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MEXICO'S RESPONSE TO PROBLEMS UNDER THE 1944 TREATY

ALBERTO SZEKELY*

I am happy to try to contribute another way to look at this matter. The one provided in Carlos Marin's and Jill Warren's presentations failed to mention precisely the single factor that should have permeated their respective contents: that at the root of this bilateral problem is the fact the Rio Bravo basin has experienced for the last 10 years an "extraordinary drought" (Ms. Warren's intervention, at the end of her presentation, alluded to that factor quite simply as "especially when nature is not supplying the necessary rainfall"). For me, that was a very strange way to make a mere passing reference to the reasons why Mexico has placed itself in a water deficit situation. No mention was made in either of the two presentations about the dimensions and the nature of the very extraordinary drought that has afflicted the basin for already more than a decade. Without reference to that, I do not see how anyone can truly understand what is happening between Mexico and the United States in the Rio Bravo.

I could spend a long time referring to the depth and the nature of the drought that has brought down the level of water storage in Mexico's dams in the system to less than 20%. Mexico was asked by Texas to empty its Rio Conchos dams in order to supposedly cover that deficit, but at a time when those dams are practically empty. So I am really surprised by the absence of any mention to this particular feature in either of the two presentations. Their authors, however, obviously are both entitled to their views.

I see that Mr. Marin has signified some of the issues subject to different legal interpretations on both sides. He considers October 2 as a critical day when, in fact, that date marks only the time when the two countries have to make accountings under the 1944 Treaty as to how much water has been delivered.¹ We do have differences about the meaning of Minute 234, which is somewhat relevant to that accounting. We certainly have differences about some provisions of the 1944 Treaty regarding what Jill Warren calls an indefinite rolling over of deficits accumulated from one cycle to the other. Undoubtedly, those legal differences will eventually be dealt with at an appropriate level between the two Governments.

But there are some statements that cannot go unanswered. There is an allegation that Mexico has increased the acreage under cultivation. In that respect, I think that if the thousands of farmers in Chihuahua were here and heard this allegation, they would really take offense, because as a result of the extraordinary drought they have been forced by the Mexican Government to significantly reduce the amount of acres under cultivation. Very specific data can be provided, known to the American Section of the IBWC, which confirms such reductions. So those farmers would really feel very offended if they heard something like that.

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1. Treaty Relating to the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, and supplementary protocol, Nov. 14, 1944, U.S.-Mexico, art. 2, 59 Stat. 1219.

But these are only some of the current issues of the day that are being debated and that deal only with momentary aspects of the problem. This is the discourse that prevails these days, simply because we are reaching the end of a five-year cycle. To deal with the instant impacts of the drought, last June we went through the very difficult exercise of negotiation to reach some kind of an agreement on water deliveries for this year through Minute 308 of the IBWC. But the more important question is: who is taking a comprehensive look at the whole situation and at the reasons why we got here?

If I had to entitle the rest of my presentation in any way, I would call it "*Estamos Cosechando*" ("We are harvesting"). Moreover, we are in fact really paying the price for our past deeds. I submit that there has been some bilateral negligence, and therefore there should be also a sharing of the consequences. We have let such an important basin, the Rio Bravo/Rio Grande basin, be governed by a limited and very poor regime provided by the 1944 Treaty (that Ms. Warren considers a very clear treaty). I wish she could read all the literature that has been produced by specialists on the 1944 Treaty over the last 60 years that has severely attacked the Treaty for its lack of clarity. Particularly in one aspect, its provisions regarding drought, the 1944 Treaty is really doing a lot of harm today to the two countries. What do we do with drought? What do we do when we are in the face of an extraordinary one? There is very little guidance in the 1944 Treaty about all that.

The United States and Mexico have been implementing the 1944 Treaty for 60 years with absolutely no difficulty in complying with our respective obligations. This is only because during 50 of those 60 years there has been plenty of water. But now that scarcity exists, suddenly we do not know what to do. Unfortunately, we have been able to be friends across the border in times of water abundance, but we do not know yet how to be friends in times of scarcity. That is the challenge: not prevailing over one another on legal differences of interpretation. The challenge is how to join efforts positively and constructively to deal with this matter as friends. Because we are friendly countries, we should all put above everything else our determination to remain friends even in times of scarcity and crisis.

I am also sorry that there was such little mention—there was only passing reference—to the positive items that, in that positive direction, were included in IBWC Minute 308 (they had been already included in Minute 307 at the insistence of the Mexican Government). That is for the first time the two countries agreed to initiate cooperation on two new fronts. First, to cooperate in the planning of response to droughts. The other more important front, to cooperate in order to plan the sustainable management of the basin. Why is Mexico insisting on this? Simply because both matters are at the core of the existing difficulties and the 1944 Treaty does not speak a word about it.

The Treaty is in fact very limited and we should strengthen it. Why is it limited? Because it is only a water distribution treaty and it says absolutely nothing about the way each country uses its water as well as nothing about how each country will manage its water. It so happens that if one party abuses its share of those waters, it will irremediably affect the other party. It is happening in the Colorado to the detriment of Mexico, and it is happening in the Rio Bravo to the detriment of the United States. That is certainly not the way to go about it. Instead, we need to plan how each of the two countries best uses its share of the water so that it will be done

in a matter that is not only sustainable, but that will also respect the rights of the other side.

There are many mistakes that have to be recognized on both sides of the border now, instead of just throwing blame at each other. We need to recognize the mistakes of the past so that we can do something about them and not repeat them. We need to strengthen the 1944 Treaty so that it is no longer only a water distribution treaty. We need to strengthen and expand the mandate of the IBWC. There is not a word in the 1944 Treaty—in this allegedly clear treaty mentioned here—as to the role that the IBWC should have in ensuring that there is sustainable management in the basin. How can we expect the IBWC to do a good job on sustainable management if it has no powers vested in it by the 1944 Treaty for that purpose? There is in fact no planning. Every side goes its own way, and that is a dysfunctional way to go about the use of a shared resource. There has been little political will to change that. The only light of hope are these provisions in those two IBWC Minutes that talk about starting cooperation on sustainable management. Both Minutes call on the two countries to start doing things together, to make sure that they do not repeat this lamentable situation in which they find themselves now. We should think that these are the considerations that we should be talking about now and not only about the problems of the day. I submit that in a meeting of this kind we should be more ambitious. We should be looking at what lessons we should learn from the past and what should be done for the future.

I was also surprised at the lack of mention of what possible motivation Mexico could have for behaving with its neighbor, the United States, as poorly as Ms. Warren has said we have behaved. If she were right, how can President Fox be talking every day about the need for strengthening the relations between the two countries, and at the same time behave like that with the water issue? I am really very surprised that there was no motivation explained at all for why Mexico should want not only to withdraw water from the United States, but also from its own domestic users. Because the same complaints that the Mexican Government is getting from the United States, it is getting from its own users. Why is Mexico giving those domestic users much less than half the water that they previously received before the year 2000? Not only that, these users have taken the Mexican Government to court for not giving that water and for giving what very little water Mexico has to the United States, as was explained here in these times of drought. Some of Mexico's highest officials have been criminally accused of high treason. What is the motivation for President Fox to come to power, launch a big initiative to strengthen the relations and friendliness with the United States, and at the same time withdraw water from everybody? Where is that water? Where is he hiding it?

The most eloquent answer to that is that there is simply no water to give. There is certainly very little water to give to the users on both sides. The testimony for that is the 19% level of storage of those dams that historically have always been full and spilling over water to Mexican users and to the United States. I submit that as long as there is no effort to find the motivation for why Mexico is behaving like that, then we are not really going to the root of the problem. I think that the only way to remain friends is not to allow this critical situation to blind us, but to take it as an opportunity to move forward. I invite that not only the governments do just that, but that we all who are interested in the matter (and that is why we are all here) do the same.

