THE 1929 PAN AMERICAN ARBITRATION TREATY

AND

THE PROPOSED TREATY BETWEEN

THE UNITED STATES AND MEXICO

by

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September 14, 1944

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INTRODUCTION

Discussions as to the desirability of the ratification by the United States of the proposed treaty with Mexico invariably involve consideration of the applicability and effect of the 1929 Pan American Arbitration Treaty. Those who favor the ratification of the treaty, which is now before the Senate of the United States, insist that the Arbitration Treaty is applicable to the existing disputes between the two nations relative to the utilization of the waters of the border streams, and that the terms of the proposed treaty are more favorable to the United States than can be reasonably expected from any arbitration. Those opposed to the treaty deny the applicability of the Arbitration Treaty to such disputes as those arising from the use of the waters of the streams flowing between and along the boundaries of the two countries.

The Arbitration Treaty was in large measure the result of a prolonged and insistent effort on the part of the United States to establish a basis for settlement of disputes between the Pan American nations by means of obligatory arbitration rather than by war. The treaty was ratified by the

United States, Mexico, and eighteen other Pan American nations.

Article 1 provides thus:

> "The High Contracting Parties bind themselves to submit to arbitration all differences of an international character which have arisen or may arise between them by virtue of a claim of right made by one against the other under treaty or otherwise, which it has not been possible to adjust by diplomacy and which are juridical in their nature by reason of being susceptible of decision by the application of the principles of law."

By Article 2 it is provided that there are excepted from the terms of the treaty controversies "which are within the domestic jurisdiction of any of the Parties to the dispute and are not controlled by international law."

Article 3 provides for the composition of a Board of Arbitrators. In the absence of an agreement of the Parties, each Party is required to nominate two arbitrators of whom only one may be a national of the Party making the choice; the others selected may be of any other American nationality. These arbitrators in turn select a fifth arbitrator who shall be the president of the court. In the event of a disagreement as to the fifth arbitrator, each Party shall designate a non-American member of the Permanent Court of Arbitration at The Hague, and the person so designated shall select the fifth arbitrator who may be of any nationality other than that of a Party to the dispute.

Article 4 is of particular importance. It provides that the Parties to the dispute "shall formulate by common accord, in each case, a special agreement which shall clearly define the particular subject-matter of the controversy, the seat of the court, the rules which will be observed in the

proceedings, and the other conditions to which the Parties may agree." It is further provided that if an accord is not reached within three months the agreement shall be formulated by the court. In connection with this Article attention is directed to the reservation made by the United States in its ratification of the treaty, reading thus:

> "That the special agreement in each case shall be made only by the President, and then only by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur."

Articles 5 and 6 relate to procedural matters of no importance in this memorandum. Article 7 provides that an award settles the dispute "definitively and without appeal." Differences regarding the interpretation or execution of an award must be submitted to the court which rendered the award.

Article 8 states that reservations made by one Party shall have the effect that the other Parties are not bound with respect to the Party making the reservations except to the same extent as that expressed in such reservation.

Article 9 provides that the treaty shall remain in effect indefinitely and may be renounced by one year's notice.

At the time of the ratification of the treaty by Mexico that nation made the following reservation:

> "Mexico makes the reservation that differences which fall under the jurisdiction of the courts shall not form a subject of the procedure provided for by the Convention, except in case of denial of justice, and until after the judgment passed by the competent national authority has been placed in the class of res judicata."

Under the provisions of Article 8, this reservation

by Mexico ap[illegible] in regard to all matters involving the applicability of this treaty to those two nations.

The Arbitration Treaty of 1929 is effective so far as the United States and Mexico are concerned. It must be assumed that each nation will respect and abide by its terms and conditions.

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POINTS RAISED BY THOSE ASSERTING THAT THE ARBITRATION TREATY AFFORDS NO BASIS FOR GIVING SUPPORT TO THE PROPOSED TREATY, RELATING TO THE USE OF THE WATERS OF THE BORDER STREAMS

Those opposing the ratification of the treaty now before the Senate make the following contentions to sustain their argument that the United States need not fear the loss of Colorado River water if Mexico appeals for arbitration under the 1929 Treaty:

1. The arbitration treaty, by its own terms, so limits the class of controversies covered by it that little of substance on the Colorado River of benefit to Mexico could be taken before an Arbitration Board.

2. The class of controversies which the United States must submit to arbitration is further restricted by the Mexican reservation in the Treaty of 1929.

3. Control of these specific issues to be submitted in each case to the Board of Arbitrators is retained by the United States Senate under its reservation to the Treaty of 1929.

4. The physical factors surrounding the Colorado River make it impossible for Mexico to get any advantage from arbitration under existing treaty and international law.

Examination of the arguments made and conclusions reached on each of these points, rather than dispelling the fear of arbitration, must convince every reasonable person that the wise procedure for the United States to follow is ratification of the proposed water treaty with Mexico and not arbitration at some future date.

I

THE TERMS OF THE ARBITRATION TREATY COVER THE EXISTING CONTROVERSIES OVER THE WATERS OF THE BORDER STREAMS

The first point raised by the opponents to the treaty is that a controversy such as that existing over the use of the water of the Colorado River would not be subject to arbitration under the 1929 Treaty. This argument is based upon the exemption contained in Article 2, excluding from arbitration those controversies which are within the domestic jurisdiction of the Parties and not controlled by international law. It is argued that the term "domestic jurisdiction" is used to include "all internal jurisdiction of the nation, judicial, legislative, and executive, or administrative," and it is pointed out that the use of, and the right to benefit from, such structures and facilities as Boulder Dam, Imperial Dam, and All-American Canal, are subject to control by courts of the United States. In other words, it is urged that these are matters within the domestic jurisdiction of the United States and are not controlled by international law. In support of this argument reference is made to the alleged interpretation placed upon the treaty by Mexico at the time of expropriation of the Mexican oil lands and upon the opinion of Judson Harmon (21 Ops. Atty. Gen. 274), given at the time of the dispute between United States and Mexico over the waters of the upper Rio Grande.

With reference to the first of the alleged supporting arguments, that is, the asserted interpretation of the treaty by Mexico at the time of the expropriation of the oil lands, it is apparent that those advancing such argument do not understand the situation which then existed. The question of the expropriation of the oil lands was a dispute between private American interests and Mexico. The legality of the expropriation was the subject of litigation in the Mexican Courts and had not been finally determined by such Courts so as to constitute "res judicata" within the purview of the Mexican reservation. Consequently, under the plain terms of the treaty and the Mexican reservation, the dispute had not reached the stage where the arbitration would apply. It is noteworthy that, while the controversy was being litigated in Mexican Courts, the matter was settled by agreement. The existing controversy, which the proposed treaty seeks to terminate, is between the two sovereign nations. Such a dispute is of a different character and stands on a different plane from a dispute with a sovereign nation on one hand and a private interest on the other hand.

The second argument made by the opponents to the treaty in connection with their contention that the existing controversy is not subject to arbitration is based upon the so-called Harmon Opinion. This Opinion was rendered by Mr. Harmon, as the Attorney General of the United States, at the time of the dispute between the United States and Mexico over the use of the waters of the upper Rio Grande. Mr. Harmon's conclusion was that in a dispute between two sovereign nations over the use of the waters of an international stream, the upstream nation is

under no obligation, by reason of any international law, to deliver any amount of water to the lower nation. In other words, the upper nation could use and dispose of all water flowing within its borders as it saw fit. It is an apt comment that in rendering this opinion, Mr. Harmon was giving advice to his client, the United States, to guide it in negotiations for the settlement of an existing controversy with Mexico. An expression of an opinion by the Chief Law Officer of a sovereign nation does not of itself create a principle of international law. This is adequately shown by the fact that the United States did not follow the advice of Mr. Harmon but did resolve its then difference with Mexico by the Convention of 1906, under the terms of which Mexico was recognized to have the right to receive a certain amount of water each year.

Moreover, in dealings with Canada, relative to the Milk, St. Mary, and Niagara Rivers, the United States did not follow the principle set forth in the Harmon Opinion, but recognized the right of each country to an equitable share of the use of the water of these international streams.

In addition, the Supreme Court of the United States has expressly repudiated the Harmon Opinion in controversies between states over the use of waters of interstate streams. Colorado has urged the principle of the Harmon Opinion in litigation with Wyoming over the Laramie River and in litigation with Kansas over the Arkansas River. In each instance the Court has rejected such contention and has ruled that each state is entitled to receive an equitable apportionment of the benefits arising from the flow

of interstate streams. (See Kansas v. Colorado, 206 U. S. 46; Wyoming v. Colorado, 251 U. S. 419.)

One further comment should be made in connection with the contention that the existing controversy with Mexico over the use of Colorado River water is within the domestic jurisdiction of the United States. Those asserting this argument are careful to avoid any statement as to the tribunal of the United States from which Mexico could secure relief. It is too plain to require argument that an international dispute of this nature cannot be finally determined in the courts of either party any more than differences between sister states of our Federal Union can be conclusively determined by a decision of the courts of one of those states. (See Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U. S. 92, 110.)

Those objecting to the proposed treaty make much of the assertion that there is no rule of international law under which one nation is entitled to use the property and facilities of another nation located wholly within the territory of that other nation. This statement loses sight of the point here involved. Mexico is demanding water. This whole dispute centers around the amount of water to which Mexico is entitled. Any advantage or benefit which may accrue to either nation by reason of constructed facilities is a mere incident. Common sense dictates that the United States make use of all facilities which are available to minimize its obligation. This does not mean that Mexico obtains any title or preferential right to the use of any facilities, constructed or to be constructed.

II

THE MEXICAN RESERVATION TO THE ARBITRATION TREATY DOES NOT MAKE THIS CONTROVERSY JUSTICIABLE IN THE COURTS OF THE UNITED STATES.

Those opposing ratification of the treaty state that the Mexican reservation, which has been referred to above, excepts from arbitration cases "under the jurisdiction of the courts" and, therefore, further enlarges the scope of the cases which are not arbitrable under Article 2 (a). This is but another method of stating the argument which has here been considered under point "I" above. It must be agreed that private rights and the rights of states to water of the Colorado River are within the jurisdiction of courts of the United States, so long as they concern disputes arising within the territorial limits of the United States; but this does not mean that controversies between two sovereign nations can be finally and conclusively determined in the courts of either nation. Here, again, the treaty opponents designate no tribunal to which Mexico could go for a judicial determination of rights; and, indeed, it would seem rather elementary that Mexico would never accede to any decision of a United States court on the matter of the apportionment between Mexico and United States of Colorado River water.

III

THE UNITED STATES RESERVATION TO THE ARBITRATION TREATY CANNOT BE RELIED UPON AS A RELEASE FROM THE OBLIGATION TO ARBITRATE

As pointed out above, the United States in ratifying the Arbitration Treaty made a reservation to the effect that the special agreement referred to in Article 4 should be made only by

the President and then only by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur. It is insisted that under this reservation the United States could nullify the treaty by refusing to make the special agreement. In support of such position, references are made to statements made during the Senate debate at the time of the ratification of the Arbitration Treaty. A full reading of the congressional record reveals that the Senators realized that there would be, in any event, an obligation to arbitrate, and that the United States could not avoid or evade such obligation by a refusal to make the requisite special agreement.

Those opposing the treaty contend with vigor that no special agreement made by the President of the United States with the advice and consent of two-thirds of the Senate would submit to arbitration any questions which would involve Mexico's right to use, or share in the benefits of, water conservation and water utilization works located wholly within the United States. As a supporting reason, it is said that the submission of any such question to arbitration would be tantamount to the creation of an easement upon property within the United States in favor of a foreign country in violation of the supreme and exclusive sovereignty of the United States within its borders.

Here, again, the opponents to the treaty confuse the question of the right of Mexico to water with the question of the ownership and control of water-use facilities in the United States. Mexico is demanding water. The proposed treaty is concerned with the allocation of specific amounts of water to Mexico. Surely, no one would argue that in supplying Mexico

with water, full use should not be made of facilities existing in the United States in order that thereby the burden upon the United States be minimized. To utilize these facilities for this purpose is not to grant an easement. The sovereignty of the United States remains exclusive and supreme. The objectors can point to no provision of the proposed treaty which gives to Mexico any power to control any water-use facilities located within the territorial boundaries of the United States. Indeed, it might be observed that the repeated reference to water-use facilities would seem to arise entirely from a desire to inject false issues.

IV.

A CONSIDERATION OF THE COLORADO RIVER SITUATION, INCLUDING ALL ITS PHYSICAL FACTORS, REQUIRES THE CONCLUSION THAT MEXICO WOULD RECEIVE GREATER AMOUNTS OF WATER THROUGH ARBITRATION THAN IT WOULD RECEIVE UNDER THE PROPOSED TREATY

Those opposing the treaty deprecate the fear of arbitration by emphasizing the physical conditions which are claimed to restrict possibilities of the use of Colorado River water in Mexico. Their basic argument is that Mexico is dependent on the works located within the United States and owned entirely by American interests; hence, they say, the fear that Mexico may expand her acreage under irrigation without the consent and the cooperation of the United States is without foundation.

In making their argument on this point, those objecting to the proposed treaty deliberately ignore the fact that the facilities constructed in the United States do so change the regimen of the stream as to enable Mexico to divert more water

and irrigate more land. The situation as existing at the present, and as it will exist for many years, is that water is released from Boulder Dam for generation of power in accordance with a more-or-less regular schedule. Such releases far exceed the amount of water which is now being used for irrigation and domestic purposes by the lower basin. Until additional works are constructed in the United States to utilize such releases, the waters will pass on into Mexico. This fact must not be ignored. It cannot be denied that the uses of water in Mexico have increased since Boulder Dam went into operation. In 1943 the Mexican diversions amounted to over 1,800,000 acre-feet. A fair appraisal of the situation requires the conclusion that the Mexican use of water will increase in the future. By expanding her irrigated acreage, Mexico is building up an economic development which is dependent upon Colorado River flow.

To accept the argument of the opponents to the treaty is to say that an Arbitration Board would make an award having the effect of curtailing Mexico uses and, thereby, destroying existing economic development and the civilization based thereon. It is believed that no thinking person can accept such a conclusion. The United States Supreme Court in many interstate controversies over water has uniformly and repeatedly adhered to the principle that existing economic development will be preserved and protected whenever possible. (See Colorado v. Kansas, 320 U. S. 383; Washington v. Oregon, 297 U. S. 517; Wyoming v. Colorado, 259 U. S. 419; Wisconsin v. Illinois, 278 U. S. 367; Missouri v. Illinois, 200 U. S. 496; New York v. New Jersey, 249 U. S. 202.)

It seems but reasonable to anticipate that a Board of Arbitration would be as sympathetic to the protection of existing economic development as has been the Supreme Court of the United States.

The extremes to which those opposing the treaty would go in an endeavor to dispel the fear of the results of arbitration is evidenced by their contention that Mexico cannot build a dam across the channel of the river within her territory because of her treaty obligations forbidding the impairment of the navigable condition of the Colorado River. While it must be admitted that existing treaties do contain provisions with reference to navigation, it is likewise true that navigation on this stream has never been possible except during flood periods. The United States, by the construction of Boulder Dam, has cut off these peak flood flows. In other words, the United States has itself interfered with andimpaired navigation along the Colorado. Having done so, it is in no position to now ask for the strict enforcement of the treaty provisions relative to navigation.

Attention is further directed to Article 4 (a) of the Colorado River Compact, which reads as follows:

> "Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding."

In view of this express provision of the Colorado River Compact, it would be utterly illogical for the United States to object, upon the ground of impairment of navigable capacity, to the construction by Mexico of a channel dam. This would be stretching the fiction of navigability to the breaking point.

It goes without saying that if the United States is required to pass below the border sufficient water to maintain the navigable capacity of the stream, the amount of water available for domestic and irrigation uses in the lower basin will be greatly reduced. Under the circumstances the United States may not consistently insist upon the strict observance by Mexico of the treaty provisions relative to navigation.

Reference has also been made that Mexico could not construct a dam within its territory because such a dam would have the effect of backing up water into territory of the United States, and it is asserted that Mexico has no right to do this for the reason that no nation may use its property to cause injury to the property of another nation. Conceding that the United States would have just cause of complaint if Mexico, by the construction of a dam within its country, flooded areas in the United States, nevertheless, it seems clear that the reason assigned applies to the United States as well as to Mexico. For the United States to cut off all Colorado River water from Mexico would be just as much an injury to Mexico as the flooding of the lands would be an injury to the United States. In other words, the very reason which the objectors to the treaty urge is

5. A delay in the definition of the Mexican right is unwise as through the regulated releases of water now being made from Boulder Dam Mexico receives a water supply which enables it to enlarge its irrigated acreage. Such development would be protected in any award that might in the future be made by a board set up under the 1929 Treaty.