nxYE YEO, M.H. The U.S. and Mexico: from confrontation to co-operation.

A WORD OF THANKS

The content of this research paper involves the cooperation between two States on a nation-to-nation basis. On an individual basis, it would be appropriate here to extend my sincere appreciation as a Malaysian student to the help and friendship I have received from various New Zealanders. My special thanks to Mr Angelo and Mr Atkin, and to Professors Ellinger, Keith and Quentin-Baxter for their encouragement and teaching; to Miss Irene Norman of the American Resource Centre for her aid with the research of this paper; and to Mrs Rita Mantell for her efficient typing of my work over the last two years.

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TITLE: THE UNITED STATES AND MEXICO: FROM CONFRONTATION TO COOPERATION

A study on the Interdependence of Nations

Research Paper in International Law for the LL.M. Degree
[Laws 517, 518]

Victoria University of Wellington,
Wellington,
New Zealand.

1978

"... and they shall beat their swords into plowshares, and their spears into pruning hooks; nation shall not lift up sword against nation, neither shall they learn war any more."

Isaiah 2; verse 4.

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INTRODUCTION

> "Either the mature of the world recognises that the 'space-ship earth' that we are inhabiting is a finite system and that we all have a community of interest in existence, ecology and destiny, or we shall all be overwhelmed in our detritus and population, run out of energy sources and raw materials and find that food is in short supply. The individual States, in a complex and interdependent world, are no longer a viable entity. The problems facing the world in the last third of the twentieth century cannot be solved on a national basis; only international cooperation and coordination will bring forth a viable solution to innumerable problems and needs." (1)

International law, or the Law of Nations, speaks of a source of order, established or evolving, which function is to enable nations both to maintain their individual sovereignty and to exist amicably beside one another. Yet this definition does not declare sufficiently the growing emphasis recognised by nations to be the current and dominant role of international law, that is, to foster cooperation between nations in respecting, if not agreeing and aiding one another's economic, social and political ideologies. The doctrine of State Sovereignty remains, but the summons for nuclear disarmament, the sharing of the seas resources, and a greater awareness by rich nations of the plight of their poorer counterparts, all evidence the increasing need for interdependence. Nations have recently been classified broadly into two heads: the developed and the developing. The former are usually the industrialised nations with histories of having been colonial powers over the latter category of nations. These developed nations increasingly realise their vulnerability and dependence in the face of a growing or developing group of nations, rich in untapped natural resources and in man-power. On the other hand, the developing nations acknowledge that their material progress is reliant upon the financial and technological aid of the developed nations. This balance of interest has created an

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(1) L.M. Salter "The end of nationalism: a call for a declaration of interdependence". 9 International Lawyer (1975) 143, at pp. 143-144.

"evolving international law of development",[2] published in international instruments such as the United Nations Declaration on the Establishment of a New International Order[3] and the Charter of Economic Rights and Duties of States[4] adopted by the "consensus" of the United Nations General Assembly. The feature of interdependence among nations has indeed become an obvious and critical reality.

The United States of America[5] may claim to be the foremost of the rich, industrialised and developed nations. It shares its southern border with the United States of Mexico,[6] a leader of the poorer, developing group of nations. Perhaps no other international boundary separates the two diverging, sometimes conflicting interests of developed and developing nations as does the United States-Mexican border.

This paper proposes to reveal the effect of the international summons for interdependence between nations by a perusal of United States-Mexican relationships over the last half a century or more. It attempts to show how these two nations have, by their domestic laws, bilateral agreements, and participation in international declarations and conventions, striven towards altering an attitude of confrontation to one of cooperation between each other. Such a study would support the proposition that it is the will of nations which would constitute the most vital factor in determining which way the future of "space-ship earth" lies. The paper proposes to show that the will of nations is a desire for peace and not destruction, and that the fibre of international law has woven itself into the factualisation of that will.

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(2) O. Schnachter "The Evolving International Law of Development". Columbia Journal of Transnational Law (1976), 1.

(3) G.A. Res 3201, 6th Special Session U.N. GAOR Supp 1, at p.3; U.N. Doc A/9559 (1974).

(4) G.A. Res 3281 U.N. GAOR Supp 31, at p.50; U.N. Doc A/9631 (1974).

(5) hereinafter cited as "the United States".

(6) hereinafter cited as "Mexico".

The following issues have been the main sources of conflict in United States-Mexican relationships and each will be discussed in turn. Broadly, they concern:

(1) Boundaries,
(2) Fresh water resources,
(3) Economic policies, and
(4) Migration.

CHAPTER I BOUNDARIES

The United States-Mexican border stretches a length of 1600 miles, separating four U.S. States in the north from six Mexican States in the south. The geography of rivers has formed a major source of controversy in this area, for not only is the boundary-line the course of a river, but a number of rivers which are important as fresh water sources, flow across it. The bilateral claims of the United States and Mexico over tracts of land along their border will firstly be discussed. Subsequently, on a multilateral level, the response of these two nations to the contemporary issues relating to the extent of state control over the seas will be dealt with. This may be seen as dealing with maritime boundaries, the discussion of which both the United States and Mexico have played outstanding roles.

Land Boundaries: the Chamizal

A part of the United States-Mexican border is formed by the Rio Grande which has the habit of changing its course with each seasonal flood, tearing land from one bank and depositing it on the other, or gradually silting the banks as it flows around its bends and corners. It was through such changes occurring between 1852 and 1868 that the Chamizal tract was formed. The "Chamizal Zone" or "El Chamizal" are common titles of an international river boundary dispute over a 636 acre tract of land located on the Rio Grande at the point where it separates the cities of El Paso (United States) and Cuidad Juarez (Mexico). This tract was one in which the

relations between the United States and Mexico were strained for almost a century.

> "The Chamizal conflict has not been a major factor in United States-Mexican relations, but has been a constant emotional irritant which has plagued both nations and had frequent reverberations throughout Latin America." (7)

The case of the Chamizal is a long and detailed one and only a basic framework will be presented here.(8)

The early treaties and conventions: Initially, the dispute arose out of changes in the course of the Rio Grande which constituted the international boundary, and the belated application to such changes of certain nineteenth century treaties between the United States and Mexico. The first treaty to affect the boundary was that of Guadalupe Hidalgo in 1848.(9) It contained language which established the international boundary at "the middle of that river [the Rio Grande, otherwise called Rio Bravo del Norte] following the deepest channel ...".(10)

In 1884, it was thought necessary to clarify the treaty language to provide expressly for changes in the river channel and the effect, if any, upon the boundary. From this attempt at clarification came the language that formed the legal basis for the Chamizal dispute. In the absence of treaty language to the contrary, a well established rule of international law is that a natural boundary, such as a river boundary, shifts when the river movement comes through erosion of one bank and accretion or deposit of soil on the opposite bank. A boundary will not shift when the change comes through avulsion, that is, when a river leaves its original bed and

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(7) B. Liss "A Century of Disagreement: the Chamizal Conflict 1864-1964" (1965)

(8) for further details, see ibid, Williams "Fifty Years of the Chamizal Controversy - a note on International Arbitral Appeals" 25 Texas Law Review (1947) 455; P.C. Jessup "El Chamizal" 67 Am.J.Int'l.L. (1973), 423.

(9) Treaty of Peace, Friendship, Limits and Settlement, signed on February 2, 1848, 9 Stat 922, T.S. No. 207.

(10) ibid at p.926, Article V. This language was carried forward by the Gadsden Treaty of December 20, 1853, Article I, 10 Stat 1031, T.S. No. 208.

cuts a new channel in another direction.[11] The Boundary Convention on the Rio Grande and Rio Colorado of 1884[12] was entered into between the United States and Mexico sixteen years after the river movements had created the Chamizal tract, Article I of the Convention read:

> "The dividing line shall forever be that described in the aforesaid Treaty (the Treaty of Guadalupe Hidalgo of 1848) and follow the centre of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one." (13)

The phrase "slow and gradual" in this Article proved to be the key words to the dispute. A provision for avulsive changes was included in Article II of the same Convention. It read:

> "Any other change, wrought by the force of the current, whether by the cutting of a new bed, or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the survey made under the aforesaid Treaty, shall produce no change in the dividing line as fixed by the surveys of the International Boundary Commissions in 1882; but the line then fixed shall continue to follow the middle of the original channel bed, even though this should become wholly dry or be obstructed by deposits." (14)

Five years later, in 1889, the International Boundary Commission (United States-Mexico)[15] was created through a convention[16] and a part of its duty, aside from attempting to settle boundary questions between the two nations, was to determine whether river changes "occurred through avulsion or erosion for the effects of Article I and II of the Convention of November 12th, 1884..."[17]

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(11) see S.B. Jones, "Boundary-making: a handbook for statesmen, treaty-editors and boundary commissions." (1945) pp. 119-125.

(12) November 12, 1884, 24 Stat 1011, T.S. No. 226.

(13) ibid, at p.1012, Article I.

(14) ibid, at p.1012, Article II.

(15) now the International Boundary and Water Commission (United States-Mexico), see post p.24

(16) Boundary Convention of March 1, 1889; Article I, 26 Stat 1512, 1513; T.S. No. 232.

(17) ibid, at p.1514, Article IV.

The 1911 arbitration: The Chamizal tract had to grow in population and value before an open conflict could develop over a small portion of it. It was only in 1894 when the case of El Chamizal No. 4 was commenced belatedly by Mexico before the International Boundary Commission. The Commission, composed of an American member and a Mexican member, heard both expert and lay testimony and in 1896 formally decided to disagree to Mexico's claim to the entire tract. However, since that Commission had no procedure by which to resolve disagreements, the case was put to rest.

From 1896 to 1905, diplomatic negotiations were continued in an effort to resolve the Chamizal question, but to no avail. Here the matter rested uneasily until 1910 when the United States and Mexico entered into a Convention[18] to submit the dispute to a mixed commission composed of the two members of the International Boundary Commission "complemented and presided over by a jurist designated by the Government of Canada. The said third member of the Commission will be vested with the necessary powers to render his award upon all questions over which the other two commissioners may disagree ...".[19] Article III of the Convention specified that:

> "The decision of the Commission whether rendered unanimously or by majority vote of the Commissioners and the Umpire shall be final and conclusive upon both governments."

On June 15th 1911, the Commission handed down its award in favour of Mexico by a vote of two to one.[20] The presiding Canadian Commissioner, with the joinder of the Mexican Commissioner, decided that the title to the tract was to be divided, with the dividing line being the river boundary of 1864. The reason given for the division was that all pre-1864

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(18) Convention for the Arbitration of the Chamizal Case, June 24, 1910 36 Stat 2481 T.S. No. 555.

(19) quotations from official documents in the National Archives, cited by P.C. Jessup, ante note (8) at p.427.

(20) [1911] Foreign Relations US 573 (1918).

river movements had been "slow and gradual" and all subsequent river movements up until 1868 had not been "slow and gradual". The American Commissioner dissented, chiefly on the ground that the Commission had no authority to divide the tract; the Commission was to decide on the whole of the Chamizal tract, whereas it had divided the tract in the award. In a formal note to Mexico, the United States officially made its own the argument of its Commissioner and refused to accept the award as valid or binding.(21)

A careful analysis both the Convention of 1910 and the award discredits the value of the argument embraced by the United States. Article III of the Convention, providing that "the Commission shall decide solely and exclusively as to whether the international title to the Chamizal tract is in the United States of America or Mexico "(22) was included to set the jurisdictional limits of the Commission so that matters other than the territorial question of dominion over the tract would not be considered. In other words, those who drafted the Convention intended that the arbitrators should be prevented from considering such questions as territorial waters. The Convention in no way precluded the possibility of settling the matter by application of the provisions of law most reasonable and proper to the case.(23) Even if it were accepted that the Commission did not adhere to the terms of the Convention, such a circumstance would not give rise to the exception of the abuse of right. That objection is reserved for serious cases of procedural violation or deviations of power, not for matters in which existing provisions are correctly applied and, as such, offer a reasonable solution.(24) Indeed, Jessup, a reputed American international jurist, has criticised the refusal of the United States to accept the 1911 arbitration award as "a violation of

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(21) [1911] Foreign Relations US 598, (1918) at p.599.

(22) ante note (18)

(23) C. Sepulveda "Areas of Dispute in Mexican-American Relations" 17 Southwestern Law Journal (1963) 98, at pp. 99-100.

(24) I. Oppenheim "International Law" (8th ed. Lauterpacht) (1955), pp. 345-347.

its treaty obligation and a blot on the American record as a supporter of settlement by international adjudication."(25) Mexico, by way of contrast to the United States refusal, had faithfully carried out its payments to the United States under the award of a tribunal of the Permanent Court of Arbitration in the Pious Fund case(26) until 1914 when payments were suspended in retaliation for the non-compliance with the Chamizal award.

Final settlement of 1963: Diplomatic negotiations over the Chamizal tract were on an intermittant basis between 1911 and 1962. In 1932, a settlement was almost consummated with a trade off by the United States of its claim over the tract in return for the remaining sum owed to it by Mexico from the Pious Fund claim. In 1940, Mexico demanded the tract in return for compensation for the expropriation of United States property.(27) The United States suggestion to arbitrate over the issue of compensation came to nought when Mexico refused, citing the United States non-compliance of the 1911 award as evidencing the futility of the arbitral method. In 1954, United States Senator Lyndon Johnson proposed the creation of a joint government advisory committee on the Chamizal tract, a proposal which was not accepted by the United States Congress.

Steps towards the final settlement of the Chamizal dispute began with a state visit by United States President Kennedy to Mexico City in June of 1962. The outcome was a joint statement by President Mateos of Mexico and President Kennedy. Point thirteen of that pronouncement read as follows:

> "The two Presidents discussed the problem of Chamizal. They agreed to instruct their executive agencies to recommend a complete solution to this problem which, without prejudice to their juridical positions, takes into account the entire history of this tract." (28)

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(25) P.C. Jessup, ante note (8) at p.434.

(26) J.B. Scott, Hague Court Reports (1916)

(27) See post pp 52-57

(28) 47 Department of State Bulletin (1962), 135.

Thus, once again, there came into public view the oldest unresolved dispute between the United States and Mexico.

It is pertinent to compare the response of the United States in the wake of this pronouncement with that taken at the time of the arbitration award of 1911. During the latter instance, the United States had felt confident that the Mixed Commission would decide in its favour, but upon realising that this was not to be the case, refused to accept the decision.(29) By way of contrast, we find the following abstract of a speech by T.C. Mann, the Assistant Secretary of State and United States Ambassador to Mexico to a House Sub-Committee on Inter-American Affairs on February 27, 1964:

> "[This settlement] takes away from the Communists in Mexico their most effective propaganda argument against the United States, that we do not live up to our treaties .... It also puts us in a consistent position. I feel very strongly about this myself. If we are going to insist that other countries live up to their treaty obligations, I think we must live up to ours. We have a lot to gain by a respect for agreements and respect for our treaty obligations while we are insisting that other nations live up to theirs." (30)

This response of the United States is in accordance with the basic norm of reciprocity found in International law.

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(29) Mills, the American Commissioner had informed his State Department of "the tendency of an umpire to split the difference". [1911] Foreign Relations US 432, (1918). The telegraphic reply of the State Department reflects the then prevailing attitude of the United States. The telegram read: "Confidential. Your confidential June 12th. You may in your discretion make suggestion of protest stating that your action is taken upon your own motion since obviously you have not had opportunity to consult your government, and that action taken by you in filing protest is subject to consideration by your government." This was anticipatory of any award which was not in favour of the United States. See P.C. Jessup ante note (8), at p.434.

(30) Hearings before the Sub-Committee on Inter-American Affairs of the Commission on Foreign Affairs of the House of Representatives, 88th Cong. 2d Sess, S2394, February 26-27th, 1964 at p.54. (1964).

Furthermore, its effect is to indemnify the international irresponsibility of the United States in its rejection of the award of 1911 handed down by the Mixed Commission.

Two other points concerning the settlement of the Chamizal dispute may here be elucidated to show the extent of cooperation reached between the United States and Mexico. Firstly, the diplomatic negotiations following the Presidential pronouncement of 1962 were carried out by the two Governments "without prejudice to their juridical positions."(31) Mexico maintained its high principles on the sanctity of arbitral awards and the United States was not made to feel belittled over embracing much of the 1911 award which it had previously refused. As Secretary of State Rusk wrote in recommending to the President the approval of a proposed treaty with Mexico:

> "The major reasons for sanguine expectations in the negotiation were the willingness of the two Governments to accept a reservation of juridical positions, and the concern of both that a settlement have as little adverse effect as possible on the two local communities so vitally involved. These proved to be the key to the settlement." (32)

Secondly, the diplomatic negotiations were aided along smoothly by the Mexican-United States Interparliamentary Group consisting of Congressmen of both nations.(33) This group arose from the Interparliamentary Union which has been functioning since 1899 and comprises of senators and members of the House of Representatives of the two nations who meet annually to discuss pertinent political issues. That the group had a responsible part in the settlement of the Chamizal dispute is indicated in the report to the United States Senate by Senator Mansfield as Chairman of the Senate Group at the Ninth Meeting in 1969:

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(31) President Kennedy, New York Times, July 6, 1962.

(32) Ante, note (30) at p.40.

(33) Authorised by joint resolution of the US Congress under the Act of April 9, 1960. Public Law No. 86-420, 74 Stat 40, and by the Mexican Congress in the Diario Oficial, May 6, 1959.

> "The effort of the two Governments to negotiate a solution to this territorial dispute on the Rio Grande [the Chamizal] had been stalled for decades when the matter came up for consideration in the Mexico-United States Interparliamentary Group. In my judgment, the careful consideration which was given to the question by the legislators helped to create the climate in which it became possible for the diplomatic agents of both nations to break through the impasse. By defusing the emotional elements in the Chamizal issue, in short, the parliamentary discussions set the stage for the negotiation of a final treaty of settlement." (34)

The final agreement of settlement was the Convention for the Solution of the Problem of the Chamizal signed in August 1963.(35) Based upon the terms agreed upon by the two Presidents in their joint pronouncement of 1962, the Convention essentially provided for (i) the relocation of the channel of the Rio Grande in the El Paso-Ciudad Juarez area, (ii) the establishment of the centre line of the new channel as the international boundary, and (iii) a transfer of land between the two nations, with the United States handing over two-thirds of the Chamizal tract to Mexico.

Aftermath of the 1963 settlement: The successful conclusion over the long disputed Chamizal tract heralded further diplomatic negotiations between the United States and Mexico to provide for preventive measures to curtail the development of any boundary problems of a similar nature. A joint Presidential pronouncement was made by Presidents Nixon (of the United States) and Ordaz (of Mexico) at their meeting in August of 1970 in which they agreed upon "the basic principles to adjust all pending boundary differences ... and to avoid future boundary problems".(36) The result of this pronouncement was the Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and River Colorado as the International Boundary, signed on

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(34) Report of the Senate Delegation on the Ninth Meeting held at Aguascalientes, Mexico, April 1969, Comm.onForeign Relations Doc. p iv. July 24, 1969.

(35) 15 UST 21, TIAS No 5515, 505 UNTS 185, see also 58 Am.J.Int'l. L.336 (1964).

(36) 63 Department of State Bulletin (21970) 298.

November 29th 1970,[37] which, as its title suggests, contained terms that classified with finality the description of the United States-Mexican boarder. The Treaty also contained procedures to guard against any future loss of territory by either nation as a result of the shifting course of the Rio Grande. Extending the spirit of cooperation yet further, the 1970 Treaty established maritime boundaries between the United States and Mexico in the Pacific Ocean and the Gulf of Mexico.

As a concluding remark, it should be noted that intrinsically, the Chamizal dispute was not a matter of simple settlement in view of its coverage over El Paso-Ciudad Juarez which was the economic and social centre of the region. Otherwise, it would have been resolved much earlier as have other important adjustments which have been made with relative ease along the border on both sides of the Rio Grande. Such adjustments involved the transfer of tracts of land much larger than the one under discussion. Thus, for example, by a convention in 1905, fifty-eight "bancos" (banks of land left by receding waters) were mutually exchanged between the two nations.[38] In 1933, after rectifying, by virtue of a treaty, the bed of the Rio Grande in the El Paso-Ciudad Juarez area, a canal was built that separated lands formerly possessed by each of the nations, and the award given in the case of the "bancos" was consummated without further complication.[39]

Maritime Boundaries: the Exclusive Economic Zone

In the multilateral sphere, one of the most important issues currently being progressively developed under International law has been the codification of the Law of the Sea. Both the United States and Mexico have played dominant roles in this development, the former as a chief prononent of views accepted by developed maritime nations, and the latter as a leader of

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(37) TIAS NO. 7313.

(38) Convention for the Elimination of Bancos in the Rio Grande from the Effects of Article II of the Treaty of November 12th, 1884, March 20 1905. 35 Stat 863, T.S. No. 461.

(39) Convention for the Rectification of the Rio Grande, February 1st 1933, 48 Stat 1621, T.S. No. 864.

developing nations which realise in the sea resources the potential for their economic upliftment. Yet, what would seem to be an area of conflicting interests does provide illustrations of changing governmental policies attempting at compromise and cooperation, motivated by the summons for interdependence among nations. A brief study of the Mexican and the United States positions on the Exclusive Economic Zone concept (EEZ) and related issues will here be made.

Mexico's policy: It is an interesting observation that early Latin American maritime claims were initially prompted by the United States President Truman's Proclamations on the Continental Shelf and on fisheries of September 28th, 1945.(40) The Truman Proclamations consisted of a claim being made only over the natural resources and not the seabed and subsoil of the continental shelf, with the superjacent waters expressly remaining high seas. As to fisheries, the claim consisted of a right to establish conservation zones in areas of the high seas contiguous to the United States coasts and providing that fishing activities therein were carried out by its nationals. Inspired by these proclamations, the Mexican President issued a Declaration on the Continental Shelf on October 29th, 1945.(41) The Declaration went further than the Truman Proclamations, as it claimed the right to take unilateral measures applicable to both its nationals and foreigners to conserve the living resources in zones of the high seas. This amounted to claiming jurisdiction over the waters above the continental shelf (the epicontinental sea) which was the result of an erroneous interpretation by Mexico of the Truman Proclamations. It was this mistaken interpretation which led subsequent Latin American nations to make the first claims to a

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(40) Presidential Proclamation No. 2667 concerning the policy of the United States with respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf, and Presidential Proclamation No. 2668 concerning the Policy of the United States with respect to coastal fisheries in certain areas of the High Seas. 59 US Stat 485 and 885 (1945); 13 Department of State Bulletin (1945) 485-486. 1 UN Secretariat, Laws and Regulations on the Regime of the High Seas 38 and 112 respectively. (St/LEG/SER B/1, 1951).

(41) UN/LEG/SER B/1 (1951) pp. 13-14.

200 mile maritime zone.[42]

More recently, the varying claims over a 200 mile zone presented what seemed to be insurmountable problems to the UN Seabed Committee as it began its preparatory work in 1970 for the Caracas Session of the Law of the Sea Conference. The developed nations were adamant over keeping national maritime jurisdiction as close to the coast as possible. In direct opposition to this, some developing nations held firmly to a 200 mile "territorialist" position. In between these two radical positions was a conciliatory concept which offered developed nations assurances of freedom of navigation throughout the 200 mile zone, and guaranteed developing nations the resources of the zone.[43]

Mexico was foremost in this moderate and conciliatory "patrimonialist" position. The Mexican delegation was the first to propose the concept of the EEZ to the Seabed Committee when on August 14th, 1971, the head of that delegation suggested the text of an Article providing for the right of the coastal state to exercise a special resource-oriented jurisdiction of up to 200 miles.[44] Thereafter, Mexico was a key nation encouraging international acceptance of the 200 mile zone. It featured prominently in the deliberations that concluded with the Declaration of Santo Domingo[45] on June 9th, 1972 wherein ten Carribean States declared that:

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(42) See in particular, the declarations of Chile and Peru in 1947. For the Chilean Declaration concerning the Continental Shelf, see UN/LEG/SER B/1, (1951), pp. 6-7; for the Peruvian Presidential Decree No. 781 concerning submerged continental and insular shelf, see UN/LEG/SER/B1 (1951) pp. 16-17.

(43) One of the main reasons for a narrow limitation of the maritime boundary insisted upon by certain developed nations, in particular the United States, was for military strategy purposes. The conciliatory concept providing for freedom of navigation in the proposed zone was therefore an important concession. The concept appeared as proposals by a number of African countries for an EEZ, and as a patrimonial sea by some Latin American States. Both proposals were practically synonymous. The African proposal was eventually adopted by the Seabed Committee because it was first in time and put with greater clarity.

(44) UN DOC A/AC 138/5CII/SR11.

(45) UN DOC CCM/12C/5 (1972, 11 ILM 892 (1972). For the complete text, see 66 Am.J. Int'l.L. (1972), 918.

> "The coastal state has sovereign rights over the renewable and non-renewable natural resources which are found in the waters, in the seabed and in the sub-soil of an area adjacent to the territorial sea called the patrimonial sea."

The area covering both the territorial sea and the patrimonial sea was not to exceed a maximum of 200 nautical miles.(46)

Mexico was also a party to a tripartite proposal to the Seabed Committee during its first session in 1973.(47) That proposal incorporated the substance of the Declaration of Santo Domingo but went further to elucidate the claims made thereunder. The proposal expressly required a coastal State, in the exercise of its jurisdiction and supervision over the exploration and exploitation of the resources of the patrimonial sea, to ensure that these and other similar activities were carried out with due consideration for other legitimate uses of the sea by third States.(48) Instrumental in the maritime policies of Mexico was its President, Luis Echeverria, who, appreciating the economic significance of the 200 mile zone, made it a central issue of Mexican foreign policy. President Echeverria made a personal appearance at the Caracas Session of the Law of Sea Conference on July 26th 1974 and gave an important speech which described in detail his nation's position.(49) On the same day, the Mexican Delegation introduced an equally important proposal which found the support of a large number of nations and which further enhanced the 200 mile zone concept.(50) The end of the Caracas Session saw virtually all the 115 delegations, including those from developed nations, support the right of the

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(46) Ibid, chapter entitled "Patrimonial Sea", para. (3).

(47) UN DOC A/AC 138/SCII/L21 (1973). The complete text of the Draft Articles proposed by Venezuela, Colombia and Mexico appears in 12 ILM 570 (1973).

(48) Ibid, Article 11. Article 12 of the proposal states that in the exercise of the freedoms and rights conferred on other States, those States shall not interfere with the activities of the coastal State referred to in Article 11.

(49) UN DOC A/CONF 62/SR 45.

(50) UN DOC A/CONF 62/L.4.

coastal State to establish a 200 mile EEZ.(51)

Further progress in gaining world-wide acceptance of the general concept of the zone was achieved in the Geneva Session of the Conference in 1975. But the main result of that Session was the Informal Single Negotiating Text (SNT)(52) the issuance of which was again partly the initiative of the Mexican Delegation.(53) This Text which purported to incorporate all the elements that appeared to be most in agreement was the basis for negotiations at the New York Session of the Conference in 1976.

It may therefore be surmised that Mexico canvasses its maritime boundary policies at the international level energetically with an attitude of moderation. It constantly rallied the support of other nations before making a proposal. This may be regarded as a feature of international politics, and yet was in step with the basic doctrine that International law develops as a result of the consensus of the community of nations.

A similar moderate policy may be observed in Mexico's unilateral or domestic claims over its maritime boundaries. Mexico set its territorial sea breadths of 3 miles, 9 miles and 12 miles only after they had each respectively gained recognition either by international agreements or by international custom.(54) The Mexican Declaration on the Continental Shelf of 1945, previously mentioned,(55) came into force only in 1960, as Mexico realised that the claim to an epicontinental sea was till then premature.(56) It followed the same International law-abiding tradition during the process of deciding when to establish its 200 mile EEZ. The Mexican Decree of 1975,(57) which unilaterally

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(51) Records of the 21st to 42nd Plenary meetings of the Conference (A/CONF62/SR 21 to 42) in Official Records of the Third UN Conference on the Law of the Sea, Vol I, pp. 59-189.

(52) UN DOC A/CONF62/WP8.

(53) For example, see the intervention by Ambassador Castaneda, Head of the Mexican Delegation (UN DOC. A/CONF 62/SR.54).

(54) A. Szekely, "Mexico's unilateral claim to a 200 mile Exclusive Economic Zone: its international significance" 4 Ocean Development and International Law (1974) 195, at pp. 203-205.

(55) ante note (41)

(56) Diario Oficial, Mexico, 20th January 1960.

(57) Diario Oficial, Mexico, 6th February 1976.

claimed such a zone, invoked in its preamble the SNT as the expression of global consensus, and the only Article of the Decree, that

> "... the Nation exercises in an Exclusive Economic Zone outside the territorial sea and adjacent to it the rights of sovereignty and the jurisdictions to be determined by the laws of Congress ... to 200 natuical miles from the baseline from which the territorial sea is measured ..."

was in direct keeping with the Articles of the SNT.(58)

The Mexican legislation accompanying the Decree of 1975 consists wholly of the incorporation of various articles of the SNT.(59) The first transitory Article of that legislation provides that more laws will be issued in order to regulate the extent of the specific jurisdictions which will be exercised in the zone. The SNT did not provide for these additional regulatory laws as they had not reached any general agreement at the international level. In accord with the SNT, the Mexican legislation thereby provided that such specific laws would be enacted after they had been formulated and agreed upon by the international community.

With the 1975 Decree and law coming into force, Mexico proceeded with caution in order to effect its unilateral action within the best possible framework of good faith and legality, and to avoid potential resulting conflicts. Mexico negotiated with its neighbours on the delimitation of their adjoining marine zones and on the question of their rights to fish the surplus of the species that exceeded Mexico's catch capacity in the Mexican EEZ.(60) Both these matters were agreed upon with Cuba on the 26th of July,(61) and with the United States on the 24th of November 1976.(62) The latter

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(58) see Articles 45 and 46 of the SNT

(59) Diario Oficial, Mexico, 13th February 1976

(60) this complied with Articles 62 and 51 respectively of the Revised SNT.

(61) Diario Oficial, Mexico, 26th August 1976.

(62) 77 Department of State Bulletin (1976), 2004.

treaty is especially illustrative of Mexico's policy of securing the rights over its EEZ in a peaceful manner. In coming to terms with the United States over questions of the sovereign rights over the living resources, Mexico was amenable to formulae which lay aside, for the time being, unsettled issues such as the question of the non-living resources in the seabed and sub-soil of the zone, the meaning of the "exclusivity" of the zone, and the jurisdictional nature of its waters. This treaty also represents the latest of a number of agreements between Mexico and the United States over the living resources of their adjacent seas.(63) Having observed in some detail Mexico's policy over its maritime borders, it is next proposed to make a comparative study of the response of the United States towards the EEZ concept.

United States Policy: The United States maritime policy is largely affected by its domestic pressures of military-strategy on the one hand, and economics on the other. Military pressure comes chiefly from the Department of Defence, advocating that the maritime borders be as close to the coast as possible. Economic pressure is exerted mainly by the petroleum and fishing industries vieing for national jurisdiction over a large coastal sea area.

The Draft Treaty proposed by the United States in August 1970 to the UN Seabed Committee favoured a narrow zone of national jurisdiction,(64) in accord with military-strategic demands. More precisely, the draft provided for the establishment of two zones: (i) an area of national jurisdiction to the 200 meter isobater and (ii) an international seabed area seaward of this limit. The latter was further divided into two parts; an International Trusteeship Area delimited by "a line beyond the base of the continental slope" in which the coastal State would act as a trustee for an International Seabed Resource

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(63) for examples of previous agreements, see 1 Hackworth "Digest of International Law" (1940) pp. 639-642; the Treaty for establishing an International Commission for the Scientific Investigation of the Tuna, January 25th 1949, 99 UNTS No 1367, at p.3.

(64) Draft UN Convention in the International Seabed Area. UN DOC A/AC138/25; 9 ILM 1046 (1970).

Authority,[65] and the area beyond that line, which would be directly administered by the Authority. In both areas, licences would be issued and payments required for exploration and exploitation of the seabed and sub-soil. These revenues would be used "for the benefit of all mankind, particularly to promote the economic advancement of developing states."[66] However, the trustee State would keep a portion of the payments it imposed.[67]

International reaction was not favourable on two counts. Firstly, the developing nations shied away from the proposal which seemed to reincarnate the old trusteeship system, a reminder of colonial times. Secondly, criticism was mounted over the fact that the proposal contained a provision which would ensure a veto power for any three of the six most developed UN member nations, all of whom would be included in the main governing organ, the Security Council.[68] The international response towards the United States' proposal may be summarised as follows:

> "The 1970 US Draft Treaty was portrayed as at best a naive attempt to place a tidy international organisational structure on top of the chaotic and contentious arena of international ocean politics; and at worst a cynical attempt by the Department of Defence to buy off developing States whose assertiveness might hamper naval mobility. More charitably, the 1976 American policy initiative can be viewed as a gesture that conceded few real interests while rhetorically aligning the national interests with universal order." (69)

Economic interests within the United States were also opposed to the proposal. The fishing industry of the East Coast opted for a 200 mile zone to protect themselves from the competition of large-scale fishing by Russian, Eastern European and Japanese

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(65) 63 Department of State Bulletin (1970) 214.

(66) redistribution would occur after the payment of administrative expenses. See UN DOC A/AC/138/25, Article 5(1) (1970).

(67) ante note (64).

(68) UN DOC A/AC 138/25 APP E (1970).

(69) Brown and Fabian "Diplomats at Sea" 52 Foreign Affairs (1974), 317.

factory ships.(70) More importantly, the petroleum industry opposed any sharing in the profits derived from the resources in the Continental Shelf adjacent to the coast of the United States.(71)

Since the draft treaty proposal of 1970, there has been a discernible shift in United States policy away from insistence that national jurisdiction be limited to the 200 meter isobath. There is increasing evidence of policy change towards accommodating a broader national resource and economic zone.(72)

> "Although the United States has never explicitly abandoned the 200 meter isobath as the limit to coastal state seabed jurisdiction, it no longer insists on it in policy statements. Instead, the Government simply delineates the provisions that must apply in coastal zones of national resource jurisdiction." (73)

A few instances may be cited to illustrate the favourable response of the United States to the EEZ concept. The United States delegation to the Caracas Session of the Law of the Sea Conference presented an early declaration accepting a 200 mile economic zone.(74) Article 1 paragraph (1) of the United States proposal read as follows:

> "The coastal State exercises in and throughout an area beyond and adjacent to its territorial sea, known as the economic zone, the jurisdiction and the sovereign and exclusive rights ... for the purpose of exploring and exploiting the natural

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(70) "... the largest gainer from a 200 mile fishing zone would probably be the United States. The reasoning is that this country already suffers from some of the disadvantages of a 200 mile zone without enjoying any of its advantages; that is, the tuna industry as our main distant water fleet already is confronted with a 200 mile zone." W.T. Burk in "Fisheries and a New Conference on the Law of the Sea" in World Fisheries Policy (ed. B. Rothschild, 1972) 52 at p.61.

(71) National Petroleum Council, Petroleum Resources under the Ocean Floor: a supplementary report, (1971); US Energy Outlook (1972).

(72) UN DOC A/CONF 72/C2/L47. A.L. Hollick "United States Ocean Politics" 10 San Diego Law Review (1973), 467.

(73) Public Law 94-265, 94th Congress HR 200. 16 USC 1801, ibid at p.469.

(74) UN DOC A/CONF 62/C2/L47.

> resources, whether renewable or non-renewable, of the sea-bed and sub-soil and the superjacent waters."

Article 2 then expressed that the outer limit of the stated zone "shall not exceed 200 nautical miles from the applicable base-lines for measuring the territorial sea." By agreeing with the majority of nations represented over this issue, the United States hoped to induce a favourable response to its main points of interest such as the freedom of navigation through international straits for both mercantile and military vessels, the right of over-flight and submerged passage for submarines even if the straits fell within a 12 mile territorial sea. Unilateral claims embracing the 200 mile zone concept include a claim by the United States to a 200 mile "fishing conservation zone". Section 101 of the Fishery Conservation and Management Act 1976 (United States)[75] provides that:

> "There is established a zone contiguous to the territorial sea of the United States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the Coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured."

It has been noted that the principal result of the Geneva Session was the preparation of the SNT. Though not constituting agreed articles or consensus texts, the SNT encompassed points that reflected probable agreement which emerged from informal negotiations.[76] In particular, Part II of the SNT contained articles incorporating a 12-mile territorial sea,[77] coastal State jurisdiction over the entire continental shelf,[78] and an exclusive economic zone of 200 miles.[79] Unimpeded passage through

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(75) Public Law 94-265. 94th Congress HR 200, 16 USC 1801

(76) for the participation of the US delegation in the informal negotiations, see generally, Stevenson & Oxman "The Third United Nations Conference on the Law of the Sea Convention: The 1975 Geneva Session" 69 Am.J.Int'l.L. (1975), 763.

(77) ante note (52)

(78) ibid Articles 72 and 63.

(79) ibid Article 46.

straits[80] and archipelagic sealans[81] were provided to serve the interests of maritime nations. It may be envisaged with a high degree of certainty that Part II of the SNT will not be objected to by the United States. The growing domestic economic pressure has caused the United States to modify its position and to focus more on resource exploitation. This policy shift in favour of the economic zone concept has furthermore been aided by the geographical fact that its extensive coastlines assure the United States of the largest economic zone of any nation.

Therefore, a highly industrialised nation with extensive merchant and military fleets has come significantly closer to the position of the developing coastal nations as championed by Mexico.

Co-operation between the United States and Mexico, as developed and developing nations respectively, is furthermore featured in the exploitation of the living and non-living resources of the economic zone. The developing nations realise their lack of scientific and technological expertise and machinery which the highly industrialised posses. This disparity of knowledge has allowed the latter nations alone to exploit the seabed, consequently causing apprehension among the developing countries. The Articles in the Lima Declaration,[82] the Declaration of Santo Domingo,[83] and in Part III of the SNT[84] illustrate the insistence by this latter group of nations for scientific research activities to be requested under some legal framework whereby the knowledge gained may be shared with them. In this regard, the stance taken by Mexico may be summarised as follows:

> "Scientific research activities in the oceans could result in genuine co-ordinated efforts of an international nature, since Mexico shares the opinion

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(80) ibid Article 34

(81) ibid Article 124(b)

(82) see 10 ILM, 208 (1971), Resolution 5.

(83) ante note (45).

(84) ante note (52) Articles 15, 16, 18, 20-22.

> that such activities do not recognise boundaries. Without them, there could be neither an objective understanding of the marine pehnomena nor a rational development of the ocean resources. Without such scientific activities, it might never be possible to reach the understanding and agreement which is so important among world scientists. The sea, far from dividing us, is the element that can best unite us." (85)

The United States has, in the past decade, consistently expressed an awareness of the need of the developing nations for improvements in their marine scientific knowledge. In the United States draft sea beds treaty of 1970(86) there appears in Article 40(m), the following provision which authorises the proposed Seabed Authority to:

> "Establish or support such international or regional centers, through or in co-operation with other international and regional organisations as may be appropriate to promote study and research of the natural resources of the seabed and to train nationals of any contracting party in related science and the technology of sea-bed exploration and exploitation, taking into account the special needs of developing States, parties to this Convention ...".

Realising that more jurisdiction over scientific research will not in itself solve the problem posed by the lack of technological know-how in developing nations, the United States has since advocated "the creation of indiginous scientific capability in developing countries where possible, coupled with the availability of impartial international assistance of both a scientific and a tehcnical nature."(87)

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(85) J.A. Vargas, "Normative aspects of Scientific Research in the Oceans: the case of Mexico". Occasional Paper No 23, October, 1974. Law of the Sea Institute, University of Rhode Island, 2 at p.15.

(86) ante note (64). See also US Draft Proposals to the Caracas Session of Sea Conference, ante note (72). Article 17 of the Draft reads: "An international register of independent fisheries experts shall be established and maintained by the Food and Agricultural Organisation of the UN. Any developing State, party to the Convention desiring assistance may select an appropriate number of such experts to serve as fishery management advisers of that State."

(87) B.H. Oxman, "Major positions, problems and viewpoints regarding the needs and interests of developing Stated: the United States position". Proceedings of the 7th Annual Conference of the Law of the Sea Institute, University of Rhode Island. June 26-29 (1972) 156 at p.159.

It is admitted that some important issues involving the rights and duties of nations over the sea and its resources remain unsettled. However the need for international co-operation stemming from the increasingly obvious interdependence of nations is clearly voiced in the worldwide acceptance, both by the developed and developing countries of the EEZ concept, and their collaboration in the field of marine scientific research and technology. The conciliatory maritime policies of the United States and Mexico have greatly contributed to the progress made in the international law of the sea in recent years.

The International Boundary and Water Commission (United States-Mexico)

This chapter would not be complete without a fuller examination of the constitution, responsibilities and achievements of a bilateral product of the United States and Mexico known as the International Boundary and Water Commission (IBWC). To gauge the success of this joint venture, another boundary commission, the International Joint Commission or IJC of the United States and Canada will form a useful comparison.

The role of the IBWC in the settlement of the Chamizal dispute was referred to earlier on.(88) That episode suggests the strength of the conciliatory and co-operative machinery within the framework of this Commission. It must be remembered also that the very existence of the IBWC is evidence of the United States-Mexican determination to co-operate together in the settlement of any problem that might arise out of their common borders.(89)

Formation, constitution and powers: The mid-nineteenth Century war between the United States and Mexico ended with the Treaty of Guadalupe Hidalgo in 1848.(90) From this Treaty, marking the

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(88) ante pp. 5 - 7

(89) for sources on the IBWC see D.H. Jordan and J.F. Friedkin, "International Boundary and Water Commission, United States and Mexico," in 5 Int'l Conference on Waters for Peace (1967) at p.192; 3 Whiteman "Digest of International Law" (1964) pp. 945-966.

(90) ante note (9)

From this Treaty, marking the end of a long period of conflict, was created the predecessor to the IBWC, the International Boundary Commission (United States-Mexico).[91] For the purposes of defining the boundary, the International Boundary Commission was granted jurisdiction over the examination and decision of -

> "all differences or questions that may arise on that portion of the frontier between the United States of America and the United States of Mexico where the Rio Grande and the Colorado Rivers form the boundary line." (92)

The Commission consisted of one Commissioner from each nation in charge of his respective national "section",[93] was established on the frontier,[94] had the power to call for information and summon witnesses,[95] and its decision was binding on both governments unless one disapproved of that decision within one month.[96]

The United States-Mexican Water Utilisation Treaty of 1944[97] made the Commission into its present form, the IBWC. Article two of that Treaty establishes the IBWC as an international body with each section reporting to its own national foreign office. The jurisdiction of the Commission extends over the limitrophe (boundary) sections of the Rio Grande and Colorado rivers and the land boundary, as well as to the works located on the boundary with each section retaining jurisdiction over that part of works located within the limits of its own territory.[98] The IBWC is furthermore provided with powers and duties to

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(91) established by the Convention to facilitate the carrying out of the Principles contained in the Treaty of November 12, 1884. March 1st 1889. 26 STAT 1512, TS No. 232

(92) ibid, Article 1

(93) ibid, Article 2

(94) ibid, Article 3

(95) ibid, Article 7

(96) ibid, Article 8

(97) Treaty relating to the Utilisation of the Waters of the Rio Grande Tijuana and Colorado Rivers, February 3rd, 1944. 59 STAT 1219 TS No. 994

(98) ibid, Article 2.

initiate and carry on the research, planning, construction and supervision of water-works; to implement particular agreements and prevent their violation, invoking if necessary, the aid of the Courts or other appropriate agencies, and to settle differences relating to the interpretations of the 1944 Treaty.(99)

Operation: The IBWC is staffed by members from the United States and Mexico who are experts in the field of technology and engineering. These administrators have continuing responsibilities and have access to a reservoir of expertise and experience to ensure a steady administration and to implement long-range plans. The Commission basically serves two functions, as a resource management and fact finding body and as a third-party mediator in disputes.

Firstly, the "resource management" role of the IBWC has predominantly beenthe planning, execution and supervision of joint United States-Mexican waterways projects designed to regulate the energy and water supplies of the boundary rivers. A number of such projects have thus far been completed upon the supervision of the Commission, in particular, two major international storage dams(100) on the Rio Grande and several smaller diversion dams; two international sanitation projects,(101) the Morillo drain diversion canal in 1969 designed to alleviate lower Rio Grande salinity; and a series of river rectification and flood control programmes.(102)

The proximity of the IBWC to the border region dictates its method of fact finding. From the earliest treaties, the Commission and its predecessor were charged with on-site inspection of regions where boundary changes occurred.(103) The Commission

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(99) ibid, Article 24

(100) the Falcon Dam in 1952 and the Amistad Dam in 1969

(101) at Douglas-Aqua Prieta in 1948 and at the twin-cities of Nogales in 1951

(102) these projects are summarised in D.H. Jordan and J.F. Friedkin, ante note (89) at pp. 36-45

(103) Convention of March 1st, 1889, ante note (91), Articles 3 and 4; the Treaty of February 3, 1944, ante note (97) Article 24(a). In addition, the Commissions have taken the responsibility of ascertaining and recording the changes of the river channels.

naturally also carries on the initial investigations required by the projects it supervises.(104) Field offices located in border cities detect boundary problems through the exercise of continuing surveillance over designated sections of the border. The Commission gives special attention to matters requiring constant observation at the locations where international problems might arise.(105)

The IJC is the northern equivalent of the IBWC. It was created for the similar purposes of international resource management and dispute settlement arising out of the United States-Canadian border.(106) It has been noted ante that the IBWC has powers to initiate its own investigations which it has put to use in expanding programmes of data-collection thereby increasing its overall efficiency and effectiveness. In contrast, the IJC cannot investigate into a problem until it is referred to by the United States or Canada. That the IJC has not been granted a planning function is the expressed and intended result of the United States-United Kingdom Boundary Waters Treaty of 1909(107) which forms the charter of the IJC. Article IX of that Treaty provides for the initiative to come from the government of the United States or Canada, to refer to the IJC for examination and to report on "any questions or matters of difference arising between them involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other along the common frontier".(108)

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(104) D.H. Jordan and J.F. Friedkin, ante note (89) at p.2

(105) ibid. Chapter II of this paper will discuss the fact-finding role of the IBWC in the recent settlement of the Colorado River salinity problem. Constant observation and recording is required of the "bancos". Treaty articles expressly provide the IBWC with this task, see Convention for the Elimination of the Bancos from the Effects of the 1884 Treaty, March 20th, 1905, 35 STAT 1863, TS No. 461; and the Treaty to resolve pending Boundary Differences of November 29th 1970, ante note (37).

(106) for sources on the IJC, see Bilder, "Controlling Great Lakes Pollution: a study in United States-Canadian Environmental Co-operation" 70 Michigan Law Review (1972), 469. See also 3 Whiteman "Digest on International Law" (1964) at 722 ff.

(107) Treaty Relating to Boundary Waters and Questions arising along the Boundary with Great Britain, January 11th 1909, 36 STAT 2448, TS No 548. Canada did not obtain treaty power until 1923.

(108) for the recommendation that the IJC be given powers to initiate investigations independently of US and Canadian Governmental Submissions, see L.B. Divorsky, "The Management of International Boundary Waters of Canada and the United States: a comparative study" 15 Nat. Resources Journal (1975) 223.

Secondly, although the IBWC is fundamentally an administrative body, it acts with a fair degree of independence from the United States and Mexican governments and to that extent, functions as a third-party dispute resolution forum. The judge or arbitrator is however replaced by a staff of legal and scientific experts from each nation and has been shown to act not upon governmental instruction but as a single body which strives towards common solutions and in consideration of joint interests.(109) Coupled with its specialised knowledge and direct involvement with the issues of any pending dispute, the IBWC as a special arbitral tribunal over international problems, has set itself as an ideal example to be followed by other similar tribunals. It was precisely this recognition of the IBWC's suitability for the settlement of disputes that caused the Chamizal problem to be referred to it in the 1911 attempts at finding a solution. The departmental memoranda of the United States between 1907 to 1910 concerning the form of arbitration to be resorted to contained no reference to the Arbitration Convention of 1908(110) between the United States and Mexico. Article I of that Convention provided that:

> "... in case no other arbitration should have been agreed upon ... differences which may arise whether of a legal nature or relative to the interpretation of ... treaties ... and which it may not have been possible to settle by diplomacy ... shall be referred to the Permanent Court of Arbitration established at the Hague ... provided that they do not affect the vital interests, the independence, or the honour of either of the Contracting Parties and do not prejudice the interests of a third party."

The United States agreed to this "Hague procedure" to determine the fisheries dispute with the United Kingdom during this same period.(111) However, the existence, constitution and experience of the International Boundary Commission made that body a natural recourse.

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(109) D.H. Jordan and J.F. Friedkin, ante note (89) at p.19. The IBWC may be accredited with the settlement of many disputes over the location of the fluvial boundary.

(110) 35 STAT 1997, TS No. 500. See 2 Am.J.Int'l.L. Supp (1908) 300.

(111) Question relatiing to the North Atlantic Coast Fisheries before the Tribunal of Arbitration, The Hague, September 7th, 1910.

While on the point of the arbitral role of the IBWC, an interesting contrast may be made with the IJC. Article IX of the Boundary Waters Treaty of 1909, it has been seen,(112) provides for unilateral references to disputes to be made by the United States or Canada. The same Article specifies further that the reports of the IJC "shall not be considered as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award." On the other hand, the decisions handed down by the IBWC are binding on the governments unless one of them objects within one month.(113)

That the IBWC has been placed with powers to initiate its own investigations and that its decisions on disputes are to be prima facie binding (in contrast to the IJC where these elements are absent) suggest the high degree of confidence which the United States and Mexican Governments have entrusted to it. That confidence is underlined with the will of the two nations to enter into a spirit of co-operation. The IBWC would be hindered in its resource management functions, and be unable to devise a settlement acceptable to both nations when that spirit is lacking. The latter failure was illustrated in the Chamizal dispute arbitration of 1911 when that will and spirit to co-operate was absent.(114) Since then however, the success of the IBWC in its day to day operations and in the arbitration of border disputes reflects the change in United States-Mexican relationships from an attitude of confrontation to one of co-operation.

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(112) ante p.19

(113) the Convention of March 1st 1889, ante note (91), Article 8.

(114) ante pp. 5-7.

CHAPTER II FRESH WATER RESOURCES

The lands flanking both sides of the United States-Mexican border abound with soil favourable for agriculture as a result of which large rural communities and a number of major cities have developed. However, the semi-arid conditions of that region have caused the fresh water needed for irrigation and human consumption to be wholly derived from the boundary rivers and underground waters present. Both these sources traverse the common border; the rivers generally flowing from north to south and the underground water basin spreading under a large part of the United States and Mexico. Geographical outlay therefore has required that these waters be shared between the two nations. The demands for, the scarcity of, and the usage of the water sources have created the cause for both actual and potential confrontation between the United States and Mexico. The salinity controversy of the River Colorado will be discussed first followed by the problem of regulating the use of underground waters.

Boundary rivers: the Colorado River Salinity Problem

The Colorado River is the mainstay of the agricultural activity in the south-western United States and north-western Mexico irrigated by its waters. Any matter affecting the supply and use of these waters has important political and economic as well as legal and technical implications for both nations. Realising the need for a bi-lateral agreement to govern the use of the River Colorado and other boundary rivers, negotiations between the United States and Mexico were begun in 1928[115] and culiminated with a treaty in 1944.[116]

The 1944 Water Treaty: This Treaty allotted to Mexico an annual amount of 1,500,000 acre-feet of "the waters of the

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(115) For a discussion of the events leading to the ratification of the 1944 Water Treaty, see M.B. Holbart, "International Problems of the Colorado River" 15 Natural Resources Journal (1975) 11, at pp. 11-14.

(116) Treaty for Utilisation of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, February 3rd, 1944, 59 STAT 1219; TS No. 894, 3 UNTS 313 (hereinafter cited as the 1944 Treaty).

Colorado River from any and all sources ..."[117] and "... whatever their origin".[118] The articles provided for the quantity of water agreed upon to be delivered to Mexico as the lower riparian but failed to express the quality of that water.[119] The quality issue subsequently became the main point for differing interpretations of the treaty provisions.

The 1944 Treaty seemed to prove a good instrument, indeed an operative and reasonable one until 1961, when certain interests in the State of Arizona (United States) initiated a process whereby the waters became polluted. Large tracts of land in that State were "washed" by flooding them with water from the Colorado River. The water was returned to the same river with the resulting increase in salinity.[120] On November 9th, 1961, Mexico formally protested that "the delivery of water that is harmful for the purposes stated in the Treaty constitutes a violation of the Treaty" and that "any contamination of international water by one of the riparian countries that causes damage or loss to the other riparian party is in itself an act clearly and specifically condemned by international law ...".[121] Thereafter, Mexico continued to remonstrate over the saline pollution of many of its north-western farms.

The initial response of the United States was that the 1944 Treaty contained no quality standard concerning the waters to be delivered to Mexico, various provisions of the Treaty[122] and

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(117) ibid, Article 10

(118) ibid, Article 11.

(119) in contrast to this Treaty is the Boundary Waters Treaty (US and United Kingdom) on January 11, 1909, ante note (107). That Treaty views the waters flowing between the two countries as a natural resource to be shared by both countries. It speaks specifically of water quality and says in Article IV that "the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property of the other."

(120) for a detailed elaboration of the events leading up to the United States-Mexican salinity conflict in 1961, see M.E. Bulson, "Colorado River Salinity Problem: has a solution been found?" 9 International Lawyer (1975) 283, at pp. 284-286.

(121) Note from Embassy of Mexico No. 4012, November 9, 1961. (Files of Department of State, unpublished), cited by H. Brownell and S.D. Eaton, "The Colorado River Salinity problem with Mexico" 89 Am.J.Int'l.L. (1975) 249, at p.250.

(122) see ante notes (117) and (118)

testimonies of its negotiators[123] being cited to support the argument that a solely quantitative element was agreed on. On the Mexican side, it was claimed that by inference, the 1944 Treaty extended to the delivery of water suitable for use as evidenced in particular by a provision expressing that the waters were to be for agricultural purposes.[124]

The problem of International Law: A literal reading of the 1944 Treaty would support the United States position. As has been stated, Article 10 refers to delivering "waters of the Colorado from any and all sources ..." which, when interpreted literally would mean highly saline water returning to the river as drainage and even possible saline ground water pumped into the Colorado River. Article 11 reiterates this point by stating that the "waters shall be made up of the waters of the said river, whatever their origin."

However, treaty interpretation principles as laid down by the Vienna Convention on the Law of Treaties[125] would tend to favour the Mexican position. Article 31(1) of that Convention states that:

> "... a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

If the reference to the object and purpose constitutes an intrinsic element of interpretation, it is clear that induced salinity by certain United States projects constitutes a violation of the Treaty in that it prevents the use of that water for the agricultural purposes contemplated in the agreement.[126]

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(123) for example, see IBWC Commissioner L.M. Lawson in Hearings on the Water Treaty with Mexico, before the Senate Committee on Foreign Relations, 79th Cong. 1st Session at p.7 (1945); Counsel for the US-IBWC section, F. Clayton, ibid. at p.107.

(124) the 1944 Treaty, ante note (116), Article 3.

(125) UN DOC A/CONF 39/27, opened for signature, 23rd May, 1969.

(126) ante note (124)

Another aspect of the Law of Treaties is that they should be presumed to have been done in good faith. The failure to recognise "good faith" implies the exclusion of the pacta sunt servanda principle that establishes the binding power of treaties and would amount to the ultimate nullification of all law of treaties. It follows that any rights derived from a treaty should be exercised reasonably and in a manner that is proper and necessary for accomplishing the specified purpose. Treaties must be equitable for both parties and one should not strive to secure advantage beyond that measure. The preamble of the 1944 Treaty stated in part that "... the utilisation of these waters for other purposes (besides navigation) is desirable in the interest of both countries ..." and that the specific purpose of the Treaty was to obtain a "... most complete and satisfactory utilisation ..." of these waters. The principle of "good faith" would necessitate that to satisfy the interests of both the United States and Mexico in the utilisation of the Colorado river waters, phrases contained in the treaty such as "from any and all sources" should be interpreted restrictively. Hence, "sources" should refer to waters that proceed from rain and thaw produced at any point along the river basin, tributary waters and the return-flow from irrigated lands. The return-flow should, in accordance with Article I(h) of the 1944 Treaty, be recognised as that portion of diverted water that eventually finds its way back to the source from which it was diverted. Only these and secondary flows occurring in the main channel by natural means can be considered as sources.

There seems to be a dearth of case law material on international river pollution. However, some analogous cases of damage to one nation caused by the activities of another may be cited. The leading case on international liability for pollution is the Trail Smelter arbitration.(127) The facts of the dispute were that fumes from a Canadian smelter were being blown across the border into the United States. An ad hoc tribunal established by convention(128) awarded damages to the United States and set up

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(127) Trail Smelter Arbitration (US vs. Canada), 3 UN RIAA 1905 (1949); 35 Am.J.Int'l.L. (1941), 684.

(128) Trail Smelter Arbitral Convention (US vs. Canada), April 25th, 1935; 49 STAT 3245, TS No. 893.

a regime to control the emissions. The case may be taken to stand for the proposition that:

> "... under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and an injury is established by clear and convincing evidence." (129)

The Lake Lanoux arbitration(130) between France and Spain supports this proposition. In that case, Spain contended that certain French development projects which diverted shared boundary waters were in contravention of their bilateral treaties. The arbitral tribunal set up in settlement of the dispute held that:

> "... the upstream State has, according to the rules of good faith, the obligation to take into consideration the different interests at stake, to strive to give them all satisfactions compatible with the pursuit of its own interests, and to demonstrate that, on this subject, it has a real solicitude to reconcile the interests of the other riparian with its own." (131)

United States case law would furthermore support the Mexican claim over the quality of Colorado river waters to be delivered. For example, the United States Supreme Court has ruled in regard to river pollution between two nations the following:

> "The contention ... that ... a State rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary cannot be maintained. The river throughout its course in both States is but a single stream wherein each State has an interest which should be respected by the other." (132)

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(129) ante note (127), 3 UN RIAA (1949) at p.1965, 35 Am.J.Int'l.L. (1941) at p.716

(130) Lac Lanoux Arbitration (France vs. Spain) 12 UN RIAA 281 (1957) 53 Am.J.Int'l.L. (1957) at p.156.

(131) ibid, 12 UN RIAA (1957) at p.303; 53 Am.J.Int'l.L. (1957) at p.160-161

(132) 29 US at p.466 American publicists may also be cited in support of Mexico's claim. For example, see H.R. Fornham "The law of Water and Water Rights" in Berker, "Rivers of International Law" (1959; D.A. Crantz, "United States approaches to the Salinity Problem on the Colorado River" 12 Natural Resources Journal (1972) 496, at p.506.

The United States defence to the above international law position would probably have rested on the "Harmon Doctrine" which, simply stated, holds that because of territorial sovereignty recognised in international law, the upper riparian is under no obligation to lower riparians for any adverse effects from waters flowing across their common border.(133) However, the international legal principles and case law cited above would have decided in favour of Mexico. The key test in reaching that conclusion would seem to be one of "reasonable use";(134) though the lower riparian cannot expect waters of the same quality as the upper riparian, it could expect water reasonably usable for the purpose intended, and in the context of the Colorado River salinity problem, for agriculture.

It is to be noted that at the time of the salinity controversy, there existed agreements such as the Arbitration Convention of 1908 (United States-Mexico)(135) and the Inter-American Arbitration Agreement of 1929(136) by which both nations had agreed to submit to arbitration any disputes that arose between them. Had Mexico then taken its case to the International Court of Justice (ICJ) a decision would probably have been reached in its favour. The United States could have invoked the Connally Amendment to its reservation on the ICJ Statute,(137) thereby preventing litigation on jurisdictional grounds, but the adverse effects on United States-Mexican relationships of such a move would have strongly militated against doing so. The awareness by the United States of its liability under international

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(133) 3 Whiteman, "Digest of International Law" (1964) at pp. 945-178. The doctrine was first asserted in 1895 by US Attorney General Judson Harmon in response to Mexico's protest against diversion of the Rio Grande. Harmon stated that "the case presented is a novel one ... but that question should be decided as one of policy only because, in my opinion, the rules, principles and precedents of international law impose no liability or obligation upon the United States." 21 Op.Atty.Gen. 274, (1895) at p.283.

(134) see generally Whiteman, ibid at pp. 924-925.

(135) ante, note (110)

(136) 49 STAT 3152, TS No. 886

(137) The United States reservation to the ICJ Statute, as originally approved by its Senate Committee on Foreign Relations, had excluded disputes falling within its domestic jurisdiction. Under the Connally Amendment, the determination of whether a dispute came within this exclusive domain was to be determined by the United States. For current American attitudes towards the ICJ, see W.P. Rogers "The Rule of Law and the Settlement of International Disputes" 64 Am.J.Int'l.L. Proceedings p. 285; see also L. Henkin, 65 Am.J.Int'l.L. (1971), 374 "The Connally Reservation revisited and hopefully contained."

law and the respect of that law, coupled with a firm conviction that the salinity problem could best be settled co-operatively without third party arbitration, caused the United States to disallow the dispute to be adjudicated. Instead, it took a number of practical steps to reduce the salinity in order to resolve that dispute.

Reduced salinity by Minutes 218 and 241: A joint Presidential announcement in March 1962 expressed the urgency of finding a mutually satisfactory solution to the salinity problem.(138) The result was to supply the IBWC with a pool of water and soil scientists of the two nations to initiate remedial measures within the shortest possible time. From the fact-finding work of the IBWC and other studies,(139) the United States and Mexico reached a five-year agreement in 1965, embodied in Minute 218 of the IBWC.(140) Under this agreement, the salinity of the Colorado River was partly reduced by the construction of extension channels, wells and the release of additional quantities of water from American storage sources.(141) The cost of these projects was borne solely by the United States. In agreeing to the transitory practical solutions contained in the Minute, the two governments specifically sought to prevent any altering of their legal positions, in a similar vein as the negotiations leading to the final settlement of the Chamizal dispute in 1963.(142) Paragraph 11 of Minute 218 provided that:

> "The provisions of this Minute do not constitute any precedent, recognition, or acceptance affecting the rights of either country, with respect to the Water Treaty of February 3rd, 1944, and the general principles of law."

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(138) by President Kennedy (United States) and President Mateos (Mexico), 46 Department of State Bulletin (1967), 542.

(139) on the United States initiative, a committee of fourteen with representatives of the seven Colorado River Basin States was formed to advise the Department of State on matters pertaining to the problem in question. See H. Brownell and S.D. Eaton, ante, note (121) at p.250.

(140) 21 UST 2478, at p.2481; TIAS No. 6988

(141) for further elaboration, see M.B. Holburt, "International Problems of the Colorado River" 15 Natural Resources Journal (1975) 11, at pp. 15-16.

(142) ante, pp. 8-11

This Minute was extended in its operation for two additional years till it was replaced by Minute 241 of the IBWC on July 14th, 1972.(143) The effect of this later agreement was to reduce the salinity of the Colorado River waters further by stipulating the construction of more drainage canals and increasing the supply of water from the United States reservoirs.(144)

Permanent solution in Minute 242 and its significance: Following further communications between Mexico and the United States in 1972 in which the former pressed for a prompt and permanent settlement of the salinity controversy, a joint communique was issued on June 17th 1972(145) by Presidents Nixon (United States) and Echeverria (Mexico). This communique affirmed the will of the United States to find a definitive solution to the problem, and of Mexico to consider the resulting proposal. The negotiations that ensued evidenced the agreement by the representatives of both nations on several counts. They recognised that the principal issue relating to the quality of delivered waters should not be confused by secondary issues(146) and it was a mutual aim to conclude an early practical and politically acceptable solution to that issue. Both sides furthermore believed that a prompt, practical, bilateral solution was highly preferable to third-party arbitration as it would save time, maintain good will and avoid uncertainty. The outcome of these negotations was Minute 242 of the IBWC on August 30th, 1973.(147) By its provisions, Mexico was guaranteed the amount of Colorado River waters stipulated by the 1944 Treaty but with the level of salinity reduced to a degree that eliminated the previous adverse effects of the water on the Mexican farmlands. This was to be accomplished by the construction

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(143) 67 Department of State Bulletin (1972) 66, pp. 197-199; 23 UST 1286 TIAS No. 7404

(144) for further elaboration on Minute 241, see M.B. Holburt, ante note (141) at pp. 17-18.

(145) 67 Department of State Bulletin (1972), 66 p. 203.

(146) as to these secondary issues that arose out of the negotations, see M.B. Holburt, ante note (141), pp. 17-18.

(147) TS No. 778; 12 ILM 1105; 68 Am.J.Int'l.L. (1974), 376. For a detailed discussion of the fact-finding programmes and negotiations leading to Minute 242, see ibid at pp. 263-268.

of a lined bypass drain carrying the saline wastes of certain United States drainage projects to the sea, the building of a huge desalination plant and other necessary works all of which were to be funded by the United States. In addition, the United States pledged its support of Mexican efforts to obtain appropriate financing for the improvement and rehabilitation of the affected farming region. Both nations agreed to consult each other prior to any undertaking of a new development involving water resources that might adversely affect the other country.(148)

Minute 242 represents a continuation of the new trend in amicable United States-Mexican relations initiated by the Chamizal Settlement. Of the salinity dispute which that Minute settled, the following description has been made in the United States Senate that:

> "No other issue in recent times has so troubled our relations (with Mexico); no other problem has so taxed our determination to seek mutually satisfactory solutions to common problems; no other problem has so tested the sincerity and ingenuity of our diplomats; and no other problem has so challenged the mutual respect and goodwill that our two countries have for each other." (149)

There is therefore ample justification for a concluding remark made of this latest agreement, namely that, it was "a mile stone in the history of [United States] relationships with the Latim American countries and [was] a very important friendly and amicable settlement of a dispute that has been very irritating." (150)

Two other observations involving the development of the international law of rivers may be gleaned from the agreement in Minute 242. Firstly, it impliedly recognises and thereby supports the growing customary legal principle that an upper riparian owes a duty to the lower riparian to insure the delivery

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(148) see Minute 242 ibid. generally.

(149) 120 Congress Records S-10371, cited by H. Brownell and S.D. Eaton, ante note (121), at p.249.

(150) US Ambassador to Mexico, H. Brownell; 69 Department of State Bulletin 392, at p.394.

of water that is of a quality that will not harm the lower riparian's interests and will allow the lower riparian to make a reasonable use of that water. Secondly, the Minute has set the stage for the possible conclusion of a United States-Mexican treaty embodying the concept of an integrated river basin. This concept has received increasing support in recent years,(151) and may be amplified as follows: "a system of rivers and lakes in a drainage basin should be treated as an integrated whole (and not piecemeal)".(152) Early United States policy toward river basins was pervaded by the "Harmon doctrine" of territorial sovereignty; the United States felt that it was under no obligation to be concerned with Mexico's riparian interests.(153) But the recent succession of joint agreements culminating with Minute 242 has evidenced an evolution away from that policy towards one of greater comity. An adoption of the integrated river basin concept by the United States and Mexico would be in line with the prevailing spirit of co-operativeness for it would spell a recognition that their common resources and common problems require a common approach by the two nations. This concept which inherently cuts across political boundaries, provides no rigid formula for solving such problems, but rather creates an atmosphere condusive to the settlement of disputes at their early stages. The future development of an integrated river basin across both sides of the United States-Mexican border is further aided by the fact that a regional agency in the form of the IBWC already exists. The powers of the IBWC could be expanded to deal with the problems affecting the Colorado River basin and could be the centre for a mutual exchange of information and technological expertise to better conserve and utilise the natural resources of that basin. In conclusion, it is reiterated that the possibility now open to the adoption of the integrated river basin concept would not have been feasible but for the current trend of co-operation between the United States and Mexican governments as depicted in their mutual settlement of the Colorado River salinity problem.

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(151) see Shapiro-Libai, "The Development of International River Basins: Regulation of Riparian Competition" 45 Indiana Law Journal (1969-70), 20.

(152) International Law Association, Report of the 48th Conference (New York) (1959) at p. viii.

(153) anta, note (137)

Groundwaters: border-region water basin problem

Acquifers or underground water basins traverse the international border and extend under many of the American south-western and Mexican north-western States. Groundwater is an important fresh water resource in this semi-arid region. However, this resource is a finite or limited one, being accumulated by geographical processes taking a long period of time. It should therefore be sparingly used. As any groundwater tapping affects the level of groundwater of the whole acquifer, both the United States and Mexico need to derive a common agreement over the regulation and utilisation of these waters.

The present problem involving the groundwater of the United States-Mexican border area has roots in both sociological and technological developments. Population influxes in south-western United States cities has been complemented by population increases in the Mexican cities of the border-area and by expanded farming operations in the northern Mexican States. Increased utilisation of groundwater is also demanded by Mexico's border industrialisation programme.(154) In addition, modern technological improvements provide for wells which tap water formerly unavailable for the developmental needs of this arid area. It has become increasingly evident that the future of man in this region is largely dependent on the proper control and use of this precious water resource.

The groundwater utilisation problem constituted a minor issue in the negotiations preceding the settlement of the River Colorado salinity issue in Minute 242. However, it was eventually found to be connected with the main issue as a portion of allotted surface waters to Mexico was obtained from American wells.(155) Certain provisions in Minute 242 currently constitute the only

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(154) see post pp. 66-70

(155) these groundwater deliveries accounted for approximately 140,000 of the 1,500,000 acre-feet to be delivered annually to Mexico under the 1944 Treaty. H. Brownell and S.D. Eaton, ante note 121 at p.261 note 20.

official action taken to regulate the use of border groundwaters. These provisions (i) limit each side to 160,000 acre-feet of groundwater pumping within five miles of the Arizona-Sonora boundary (the San Luis area) pending the conclusion of a comprehensive groundwater agreement,(156) (ii) require the United States and Mexico to consult with each other "prior to undertaking any new development of either the surface or the groundwater resources, or undertaking substantial modifications of present developments, in its own territory in the border area that might adversely affect the other country."(157)

It is therefore seen in Minute 242, provision for further negotiations between the two nations on the border groundwater problem. The existence between the United States and Mexico of both bilateral and multilateral agreements for the peaceful and orderly adjustment of controversies especially through means of arbitration and compromise, coupled with the already developed tradition of diplomatic negotiation, facilitate the creation of a separate groundwater treaty in the near future.

Another important factor that enhances the conclusion of such a treaty is the existence of the IBWC. The successful history and work of this Commission has already been elucidated(158) and it would not be difficult to accept the proposition that the IBWC would form the ideal resolution forum for any disputes pertaining to a groundwater treaty between the United States and Mexico.(159) The IBWC recommendations are equivalent to the

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(156) Minute 242, ante note (147) Article 5. The amount was derived from the maximum pumping capacity of Mexican pump installations in the area in 1973

(157) ibid, Article 6. The requirement of notification of contemplated works which might adversely affect the other country is consistent with the recommendation contained in Article XXIX, paragraphs (1) and (2) of the "Helsinki Rules" on the Uses of the Waters of International Rivers adopted by the International Law Association in 1966. Report of the 52nd Conference held at Helsinki 1966, 484 at p.518 (1967). The Helsinki Rules have never been presented to governments for approval or adoption and thus have no formal legal stature.

(158) ante, pp. 24-29

(159) see L.C. Sepulveda, "Implications for the Future Development of Viable International Institutions", 15 Natural Resources, 215.

decision of a third party arbitrator and are founded on an adequate technical basis. These elements of neutrality and expertise would make the recommendations more acceptable to each government. A jurisdictional increase in the powers of the IBWC to regulate the underground water basins would ensure that no only the utilisation of surface waters but of ground-waters as well would be determined under one bi-national body for the benefit of a region that stretches across both sides of the United States-Mexican border.

Hence the common sharing of underground water resources by the United States and Mexico provides another opportunity to further illustrate the growing spirit of interdependence and co-operation between these two nations.

CHAPTER III ECONOMIC POLICIES

Any study on the inter-relationship between developed and developing nations would have to form, as its main content, economic and consequently certain politically, socially and legally related issues. This chapter proposes firstly to highlight these issues, both previous and current, occurring in United States-Mexican relations with a discussion on the "Calvo Clause". Next, some Mexican and United States economic policies will be observed in turn. Lastly, the economic views of these two nations will be seen on a multi-lateral level, particularly in the light of various Inter-American organs and instruments and the UN Charter of Economic Rights and Duties of States. It is to be borne in mind that whole volumes may be devoted to the issues concerned here; for our present purposes, only a brief study will be afforded but sufficient to adequately reveal the changing trend from confrontation to cooperation represented in United States and Mexican policies over the last half a century.

Economic, political and legal implications of the Calvo Doctrine.

The Calvo clause is closely related to, and a result of, the development and exploitation of the natural resources in the less developed nations that occurred in the latter half of the nineteenth century and early part of this century. This exploitation took the form of outright colonisation in various forms and degrees in some under developed areas; where independent governments existed it came in the form of large foreign investments and a consequent migration of foreigners to these nations to supervise and direct the development of their natural resources. This investment and migration were both necessary and mutually profitable. However they inevitably created a certain amount of tension and conflict between the resident aliens and the local (or native) governments. The tension and conflict were greatly enhanced by the chronic social, economic and political instability that characterised many of these under developed nations. The instability and disorder in turn led inevitably to a number of injuries to the persons and property of resident aliens. Judicial machinery

was often provided to redress these wrongs but the resident aliens tended to question the merit of foreign justice. The pressures thus created led to the institution of procedures by which citizens abroad could appeal to their governments for protection of their persons, property and rights. It was from these beginnings that the institution of diplomatic protection of citizens abroad originated.(160) The under-developed or developing nations, in protest to this institution which they deemed as foreign intervention in their sovereign jurisdiction, embraced what is popularly known as the Calvo Doctrine.

The Calvo Doctrine: Based on the generally accepted rules of national sovereignty, equality of nations and territorial jurisdiction, two cardinal principles constitute the core of this Doctrine. Firstly, sovereign nations, being free and independent, enjoy the right on the basis of equality, to freedom from "interference of any sort" by other nations, whether by force or diplomacy. Secondly, aliens are not entitled to rights and privileges not accorded to nationals and they may therefore seek redress for grievances only before local courts.(161)

The Mexican position: This Doctrine was enthusiastically received in Mexico as in other Latin American nations. A failure to win international acceptance of the Doctrine on its own merits(162) compelled these nations to resort to various devices and techniques for its implementation. Mexico's participation includes the embodiment of the Doctrine by treaty,(163) in its

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(160) for a historical evolution of the institution of diplomatic protection, see E.M. Borchard "The Diplomatic Protection of Citizens Abroad" (1915) pp. 836-838; J. Cuthbert "Nationality and Diplomatic Protection: the Commonwealth of Nations" (1969), pp. 2-4. See also E.M. Borchard "Limitations on Coercive Protection" 21 Am.J.Int'l.L. (1927) p.303, A.V. Freeman, "Recent aspects of the Calvo Doctrine and the challenge to International Law" 40 Am.J.Int'l.L. (1946) 144.

(161) 5 Hackworth "Digest of International Law" (1940-1944) 635; D.R. Shea "The Calvo Clause: a Problem of Inter-American and International Law and Diplomacy" (1955) pp. 16-20.

(162) L.M. Summers "The Calvo Clause" 19 Virginia Law Review (1933) 464; K. Lipstein "The Place of the Calvo Clause in International Law" 22 British Yearbook of Int'l Law (1945) 130.

(163) for example, the Treaty of December 5th 1882 between Mexico and Germany, Article 18(2), cited in A.V. Freeman "The International Responsibility of States for Denial of Justice" (1938) pp. 491-492.

domestic laws,[164] by contractual stipulation,[165] and has given it constitutional status.[166] A good illustration of the Doctrine in operation is the inclusion of a Calvo clause in contracts made between the Mexican government and foreign investment enterprises. In the North American Dredging Company case,[167] the dispute before the United States-Mexican Claims Commission[168] was whether the United States government had a right to forward a claim against Mexico on behalf of an American corporation for alleged breaches of a dredging contract, in view of a term in that contract which read as follows:

> "The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract ... shall be considered as Mexicans in all matters .... They shall not claim, nor shall they have ... any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favour of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract." (169)

As to the doctrine being included as a constitutional provision, Article 27 of the Mexican Constitution of 1917 states that the acquisition of lands and waters, and the exploitation of mines, waters and combustible minerals present in Mexico are to be reserved only to Mexican nationals, but the Government may grant the same rights to foreigners on the condition that they agree:

> "... to be considered as nationals [of Mexico] in respect to said properties and not to invoke, on account of the

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(164) for example, the Organic Law of Section 1 of Article 27 of the Constitution; the law to promote Mexican investment and regulate foreign investments, Diario Oficial, Mexico, March 9, 1973.

(165) post, note (167)

(166) Article 27 Fraction I, the Mexican Constitution of 1917.

(167) United States (North American Dredging Company) v. United Mexican States Opinions of the Commissioners, I (September 8th, 1923) pp. 21-22.

(168) established under the General Claims Convention of September 8th, 1923; 43 STAT 1730, TS No. 678

(169) ante note (167) at p.22

> same, the protection of their Governments for anything referring to them, under the penalty, in case of breach of the agreement, of losing to the benefit of the nation [that is, a reversion of titles to the Mexican government] the property which they shall have acquired by virtue of the same [agreement]." (170)

It will later be shown how Mexico has reinterpreted the Calvo Doctrine and the clause embodying it in a manner which is more acceptable to those developed nations with foreign investment interests in Mexico such as the United States.

The United States position: The United States has been the main protagonist of the opposition to the validity of the Calvo Doctrine.(171) Its position on the Doctrine, like that of Latin American nations, is tied to its general attitude toward the institution of diplomatic protection. The United States has felt that abolishing the right to intervene diplomatically, without substituting an acceptable alternative, would leave its citizens at the mercy of natice justice, which often does not measure up to what it considers as international minimum standards. This attitude of the United States may best be illustrated by reference to the diplomatic exchange of notes that have dealt with this controversy.(172) For instance, United States Secretary of State, Kellogg, in a communication directed to the Mexican Minister of Foreign Affairs on January 28th, 1926, expressed in detail the United States position:

> "... [in] the past, this Government has frequently notified the Mexican Government that it does not admit that one of its citizens can contract by declaration or otherwise to bind his own government not to invoke its rights under the rules of international law. Under the rules applicable to intercourse between States, an injury done by one State to a citizen of another State through a denial of justice is an injury done to the State whose national is injured. The right of his State to extend what is known as diplomatic protection cannot be waived by the individual. If States by their unilateral acts or citizens by their individual acts were permitted to

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(170) ante, note (166)

(171) P.C. Jessup "A Modern Law of Nations, an Introduction" (1968) p.111.

(172) see 6 Moore "A Digest of International Law" (1906) pp. 293-301.

> modify or withhold the application of the principles of international law, the body of rules established by the custom of nations as legally binding upon states would manifestly be gradually broken down." (173)

However, it should be noted that while the United States considers the Calvo clause to be ineffective as a bar to its diplomatic intervention, its position, as will later be examined, does not regard the clause as superfluous, illegal or futile.

A compromise of conflicts: Mexico, the leader of the Latin American nations in the Calvo Doctrine controversy has, since its early attempts at gaining international recognition of the Doctrine in its broad interpretation, modified its position by accepting two major qualifications. The event of a real denial of justice is now regarded as an exception to the operation of the Calvo clause. Furthermore, Mexico has admitted that the clause, in comtemporary international law, probably does not bind the State of the alien from intervening, but does bind the alien from seeking such intervention. These concessions were admitted in a note by the Mexican Foreign Minister, Saenz, to the United States Secretary of State, Kellogg, on October 7th, 1926. That note read as follows:

> "The Mexican government therefore does not deny that the American Government is at liberty to intervene for its nationals; but that does not stand in the way of carrying out an agreement under which the alien agrees not to be the party asking for the diplomatic protection of his government. In case of infringement of any international duty such as a denial of justice would be, the right of the American government to take with the Mexican government appropriate action to seek atonement for injustice or injury which may have been done to its nationals would stand unimpaired. Under these conditions neither would the American government have failed to protect its nationals nor the Mexican government to comply with its laws." (174)

The United States has responded favourably to this Mexican

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(173) Rights of American citizens in certain oil lands in Mexico, Senate Executive Document No. 96, 69th Congress 1st session (1926) pp. 22-23.

(174) U.S. Department of State, "American Property Rights in Mexico" (Washington DC, 1926) p.14, cited by D.R. Shea, ante, note (161) at p.37.

compromise. The United States Government has not opposed the Calvo clause to the extent of attempting actively to discourage its inclusion in contracts. This is in recognition by the United States of the rights of another Government to prescribe the contractual terms between that Government and aliens; and after those terms in which a certain privilege is denied have been accepted, the United States will not demand the annulment of the disabling provision.(175) More importantly, the United States Department has interpreted the clause narrowly, thereby reconciling it to what the United States considers as the rules of international law, and granting to it a limited degree of validity. In effect, this interpretation accepts the principle that, although the clause does not modify the rights of the State under international law, it does serve to abrogate any rights that are possessed by the individual in the matter. In a memorandum on March 27th, 1908, to the United States President concerning "the American attitude towards the Calvo Clause" Secretary of State Root asserted: "It is true that the claimant company itself waived all rights of diplomatic intervention as far as it was concerned ..."(176) This statement would place the United States in agreement with the contentions of the Mexican Foreign Minister Saenz that under the contemporary rules of international law, the Calvo clause, although not binding upon the State, does bind the individual.(177) The United States position may in addition

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(175) see 6 Moore "Digest of International Law" (1906) p.289, E.M. Borchard ante note (160) at p.796.

(176) see 5 Hackworth "Digest of International Law" (1943) p.636. See statement to the same effect in "correspondence relating to wrongs done to American citizens by the Government of Venezuela", (Senate Executive Document No. 413, 60th Congress, 1st session, 1908) p.116

(177) ante, note (174). The correspondence between the United States and Mexico in relation to Mexican agrarian and petroleum laws of the 1920's has been interpreted by several authorities as having reached agreement on this compromise. See L.M. Summers, ante note (162) at p.471. C.C. Hyde "Concerning attempts by Contract to Restrict Interposition", 21 Am.J.Int'l.Law (1927) pp. 298-301.

be illustrated by the 1961 Harvard Draft Convention on International Responsibility.[178] Article 22(5) of the draft convention states that:

> "(5) No claim under this Convention may be presented by a claimant with respect to any injury ....
>
> (a) if prior to his acquisition of property rights or of a right to exercise a profession or occupation in the territory of the State responsible for the injury, or as a condition of obtaining rights under a contract with, or a concession granted by that State, the alien to whom such rights were accorded agreed to waive such claims as might arise out of a violation by the respondent state of any of the rights thus acquired."

That the individual, as the claimant, has waived his right to petition for diplomatic protection is recognised here. The United States Department of State has gone further to indicate that the existence or non-existence of a Calvo clause will be influential in determining whether or not it will take steps on behalf of the individual.[179] However, this is probably as far as the United States position will advance in accepting the Calvo Doctrine, and in the foreseeable event of Mexico continuing to join the mainstream of Latim American nations in pressing for the recognition of the full and broad interpretation of that doctrine, this controversy is as yet unsettled.

Yet, the compromise thus far arrived at has created ample impetus for the continual growth of United States foreign investments in Mexico. It would be safe to assert that the compromise has, through its continued application over the last

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(178) Draft Convention on the International Responsibility of States for Injuries to Aliens Draft No. 12, April 15th, 1961. Reporters Sohn and Baxter, Harvard Law School, pp. 186-187; 55 Am.J.Int'l.L. (1961) pp. 578-579. With regard to another draft Convention attempting to state the international legal position on the Calvo clause, see Article 10 of the Special Rapporteur Garcie-Amador's draft to the International Law Commission in 1961, "Revised draft on international responsibility of the State for injuries caused in its territory to the person or property of Aliens" UN DOC A/CN 4/34/Add 1. Disagreement on the status of the Calvo Clause, among other issues, contributed to the failure of the ILC to make any progress in the codification of this sphere of international law.

(179) 5 Hackworth "Digest of International Law" (1943), p.637.

fifty years, formed the status quo which will not be lightly shaken. This assertion gains greater significane in view of the fact that the compromise has been the rule of law laid down in the most recent international arbitral decisions involving the validity and effectiveness of the Calvo clause.(180)

Non-intervention: One other point may be stated here in conjunction with the non-intervention concept embodies in the Calvo Doctrine. The United States, under the impetus of the Roosevelt Corollary had frequently adopted a policy of intervention in the politics of Latin American nations. These nations treated such intervention as acts of aggression which infringed their territorial and sovereign rights. The international conferences of American States were the forums during which attempts were made to cause United States acceptance of both the non-intervention and equality principles of the Calvo Doctrine. The preceding discussion on the latter principle has shown that a compromise has been reached, but as to the former, non-intervention, Mexico and the other Latin American nations have achieved complete success in causing the United States to adopt a policy of non-intervention in their domestic affairs.(181) It was only after seven Inter-American Conferences that theUnited States accepted, without qualifications, the Calvo principle of non-intervention. At the international conference of American States at Buenos Aires in 1936, the Non-Intervention Protocol was proposed and signed by all twenty-one delegations including the United States. Article I of that

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(180) the United States (North American Dredging Company of Texas) v. the United Mexican States, ante note (167), the United States (International Fisheries Company) v. The United Mexican States, Docket No. 625, Opinion rendered in July 1931, opinions of Commissioners III, pp. 207-286; Great Britain (Mexican Union Railway Ltd) v. the United Mexican States Decision No. 21, February 1930, Decisions and Opinions of the Commissioners pp. 157-175, Great Britain (Interoceanic Railway of Mexico et al) v. the United Mexican States, Decision No. 53, Further Decisions and Opinions of the Commissioners, pp. 118-135, rendered on June 18th, 1931, Great Britain (Veracruz Railway Ltd) v. United Mexican States decided on July 7th, 1931, ibid pp. 207-211; Italy (Ornato Pitol) v. the United Mexican States, Decision No 107 (unpublished), cited by D.R. Shea, ante note (161) at pp. 254-255

(181) for an elaborate survey of the non-intervention principle before the Inter-American Conferences, see D.R. Shea, ante note (161) at pp. 64-72.

Protocol reads:

> "The High Contracting Parties declare inadmissible the intervention of any of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any of the other parties.
> The violation of the provisions of this Article shall give rise to mutual consultation with the object of exchanging views and seeking methods of peaceful adjustment." (182)

The importance placed on this principle as essential to fostering friendly intra-American relations is seen by its inclusion in the Charter of the Organisation of American States.(183) Article 15 of Chapter III of the Charter provides that:

> "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements."

The language used in this Article is stronger than what appears in the Non-Intervention Protocal 1936. It applies to actions of a "group of States" as well as of one State, and it contains the additional phrase forbidding "any other form of interference" or threats against a State, all of which would appear to have firmly entrenched the non-intervention principle as interpreted and recognised by the Latin American nations. This unreserved acceptance by the United States of that principle has had the following result:

> "The reorientation of the United States foreign policy toward the American republics has undoubtedly paid

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(182) Inter-American Juridical Yearbook (1950-1951) p. 166. The United States ratified on July 15th, 1937, 51 US STAT L.41(1937). This principle was reaffirmed at Lima by the Eighth International Conference of American States in a resolution adopted on December 24th, 1938 (Resolution CX, the International Conferences of American States, 1st supplement, pp. 309-310). It was again reaffirmed in Resolution XCV (The Declaration of Caracas) of the Tenth International Conference of American States (1954).

(183) signed at the Ninth International Conference of American States at Bogota in 1948. The International Conferences of American States, Second supplement, pp. 331-348, ZUST 2394, 119 UNTS 3.

> rich dividends in the advancement of the economic and security interests of the Western Hemisphere. Even more important ... the Good Neighbour Policy [of the United States] has resulted in the acceptance of one of the cardinal Calvo principles, non-intervention, as perhaps the basic principle governing international relations in the Americas." (184)

On hindsight, it may be observed that it was in the United States national interest to have adopted a policy of non-intervention. Intervention frequently leaves few positive effects, as was recently seen in the case of Vietnam.(185) With regard to Mexico, history has shown that United States withdrawal of military intervention permitted Mexico "to gain its own experience with success and mistakes that would eventually make it into one of the most stable nations in Latin America."(186) A politically stable nation enhances its economic development. This in turn ensures the proper utilisation of that nation's natural resources, its participation in the international economic sphere as both contributor and marketer, and has the overall effect of encouraging goodwill, cooperation and peace within the community of nations.

Mexico's Economic policy: from expropriation to fostering foreign investment.

A study of Mexican economic policy as reflected in its laws governing foreign investment cannot ignore the importance of historical context in which that policy has developed. Mexico affords an excellent example of the thesis that many provisions found in legal systems are "clear manifestations of attempts to deal with given historical situations."(187) The history of

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(184) Dr Shea, ante, note (161) at p.70.

(185) see R.A. Falk "International Law and the United States Role in the Vietnam War" 75 Yale L.J. (1966) 1085; C.F. Murphy jr. "Vietnam: a study of law and politics", 36 Fordham Law Review (1968), 453.

(186) J.W. Wilkie in "Recent Developments in Mexico and their Economic implications for the United States", Hearings before the sub-committee on Inter-American Economic Relationships of the Joint Economic Committee, 95th Congress 1st session (1977) 17 and 24 1977, p.9 (hereinafter cited as "Hearings").

(187) R. Batiza, "Current Attitudes on Mexico's Treatment of the Foreign Enterprise", 17 Rutgers Law Review (1963), 365 at p.366.

Mexican economic development is filled with incidents of foreign exploitation. After the establishment of the Mexican republic in 1957, foreign investment capital flowed into Mexico in increasingly large amounts. During the dictatorship of President Diaz, which was ended by the 1910 Revolution, such investment increased at an even greater rate.(188) Although many factors led to the Revolution, resentment against foreign exploitation of economic resources and foreign control of much of the nation's land must be rated as prime causal factors. This is evidenced in the Articles of the Mexican Constitution of 1917.(189) The deep impression rooted in the Mexican consciousness by the history of foreign exploitation is of great importance to any study of the present-day investment situation. Other influencing factors include nationalism and the effect of special pressure groups. One analyst has succinctly pointed out that whatever reasons for Mexico's attitude towards foreign investment are suggested, they "represent only partial aspects of a more complex situation - the painful historical process of a country moving in the direction of becoming a fully integrated nation."(190) This movement will now be traced to show that out of the pain and confusion is emerging an increasing awareness by Mexico that in the concepts of interdependence and cooperation are embedded the key to economic, social and political progress and development.

Mexican expropriations: Mexico's early attempts at nationalisation of farmlands, railroads, telecommunications and petroleum properties caused much friction with the United States. The United States Government insisted that these were not acts of expropriation but of confiscation as they were done arbitrarily and without "adequate, effective and prompt" compensation.(191)

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(188) Vernon, "The Dilemma of Mexico's Development" (1963) p.42-43.

(189) ante p.45.

(190) R. Batiza, ante note (187) at p.370. For a concise work on the process of Mexican developments see Vernon, ante, note (188)

(191) see exchange of notes between the United States Secretary of State and the Mexican Minister of Foreign Affairs and Mexican Ambassador to the United States (1938-1940), 3 Hackworth "Digest of International Law" pp. 656-665.

The United States claimed that payment of such compensation was an internationally established legal prerequisite for a valid act of expropriation. Mexico had an opposing view, namely that there was "in international law no rule universally accepted in theory nor carried out in practice, which [made] obligatory the payment of immediate compensation nor even of deferred compensation for expropriations of a general and impersonal character."(192)

While a diplomatic exchange of notes was still in the process of determining whether Mexico was liable to compensate for certain American-owned agrarian properties expropriated subsequent to August, 1927, a Mexican Presidential Decree was issued which took over certain foreign-owned oil properties on behalf of the Mexican Government.(193) The United States regarded the Decree as an arbitrary act of the Mexican President, the oil properties having been seized without an order from the Courts and without any indemnification having been offered. These two requirements were alleged to be derived from the international law principles of denial of justice and the payment of a full and prompt compensation in the event of a seizure of foreign-owned property.(194) The United States furthermore claimed that the domestic laws of Mexico subscribed to these requirements and the expropriations were in breach of those laws.

It would be appropriate here to highlight some of these Mexican domestic laws on expropriation. Article 27 of the Mexican Constitution states that "private property shall not be expropriated except for reasons of public utility and by means of

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(192) Note of August 3rd, 1938 by Mexican Minister of Foreign Affairs. Hackworth, ibid, p.657.

(193) Diario Oficial Mexico, March 18th, 1938. For a detail of the events leading up to the Decree, see L.H. Woolsey "The expropriation of Oil Properties by Mexico", 32 Am.J.Int'l.L. (1938), 519.

(194) Hackworth, ante note (191) at pp. 661-665.

indemnification".(195) That Article further provides that "the amount fixed as compensation for the expropriated property shall be based on the sum at which the said property shall be valued for fiscal purposes in the catastral or revenue offices [and] ... the increased value which the property in question may have acquired through improvements ... shall be ... subject to expert opinion and judicial determination." Article 14 provides that no one shall be deprived of his property without due process of law before a duly created Court and in conformity with previously existing laws;(196) and Article 22 declares that the confiscation of property is prohibited. The Mexican Expropriation Law of 1936(197) provides some indication of what constitutes "indemnification". Under its provisions, the amount of the indemnity will be "covered" by the State as soon as title to the property expropriated has passed to the State.(198) As to the time of payment, the State authority expropriating will fix "the form and periods of time in which the indemnity must be paid, which shall never embrace a period greater than ten years."(199)

In his reply of May 1st, 1940, to the United States Secretary of State, the Mexican Minister of Foreign Affairs re-emphasized his nation's position that there did not exist in international

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(195) ante note (166). The phrase "by means of indemnification" replaced the words "indemnification having been made" in the Mexican Constitution of 1856. The intention of the framers was to modify the 1856 rule of prior indemnification. cf. Expropriation Law of Venezuela 1936 which provides for "previous payment in cash, money, of the price which represents the indemnity" cited by H.P. Crawford. "Expropriation of Petroleum Companies in Mexico" 12 Tulane Law Review, 495 at p.499. The Mexican Expropriation Law 1936, post note (197), and the Presidential Decree of 1938 contemplate instalment payments in support of Article 27 of the Mexican Constitution.

(196) Article 14: "No one may be deprived of life, liberty, or his properties, possessions, or rights except by means of proceedings followed before tribunals previously established in which may be fulfilled the essential formalities of procedure and in conformity with laws passed prior to the Act."

(197) Diario Oficial, Mexico, November 25th, 1936.

(198) ibid. Article 19

(199) ibid. Article 20

obligation to provide for adequate compensation for expropriations. However an obligation to indemnify was created in its own domestic laws which Mexico intended to comply with. The relevant part of that reply is as follows:

> "Your Excellency's Government insists, as on other occasions, in maintaining the opinion that to expropriate without a just and prompt compensation, is confiscation, and does not cease to be so because there may be the express desire to pay at some time in the future. Mexico considers that it is not in such a situation since it not only has manifested its desire to pay, but also has expressed unequivocally its readiness to do so, having done everything that it should in accordance with its own laws, in order that ultimately, the total amount may be fixed that is to be paid." (200)

As a consequence of this exchange of notes, the two Governments agreed that each would appoint "... an expert whose duty it shall be to determine the just compensation to be paid the nationals of the United States of American whose properties rights or interests in the petroleum industry in the United Mexican States were affected to their detriment by acts of the Government of Mexico subsequent to March 17th 1938."(201) It was stipulated that if the experts were "in accord" regarding the amount of compensation due, a joint report fixing the indemnities would be submitted to the two Governments,(202) which would regard the recommendations in the joint report as unappealable.(203) Since then, Mexico has fulfilled its part of the agreement and paid the large sum stipulated by the joint report of experts in full and final settlement of the claims of American owned petroleum companies.(204) Similarly, the Mexican Government has complied with the payments of indemnification for its agrarian expropriation as determined by a Commission

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(200) Hackworth, ante, note (191) at p.664.

(201) Exchange of notes signed on November 19th, 1941. US EAS 234, 55 STAT 1554, at p.1558.

(202) ibid, paragraph (11)

(203) ibid, paragraph (12)

(204) EAS 419, pp. 1-5. US Department of State File 212 1141/8-2857 cited in 8 Whiteman "Digest of International Law" p.1103.

set up under the agreement of November 9th, 1938 between the two nations.(205) As recently as 1967, by an exchange of notes, Mexico proposed and the United States accepted a monetary sum for the taking of certain American-owned lands under a Mexican Presidential Decree of 1961.(206) Payment was made in instalments over a period of one year.(207)

It is therefore seen that the controversies posed by various Mexican expropriations of American owned properties have been amicably settled through diplomatic channels. Mexico, in "knowing how to honour its obligations of today and its obligations of yesterday"(208) has had to pay large indemnifications which have been a financial strain in its efforts at development. The existence of domestic laws preventing the arbitrary taking of property, the respect shown to those laws by the Mexican government, plus the payment of indemnifications for previous expropriations, all indicate the political stability existing in Mexico. Also revealed is the Mexican awareness that its future development is largely dependent upon foreign investment and has therefore set itself the task of creating a favourable investment climate.

It will be noted that Mexico still maintains its position that the question of compensation for acts of expropriation lie within the domain of its domestic jurisdiction. Steps taken by Mexico to encourage a world-wide acceptance of this position will be discussed subsequently in the context of the UN Charter of Economic Rights and Duties of States.

Mexican Foreign Investment laws: Although Article 27 of the 1917 Constitution reasserted Mexico's traditional monopoly of

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(205) MS Department of State File 812 52/2939A/3025/3126A/3203/3209/3492B/3496 cited in Hackworth ante, note (191) at p.661

(206) Diario Oficial, Mexico, July 19th 1961

(207) MS Department of State File PS 8-4, US-Mexico/Real Estate Company of Mexico, cited in Whiteman, ante, note (204) at p.1105.

(208) note of March 31st, 1931 by the Mexican President to the US Ambassador to Mexico, Hackworth ante, note (191) at p.661.

land and sub-soil ownership rights,[209] nothing more than symbolic protests were made against the domination of Mexican resources by foreigners until the Presidential Decree effecting oil expropriation in 1938. The successful nationalisation of petroleum had the effect of establishing that foreign investors indeed were to be subject to Mexican law.

During the second world war, there was a great influx into Mexico of foreign capital which came from nations that had placed restrictions on venture capital and from refugees of the war in Europe.[210] The net effect of this new investment was beneficial to the Mexican economy,[211] but the Mexican government feared that such "swallow capital" might reap its profits and then leave once the instability caused by the war was over, thereby plunging Mexico into a state of depression and economic chaos. In order to prevent any such occurrence on a large scale and to channel excess capital into new and stable productive sources which would aid both the economy of the nation and the war effort, the Mexican Government enacted the general emergency measures embodied in the Emergency Decree of 1944.[212] The Decree provided that foreign companies, and Mexican enterprises with foreign participation, had to obtain permits from the Ministry of Foreign Relations before entering into specified activities. Hence, such permission was necessary to acquire ownership or a controlling interest in companies which were involved in the industrial, agricultural, forestry or real estate fields; to acquire real estate for any purpose; and to obtain concessions for mines, waters or mineral fuels.[213]

The Ministry of Foreign Relations was given wide discretionary powers to grant or deny permits. The granting of permits might be conditioned upon the requirements that Mexican citizens held

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(209) ante, note (166)

(210) Brandenburg, "The Making of Modern Mexico" (1964) pp. 99-102.

(211) ibid, at p.267

(212) Decree of June 29, 1944. Diario Oficial, Mexico, June 29, 1944. This Decree was made pursuant to powers granted under the suspension of Guarantees Decree, Diario Oficial, Mexico, June 1st, 1942.

(213) ibid, Article 1.

at least 51% of the corporate capital and formed the majority of partners or shareholders in charge of the company administration. The Ministry could dispense with these conditions when the company in question was organised to establish industrial operations in a new and necessary field of the economy.(214) The Decree provided that any act performed in violation of its provisions was null, and the property affected by the transaction passed to the Mexican Government upon institution by the Office of the Attorney General of a suit for a declaration of nationalisation of the property.(215)

A state of confusion prevailed in post-war Mexico with respect to the laws governing foreign investment and the application of those laws. This confusion appears to have been the result of two factors: the first was the absence of any unified governmental policy with regard to foreign investment and the consequent lack of any organised body of laws governing the subject; and secondly, confusion naturally followed from the extreme discretionary powers granted to such organs at the Ministry of Foreign Relations. Under such conditions "the private sector operat[ed] in a milieu in which the public sector [was] in a position to make or break any private firm."(216) Discretionary administration of Mexican economic laws resulted in discriminatory standards accompanied by a lack of predictability and uniformity of treatment.(217)

Recent Mexican economic legislation have remained consistent with the governmental policy on foreign investment as expressed in the Mexican Constitution, the Emergency Decree of 1944 and other subsidiary regulations. That policy may be summarised as follows:

> "Foreign private investment is well received when it does not displace Mexican capital, when it associates on a minority basis with local investors, devotes itself to increasing the country's productivity, and

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(214) ibid, Article 3

(215) ibid, Article 5

(216) Vernon, ante note (188) at pp. 26-32.

(217) ibid

does not attempt to obtain privileges or preference." (218)

The Law to Promote Mexican Investment and Regulate Foreign Investment of 1973[219] has retained the above policy.[220] However, its provisions reveal a marked difference from those of the Emergency Decree of 1944 in relation to the methods adopted to accomplish the goals underlying that policy. Under the 1973 law, the powers of the Ministry of Foreign Relations over foreign investment have been transferred to a new organ called the National Commission on Foreign Investment. This Commission together with another newly created body, the National Registry of Foreign Investment, have, by their structure and specific procedural content eliminated the previous practices of inconsistency and arbitrariness that had been a major concern to foreign investors.[221] The new legislation furthermore provides for flexibility so that in in certain cases, foreign investment may be allowed on a majority or total basis.[222] Failure to comply with the provisions of the 1973 Law results in such sanctions as the denial of the contravening company to pay dividends,[223] and fines[224] but not with forfeiture of properties as was provided for in the previous laws.[225]

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(218) Banco National de Comercio Exterior, Mexico (1963) 288, cited by E.C. Epstein in "Introduction to recent developments in Mexican Law: politics of modern nationalism" 4 Denver J. Int'l.L. and Policy, 1 at p.4. See also F.R. Miranda, "Foreign Investment and Operation in Mexico", 2 Arizona Law Review (1960) 187, at pp. 210-211.

(219) Diario Oficial Mexico, March 9, 1973 (hereinafter cited as "the Foreign Establishment Law" or "1973 Law")

(220) Articles 4 and 5, for example, maintain the pre-existing classification of various activities in which foreign investment is either totally prohibited or limited. The general principle that foreign investment should limit its participation in the capital of Mexican enterprises to 49% is also restated.

(221) see effect of 1973 Law in E.C. Epstein, ante note (218) at pp. 4-5; 7-9; A.A. Vizcaino, "The Law on Foreign Investment", 7 Virginia J. of Int'l.L & Comp.L. (1977), 33.

(222) for example, companies engaged in bond operations, or established in certain specific geographic areas which are engaged principally in export activities. The latter example would be those companies involved in Mexico's border industrialisation programme. See post pp.

(223) 1973 Law, ante note (219), Article 27.

(224) ibid, Articles 28, 29 and 31.

(225) for example, the Emergency Decree of 1944, Article 5; ante, note (215)

Closely linked with the 1973 Law is the Mexican Law of Technology Transfer of 1972.(226) The 1972 Law is aimed at controlling the importation of costly technology which may not make any major contribution to Mexican economy and technological advancement.(227) A National Registry for Transfer of Technology has been created to cause the registration and evaluation of prospective technology-transfer contracts. The criteria for rejection of these contracts are specifically laid down in the Law,(228) and there is furthermore provision for review of the Registry's determinations on such contracts.(229)

The aim of increasing Mexican enterprise without cutting off the flow of foreign capital and technology is therefore reflected in the objectives and policies underlying the recent laws on foreign investment and transfer of technology. These recent legislation represent an intermediate position between two extremes of opinion towards foreign investment currently existing in Mexico.(230) The first, in regarding such investments as tools for the colonisation of Mexican economy, proposes their complete exclusion by tariff restrictions. The opposite extreme encourages unlimited foreign investments for the reason that Mexican national capital will thereby be reinforced. The present position taken by Mexico considers both the need for nationalisation and for foreign technology. In so doing, Mexico has set itself as an example for other developing nations to follow in their treatment of foreign investment. It is conceded that the Mexican experience has not established either international law standards or international machinery which

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(226) Law for the Registration of the Transfer of Technology and the Use and Exploitation of Patents and Trademarks, Diario Oficial, Mexico, December 30th, 1972 (hereinafter cited as "the 1973 Law")

(227) for the operation and content of the 1973 Law, see E.C. Epstein, ante note (218) at pp. 5-7; J.A. Soberanis, "Legal Aspects concerning the Technology Transfer Process in Mexico", 7 Virginia J.Int'l. and Comp.L. (1977), 17.

(228) 1972 Law, ante note (226), Article 7.

(229) ibid, Article 14

(230) R. Batiza, ante note (187) at pp. 365-366

might set common rules for foreign enterprises. However, certain features in Mexico's treatment of such enterprises support the proposition that any present-day process of nationalism cannot totally exclude the element of inter-dependency with other nations. The "Mexicanisation" of foreign investment has been both gradual and consistent; present Mexican legislation governing such investment is specific, clear and flexible; and foreign capital and management have been combined with their Mexican equivalents which has been regarded as an economically advantageous move. These are features which have fostered economic cooperation between Mexico and the nations, particularly the United States,[231] which have invested there.

The United States Encouragement of Mexico's Economic Development

There is perhaps no clearer evidence of the response to the call for interdependence and cooperation between nations than the United States economic policy of providing aid in the form of grants, loans and the lifting of its tariff barriers in favour of developing nations such as Mexico. Only some of the numerous United States legislation and policy statements providing foreign assistance to less developed nations will be stated here.[232]

The United States policy of providing grants or loans to sponsor nations in their initial attempts at self-development is embodied in the Foreign Assistance Act of 1961.[233] By that Act, the Development Loan Fund was established.[234] The United States President was authorised to use the Fund to make loans on such terms and conditions as he might determine "in order to promote the economic development

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(231) United States direct investments in Mexico doubled in the 1970s from $1.2 billion in 1970 to $2.4 billion in 1975, reflecting the confidence of the American investors, despite the widely recognised difficulties of the period. C.W. Reynolds, Hearings, ante note (186) at p.55.

(232) for a fuller treatment of United States foreign assistance programmes, see 14 Whiteman, "Digest of International Law" (1970) at pp. 879-928.

(233) Public Law 92-226, 22 USC paragraphs 2151 et seq.

(234) ibid, s.201(a).

of less developed friendly countries and areas, with emphasis upon assisting long-range plans and programmes designed to develop economic resources and increase productive capabilities".(235) Mexico was a recipient of economic assistance under the provisions of this Act until 1970 when it was considered to have been sufficiently developed so as not to warrant a furtherance of such assistance.(236)

The United States has also consistently encouraged its private enterprise sector to invest in the less developed nations. It may be noted that the Foreign Assistance Act of 1961 was the result of a legislative proposal for "an Act for International Development" or, in its abbreviated form "AID".(237) There appears in Section 102, one of the main purposes of the 1961 Act, namely that:

> "It is the policy of the United States to strengthen friendly foreign countries by encouraging the development of their free economic institutions and productive capabilities, and by minimising or eliminating barriers to the flow of [United States] private investment capital."

Part III of the Act effectuates the above purpose by establishing a system of United States government guarantees of private investments which are connected with the development programmes in certain less developed nations. The Foreign Assistance Act of 1969(238) enhanced this guarantee-system by creating the Overseas Private Investment Corporation which uses government funds as its capital. The Corporation is authorised to issue investment insurance and investment guarantees, to make direct loans "to firms privately owned or of mixed private and public ownership upon such terms and conditions as the Corporation may

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(235) ibid, s.201(b)

(236) Secretary of State, Rogers, "Hearings before the Senate Committee on Foreign Relations in 1969 on Foreign Assistance", 91st Congress 1st session, pp. 43-46

(237) H.R. 7372

(238) Public Law 91-175, December 30th, 1969, 83 STAT 805

determine", and to encourage "the identification, assessment, surveying and promotion of private investment opportunities, utilising wherever feasible and effective the facilities of private organisations or private investors."(239)

With regard to the lifting of United States tariff barriers in favour of imports from developing nations, one notes that the United States adopted Resolution XXI (ii) of the Second Session of the UN Conference on Trade and Development in 1968(240) which recognises "the unanimous agreement in favour of the early establishment of a mutually acceptable system of generalised non-reciprocal and non-discriminatory preferences which would be beneficial to the developing countries."

For its part, the United States has expressed its intention to seek a modification of its most-favoured-nation trade policy.(241) In January, 1970, Deputy Under-Secretary for Economic Affairs, Samuels announced that:

> "... [the United States President] has decided to seek a system of generalised tariff preferences applicable to all less developed countries, a system to be adopted by all industrialised nations in which there would be broad product coverage, no ceilings on preferential imports, and equal access to industrial markets for all developing countries. [There] would in effect [be] a two-tier most-favoured-nation policy, one applicable to more developed countries and another applicable to less developed countries." (242)

The above intention has since been clothed in the domestic

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(239) ibid, Title 4, s.235

(240) Resolution XXI (II) March 26th, 1968, UN Conference on Trade and Development, 2nd Session, Report and Annexed, Volume I, p.38

(241) for a detailed outline of this policy, see 14 Whiteman "Digest of International Law" pp. 751-782

(242) 62 Department of State Bulletin (1970) pp. 181-182. The developed nations are in the process of examining in detail several of the numerous technical problems involved in such a programme of generalised preference in an Ad Hoc Working Group on Preferences of the Trade Committee of the Organisation for Economic Cooperation and Development. (OECD)

laws of the United States, in particular, in the Trade Act of 1974.(243). The main purposes of this Act are, through trade agreements affording mutual benefits,

> "(1) to foster the economic growth of and full employment in the United States and to strengthen economic relations between the United States and foreign countreis through open and non-discriminatory world trade, (244) and
>
> (2) to provide fair and reasonable access to products of less developed countries in the United States market." (245)

The 1974 Act vests the United States President with authority to enter into trade agreements with other nations so as to remove undue burdens or restrictions occurring in the foreign trade of the United States. In order to achieve such trade agreements, the President is given power to modify or discontinue any existing United States duties or other non-tariff barriers.(246) It is clearly specified that a United States negotiating objective "shall be to enter into trade agreements which promote the economic growth of both developing countries and the United States, and the mutual expansion of market opportunities."(247) Following from the 1974 Act, one such trade agreement has already been negotiated with Mexico concerning the tariffs for certain textile raw materials.(248)

The United States is aware that its policy of foreign assistance may be misinterpreted; this is succinctly elaborated in the answer given by one American authority to the question of where the development of under-developed nations would lead:

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(243) Public Law 93-618, 19 USC 2101 (hereinafter cited as "the 1974 Act")

(244) ibid, s.2(1)

(245) ibid, s.2(6)

(246) ibid, ss. 101 and 102

(247) ibid, s.106

(248) Agreement relating to trade in cotton, wool and man-made fibre textiles. Exchange of notes at Washington D.C. May 12th, 1975. 26 UST 910, TIAS 8079

> "It could lead to the feeling on the part of such States and their citizens that the aiders are exploiters, colonialists or imperialists in the worst possible sense.(249) The free world states could do better in preventing such a result by pointing out more clearly the need at times for strong States to assist their less developed neighbours for their mutual benefits, and also in pointing out the nonsense behind the description of economic development agreements as devices of imperialists." (250)

The United States, as observed in its domestic legislation, has set about to create an economic partnership with under-developed nations like Mexico. The result of such a policy is evidently a mutually beneficial one. The advantages accruing to Mexico are obvious. For the United States, economically stable neighbouring nations not only spell markets for United States exports but has the general effect of promoting a climate of world peace, the development of which is presently hampered by the disparity of wealth among nations.

Mexico's Border Industrial Programme and the United States participation

The prevailing spirit of cooperation between the United States and Mexico in the economic sphere may specifically be shown in a study of an important economic phenomenon that has recently developed in the international border region, namely, the "Programa Fronteriza de Industria" or Mexico's Border Industrial Programme.(251) This programme provides for a unique combination of factors of production between the two nations. Essentially, it allows for a duty-free importation of component parts into Mexico where

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(249) this view is taken by the first extreme position adopted by some Mexicans concerning foreign investments, see ante, p.61

(250) G.W. Ray Jr. "Economic Development as a Hard Core of Foreign Policy: an American View", ICLQ Supplement No. 3 (1962). "The encouragement and protection of investment in developing countries", 50, at p.57.

(251) Border Programme, codified under specific law by Article 321, paragraph (3) of the Customs Code of Mexico.

they are assembled by the abundant labour supply in Mexico and then exported back to the United States with a duty charged on the value added on in Mexico. The Border Industrial Programme was initiated to ease the high unemployment rate existing in Mexico's northern boundary region in the 1960's. This large unemployed population owed its origin to the migration to the border cities as a result of the transition of the Mexican economy from a predominantly agrarian to an industrialised one.(252) Another cause for the northward migration was the hope of enlisting in the Bracero programme which allowed Mexican farm labour to enter the United States on temporary permits.(253)

The drafters of the Mexican Constitution of 1917 embodied in its Articles the then prevailing fear in Mexico of the colonisation of its northern territories by the United States. As a safety measure in line with a policy of self defence, Article 27 of the constitution prohibits:

> "The acquisition by foreigners, including foreign companies, of title to land or bodies of water within the so-called prohibited zone - that is, within 100 kilometers of the land borders or 50 kilometers of the seacoast." (254)

The current Programme, by its very locality and nature, shows the evolution from this Mexican fear of military confrontation with the United States over its border region,

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(252) M.E. Bulson, Comment "Mexico's Border Industrial Program: Legal Guidelines for the Foreign Investor" 4 Denver J.Int'l.L. and Policy (1974), 89.

(253) Ibid, at p.90. The Bracero Programme was started in 1942 due to the increased need for labour in the United States during World War II. The United States negotiated agreements with Mexico to import farmworkers. Treaties or agreements with Mexico concerning Agricultural Workers include April 26th, 1943, 57 STAT 1152, EAS No. 351; April 29th, 1943, 57 STAT 1353, EAS No. 376; March 10th, 1947 61 STAT 4097, TS No. 1857; March 10th, 1947, 61 STAT 4106, TS No. 1858; March 25th, 1947, 61 STAT 3738, TS No. 1710; August 1st, 1949, 2 UST 1048, TIAS 2260; August 19th, 1949, 2 UST 1089, TIAS 2260; October 13th, 1949, 2 UST 1130, TIAS 2260; August 11th, 1951, 2 UST 1940, TIAS 2331; May 19th, 1952, 3 UST 4341, TIAS 2586. Under these agreements, Mexican agricultural workers were brought into the United States at United States expense, certain minimum wages and standards of living were specified, and a maximum of six months stay was granted to such workers. For the relationship of the Bracero programme to United Stated immigration laws, see S.L. Green, "Immigration Law and Rural Poverty: the problems of the illegal entrant" Dulce Law Journal (1960) 475, pp. 476-482.

(254) ante, note (166)

to an attitude of mutual cooperation in the economic development of that region. Realising that foreign enterprises need land to operate on, the Mexican Government has made certain acquisition methods available. Land within the prohibited zone may be leased by, or may be held in trust for the benefit of a foreign enterprise.(255)

The Mexican encouragement of foreign investment participation in the Programme is best evinced by an exemption from the most important provision of the Foreign Investment Law of 1973, namely, the requirement of a majority capital holding by Mexicans. By a resolution of the National Commission of Foreign Investments, "such enterprises [in the Border Programme] can constitute themselves and operate even with 100% of foreign capital".(256) Furthermore, in view of the complicated registration procedures, the Mexican Government has set up quasi-official committees situated at border cities to "assist potential investors to forward the proper applications for permits and to submit along with the firm's papers an opinion based on the information rendered by the applying firms as to the firm's suitability in regard to the purposes of the programme."(257)

The Border Programme is provided with various tariff incentives by both nations. Section 807 of the United States Tariff Schedules limits the duty upon the full value of the imported products, less the value of the United States fabricated components contained therein to imported items assembled in foreign enterprises with fabricated components that have been manufactured in the United States.(258) A similar section allows for the same treatment of metal component parts to be assembled outside the United States.(259) It has been noted that

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(255) M.E. Bulson, ante note (252) at p.98

(256) National Commission on Foreign Investment, Resolution No. 1 published on 7th November, 1973, cited by H.A. Inman & L.A.O. Tirado, "A Mexican Dividend: Las Maquiladoras", 9 Int. Lawyer (1975) 431 at p.438.

(257) M.E. Bulson, ante, note (252) at p.97

(258) 19 USC 807.00 (1963)

(259) 19 USC 806.30 (1963)

the Trade Act of 1974 (US) envisages giving trade preferences to a developing country like Mexico.(260) No Mexican import or export duty is imposed on the products made under the Programme although there is a 4% sales tax on any Mexican component in the goods assembled.(261) The Mexican government is currently contemplating the repeal of this sales tax and the issuing of tax rebate certificates to further encourage the development of the Programme.(262)

Most of the industrial plants under the Programme are United States-owned and many American companies have established sister-plants on the American side of the border to complement their operations. The Mexican Border Industrial Programme may therefore be accredited with the following achievements: it has provided employment to the large populations congregating on both sides of the border; it has enabled certain American products to complete against similar low-cost foreign imports by the use of inexpensive but high quality Mexican labour; it has featured as an important part of Mexico's plan for economic development;(263) and most importantly, it has added to the growing spirit of mutual cooperation between the United States and Mexico as evidenced throughout this short study on the border programme.

Industrialisation and population concentration in the border region will be the cause of a future problem affecting both the United States and Mexico. This is the environmental issue of air-pollution which traverses geographical or political boundaries. Already, there exists a joint air-pollution monitoring programme in the US-Mexican twin cities of El Paso-Ciudad Juarez set up to study the environmental aspects involved and to provide appropriate

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(260) ante, note (243)

(261) H.A. Inman and L.A.O. Tirado, ante, note (256) at p.432

(262) ibid, at p.440

(263) It was estimated that for 1974, the value added to the programme in Mexico reached $450 million, and the United States component value was $550 million. See ibid, at p.439

preventative measures.(264) The Governments of both nations have unilaterally enacted legislation for environmental protection(265) which show their awareness of this pending problem. However, joint cooperation is necessary to provide for truly effective measures to check and prevent air pollution, and a bilateral agreement between the two nations has been suggested.(266) Here again, the IBWC, with extended powers, may provide the ideal forum for the settlement of future air-pollution disputes, as it has done so successfully with the boundary and salinity issues.

United States-Mexican Economic Policities at the Multilateral Level

United States-Mexican economic cooperation extends into the multilateral sphere. Firstly, it is proposed to lay down some aspects of the functions and structure of the inter-American Economic and Social Council (IA-ECOSOC), which, as its title suggests, is the chief multilateral organ involved with carrying out the common economic and social aims of the Western Hemispheric nations. Secondly, a view will be expressed that even the controversial UN Charter of Economic Rights and Duties of States may be regarded as evidence of the emerging trend of economic cooperation between the developed and developing nations.

The Inter-American Economic and Social Council: The United States and Mexico are members of the Organisation of American States (OAS) which aims are embodied in its Charter of April 30th, 1948.(267) Article 2 in part reads that:

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(264) This programme was developed in conjunction with the Health Departments of the two cities in collaboration with the Field Office (US-Mexico Border) of the Pan American Health Organisation and the WHO. See G.H. Davila, "Air Pollution control on the US-Mexico Border: International Considerations" 12 Natural Resources Journal (1972) 545, at p.547.

(265) See B. Enriquez, "International Legal Implications of Industrial Development along the US-Medican Border", 12 Natural Resources Journal (1972) 566, at pp. 574-575.

(266) B. Enriquez, ibid, at pp. 575-576; G.H. Davila, ante note (264) at pp. 548-549.

(267) ante, note (183)

"The Organisation of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes ...

(d) to seek the solution of political, juridical and economic problems that may arise among them, and

(e) to promote, by cooperative action, their economic, social and cultural development."

In order to achieve these aims, the Charter established the IA-ECOSOC as an Organ of the OAS Council.(268)

The Protocol of Amendment to the Charter(269) sets down the purpose of the IA-ECOSOC as the promotion of "cooperation among the American countries in order to attain accelerated economic and social development."(270) For the purpose of achieving its aims, the IA-ECOSOC is authorised to:(271)

(a) recommend programmes and courses of action and periodically study and evaluate the efforts undertaken by Member States;

(b) promote and coordinate all economic and social activities of the Organisation;

(c) coordinate its activities with those of the other councils of the Organisation;

(d) establish cooperative relations with the corresponding organs of theUnited Nations and with other national and international agencies, especially with regard to coordination of inter-American technical assistance programmes, and

(e) promote the solution of the cases contemplated in Article 35 of the Charter, establishing the

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(268) ibid, Article 57. The IA-ECOSOC was created earlier at the 8th Inter-American Conference by Resolution IX para (7). Final Act of the Inter-American Conference on Problems of War and Peace, Mexico City, February to March 1945, res. XI at p.46

(269) Signed at Buenos Aires on February 27th, 1967; entered into force on February 27th 1970; TIAS No. 6847.

(270) ibid, Article 94

(271) ibid, Article 95

appropriate procedure." (272)

The IA-ECOSOC is the forum through which inter-American social and economic cooperation is carried out. Thus, it was the work of a specialised committee of the IA-ECOSOC which facilitated the conclusion of an agreement establishing the Inter-American Development Bank (IDB).(273) The agreement designated the IDB the following functions: to promote the investment of public and private capital for development purposes; to utilise its own capital funds raised by it in financial markets and other available resources for financing the development of the member countries, giving priority to those loans and guarantees that will contribute most effectively to their economic growth; and to cooperate with the member nations to orient their development policies toward a better utilisation of their resources, in a manner consistent with the objectives of making their economies more complementary and of fostering the orderly growth of their foreign trade.(274)

It was also at a special meeting of the IA-ECOSOC that the Charter of Punta del Este which formally established the Alliance for Progress was adopted.(275) This was the result of the United States initiative a few months earlier when President Kennedy called upon the nations in the Western Hemisphere to create such an Alliance which he described as:

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(272) Article 35 of the OAS Charter, as amended by the Protocol of 1967 reads: "The member States agree to join together in seeking a solution to urgent or critical problems that may arise whenever the economic development or stability of any member State is seriously affected by conditions that cannot be remedied through the efforts of that State."

(273) Agreement Establishing the Inter-American Development Bank, April 8th, 1959. TIAS No. 437; 10 UST 3029, 389 UNTS 69, 74.

(274) ibid, section 2. For an elaborate study of the IDB, its structure and its achievements, see "The Inter-American System" Inter-American Institute of International Legal Studies (1966) pp. 230-233; 14 Whiteman "Digest of International Law" at pp. 1032-1039. Through United States initiative, an agreement was made on June 19th, 1961 between the United States and the IDB for the establishment of a Social Progress Fund to assist the Latin American nations in their social and economic development. See TIAS No 4763; 12 UST 632; 410 UNTS 33.

(275) "The Inter-American System" ibid, at Appendix 18.

> "A vast cooperative effort, unparalleled in magnitude and nobility of purpose, to satisfy the basic needs of the Americal people for homes, work and land, health and schools." (276)

The Charter of Punta del Este was adopted in conjunction with a Declaration to the Peoples of America.[277] Read together, the Charter and the Declaration express the respect for the sovereignty of individual nations and, at the same time, recognise the need for cooperation among nations. Consequently, the signatory nations bound themselves on the ond hand "to improve and strengthen democratic institutions through application of the principle of self-determination by the people",[278] and on the other, "to accelerate economic and social development, thus rapdily bringing about a substantial and steady increase in the average income in order to narrow the gap between the standard of living in Latin American countries and that enjoyed in the industralised countries".[279] Within the same frame of reference, the Preamble of the Charter declares that:

> "We, the American Republics, hereby proclaim our decision to unite in a common effort to bring our people accelerated economic progress and broader social justice within the framework of personal dignity and political liberty."

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(276) 44, Department of State Bulletin (1961), 1136. This initiative was a continuance of the US policy reflected in its earlier recommendations resulting in the Act of Bogota, 1960. See "Inter-American System" ante note (274), Appendix 17. The Act, in realising that the impact of economic development programmes on social welfare may be long delayed, declared that prompt measures were necessary to meet social needs. The Act therefore recommended the establishment of an "Inter-American programme for social development" oriented toward agrarian and fiscal or tax reforms, improvement of housing, community services, health, education and an increase in the mobilisation of national resources. The Act itself recommended changes in the IA-ECOSOC to strengthen the Inter-American system in the field of economic and social development. See Act of Bogota ibid, Chapter IV.

(277) ante, note (275)

(278) ibid, Declaration to the People of America.

(279) ibid, the Charter of Punta del Este. Title 1, paragraph (1). These two elements, respect for territorial sovereignty, jointly with the improvement of the economy and social welfare of less developed nations are, it has been noted, in line with Mexico's current social, economic and political objectives. For example, non-intervention ante pp. 50-52; policy on expropriation, ante p.53; policy on foreign investment, ante pp. 59-60.

The Charter furthermore reinforces the role of the IA-ECOSOC. It authorises the IA-ECOSOC to review annually the progress achieved in the formulation, national implementation and international financing of development programmes made as a result of the Alliance for Progress.(280) This concerns the Annual Meeting of the IA-ECOSOC at the Ministerial level. In addition, the Charter provides for the creation of an Inter-American Panel of Experts which would meet prior to the annual meeting. The purpose of this annual review at the expert and ministerial levels is, in accordance with an annexed resolution(281) to the Charter, to:

> "... analyse and discuss the social and economic progress achieved by member countries and the problems encountered in each country, to exchange opinions on possible measures that might be adopted to intensify further social and economic progress, to prepare reports on the outlook for the future, and to make such recommendations as may be considered appropriate on policies and measures of a general nature to promote further economic and social development in accordance with the Act of Bogota and the Charter of Punta del Este."

This "process of confrontation" is based on the reports presented by each member nation as well as on other working documents of an analytical and statistical nature prepared by the OAS General Secretariat. The results of each annual review are summed up in a report issued by the IA-ECOSOC Meetings covering the principal accomplishments and problems of economic and social development in Latin America, the future tasks that need emphasis, and the outlook for the region as a whole.(282)

United States participation in the Alliance for Progress, and correspondingly, in the OAS, may be seen, in a large measure, in the Foreign Assistance Act of 1961.(283) The view of the United States Congress on that Act may be cited in part as follows:

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(280) ibid, Title II, Chapter V, paragraphs (2) and (8).

(281) Official Documents emanating from the Special Meeting of the IA-ECOSOC at the Ministerial Level, Punta del Este, Uruguay, August, 1961; OEA/Ser H/X II 1, Resolution D.

(282) ibid

(283) ante, note (233)

> "... the basic purpose of the Act is to provide long-term support for economic development programmes created by the developing countries themselves .... The Act authorises a broad range of US programmes of development grants and loans, technical cooperation, investment guarantees, surveys of investment opportunities and development research. On August 1st, 1962, the Congress formally stated its view that the Alliance for Progress offers great hope for the advancement of the welfare of the peoples of the Americas and the strengthening of the relationships among them. It enacted a new title of the Foreign Assistance Act relating solely to the Alliance .... The new provisions are based on the principles contained in the Charter of Punta del Este and the Act of Bogota ...." (284)

Out of this brief study, two conclusions may be drawn. Firstly, the awareness of their interdependence have caused the nations of the Western Hemisphere to create a highly developed multilateral organ, the IA-ECOSOC, to actualise their common economic and social goals. Secondly, the United States, as the only developed nation in that hemisphere,(285) has taken the initiative on a number of occasions to encourage the economic and social development of its poorer neighbours.

The Charter of Economic Rights and Duties of States: The increasing stress on finding solutions to breaching the poverty gap between developed and developing nations may appropriately be termed the "evolving international law of development".(286) This has involved efforts on the part of the developing nations to revoke or "delegitimize" certain legal principles and practices which they regard as inimical to their needs and development. One example of such efforts, it has been observed, has resulted in the widely approved move by developed nations to modify the scope of the most-favoured-nation clauses and the broad principle of non-discrimination in trade so as to allow preferences for developing countries.(287) Another and far more controversial example is the effort to eliminate the requirement of the "international standard" in respect of compensation for the nationalisation and expropriation

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(284) 76 STAT 257; 22 USC para. 2211

(285) Besides Canada, which is not a member of the OAS.

(286) ante, note (2)

(287) ante, pp. 62-65

of foreign-owned property. The issue has been presented in the Declaration on the Establishment of a New International Economic Order[288] and by the Charter of Economic Rights and Duties of States[289] which, under the broad principle of "permanent sovereignty over national resources" assert that nationalisation and expropriation, together with related questions of compensation in respect of foreign-owned property, are matters governed by the domestic law of the expropriating nation. The clear intent of these declarations is to exclude any requirement of international law as applicable to controversies about expropriation. Thus it is declared in Article 2(c) of the 1974 Charter that every State has a right -

> "To nationalise, expropriate or transfer ownership of foreign property, in which case, appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising state and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of sovereign equality of States and in accordance with the principle of free choice of means." (290)

It is of interest to note that the 1974 Charter owes its origin to a proposal made by the President of Mexico before a plenary meeting of the UN Conference on Trade and Development (UNCTAD) in April, 1972.[291] Consequently, Mexico was the chief proponent of Article 2(c) and the adoption of the 1974 Charter as a whole.

The major industrialised and capital-exporting nations, including the United States, have strongly expressed their disagreement with the above position. Furthermore, they have maintained

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(288) G.A. Resolution 3201, Sixth Special Session UN GAOR Supp.1, at p.3 UN DOC A/9559 (1974)

(289) G.A. Resolution 3281, 29 UN GAOR Supp. 31, at p.50; UN DOC A/9631 (1974) [hereinafter cited as the 1974 Charter)

(290) In a separate vote on this Article of the 1974 Charter, it was adopted by 104 in favour to 16 against with 6 abstentions. In the final vote on the Charter as a whole, 6 countries cast negative votes; Belgium, Denmark; Federal Republic of Germany, Luxembourg, United Kingdom and United States.

(291) Summary address of President Echeverria of Mexico before the 92nd Plenary Meeting of UNCTAD; UNCTAD Proceedings, 3rd session; UN DOC TD/180, Vol. 1A, Part I at 184, 186 (1972)

that such non-binding resolutions(292) which lack general agreement cannot change established law as evidenced by long and uniform practice. That practice, which is said to have reached international law status, has been expressed in the Restatement of the American Law Institute on the Responsibility of States for Injuries to Aliens(293) as follows:

> "s.185 The taking by a State of property of an alien is wrongful under international law if (a) it is not for a public purpose [or] (b) there is not reasonable provision for the determination and payment of just compensation as defined in s.187, under the law and practice of the State in effect at the time of taking.
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> s.187 Just compensation ... must be (a) adequate in amount ... (b) paid with reasonable promptness ... and (c) paid in a form that is effectively realisable by the alien to the fullest extent that the circumstances permit ...."

The UN Declaration on Permanent Sovereignty over Natural Resources(294) is often cited as confirmation by the General Assembly itself of an international standard providing for prompt and adequate compensation for expropriatory acts. In part, that Declaration states that:

> "In such cases [nationalisation, expropriation or requisitioning] the owner shall be paid appropriate compensation in accordance with rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law."

It is claimed that in the full context of that Declaration, the words "appropriate compensation" could only mean prompt, adequate and effective compensation,(295) and that there is a mandatory obligation under international law that such compensation

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(292) For the view that G.A. Resolutions as opposed to multilateral conventions or treaties have only a recommendatory force, see J. Brierly "The Law of Nations" (1963), 110. For the contrary view, see J. Castaneda "Legal Effects of UN Resolutions" (1969), Sloane, "The Binding Force of a 'Recommendation' of the G.A. of the U.N." Br. Yrbook of Int'l L. (1948) 1

(293) American Law Institute, Restatement of the Law, Second, Foreign Relations Law of the US (1965) Part IV "Responsibility of States for Injuries to Aliens" pp. 553-554.

(294) G.A. Resolution 1803 (XVII); 17 UN GAOR Supp. 17, at 14, UN DOC A/5217(1962)

(295) See UN Press Release No. 4091, at p.6, cited by Schwebel in "The Story of the UN's Declaration on Permanent Sovereignty over Natural Resources", American Bar Association Journal (1963) 463 at p.465.

"shall" be paid.(296)

However, many of the developing nations deny that the international standard has become general international law pointing to the Calvo Doctrine in Latin America(297) and the long-standing rejection of that standard by many non-Western nations. They have therefore emphasized that the supposed requirement of compensation cannot be regarded as applicable especially in the present time when a large number of nations have expressed their conviction that it does not constitute law.(298)

It is clear that these positions, when stated in the abstract, are in contradiction, but the conflict may not be as sharp when the issues are placed in a more specific context. When a controversy arises over expropriation, it is almost certain that issues of fair treatment and "appropriate compensation" will be raised within the negotiating framework established by the expropriating government.(299) The perception of these issues will be substantially affected by standards developed in other contexts, whether explicitly stated or not. It is submitted that this would be so even though the references to applicable law are limited to the legislation of the expropriating nation. The essential reason for the consideration of such external standards is that the expropriating nations have an interest in maintaining confidence of foreign investors and trade. It may be concluded then that nationalising governments are likely to be influenced by principles and standards followed in other nations and, broadly speaking acceptable to the capital-exporting or foreign investment oriented nations. The experience in most of the developing nations tend to bear this out.(300) The International

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(296) see text at note (294)

(297) see ante, pp. 43-46

(298) see 29 UN GAOR Second Comm. 1649 (1974) c/f Roy, "Is the Law of Responsibility of States for injuries to Aliens a part of Universal International Law?" 55 Am.J.Int'l.L (1961), 863

(299) for example, see Exchange of Notes between US Secretary of State and Mexican Ministry of Foreign Affairs on the Mexican agrarian and petroleum expropriations of the 1930s cited at ante pp. 53-57

(300) see the settlement by Mexico with the United States for the former's expropriations. ibid. The Mexican Constitution of 1917 and the laws of expropriation incorporate the essential features of the international standard. See ante, pp.53-57.

Standard will therefore probably be complied by developing nations but not as a duty, only a necessity.

One other point may here be made. Although the developed nations did not adopt the final text of the 1974 Charter, their jointly proposed substitute of the controversial Article 2 reflects the genuine willingness of these nations to cooperate toward the adoption of a universally accepted Charter. By comparison, the proposed text was less specific and forceful of the position held by the developed nations as embodied in the UN Declaration on Permanent Sovereignty over Natural Resources.(301) The proposed Article 2(2)(d),(302) which related to expropriation, expressed that each State has the right:

> "To nationalise, expropriate or requisition foreign property for a public purpose provided that just compensation in the light of all relevant circumstances shall be paid."

Thus, the compromise proposed would specifically require that expropriation be for a public purpose, and that "just compensation in the light of all relevant circumstances shall be paid." This is a considerable modification of the position that the compensation had to be "prompt, adequate and effective". Presumably also, the wealth and consequent ability of the expropriating nation to indemnify, and the fact that the expropriation is part of its efforts at development would be "relevant circumstances" which would influence the compensation to be paid.

It may therefore be concluded that there is strong evidence of a growing cooperative spirit existing between developed and developing nations in the multilateral sphere as well.

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(301) ante, note (294)

(302) Report of the Second Committee, UN DOC A/9946 at p.16. Art 2(2)(a) of the proposed text shows an acceptance of domestic laws such as the Mexican Foreign Investment Law 1973, the Technology Law 1972, ante notes (219) and (226) respectively by developed nations. That Article provides that each State has the right "to enact legislation and promulgate rules and regulations, consistent with its development objectives, to govern the entry and activities within its territory of foreign enterprises."

CHAPTER IV: MIGRATION

The Governments of Mexico and the United States are currently beset with the problems caused by the migration of Mexican workers illegally into the United States in seach of better living standards and jobs. The migration problem and its significance on both nations will firstly be outlined below. Next, a study of the response of the two governments to their problem in their attempts at a solution will be made, followed by a discussion of some international social, economic and legal considerations which are intrinsically tied in with this transboundary migration as a whole.

The Problem of the Undocumented Mexican Alien

Mexicans residing without proper documentation in the United States have variously been labelled as mojados (wetbacks), alambristas (wire-jumpers) and "illegals".(303) Just as these undocumented(304) Mexican aliens have problems in adjusting to the United States, so has the United States problems in adjusting to them. Indeed, the flow of these aliens across the United States-Mexican border has been described as "one of the Nation's [the United States'] most pressing problems"(305) and "the most important problem in the relations between [Mexico

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(303) The legal definition of an alien not entitled to lawful residence in the United States is found in 8 USC (1970) s.1325: "Any alien who (1) enters the United States at any time or place other than as designated by immigration officers or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by wilfully false or misleading representation or the wilful concealment of a material fact, shall, for the first commission of any such offences, be guilty of a misdemeanour ..."

(304) "Undocumented" refers to the requirement that aliens present an immigrant visa or non-immigrant visa in order to be admitted legally to the United States. 8 USC (1970) ss. 1881, 1201-1204; 8 CFR (1976) ss. 211, 212.

(305) [1974] INS Annual Report at (iii); see also R. Marshall, U.S. Secretary of Labour in "Outside the Law" Worklife (December 1977) 23 at p.23 "... the problem of undocumented workers is one of the most serious civil liberties problems that we face ..."; a comprehensive source book on the "Wetback Problem" is J. Samora "Los Mojades: the Wetback Story" (1971).

and the United States]."(306)

It is difficult to arrive at a working estimate of the total number of undocumented aliens residing in the United States.(307) The US Immigration and Naturalisation Service (INS) has indicated a figure ranging from six to twelve million.(308) Mexico is probably the largest source of such undocumented aliens. In 1974, the INS apprehended a record 788,000 "illegal aliens" of whom about 90% were Mexican nationals.(309) In that same year, 88% (693,000) of all deportable aliens were illegal entrants, as distinguished from those overstaying visas or otherwise violating United States immigration laws. Of the total number of deportable illegal entrants, 99% were Mexican.(310) INS records indicate that the population of undocumented Mexican aliens is no longer concentrated along the border or in agriculture but is geographically and occupationally dispersed.(311)

The explanation for this northward migration is the theory conceiving of the "push" of economic disadvantage in Mexico and the less important "pull" of the economic upliftment in the United States. More specifically, unemployment created by an annual birthrate of 3.4%, one of the highest in the world,(312) is the chief cause of migration from Mexico. Substantial

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(306) C. Flores, Remarks at the 68th Annual Meeting of the American Society of International Law, Proceedings of the American Society of International Law (1974) 43, at p.43. This writer also suggests that the problem has come into sharp diplomatic focus only after the negotiations of common border and Colorado salinity problems were settled. At the first meeting between the new Presidents of Mexico (Portillo) and the United States (Carter), the problem of undocumented aliens was addressed to. NY Times February 18th, 1977, Section A at p.12, col. 3.

(307) Sub Comm. No. 1 of the House Comm. on the Judiciary, 93rd Cong. 1st Session, Illegal Aliens: a review of hearings conducted during the 92nd Congress 7-10 (Comm. Print 1973).

(308) [1974] INS Annual Report, ante, note (305). This is a staggering increase of 500-1000% over the 1972 INS estimate (1,013,000) and 500-1400% over the 1973 estimate (800,000-1,000,000).

(309) INS Annual Report, ante, note (305).

(310) ibid

(311) ante, note (307) at pp. 7-10

(312) "Policies on Population Around the World" 29 Population Bulletin (No. 6) (1974) at pp. 26-27.

differences in United States and Mexican wage rates also encourages the flow. Furthermore, both the Bracero Programmes and the more recent Border Industrialisation Programme have "pushed" Mexicans northward, which is the penultimate step of transboundary migration.(313) Consequent over-population, high unemployment and poor living conditions in the Mexican border cities induce additional border crossings. The "pull" factors include the obvious economic factors of better wages and employment opportunities in the "promised land" of the United States. The US Secretary of Labour, Ray Marshall, in stating that Mexico was the largest source of undocumented aliens in the United States, commented that -

> "This is understandable since there is no border in the world with more extreme economic differences than the border between the United States and Mexico. As long as Mexico has one of the world's highest birthrates, as long as Mexico cannot create enough jobs, then the temptation to sneak across the border will be irresistable." (314)

The effect on Mexico: The migration of Mexican workers to the United States is a major concern to a nation like Mexico which is just beginning to work out industrial and rural programmes in order to achieve its developmental goals. It is usually the best farm-workers who migrate, resulting in a long-term accumulation of a less competent rural labour pool.(315) The Mexican Government also sees the northward emigration as tearing the socio-economic fabric of emigration-inclined communities, contributing to the welfare cost of returning aliens, psychologically diminishing the sense of a future in communities evacuated by young labour, and often causing hardship to unsuccessful migrants.(316) There is an overall concern that the migration of its labour force has contributed to a deficit in Mexico's balance of payments.(317)

The effect on the United States: A US Congressional Subcommittee

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(313) H.A. Inman and L.A.O. Tirado, ante note (256) at pp. 431-432.

(314) R. Marshall, ante, note (305) at p.24.

(315) J.W. Wilkie, hearings, ante, note (186) at p.9.

(316) C. Flores, ante note (306)

(317) ibid, at p.47.

concluded in 1973 that "the illegal alien is responsible for a substantial displacement of American labour".(318) The US employer, particularly of agricultural workers, is able to gain a ready pool of available labour and to minimise costs by employing undocumented Mexican aliens at below-average wages because of their precarious status in the United States.(319) Other advantages accruing to the employers are the opportunities to by-pass regulations on maximum hours, job termination, and the responsibility for disability, health, housing and other welfare obligations.(320) The effect of such unlawful employment trends has been to cause the displacement of both indiginous and legal immigrant labour.(321) In addition, the abundance of inexpensive labour impedes any incentive on the part of employers to modernise their present labour-intensive methods of production.

The remittances and other direct transfers of money back to Mexico by undocumented aliens are claimed to have an adverse effect on the United States balance of payments.(322) The 1973 congressional Subcommittee estimated the total outflow to be "closer to US$1 billion".(323) These congressional hearings disclosed that "a large number of illegal aliens fail to file Federal income tax returns, claim non-existent dependents, or otherwise fail to comply with Federal tax requirements."(324) It also stated that the cost to apprehend, detain, and deport illegal aliens was about US$35 million each year,(325) of which 97% or about $34.5 million was expended on Mexican nationals.(326)

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(318) ante, note (307) at p.12

(319) J. Samora, ante, note (305) at pp. 36-39.

(320) ibid.

(321) Despite the US-Mexican agreements providing for labour through the Bracero Programme of the 1940s, US employers continued to employ undocumented Mexican workers. The avoidance of the terms of the agreements strained relations with Mexico which, in 1947, abrogated the treaties because of continued use of illegal rather than bracero labour. See ante, note (253).

(322) Chapman, "A Look at Illegal Immigration: causes and impact on the United States" 12 San Diego Law Review (1974) 34, at p.37.

(323) ante, note (307) at p.19.

(324) ibid

(325) Illegal Aliens: Hearings before Subcommittee No.1 of the House Comm on the Judiciary, 92nd Cong. 1st and 2nd sessions 1179 (1971-1972) at p.25.

(326) ibid at p.29.

Lastly, the undocumented Mexican aliens pose a public-welfare burden as most United States public assistance laws do not specifically discrimate against such illegal migrants.(327) As compared with the 19th century immigration when employment opportunities and the economic barometer prevailing in the United States were high, the current undocumented migrant has come at a time when there is much public concern over the availability of jobs and the current belief that the United States, with its limited resources which can accommodate little more than zero population growth, cannot absorb many more undocumented aliens.

The undocumented alien: The illegal alien has created one of the most serious civil liberties problems especially in the context of his presence in the United States, which has prided itself in its political freedoms. The United States laws providing for employee protection are not available to him due to his status. Studies have found that as many as 40% of all Mexicans working in the United States illegally are being paid less than the minimum wage set by US legislation, and such workers are usually forced to endure unsafe working conditions or harsh treatment by their employers.(328)

There is a further sociological problem; these aliens initially enter the United States for economic reasons and for the benefit of their immediate families in Mexico. But an extended period of time causes many to become less fettered by obligations of family affinity and support, and more a part of the community they are in. Evidence of this trait is that deported aliens usually encounter problems of readjustment in the event of their return to Mexico and the resulting socio-psychological pressures motivate repeated undocumented entry.(329)

United States-Mexican Response and Search for a Solution

Mexican unilateral action: Historically, Mexico has discouraged

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(327) J. Samora, ante note (305) at p.62.

(328) R. Marshall, ante, note (305) at p.23.

(329) J. Samora, ante note (305) at pp. 76-77.

northward migration.[330] For example, during the 1920s the Mexican Government cooperated with organised labour unions to suspend repatriation rights of migrants, and developed a programme for internal self-colonisation. By establishing inter-departmental coordination and local centres to encourage a more advantageous distribution of employment, it hoped to persuade prospective migrants to remain in Mexico. This dissuasionist policy was reflected in the terms of the United States-Mexican labour agreements relating to the Bracero Programme.[331] Such bilateral agreements established the "definitive foundations [of] the Mexican position on the discouragement of emigration and protection of Mexicans resident in the United States".[332] More recently, in an official 1972 Report, the President of Mexico, reiterating the dissuasionist policy, "recognised that the emigration of Mexican workers troubles the national conscience" and added that "the unjust and, on occasion, inhuman treatment to which they are subject in the United States was above all a matter of concern".[333]

Mexican unilateral action to solve the migration problem corresponds generally with the observation that the illegal migrants "have not been so much attracted to the United States as they have been forced out of Mexico by an inimical economic situation".[334] Therefore, Mexican proposals emphasize that the "basic solution" must be found in economic and social progress through the creation of well-paid jobs within the nation itself.[335] Mexican efforts at rural and industrial development, the more equitable distribution of population and income, and the incorporation of family planning into its public health and education structures, are evidence of new efforts to find the

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(330) C. Flores, ante, note (306) at p.45

(331) ante, note (253)

(332) C. Flores, ante, note (306) at pp. 45-48.

(333) ibid, at p.50

(334) J. Samora, ante, note (305) at p.12

(335) C. Flores, ante, note (306) at p.50. See also Note "Commuters, Illegals and American Farm Workers: the need for a broader approach to Domestic Farm Labour Problems" 48 N.Y.U.L.Rev. (1973) 439, at p.479

"basic solution".(336)

United States unilateral action: The United States solution to the migration problem may best be seen in its existing immigration laws, and in current legislative proposals. The thrust at the problem has been two-pronged; to markedly reduce the increasing flow of undocumented aliens, and to regulate the presence of such aliens who are already in the United States.

On August 4th, 1977, US President Carter presented before the Congress a set of proposals which "cannot solve this enormous problem overnight, but ... will signal the beginning of an effective Federal response".(337) Topping the list of these proposals is the imposition of civil and criminal sanctions on the employers of undocumented aliens. Under existing United States legislation, any person who knowingly conceals, harbours or shields an "illegal" alien is guilty of a felony, "provided however" that for the purposes of this section, employment, including the usual and normal practices incident to employment, shall not be deemed to constitute harbouring".(338) Thus, a mere employer of an undocumented alien is beyond the reach of the law. The Presidential proposal provides for high civil fines for each undocumented alien hired by an employer, and for imprisonment of employers who violate a Court injunction not to further engage in the practice of hiring such aliens.(339)

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(336) There are recent indications of a vigorous effort by Mexico to recognise its agriculture. In the past, Mexican Government policies have strongly favoured urban development, and since the breakup of the hacienda system, have done little to foster rural development. The Mexican Government is reversing that trend today by expanding subsidies and other supports to encourage agriculture. See J. Samora, ante, note (305) at pp. 112-116.

(337) Weekly compilation of Presidential Documents (August 8th, 1977) Vol. 13, No. 32, p.1170 at p.1171 (hereinafter cited as the Presidential Proposals). These proposals have now been embodied in a Government sponsored bill No H.R. 9531, introduced into the House of Representatives. Until these proposals are made law, the US Immigration and Nationality Act 1952, 66 STAT 163 (codified in scattered sections of Titles 5, 8, 18, 22, 31, 49, 50 USC) is still the basic immigration law. There has been no new major immigration legislation since 1965 despite general agreement that new legislation is necessary. The Presidential Proposals of August 4th, 1977 and the subsequent H.R. Bill are the first positive steps to change this inertia.

(338) 8 USC (1970) s.1324(a).

(339) This proposal follows from a US House of Representatives Bill popularly known as "The Rodino Bill" that was submitted to Congress in 1973 and resubmitted in 1975. HR 982 93rd Cong. 1st Sess (1973), resubmitted as H.R. 8713, 94th Cong. 1st Sess (1975).

Another proposed step to curb the flow of undocumented aliens is to significantly increase existing border enforcement efforts. Additional enforcement personnel will be placed on the United States-Mexican border, and an anti-smuggling Task Force will be established in order to reduce the number and effectiveness of smuggling syndicates which, by obtaining forged documents and providing transportation, systematically smuggle a substantial percentage of undocumented aliens into the United States.(340)

The United States Government has furthermore realised the sociological problem previously referred to,(341) that many undocumented aliens have since developed family and community ties in the United States and have shown themselves as productive and law-abiding residents in search of a new life. The Presidential Proposals provide for an adjustment of nationality status(342) as a solution to this problem. It recommends that all undocumented aliens who have been continuously in the United States since January 1st, 1970 can apply for permanent resident status. This status can lead up to full citizenship in five years.(343) Those undocumented aliens residing in the United States on or before January 1st, 1977, who register with the US Immigration and Naturalisation Service will be granted a new temporary resident alien status for a five-year period. Such persons are entitled to remain in the United States for at least five years; during that period, a final decision will be made on their legal status. In addition, the Presidential Proposals cause an increase in the current annual limitation on legal Mexican and Canadian immigration to a total of 50,000.(344)

Apart from these proposals, the United States Congress has

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(340) Presidential Proposals, ante, note (337) at pp. 1172-1173.

(341) ante, p.84.

(342) Presidential Proposals, ante, note (337) at p.1174.

(343) This will be done by updating the registry provisions already contained in the US Immigration and Naturalisation Act which was last updated in 1965 granting permanent resident alien status to those who resided in the United States prior to 1948.

(344) Presidential Proposals, ante, note (337) at p.1175. The current limit on annual Mexican and Canadian immigration to the United States is 20,000.

occasionally acted to better the status of the undocumented alien. Worthy of note are the Immigration and Nationality Act Amendments of 1974[345] which have the overall effect of allowing those aliens of Western Hemispheric origin to seek visas under various preferential categories, one of which grants preference "to qualified immigrants capable of performing specified skilled or unskilled labour, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exist in the United States".[346] The new measure also permits those of Western Hemispheric origin to apply for readjustment of status while within the United States, and has the beneficial effect of assisting in the reunification of families.

United States-Mexican bilateral action: It is obvious from the foregoing discussion that the migration problem cannot be met only by unilateral governmental action but requires the joint efforts of the United States and Mexican Governments before any permanent solution may be realised. Furthermore, any unilateral effort at a solution by one nation would most likely affect the other due to the "source-recipient" nature of the problem. The recent unilateral proposals by the US President have caused the Mexican Government to express some concern.[347] Mexico fears that these proposals, if effected, would amount to an immediate attempt by the United States to repatriate from two to three million Mexican workers, or 13% of the current Mexican labour force[348] back into Mexico. The Mexican employment policy would be dealt a sudden devastating blow and would have a crippling effect on both wages and the share of income of the working class. The result

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(345) Public Law No. 94-541, 90 STAT 2703.

(346) This preferential category is particularly advantageous to the undocumented Mexican worker as studies have shown that he takes up jobs that are rejected not only by indiginous labour but by legal migrant workers and other poor minority groups. See Immigration and Naturalisation Service Regional Office Operations: Hearings before a Subcommittee of House Comm on Governmental Operations, 93rd Cong. 2d Sess 577 (1974).

(347) "Migrant Workers: US" Social Labour Bulletin No. 1 (1978), International Labour Office (Geneva) 86, at pp. 87-88.

(348) J.W. Wilkie, Hearings, ante, note (186) at p.56.

would be to damage the success of the Mexican shared-growth strategy and to destabilise the political situation as well. The consequences of major economic and political instability in Mexico to the United States can hardly be overstated. This recent United States-Mexican controversy would probably be nipped in the bud through the usual forum of diplomatic negotiations. The Mexican Minister of Foreign Affairs has already announced that his government is preparing counter-proposals for submission to the United States Government based on ananalysis which takes into account economic, social and political considerations.(349) It is envisaged that the United States response to these counter-proposals would be favourable. The US Presidential Proposals themselves devote a chapter to seeking the cooperation of "source countries" like Mexico.(350) In recent years too, the United States and Mexican Governments have, by agreement, cooperated in seeking a higher standard of living for border communities.(351) An agreement has also been reached with the two nations mutually committing themselves to help resolve aspects of the undocumented alien problem which affect relations between them.(352) This trend of jointly seeking out a basic solution to the migration problem by methods which are acceptable to both nations would most certainly continue. future bilateral action by the United States and Mexico is reflected succinctly in the US Presidential Proposals themselves. In stating that an effective policy to control illegal immigration should include the development of a strong economy in the source countries, President Carter expressed the following:(353)

> "... I believe that marked improvements in source countries' economies are achievable by their own efforts with support from the United States. I

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(349) ante, note (347) at p.88

(350) Presidential Proposals, ante, note (337) at p.1173.

(351) Agreement on Border-Area Development, June 23, 1970, US-Mexico, 21 UST 1475, TIAS No. 6905. See also H.A. Inman and L.A.O. Tirado, ante, note (256); M.E. Bulson, ante, note (252); Mexico's Border Industrialisation Programme and the U.S. Participation, ante pp. 66-70.

(352) Agreement on Illegal Entry of Migratory Workers, July 19th, 1973, US-Mexico, 26 UST 1724, TIAS No. 8131.

(353) Presidential Proposals, ante, note (337) at p.1173.

> welcome the economic development efforts now being made by the dynamic and competent leaders of Mexico. To further efforts such as those, the United States is committed to helping source countries obtain assistance appropriate to their own economic needs. I will explore with source countries means of providing such assistance. In some cases, this will mean bilateral or multilateral economic assistance. In others, it will involve technical assistance, encouragement of private financing and enhanced trade, or population programmes."

The problem of the undocumented Mexican alien, current and unsettled as it is, would foreseeably be solved in the not-too-distant future through the efforts, willingness and cooperation of the United States-Mexican Governments. Thus, the inter-dependence required of both these nations to deal effectively with this problem is clearly revealed.

The Undocumented Mexican Alien: International Law Considerations

> "Any actions taken to address the problem of undocumented workers must be based on the circumstances surrounding today's illegal influx. The first point is an awareness that the problem of undocumented workers illustrates the degree to which the United States is affected by the problems of the under developed world. We [the US] can no longer turn a deaf ear to the problems of world poverty. The millions of undocumented workers who live among us illustrate that world poverty is not just their problem; it's our problem as well." (354)

The above quotation is a vivid pointer to the fact that the cause for migration is poverty, a phenomenon which affects directly or indirectly the international community as a whole. This part of the chapter will discuss the problem of the undocumented alien in relation to certain norms, both established and emerging under international law.

Firstly, it must be stated that no general principles of international law require a State to admit aliens into its territory, much less assure them of employment.(355) For example,

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(354) R. Marshall, ante, note (305) at p.26.

(355) See Oda, "The individual in International Law" in Manual of Public International Law (ed. M. Sorensen, 1968), 481.

Article 12 of the International Covenant on Civil and Political Rights[356] establishes freedom of movement for "everyone lawfully within the territory of a State" and vests the definition of "lawful" to each nation. The Constitution of the Intergovernmental Committee for European Migration,[357] of which the United States is a party, acknowledges that control of immigration is vested within the domestic jurisdiction of States and subjected under municipal law. Most nations, however, follow the practice of selective entry according to stipulated categories of aliens. United States immigration laws which conform in their restrictiveness with international custom, are nevertheless subject to scrutiny under the UN Charter. The United States has pledged itself under that Charter, to take "joint and separate action in cooperation with" the United Nations to help achieve fundamental human rights and socio-economic development.[358] These purposes must be considered in bringing international law to bear on domestic immigration practice by evaluating the international legality of domestic immigration measures. The United States immigration policy-makers have no doubt given their due consideration to such purposes to ensure conformity with international law.

The growing global awareness of inequitable geographical allocation of resources has led to an appreciation of the resource-allocating capacity of immigration. A general expression of this viewpoint might be that people should be allowed to move to where the resources are. However, uncontrolled access to resources may harm not only resource-rich nations but resource-poor nations which rely upon stable labour pools for

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(356) 21 UN GAOR Supp. (No. 16) 54; UN DOC A/6316 (1967). Neither the United States nor Mexico has ratified this covenant. It is noted also that Article 6 of the International Covenant on Economic, Social and Cultural Rights" recognise[s] the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts ...." Ibid at p.50. It is doubtful that this right contemplates a liberalisation of domestic immigration laws to effect its provisions.

(357) Constitution of the Intergovernmental Comm. for European Migration, opened for signature on October 19th, 1953, 6 UST 603, TIAS No. 3197, 207 UNTS 189.

(358) United Nations Charter, Articles 55 and 56.

further economic development. Hence it has been suggested that free migration may injure the Mexican economy.(359) The intelligent controlled entry advocated under the US Presidential Proposals(360) therefore seems preferable.

There are some contemporary global norms affecting migrations which may also be appropriately considered here. In Tunis and Morocco Nationality Decrees, the Permanent Court of International Justice held that:(361)

> "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain."

This decision urges a continuing reassessment of the evolving state of international relations. The steady development of international relations in respect of migration seems to point toward a gradual sharing of authority over the "reserved domain" of nationality. The European Economic Community is illustrative of this trend. Under the Rome Treaty of 1957, members of the European Community are obligated to abolish "any discrimination based on nationality between workers of the member States as regards employment, remuneration and other working conditions".(362) Article 49 of that Treaty prescribes procedures for implementing the free movement of workers and, pertinent to this study, Article 50 requires that "member States

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(359) ante p.82.

(360) ante, note (337)

(361) Advisory Opinion on Tunis and Morocco Nationality Decrees [1923] PCIJ, Ser B. No. 4.

(362) Workers are ensured of free movement within the Common Market nations and enjoy the rights (a) to accept offers of employment actually made, (b) to move about freely for this purpose within the Member States, (c) to stay in any Member State in order to carry on an employment in conformity with the legislative and administrative provisions governing the employment of the workers of that State and, (d) to live, on conditions which shall be the subject of implementing regulations to be laid down by the Commission, in the territory of a Mamber State after having been employed there." Treaty Establishing the European Economic Community, Article 48(3), March 25, 1957, 298 UNTS 3. See W.R. Bohning and D. Stephen. "The EEC and the Migration of Workers" (1971), K.R. Simmonds "Immigration control and the free movement of labour", 21 ICLQ (1972) 306 at pp. 307-310.

shall, under a common programme, encourage the exchange of young workers".(363)

It is conceded that the regional community norms expressed by the Rome Treaty may remain inapplicable on the American continent. Although freedom of movement has not been extended to United States immigration policies, international State practice does recognise a freedom to emigrate which, in its concern for basic human rights, suggests an analogous freedom to immigrate in support of individual welfare and more equitable allocation of population to resources.

Of more direct significance, the World Population Plan of Action(364) of 1974 is the best evidence of contemporary norms for domestic regulation of migration. Endorsed by the United States and Mexican delegations to the 1974 World Population Conference in Bucharest, this document recommends inter alia that governments facilitate migration, protect the rights and welfare of migrants, help prevent discrimination and prejudice against them, help reunite families, and provide proper and adequate welfare services for them in conformity with relevant conventions of the International Labour Organisation.(365) The document further urges nations affected by significant numbers of migrant workers to conduct bilateral or multilateral consultations with a view to harmonising policies which affect these movements,(366) and to conclude bilateral and multilateral agreements.(367) The more developed nations are encouraged to cooperate through bilateral or regional organisations in creating favourable employment opportunities at the national level in nations concerned with the outflow of migrant workers.(368) By its endorsement of this Plan, the United States undertakes an international obligation to assist in the process of human

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(363) ibid, Articles 49 and 50.

(364) UN DOC E/CONF 60/WG/L55/Add 3, (1974) World Population Plan in Action; Report of the UN World Population Conference (1974) E.CONF/60/19 at pp. 16-17.

(365) ibid, paragraphs 51, 52, 53, 55 and 58.

(366) ibid, paragraph 52.

(367) ibid, paragraph 62.

(368) ibid, paragraph 54.

migration and redistribution of global resources. Steps taken by the United States Government in compliance with this undertaking have already been noted, especially with regard to the Mexican undocumented migrant.(369)

More recently, the UN General Assembly adopted a resolution on December 9th, 1975(370) which further elaborates the global concern for the human rights of undocumented workers. It appeals to governments of Member States to remind their administrative authorities of their obligations "to respect the human rights of migrant workers, including those that are undocumented or irregular".(371) It also urges those governments to help d-plomatic and consular agents protect and defend the human rights of migrant workers.(372)

The foregoing study of the existing and proposed measures by the United States Government, working in conjunction with the Mexican Government, to solve the social and economic problems created by the undocumented Mexican alien are all supportive of these emerging global norms pertaining to migrants.

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(369) ante, pp. 86-88.

(370) General Assembly Resolution 3449, 30 UN GAOR Supp. (34) 90; UN DOC A/10034 (1976)

(371) ibid, paragraph 3

(372) ibid, paragraph 4.

CONCLUSION

A number of factors have been the cause for confrontation between the United States and Mexican Governments over the last half a century or more. The sharing of a common boundary and fresh water resources have resulted in disputes over the precise location of the border, the salinity of the Colorado River and related groundwater issues; the United States as a developed, capital-exporting nation with a considerable portion of its foreign investment placed in the less developed Mexico has given rise to controversies with the expropriation of American properties as part of the Mexicanisation programme; and the poverty of Mexico has led to the migration of millions of workers, in their quest for a high standard of living, northward into the United States. These factors of geographical proximity and divergent wealth still remain. But there has been a dramatic change of governmental attitudes in the last half a century. This change has been from one of selfishness ensuing from the belief that territorial sovereignty is the overruling principle in international law[373] to a spirit of cooperation supporting the call for interdependence among these two nations. It has been this change, sponsored by the will of both nations to consider the interests of each other that has seen the actual and pending settlements of those issues of confrontation mentioned. In addition to these issues, United States-Mexican cooperation has extended into the fields of epidermiology, narcotic control, extradition and broadcasting, to name a few of a large number of issues which have been their common concern.

This spirit of cooperation has been evidenced in the multilateral sphere as well with the virtual acceptance by the United States of the Exclusive Economic Zone concept promulgated chiefly by Mexico, and the American attempts at reaching a compromise to the controversial Article 2 of the Charter of Economic Rights and Duties of States. Also reflective of this spirit is

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(373) The clearest example of this attitude may be viewed in the Harmon Doctrine initiated by the United States at the close of the 19th Century. See ante, note (133).

the existence and accomplishments of the Organisation of American States of which the United States and Mexico are founding members. The IA-ECOSOC, as an organ of that organisation, is successfully carrying out the purposes for which it was created.

United States-Mexican concurrence has had the result of creating and developing the highly successful International Boundary and Water Commission with its potential for an enlarged responsibility to include the control of groundwater and air-pollution in the border region. The favourable outcome of the Mexican Industrialisation Programme is yet another special feature of this inter-governmental cooperation.

Both existing and emerging principles of international law have been supported or developed through the solutions the United States and Mexico have attained in settlement of their mutual problems. For example, Minute 242 which solved the Colorado River salinity controversy embodied the established principle that an upper riparian owes an international obligation to the lower riparian for the delivery of a reasonable quality of water. That agreement has furthermore set the stage for the incorporation of the emerging integrated river basin concept. United States economic policy assisting the development of Mexico is indicative of its active participation in what has been termed "the evolving international law of development". The establishment in the Law of the Sea of the 200-mile economic zone, and the support of emerging global norms on the welfare of migrants are some of the other international legal issues arising out of the amicable United States-Mexican governmental relationship.

To conclude, two observations may be made. Firstly, the fact that Mexico as an under developed nation has as its neighbour, the highly developed, industrialised and militarily powerful United States, has caused Mexico to acquire a "strength" born out of its comparative weakness. In the face of an overbearing American economic and political influence, Mexico has had to insist on its national sovereignty; this is clearly illustrated in its position on the Calvo doctrine, expropriation and the natural resources of the sea. Yet, this insistence has

not been without due regard to Mexico's need for foreign assistance, particularly from the United States. This balance of interests is succinctly pointed out, in respect of US foreign investment in Mexico, as follows:

> "Mexico will continue its effort to achieve the degree of economic independence that is realistically possible in this interdependent world. To an ever-increasing degree, Mexico wants the basic decisions affecting the Mexican economy to be made in Mexico and to have its natural resources under Mexican control. ... The concern over the economic and cultural penetration of the United States, one of the "perils of proximity", and a desire to avoid an excessive dependancy on the United States has been behind the effort of the Mexican Government to diversify the sources of its foreign investments.
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> The Mexican Government, as it has stated many times, is not trying to discouage US investment in Mexico and to convince it to stay at home. It wants US investment which will be made according to the rules set by Mexico, in association with Mexican capital, and contributing technology which is useful and adapted to Mexico's needs." (374)

Secondly, the dominant feature present throughout this study of United States-Mexican relationships is their recourse to diplomatic forums in settlement of their controversies. Third party adjudication has been regarded by both nations as a last resort, preferring instead the use of such negotiatory instruments as the exchange of notes, bilateral conventions and treaties, and standing committees to reach a compromise. This is surely the most succinct evidence of the confidence both these nations have, that they can mutually solve their own disputes. No less than 108 treaties and other international agreements which are still in force[375] have been reached between the United States and Mexico since the signing of the Treaty of Guadalupe Hidalgo in 1848. A breakdown of this number will furthermore suggest that the growing spirit of cooperation is largely a post-war development. Of the stated

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(374) J.E. Ritch Jr. "Impact of Recent legislation affecting foreign investment: Outlook for the future" Mexican-US Dialogue on topic "Should investment capital stay home" 69 American Society of International Law Proceedings (1974) 67, at pp. 69-70.

(375) "Treaties in Force on January 1, 1978" compiled by the Treaty Affairs Staff, US Dept. of State.

89 treaties (or 83%) were effected only after 1945, and 62 treaties (or 58%) were made only since 1970.

The amicable and cooperative relationship between the United States, as a developed nation, and Mexico, as a developing one, is instructive to the other members of the community of nations that it is possible, despite their economic social and political differences, to promote world peace and to share their resources with one another. Indeed, these two nations have "beat[en] their swords into plowshares" in their efforts at recognising the necessities for survival demanded by this increasingly interdependent world.

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