessary to begin with a brief overview of the contents and purposes of the Treaty as a whole.

According to the Preamble of the Treaty, its express purpose is to allocate between the two nations the rights to waters of the Rio Grande or Rio Bravo, Tijuana, and Colorado Rivers for uses other than navigation. It is to "fix and delimit" those rights "in order to obtain the most complete and satisfactory utilization" of the waters "in the interests of both countries. . . ." Moreover, the Treaty is said to be undertaken in "the sincere spirit of cordiality and friendly cooperation which happily governs the relations between them. . . ." Most of this language should probably be disregarded as mere rhetoric, but it nevertheless contains the most explicit reference to the main purpose—a "complete and satisfactory utilization" by both Mexico and the United States. No indication is given in the Preamble that the utilization by the United States is to be considered invariably more important than that by Mexico, although the body of the Treaty might suggest such a principle implicitly governs. Perhaps this is because it was indeed foremost in the minds of the persons who drafted the Treaty, that is, the members of the United States Department of State.¹⁰

9. Reference is made here to the measures undertaken pursuant to Minutes 218 and 241 of the International Boundary and Water Commission, to ameliorate the Wellton-Mohawk situation, and to proposals of the United States Bureau of Reclamation for future reduction of the naturally accruing salinity from the Upper Colorado River. These measures and proposals are discussed extensively in two of the papers presented at the recent conference on United States-Mexican environmental problems, *supra* note 1; Gantz, *United States Approaches to Salinity Problems on the Colorado River*, 12 *Natural Resources J.* 496 (Oct., 1972) [hereinafter cited as Gantz]; and Reynolds, *The Water Quality Problem on the Colorado River*, 12 *Natural Resources J.* 481 [hereinafter cited as Reynolds]. The position is taken in both papers that none of the actions by the United States were or could have been dictated by the provisions of the Treaty, much less by general principles of international law.

10. See, e.g., Memorandum From the Department of State, [1942] 6 *Foreign Rel. U.S.* 561 (1963), "Based upon the best data presently available, the total virgin flow of the river . . . can all be beneficially used in the United States"; Memorandum by the Legal Adviser to Mr. Charles A. Timm of the Division of the American Republics, [1943] 6 *Foreign Rel. U.S.* 619 (1965), "[W]e would probably argue . . . that we have a right to use all waters having their source in the United States . . ."; and Memorandum from Department of State to the Mexican Ambassador,

The body of the Treaty consists of seven parts, only three of which need be mentioned here: that dealing with the distribution, control, and development of the Colorado River,¹¹ that pertaining to the Rio Grande (Rio Bravo),¹² and a short section dealing with the Tijuana River.¹³

Probably the most controversial passages in the Treaty have been those purportedly related to the matter of water quality: Articles III, IV, X and XI.¹⁴ Prior to the enactment of the Treaty, the question of water quantity was of primary importance to both nations and was, in fact, the main reason for the Treaty.¹⁵ Now, however, since both nations have been committed by the Treaty to certain numerically precise quantities, the only opportunity either country has for improving its condition is through favorable interpretation of the alleged water quality provisions of the Treaty.¹⁶

Article III states that there is an order of preferences for joint water use which the International Boundary and Water Commission must follow in any decisions it makes regarding such use. Since agriculture and stock-raising are second on the list, with only domestic and municipal uses having a higher priority, Mexico has taken the position that the allocations of water to Mexico must be at least of a quality suitable or adequate for these two categories, particularly if the water supply is insufficient to satisfy the requirements for all six of the specified uses.¹⁷ Since both nations acknowledge that there is insufficient water to meet all possible uses,¹⁸ this would appear to be a reasonable

[1942] 3 M. Whiteman, *Digest of International Law* 952 (1964), "It is thus apparent that any waters allocated to Mexico over and above the return waters present in the river at the international boundary must operate to restrict proportionately the ultimate development within the United States."

11. TREATY, at art. X-XV.

12. *Id.* at art. IV-IX.

13. *Id.* at art. XVI.

14. Attempts to resolve the crisis brought on by the increase in salinity of the Lower Colorado River have been directed at least partially toward interpreting the Treaty so as to find in it provisions which do (do not) require the United States to mitigate the salinity condition. *See, e.g.*, Sobarzo, *supra* note 8, at 511, and Gantz, *supra* note 9, at 498.

15. [1940] 5 Foreign Rel. U.S. 1029 ff. (1961); [1941] 7 *id.* 378 ff., 384 ff. (1962); [1942] 6 *id.* 547 ff. (1963); [1943] 6 *id.* 592 ff. (1965). *See, e.g.*, Letter from the Under Secretary of State to the Mexican Ambassador, [1939] 5 *id.* 1029 (1961).

16. This follows from the fact that water quality requirements directly determine the quantity of *usable* water to which a nation would be entitled under the Treaty.

17. Sobarzo, *supra* note 8, at 511.

18. *Id.*; Memorandum by Mr. Charles A. Timm of the Division of the American Republics to the Adviser on Political Relations, [1943] 6 Foreign Rel. U.S. 603 (1965), "The [Mexican] memorandum is on pretty sound ground when it notes that if costs be disregarded the United States could eventually use double the supply of the river."

argument for the position that the only water Mexico is allocated must not fall below that quality required for agriculture. However, it is questionable whether Article III was intended to refer to the water allocated to the individual countries at all, since that was already clearly specified elsewhere in the Treaty.¹⁹

Articles X and XI, relating to the quantities of water allocated to Mexico from the Colorado River, are brought forth by one United States commentator²⁰ as evidence that Mexico explicitly agreed to accept water of any quality. The phrases, "Of the waters of the Colorado River, *from any and all sources . . .*"²¹ and "of the waters of the said river, *whatever their origin . . .*"²² are considered, in his view, to mean all water including drainage—whether natural or artificially developed—and perhaps even industrial wastes (although he explicitly avoids pushing the argument that far), such that Mexico has no grounds for complaint about the increasingly saline condition of the Colorado River.²³ Mexican commentators, on the other hand, argue that the absence of any reference to a right to provide Mexico with polluted water is no more persuasive of the existence of a right to pollute than is the absence of clauses assuring to Mexico a supply of unpolluted water.²⁴ In other words, their position is that no inference regarding water quality can legitimately be drawn from the Treaty wording *per se*, except for the suggestion raised by Article III (if applicable to this matter.) They argue further that an interpretation of the terms of the Treaty in the light of its purpose yields the inference that the water must at least be appropriate or usable for the purposes indicated in the Preamble.²⁵

An objective analysis of the Treaty language in question could bring one to the conclusion that the American commentator is making too literal an interpretation of those phrases if it is considered that they could in actuality refer to the *natural* sources of the river, such as springs, tributaries, precipitation, and so forth. However, there is one other passage in the Treaty which

19. TREATY, art. IV-IX, X-XV.

20. Gantz, *supra* note 9, at 498.

21. TREATY, art. X.

22. *Id.* art. XI.

23. Gantz, *supra* note 9, at 499.

24. Sepulveda, *The International Water Quality Problems Between Mexico and the United States: Prospects and Perspectives*, 12 *Natural Resources J.* 488, 489 (Oct. 1972) [hereinafter cited as Sepulveda]; Sobarzo, *supra* note 8, at 511.

25. Sepulveda, *id.* at 489; Sobarzo, *supra* note 8, at 512.

argues against this conclusion and in favor of the view that those phrases do signify the non-obligation of the United States with respect to water quality: that is Article IV, Section A(a), relating to Rio Grande waters to be delivered to Mexico. This section refers to "All of the waters reaching the main channel of the Rio Grande (Rio Bravo) from the San Juan and Alamo Rivers, including the return flow from the lands irrigated from the latter two rivers." (Emphasis added). This passage, together with the absence of similar language in that part of Article IV allocating water to the United States, tends to support the argument²⁶ that all of the supposed water-quality language was intentionally included, and furthermore, was intended to be taken quite literally.

This argument does not demonstrate anything about Mexico's concurrence in the selection of the language in question, despite references by United States commentators to the Senate Hearings on ratification of the Treaty and to the comments of various United States senators and officials as to Mexico's understanding of the consequences of the wording.²⁷ No doubt Mexico was painfully aware of all this (though she may be understandably reluctant to admit it in the context of the present controversy²⁸), but the circumstances of enactment of the Treaty were such that Mexico apparently had no hope whatsoever of contesting the inclusion of the language, the primary concern at that time being to obtain water in any form.²⁹

In the interpretation of particular treaty passages, it is customary to refer to general principles of international law to clarify the meaning of a section of a treaty, if there is nothing in the convention itself to assist in the interpretation. Here the argument is made by the United States commentator that the meaning of the passage is perfectly clear,³⁰ but this is true only if the view is accepted that a correct interpretation of an agreement can be one that is unreasonable in light of the intent of the parties and their manifest purpose. If this were the position the United States meant to take on this Treaty, the argument would violate not only general principles of international law but also

26. Gantz, *supra* note 9, at 499.

27. *Id.* at 498.

28. See, e.g., Sepulveda, *supra* note 24, at 489.

29. See, e.g., Letters, *supra* note 3.

30. Gantz, *supra* note 9, at 499.

the law of the United States. In the case of *Hidalgo County Water Control and Irrigation District v. Hedrick*, it was held, with reference to this very Treaty: "The rule for construction of treaties has been thus stated: 'Treaties are to be construed as other contracts according to the intent of the parties . . . and so as to carry out their manifest purpose.'"³¹ In *Board of County Commissioners v. Aerolineas Peruanas, S.A.* is found: "We proceed also under the admonition that where a treaty admits of two constructions, one restrictive of and the other favorable to rights claimed under it, the latter is to be preferred."³² This holding clearly applies to the present discussion if it is assumed that the rights to be protected are Mexico's rights to receive water usable for agriculture.

On the other hand, the United States position is not without merit when it is considered that any obligations the United States is construed to have regarding the provision to Mexico of non-saline water will necessarily create either a financial or a water-use burden. That is, the United States will either have to spend money for the construction of desalinization facilities of some type, or else suffer a diminution of its own water-use rights, since part of its supply would have to be wasted to dilute the waters given to Mexico. This same problem is present with respect to interstate water compacts, and cannot easily be resolved.³³ Even recourse to international law is not much help here, since it merely suggests that the needs of the parties be weighed and the rights to water distributed on an equitable basis in accordance with those needs, with prior agreements, with projected development, and various other highly subjective factors.³⁴ Thus it cannot be considered exclusively an act of bad faith for a nation to protest an interpretation of a treaty which, in effect, would require it to forego part of its water rights to assure a downstream nation equally pure water. Such a protest is at least partially a recognition of the fact that there is no easy solution to the problem of the relative rights of co-riparians, particularly in areas such as the Southwest where the scarcity of water makes the

31. 226 F.2d 1, 7 (5th Cir. 1955).

32. 307 F.2d 802, 806 (5th Cir. 1962).

33. Reynolds, *supra* note 9, at 485.

34. See, e.g., Principles of Law and Recommendations on the Uses of International Rivers: Submitted to the International Committee of the International Law Assoc. by the Comm. on the Uses of Waters of International Rivers of the Amer. Branch at New York University Conference, Principle II (1958) at 3.

problem of "naturally accruing" saline pollution more severe than elsewhere.³⁵

On balance, then, a "plain-meaning" or literal interpretation of the disputed passages of this Treaty, as advocated by United States officials,³⁶ results in a situation which is manifestly unfair to Mexico, whose intent and purpose in joining in the Treaty was to obtain water for agricultural purposes.³⁷ It cannot be argued that Mexico would have voluntarily submitted itself to a future obstacle of this nature. By the same token, it is unlikely that the United States intended to submit itself to a convention which would ultimately require it to sacrifice part of the share of water it had secured. Unquestionably, the issues of water quality and of the quantities of water allocated present examples of non-agreement which are so fundamental to this Treaty as to render it meaningless, at least as a potential source of remedies for grievances between the parties. Why, then, was the Treaty signed?

CONDITIONS UNDER WHICH THE 1944 WATER TREATY WAS SIGNED

There are at least six matters to discuss in evaluating the conditions under which Mexico signed this Treaty. First, what actually precipitated the agreement at the particular moment in time, when negotiations had been going on for such a long period before, with no real breakthrough in sight? Second, were the terms of the Treaty actually agreed upon ("bargained for") in full by both parties? Third, who were the actual moving parties to the Treaty: was it a straightforward negotiation between two nations, or were there other interests involved which may have shifted the balance of the negotiations? Fourth, were the parties (whatever their true identity) on a fairly equal footing in their relations concerning the Treaty, or were there unfair advantages on one side? Fifth, were all the terms of the Treaty, whether or not truly agreed upon, in harmony with principles of national and international law? And, finally, did both parties act throughout the negotiations with the good-faith intention of developing a just and equitable agreement?

There is reason to believe (despite the United States' official

35. Reynolds, *supra* note 9, at 484.

36. Gantz, *supra* note 9, at 499.

37. See, e.g., Letters, *supra* note 3.

disbelief³⁸) that Mexico was forced finally to agree to the United States' maximum water allowance figures, and thereby open the way for the completion of a treaty, by a drought which occurred in the Mexicali Valley in the spring of 1943.³⁹ This drought was so severe that Mexico was forced to buy water to meet its immediate irrigation needs in that area; worse still, this water had to be purchased from the Imperial Valley Irrigation District at exorbitant rates.⁴⁰ When problems with delivery of the water developed, Mexico sought help from the State Department, which was apparently unresponsive.⁴¹ Finally, out of desperation, Mexico let it be known it would try to negotiate directly with President Roosevelt on the matter, or else resolve it through the enactment of a treaty, if possible.⁴²

As noted above, the State Department presented itself as skeptical of the whole matter, but was apparently not pleased with the involvement of the Imperial Valley Irrigation District.⁴³ This District was one of the California water and power interests which were making the United States negotiations with Mexico more difficult by the rigidity of their demands for the protection of their own established uses of the Colorado River.⁴⁴ Ironically, this same organization, a California public corporation, had a concession for agricultural production in the Lower Colorado area of Mexico, through its subsidiary, Cia. de Terrenos y Aguas de la Baja California, S.A.,⁴⁵ that it may be assumed that it was not unconcerned with what potential Mexico held for it. These comments, of course, relate also to the third point, discussed below: that there may have been more parties to the Treaty than just Mexico and the United States.

The terms of the Treaty, as has already been suggested, by their very nature give rise to the suspicion that they are not a close approximation of what Mexico might have been expected to agree to had a genuine compromise taken place. The terms

38. Letter from the Under Secretary of State to the Ambassador in Mexico, [1943] 6 Foreign Rel. U.S. 615 (1965); Memorandum by Mr. Charles A. Timm of the Division of the American Republics to the Adviser on Political Relations, [1943] 6 Foreign Rel. U.S. 615 (1965).

39. Letters, *supra* note 3, at 611.

40. *Id.* at 611-12.

41. *Id.* at 611.

42. *Id.* at 612-13.

43. *Id.* at 612.

44. Memorandum by the Legal Adviser to the Secretary of State and the Under Secretary of State, [1943] 6 Foreign Rel. U.S. 610 (1965).

45. Memorandum from the Mexican Ministry for Foreign Affairs, [1943] 6 Foreign Rel. U.S. 600 n. 22 [hereinafter cited as Memorandum].

relating to water quantity, which were without a doubt the most important parts of the Treaty from Mexico's point of view, might have been subject to further modification, if Mexico had not been forced to capitulate altogether. This is because Mexico had two points in its favor: potential control over most of the water of the Rio Grande in certain areas,⁴⁶ and an apparent willingness to submit the whole water question to outside arbitration,⁴⁷ a prospect which the United States, however, did not share.⁴⁸ Throughout the period of negotiations, the United States consistently bargained for a lower and lower figure, one far less than what Mexico seriously believed was essential to a reasonable level of agricultural development.⁴⁹ Mexico finally had to accept a figure that the United States interests had previously decided on as an absolute maximum,⁵⁰ and which was substantially less than Mexico's most conservative estimate of the minimum needed to support its reasonable present and future agricultural needs.⁵¹ It is possible, therefore, that the terms might have been different with respect to water quantity if Mexico had been able to delay long enough to initiate arbitration.

In the matter of water quality, as already noted, it is doubtful Mexico had any say whatever in the final terms of the Treaty. The pressure it was under probably caused all its efforts to be directed to the question of quantity. Because of the drought it could not afford to press the issue of water quality at that time, although it cannot seriously be doubted that the topic was on the minds of the negotiators on both sides.⁵² Perhaps, as Sr. Sepulveda suggested,⁵³ insistence on dealing with that topic would have created such firm resistance on the part of the United

46. *Id.* at 597.

47. Letter from the Chargé in Mexico to the Adviser on Political Relations, [1943] 6 Foreign Rel. U.S. 594 (1965).

48. Letter from the Adviser on Political Relations to the Chargé in Mexico, [1943] 6 Foreign Rel. U.S. 605 (1965).

49. *See, e.g.*, Memorandum, *supra* note 45, at 600-01.

50. Letter from the Adviser on Political Relations to the Counselor of Embassy in Mexico, [1943] 6 Foreign Rel. U.S. 618 (1965).

51. Memorandum, *supra* note 45, at 600-01.

52. *See, e.g.*, Sepulveda, *supra* note 24, at 489; Gantz, *supra* note 9, at 498; Letter from Mr. Charles A. Timm of the American Republics to the Adviser on Political Relations, [1943] 6 Foreign Rel. U.S. 627 (1965), "The major difficulty centers . . . around the effort of the Mexicans to find loopholes by which they could demand virtually all of the 1,500,000 acre-feet at points above the lower boundary, thus insuring, first, that most of the allocation would be practically fresh water. . . ."

53. Sepulveda, *supra* note 24, at 490.

States that there would have been no treaty at all, and this was not a possibility Mexico could afford to consider.

The degree of control the United States had over this aspect of the Treaty is revealed in the remarks of Mr. Frank Clayton, Counsel for the United States Section of the International Boundary Commission before the Senate Committee on Foreign Relations, when he said: "The representatives of the United States insisted upon those words in the treaty. They were objected to by Mexico. . . ." ⁵⁴ but were nevertheless incorporated. It is interesting to note that Canada, too, in the negotiation of its boundary waters treaty with the United States, ⁵⁵ had occasion to experience such insistence on the part of the United States as to the terms of the Treaty. Canada's acquiescence to the insistence was explained by the Prime Minister as follows: "I, for my part, have always believed that the Americans are very good and very fair neighbors, but they always stand for their own view of things and in this matter they did. It was no use to argue with them." ⁵⁶

The matter of the identity of the parties to the Treaty is possibly one of the most significant factors, both in determining what the terms of the Treaty were to be and in relation to the economic conditions which made capitulation by Mexico necessary. It was indicated above ⁵⁷ that at least one California water interest was involved in Mexico's agricultural economy, both by selling water and by actually operating and developing farm lands. Thus it is reasonable to assume it had an interest in and possibly some influence over Mexico's decisions regarding the Treaty. ⁵⁸ The California interests were also influential in the decisions of the United States. Together with the other Colorado River Basin States, they helped determine the water quantity

54. *Hearings on the Water Treaty with Mexico Before the Senate Comm. on Foreign Relations*, 79th Cong., 1st Sess., pt. 1, at 7 (1945), quoted also in Gantz, *supra* note 9, at 498.

55. Treaty with Canada Relating to Boundary Waters and Questions Arising Along the Boundaries Between the United States and Canada, Jan. 11, 1909, 35 Stat. 2448 (1911), T.S. No. 548.

56. Remarks of Sir Wilfred Laurier, P.M., *House of Commons Debates*, Sess. 1910-1911, vol. 1, at 869-913, quoted in McDougall, *The Development of International Law with Respect to Trans-Boundary Water Resources: Co-operation for Mutual Advantage or Continentalism's Thin Edge of the Wedge?* 9 Osgoode Hall Law J. 261 (1971) at 268 [hereinafter cited as McDougall].

57. Letters, *supra* note 3; Memorandum, *supra* note 45.

58. That this was at least suspected by the United States officials is indicated by the comment, "It would seem that both the Imperial District and the Mexicans need careful watching." Memorandum by Mr. Charles A. Timm of the Division of the American Republics to the Adviser on Political Relations [1943] 6 Foreign Rel. U.S. 615 (1965).

terms and the purposes of the Treaty, one of which was to put a limit on Mexico's development.⁵⁹ Although the identity of these "interests" was known to Mexico, it was a matter which was treated confidentially by the State Department.⁶⁰ This put Mexico at the disadvantage of being prevented from confronting its true adversaries.

There was quite definitely an inequality in the bargaining positions of the parties, above and beyond the situation of the extreme pressure of the drought which ultimately compelled Mexico to come to agreement on a basis not chosen by it. This inequality was manifested in several ways, not the least of which was the location of the United States as the upstream riparian; there was also its greater amount of technical expertise and resources (claimed,⁶¹ though not satisfactorily demonstrated), its greater financial investment as of that time in flood control and storage projects (which it argued gave it a greater right to the use of the water as well as to the determination of the contents of the Treaty),⁶² and its head-start in agricultural development in the Southwest—which was evidently considered a strong reason for preferential use of the water at that time and in the future.⁶³ The only special advantages Mexico had were those already cited:⁶⁴ its location as the upstream riparian on part of the Rio Grande, and its willingness to submit the water question to an outside arbitral body. It should be reiterated that the probable reason for Mexico's failure to capitalize on these two advantages was the factor of the drought which gave the United States an additional advantage. It resulted in a practically unbeatable combination of bargaining tools for the United States, and the results were almost inevitable under the circumstances.

The last two factors were the presence in the Treaty of provisions contrary to accepted principles of international law (the Harmon Doctrine in various disguises) and the failure of the United States to demonstrate good faith in the enactment of the

59. Statement by Lawson, *supra* note 4, at 946.

60. Telegram from the Secretary of State to the Ambassador in Mexico, [1941] 7 Foreign Rel. U.S. 384 (1962).

61. See, e.g., Memorandum by Mr. Charles A. Timm of the Division of the American Republics to the Adviser on Political Relations, [1943] 6 Foreign Rel. U.S. 603, 6 (4)-(5), (1965).

62. See, e.g., Memorandum by the Legal Adviser to Mr. Charles A. Timm of the Division of the American Republics, [1943] 6 Foreign Rel. U.S. 619 (1965).

63. See, e.g., Memorandum from the Mexican Ministry of Foreign Affairs, [1943] 6 Foreign Rel. U.S. 597 (1965).

64. *Id.*; and *supra* note 47.

Treaty. These have a bearing not only on the circumstances of enactment but also on the quality of the agreement which emerged. They are factors which can still be observed in the form and the implementation of the Treaty.

In effect, the Treaty language incorporates the United States' perpetual theme in its international water law: the concept, once called the Harmon Doctrine after the individual who made it notorious in the early 1900's, that a nation by virtue of its sovereignty has an inherent right to use, use up, waste, and control for its own benefit exclusively, any water which happens to flow through its territory. This doctrine ". . . represented the extreme of nationalistic positions . . . unorthodox . . . in comparison with . . . international law."⁶⁵ This doctrine makes possible more than mere territorial control, however; it also gives the striking economic advantage of "underpricing the cost of development" by ignoring the costs to the downstream users. That is, it makes possible ". . . shifting the diseconomies of development."⁶⁶

If this was ever justifiable under any circumstances, it is no longer, particularly not in an area such as the Southwest where only an equitable basis for sharing can possibly satisfy the requirements of international law. Nowhere in any of the current attempts to codify and restate international river law does any principle resembling the unmodified Harmon Doctrine appear.⁶⁷

With regard to the failure of the United States to contract the Treaty in good faith, the obvious contrast between the Treaty preamble and its body suggests the tenor of the United States' dealings throughout the negotiations. If "good faith" implies honesty in some form, it would appear that it was lacking on the part of the United States. For example, at one point a memorandum was written by the Assistant Chief of the Division of the American Republics relating to the fact that, while one branch of the government had been trying to cut down on Mexican water use through the treaty negotiations, another branch was responsible for encouraging certain agricultural development projects which would ultimately require an increase in the use of irrigation water by Mexico if the projects were to be continued.⁶⁸

65. McDougall, *supra* note 56, at 264.

66. *Id.* at 266.

67. *See, e.g.*, Sepulveda, *supra* note 24, at 493-94.

68. Memorandum by the Assistant Chief of the Division of American Republics, [1943] 6 Foreign Rel. U.S. 620 (1965).

Another example is a memorandum of the Legal Adviser of the Department of State warning that the United States ought not operate on the basis of the Harmon Doctrine: “[W]e are precluded from assuming a dog-in-the-manger attitude. In other words, we cannot with good grace answer Mexico by saying that we have captured the water and have a right to divert it within the United States regardless of Mexico’s interest. . . .”⁶⁹ This memorandum, giving advice on the legality of the actions of the United States during the negotiations, appeared at a time when the “dog-in-the-manger” attitude was still characteristic of the United States and of its “interests” in their attempts through the Treaty to control all the water.

CONCLUSION

One of the purposes of this note was to indicate some of the background of the 1944 Water Treaty, and to suggest why it was enacted; there now appears to be good reason for believing Mexico was compelled by the drought of 1943 to commit itself to this particular Treaty.⁷⁰

This Treaty is not a matter of purely historical interest, however; it is at the center of problems being faced at this very moment by Mexico and the United States.⁷¹ It is appropriate, therefore, to consider what alternative means are available for solving these problems, since it appears the Treaty has not been and will not be especially useful.

A number of suggestions have been made,⁷² relating to the Treaty, its enforcement mechanism, and even to general principles of international law, concerning possible ways of settling the current dispute and preventing future ones. It is the opinion of the writer that these suggestions, some of which may ultimately prove useful to a certain extent, nevertheless do not address the main factor at the core of these water disputes: the economic

69. Memorandum by the Legal Adviser of the Department of State, 3 M. Whiteman, *Digest of International Law* 953 (1964).

70. Numerous passages have been cited already, but the following further confirm what has been indicated. “They said that if there were a water agreement so ardently to be hoped for they should be getting this water for nothing.” Letter from the Ambassador in Mexico to the Under Secretary of State, [1943] 6 *Foreign Rel. U.S.* 611 (1965); “There is no doubt as to the importance of this matter and . . . there is in my mind no doubt that we should make possible the delivery of this water this season. I can assure you that they [the Mexicans] were not staging a show for me. . . .” *id.* at 612.

71. See, *Epilogue*, 12 *Natural Resources J.* 578 (1972).

72. See, e.g., Sepulveda, *supra* note 24, at 495.

imbalance between the two nations. It seems that all discussions limited to a legal approach will likewise fail in arriving at an answer which would have some effect on the actual conduct of the two nations. The first step will have to be a determination of a workable method for balancing the competing interests in a scarce natural resource. Until this step is taken, in the form of the creation of an international, and perhaps continental, water allocation and development plan, there is little hope of putting an end to the classic struggle between the "haves" and the "have-nots."

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