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## THE 1944 U.S.-MEXICO WATER TREATY AS A CONSTITUTIONAL DOCUMENT

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## Introduction

Judged through the lens of international treaty assessment, the treaty between the United States of America and Mexico regarding the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, with accompanying Protocol, signed at Washington, D.C., on November 14, 1944, was at the time and is today an extraordinary achievement. Ratified by the U.S. Senate on April 18, 1945, after 21 successive days of hearings conducted by the Senate Foreign Relations Committee between January 22 and February 15 and ratified by Mexico's Senate on October 16, 1945, after nearly a month of hearings in August, the 1944 water treaty ranks without a doubt among the two or three most consequential binational agreements made by the two countries.

Several additional observations may also be made of the treaty and its origins. At its signing, the water treaty was quite arguably Mexico's most successful negotiation of great consequence with the United States, and the first and still among the few binational agreements negotiated from a position of binational power parity between the two countries. It was regarded by its negotiators as an equitable agreement that served the national interests of both countries. Now, 75 years later, that can still be said. It may also be said of both countries that its diplomacy was a triumph for the foreign ministries, which succeeded in advancing a clear national interest over the parochial interests of other federal agencies and, particularly in the U.S., the interests of the individual states in the named river basins. In the absence of the U.S. State Department's dispositive insistence on subordinating particular state concerns to international objectives, the treaty would never have been written as it was. In the U.S. this meant keeping the pressure on the Rio Grande and Colorado River basin states to reach a linked agreement on water sharing on these rivers at a time that the Roosevelt administration was crafting the post-World War II world order. In Mexico it meant a close working alliance with between the Secretariat of Foreign Relations and the influential National Irrigation Commission in countering the objections of opposition politicians to aspects of the signed water treaty, fully aware of the unique opportunity that offered itself at the time (Enriquez 1976 Samaniego Lopez 2006, 369-378).

Remarkable as it was at its signing and ratification, the treaty was not yet politically consolidated. That would take time, at least 20 years to put a number on it. But the treaty worked and its mechanisms proved sufficient to the anticipated and unexpected challenges it faced. In both design and operational practice the water treaty has gained stature such that today it enjoys a quasi-constitutional standing in binational water governance. To appreciate this achievement it is necessary to consider the various elements that lend the treaty such force and resilience as an international instrument.

## Treaties as Constitutional Documents

Before examining the 1944 water treaty itself, it is worth asking if treaties in fact can acquire a kind of constitutional standing. The short answer is yes, but only under narrow and exacting conditions. Territorial treaties, for example, are inherently constitutional as they affect the geographic extension of a state's authority. A state's sovereign authority is bounded by its geographical limits. A state's boundaries by themselves don't establish that sovereign authority but they do delimit its reach. In that sense these treaties are inherently constitutional even if we don't think of them that way. Treaties, as contracts between sovereign states, may also acquire the stature of municipal law—indeed the incorporation of customary international law into municipal law may well be considered as the holy grail of international law (Von Glahn 1992, 37). Under certain admittedly narrow circumstances these contracts may require the amendment or alteration of a nation's municipal law if they are to be effective (Frost 2013; Nateleson 2013). That is to say that the obligations found in a treaty may require modifications of domestic law in order to comply with the treaty. This is more apt to occur when treaties are self-executing, stipulating individual compliance in specific ways. When this occurs we can say that the treaty, an international contract, has attained a quasi-constitutional standing.<sup>1</sup> Yet even where treaties are not self-executing, but require each party to enact legislation required to comply with the treaty, the accrual of such legislation over time in the treaty's service may have the effect of altering municipal law, reinforcing the import of the treaty. Thus, while it is proper to resist the notion that treaties may enjoy a form of constitutionality, it is entirely fair to say that under highly restrictive circumstances that may happen. And this is what we see in the 1944 water treaty.

## Pillars of the 1944 Water Treaty's Quasi-Constitutional Standing

The 1944 water treaty's unusual authority rests on a set of supports, or pillars, some of which are found in the document, others of which have (literally) accrued or evolved over time. The key pillars are the treaty's complexity, its water-allocation function, its establishment of an implementing agency, its allowance for interpretation and amendment, its provisions for fact finding and dispute resolution, its longevity, and its general acceptance by stakeholders in both countries over time. Each of these elements deserves a short explanation.

### *Treaty Complexity*

The 1944 water treaty is a complex treaty, to say the least, and it is complex in ways most water treaties are not. Its most obvious complexities are its differential multi-basin application—it can be thought of as three treaties rolled into one, one for the Rio Grande River, one for the Colorado River, and one for the Tijuana River. Further complexity is

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<sup>1</sup> See McCarthy, 2011, 32. The United States has taken the position that only self-executing treaties have this standing, with the U.S. Supreme Court arguing in *Medellin v. Texas* (2007) that U.S. courts may not enforce the non-self executing provisions of a treaty to which is a party.

found in its Article 3 provision on transboundary sanitation, its anticipation of future development, and not unimportant, its linkage to all binational boundary treaties and boundary treaty administration through the offices of the International Boundary and Water Commission. This later provision has the effect of tying the treaty to territoriality, a not insignificant element contributing to its quasi-constitutionality.<sup>2</sup>

Treaty complexity may be viewed as a stabilizing element in treaty design inasmuch as it usually raises the stakes of defection. A multipurpose, differentially applied set of treaty conditions means that difficulty in one domain isn't inherently transitive or disqualifying of another. Problems may arise with respect to one set of conditions but satisfaction with the others is apt to temper any effort to discredit the whole. In essence, treaty complexity enhances the opportunities for success and amplifies the incentives to negotiate matters on which the parties disagree. In addressing multiple issues, of course, the range of possible disagreement is broadened, but also buffered by a broader range of stakeholders with interests in various aspects of the treaty. Complexity, viewed this way, contributes to a treaty's resilience in the face of adversity. And that is what the 1944 treaty's complexity does.

### *Water Allocation*

The 1944 water treaty does a number of things, providing for the development of water storage, hydropower, protection from flooding, and establishing a mechanism for managing transboundary sanitation problems along the riparian and land boundary. But without a doubt its animating force and most important function is allocating the waters of the Rio Grande and Colorado rivers. This function elevates the importance of a water treaty to its parties wherever water is, in fact, scarce. This, of course, describes the binational border region and its riparian geography.

The assignment of sovereign endowments or entitlements to the waters of a shared river, of course, has the effect of setting the parameters for the assignment of use rights to water in each national party to the agreement. It is obviously not the only factor associated with the establishment of property rights or use rights to the water. But as Elinor Ostrom (1990) and other scholars argue, the assignment of property rights is one of the most powerful mechanisms for establishing stakeholderhood in water institutions. The 1944 water treaty, by allocating the water of our shared rivers, establishes a basis for other sovereign municipal decisions setting property rights and is thus a cardinal element of the Law of the Rivers. It is this feature of the 1944 water treaty that is arguably the most vital force for its quasi-constitutionality—the fact that it is fundamental to setting the terms of access to water for a population of at least 40 million water users in or linked directly to the waters of the Rio Grande and Colorado rivers.

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<sup>2</sup> The International Boundary and Water Commission (IBWC) has jurisdiction over the 1848 Treaty of Guadalupe Hidalgo, the 1853 Gadsden Treaty, the 1884 Boundary Convention, the 1889 Boundary Convention, the 1933 Boundary Rectification Convention, the El Chamizal Convention, and the 1970 Boundary Treaty (see IBWC at [https://www.ibwc.gov/Treaties\\_Minutes/treaties.html](https://www.ibwc.gov/Treaties_Minutes/treaties.html)).



### *Implementing Authority*

Enduring water treaties benefit from the establishment of a permanent implementing authority charged with executing the treaty's provisions (Leb 2013, 177). A wide range of institutional options are available for this purpose, ranging from those possessing a form of supranational authority for administering whole river basins to those composed of national sections representing each party's interest in a treaty focused more narrowly on one or more transboundary water bodies.

The International Boundary and Water Commission (IBWC) is of the latter type, the weaker form of international joint mechanism intended to administer the terms of the treaty subject to the authority and in the service of each section's federal government. Its permanent existence as a dependency of each country's foreign ministry, however, is evidence of the importance the parties assign to the treaty and the recognized value of a permanent administrative body husbanding the technical and non-technical knowledge essential to the treaty's effective operation and functioning. In this case, the fact that the IBWC when established built on 45 years of institutional effort of its predecessor, the International Boundary Commission (IBC), added weight and confidence to the prospect that in its new form it would have the expertise and experience to manage the various treaties, including the 1944 water treaty, in its charge. The treaty's stipulation in Article 2 that the IBWC's national commissioners should be technically proficient professional engineers was meant to highlight the technical and dispassionate fact-finding and advisory functions of the commission, downplaying its political role and emphasizing the political guidance inherent in the foreign ministries. Over time, though much criticized, this technical function has worked well, endowing the IBWC with a reputation for technical authority and reliability in reporting the factual elements bearing on boundary and water decision-making. While not sufficient to lend the commission an aura of supra-national impartiality, that was never intended, as the treaty's Protocol and accompanying U.S. Senate resolution attests. Apart from its treaty-mandated common elements, each section is established and funded by its own government and separately endowed with different administrative capacities bearing on the commission's operations. This arrangement cements these sections to their respective governments, strengthening the view that this has, by and large, been a workable arrangement in which the governments have confidence. In short, the existence of an implementing authority like the IBWC is an important manifestation of each government's investment in the treaty and a vital means of accruing and applying the experience and resources essential to its management.

### *Fact-finding and Dispute Resolution*

An axiom concerning the effectiveness of transboundary water agreements is that agreement on the factual basis of any dispute is an essential precondition for dispute settlement. Establishing a fact-finding and dispute settlement mechanism is thus a substantial buttress shoring up the parties' confidence in any transboundary water treaty. The IBWC, in Article 2, is endowed with the responsibility to apply the treaty and settle all disputes "to which its observance and execution give rise..." To this authority, Article 24 adds the responsibility to "exercise and discharge the specific

powers and duties entrusted to the Commission by this and other treaties and agreement in force between the two countries, and to carry into execution and prevent the violation of the provisions of those treaties and agreements . . .” And further, the commission is instructed in Article 24(d) “To settle all differences that may arise between the two Governments with respect to the interpretation or application of this treaty, subject to the approval of the two Governments.”

This last condition, “subject to the approval of the two Governments,” underscores the IBWC’s national sections as dependencies of their respective foreign ministries, ensuring that these ministries will be engaged in the diplomacy of dispute resolution, either at the approval stage, or at earlier stages of negotiations to the extent the IBWC’s sections are unable to settle the matter. The vast majority of the IBWC’s minutes have not required the guidance and active intervention of the foreign ministries. However, the most contentious questions have and will, in which case each section acts as a technical advisor (and depending on the issue it may not be the only technical advisor) to the State Department or the Ministry of Foreign Relations.

Should high-level negotiations fail to resolve a dispute, the treaty, in Article 24(d), provides for the “application where proper of the general or special agreements which the two Governments have concluded for the settlement of controversies.” At the time the treaty was signed this meant, at minimum, that the U.S. and Mexico could submit a matter in dispute to arbitration under the terms of the 1929 Inter-American Arbitration treaty.<sup>3</sup> It is worth noting that in 75 years it has not been necessary to resort to arbitration or to adjudication in an international tribunal. The closest the two countries have come to this mode of dispute settlement was during the dispute over Colorado River salinity, settled in 1973. More recently, a Texas irrigation district challenged Mexico’s delivery of Rio Grande treaty water in a NAFTA dispute resolution panel, but that challenge was not successful (Kibel and Shutz 2007). Viewed through the lens of time this is a remarkable record of peaceful dispute settlement under Article 24 procedures.

### *Interpretation and Amendment (Modification)*

An essential element of a treaty’s resilience is its ability to satisfy ongoing operational commitments and adapt to emerging and unforeseen challenges. The 1944 water treaty was designed to adapt and has done so over 75 years in a manner that is remarkable in the world of transboundary water treaties.

The specific mechanism established for this purpose dates back to the 1889 Convention and is known as the Procedure and is detailed in the treaty’s Article 25. The IBWC’s formal decisions are recorded as “minutes” and are binding commitments of the governments if left unchallenged for 30 days after signature. Since 1922, the commission has signed 324

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<sup>3</sup> This prospect arose during the long-running Salinity Dispute. The 1964 opinion solicited by Mexico from the Chapman & Friedman law firm in Washington, D.C., affirmed Mexico’s right to recourse under the 1929 Protocol. This was taken seriously by the U.S. State Department at the time (Chapman, Friedman, & Lenzini, 1964).

such agreements, 145 of these since the treaty was ratified. These agreements range from the mundane (Minute 281 modifying the IBWC's official decal) to the monumental (Minute 242 resolving the salinity problem on the Colorado River) (IBWC 1973, 1990).

This procedure has drawn a great deal of attention over the years. As many knowledgeable observers are wont to note, these minutes are technically executive agreements between the two governments (Glennon and Culp 2002, 981). And yet, it is fair to say, they are uncommon executive agreements. These are not freestanding executive agreements subject to ready alteration or withdrawal. They are extensions and applications of the treaty, often described as amendments.<sup>4</sup> While these minutes are not self-executing they have consistently been written into the law and administrative practice of the parties consistent with the parties' pledged commitments and are thus judicially enforceable.<sup>5</sup> No IBWC minute comes with a statement (found often in other executive agreements) that says a party may vacate a minute given certain advance notice by one party to the other. Any change requires joint concurrence of the governments as written into another minute.<sup>6</sup> In this sense the minutes are tied to the treaty and are extensions of the treaty. If a government is unsatisfied with a minute, then it must work with the other government to change it. This is a bilateral, not unilateral process that builds stakeholderhood in the treaty. It is worth noting as well that no IBWC minute has altered the text of the 1944 treaty—which would require senatorial approval; they have only interpreted and applied that text. This repeated affirmation of the text adds to the quasi-constitutional character of the treaty.

### *Longevity*

The passage of time is often overlooked in discussions of treaty effectiveness. At their signing, treaties are untested, specifying obligations, duties, and assignments but remaining essentially unfulfilled promises by the compacting parties. Thus, the duration of a treaty is at least partial evidence of its worthiness. Treaties that last, particularly complex treaties designed to manage an evolving agenda and unforeseen developments on the river or rivers in question, establish further commitments that reinforce the perceived value of the treaty and strengthen its institutions. While there is no agreed-upon term that may be taken as indicative of a treaty's consolidation a reasonable rule of thumb may be 50 years of service. Such a term allows ample opportunity for political shifts within each compacting state, for oscillations in government, even changes in state practice that might influence a government's commitment to a treaty. Interestingly, when this metric is applied to the universe of contemporary or prior existing water treaties, the number of international freshwater treaties meeting this test diminishes from more than 600 to just over 70 such treaties (Mumme 2019). Most contemporary water treaties have yet to stand the test of time. Longevity isn't an exacting, standalone test of international commitment

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<sup>4</sup> Glennon and Culp (2002, 981) describe the IBWC's minutes as "treaty executive agreements" that authorize activities required by a treaty.

<sup>5</sup> The key to their enforceability in law is statutory support. Even where statutory authority does not exist and the jurisdiction of federal courts is not engaged, the executive power must comply with the terms of a treaty. See McCarthy (2011, 287-286).

<sup>6</sup> This does not mean that one country cannot decide it cannot or does not wish to comply with the terms of the minute, but it does mean the minute remains in force until it should be altered by another minute.



but it should be taken as one of the indicators that a treaty may have gained quasi-constitutional status.

### *Stakeholder Acceptance*

An additional indicator that a treaty has become deeply embedded in the normative and operational expectations and practices of its compacting parties is enduring stakeholder acceptance. Most complex water treaties have numerous stakeholders, including domestic governments ranging from the federal to the subnational, a wide range of water dependent industries, irrigation districts, municipal utilities, electric power providers, environmental organizations, recreational bodies, and even international organizations with interests in the watershed. This is certainly true of the 1944 water treaty.

In the case at hand, the evidence of sustained stakeholder support for the treaty is extraordinary. One can point to the manner in which the treaty has been incorporated as a basic structural condition for understanding the Law of the Rivers (both the Rio Grande and the Colorado rivers). The treaty is today one of the fundamental legal instruments guiding the management and allocation of water in these river basins in both countries. Recent evidence of this is seen in the drought conservation plan recently negotiated among the seven Colorado River basin states north of the border (U.S. Bureau of Reclamation 2018). That the treaty is accepted as a guide-tool for rationing water resources to a wide range of water interests in both countries in times of scarcity is a strong indicator of stakeholder commitment to the treaty.

Knowledgeable observers may well point to various instances of sharp criticism of the treaty and localized demands that the treaty be disregarded or abandoned in favor of some other more desirable instrument better suited to the needs and expectations of particular stakeholders. During the salinity crisis,<sup>7</sup> for example, Mexico threatened at one point to withdraw from the treaty in the face U.S. unwillingness to accept Mexico's legal position. A few Colorado River basin-state representatives thought the treaty should be revisited. Other criticisms have been directed at the IBWC's laggardly and bureaucratic management of transboundary sanitation projects, notably problems at Nogales, Mexicali, and Tijuana. During the late 1970s and 1980s the inadequacy of the treaty in the face of border region environmental threats led to a new agreement, the La Paz Agreement on binational environmental cooperation. The treaty's lacunae have often been a source of scathing criticism by stakeholders who viewed it a more a barrier than a bridge to addressing certain pressing water related problems in the border area. Most recently, various Texas stakeholders on the Rio Grande River claim the treaty is inadequate and should be revised to better assure the reliability of Mexico's delivery of Article 4 treaty water.

What is interesting in all this is that at no time has Mexico or the United States seriously considered revisiting the text of the treaty. I would argue that the criticisms have, in fact, largely reinforced the treaty by drawing attention to its resilience and the need to engage in further negotiation within the text and spirit of the treaty to solve particular problems.

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<sup>7</sup> A detailed account of the politics associated with the salinity dispute is given in Mumme, 2016.

The solutions to the problems, even when temporary or partial, as in the case of IBWC's sanitation projects, have the effect of reinforcing commitment to the treaty and elaborating the means and forms by which it may be extended to address these problems. At the end of the day and at any given time, most of the treaty's many and diverse stakeholders have accepted the treaty as on-balance fair and as a core institutional mechanism insuring both security of water supply and flexibility to deal with a range of challenges, anticipated and unanticipated. Most important, stakeholders basically understand the treaty is a political document that points toward negotiated, peaceful settlement of disputes small and large in U.S.-Mexico water relations. It is this enduring stakeholder support predicated on a deeply embedded institutionalization of the treaty's commitments and procedures in water management on both sides of the boundary that lends the treaty a quasi-constitutional character.

## Present and Future Challenges

If the 1944 treaty has acquired quasi-constitutional stature as I think it has, that does not mean that it is adequate to every present or future circumstance in its present evolved state. A brief enumeration of the well-known lacunae and challenges will suffice to make the point. These include:

### *Water rationing rules for managing drought-driven scarcity conditions*

The landmark agreements in Minute 323 (2017) and predecessor agreements, Minutes 317-319, governing shortage sharing paved new ground, technically sidestepping but acting in the spirit of the treaty's Article 10 recipe for managing extraordinary drought. The 2018 U.S. stakeholder agreements on shortage sharing give this effect in the Colorado River Basin. These agreements do not apply to the Rio Grande River situation, however, where more needs to be done in establishing mutually agreed ground rules for shortage sharing.

### *Managing transboundary groundwater*

This well-recognized deficit in the 1944 treaty still awaits adequate address. IBWC Minute 242 (1973) legitimized the treaty's applicability to groundwater situations by 1) regulating groundwater extraction on the San Luis Mesa and 2) envisioning a comprehensive groundwater treaty for the boundary area. The IBWC explored this issue in the 1970s but the U.S. thought it advantageous not to enter into negotiations at the time. The Transboundary Aquifer Assessment Act (PL109-448 2006) enabled the U.S. Geological Survey (USGS) and the U.S. Section of the International Boundary and Water Commission (USIBWC), partnering with academic researchers to study groundwater along the New Mexico-Chihuahua and Arizona-Sonora boundary but the program expired in 2015 and has not yet renewed. IBWC Minute 323's authority for developing alternate water sources includes groundwater and arguably provides a mechanism for considering transboundary management in the lower Colorado River zone (IBWC 2018). But more needs to be done to avoid a race to the bottom in groundwater dependent communities along the boundary.

*Strategic planning and funding to manage transboundary sanitation threats*

One of the widely recognized problems IBWC has faced in solving transboundary sewage and sanitation problems along the border is the simple fact that problems outpace solutions owing to the rapid pace of urbanization in the border region. As presently practiced, the treaty supports an ad hoc “crisis-response” approach to managing transboundary sanitation problems rather than a strategic long-term planning and management approach that anticipates and addresses known and predictable problems along the border.

*Provision for ecological uses and management of treaty water and waterways*

Minutes 317-319 and Minute 323 paved new ground in recognizing environmental threats to water availability and the need to protect water-reliant ecological values in the lower Colorado River riparian corridor. This is the first time such values have ever been recognized as a function of the treaty, paving the way for similar interpretation in addressing ecological needs in other transboundary riparian corridors along the boundary. But this could be a slow process, particularly on the Rio Grande where water disputes (and U.S. security measures) have blinded some stakeholders to the value of safeguarding ecological values served by the river.

*Establishing additional public and expert advisory bodies to the IBWC*

Progress is being made here. Citizen advisory forums were established by the U.S. section beginning in the late 1990s and there is now a move afoot for Mexico to establish similar bodies to the CILA—the Mexican section of the IBWC. These bodies are really sounding boards and public relations outreach by the IBWC’s national sections, but still worthwhile. There is little evidence, however, they move IBWC’s decision-making. However, the new agreements since 2010 on the Colorado River establish both intergovernmental and expert governmental-nongovernmental advisory bodies (Binational Consultative Council, Binational Core Group, and issue-centered work groups) that have moved the needle at IBWC and the governments. The fact these are now treaty-recognized bodies is a major advance in IBWC’s capacity to listen and utilize the concerns and expertise these advisory groups bring to the table. This does not extend to other transboundary rivers, however. On the Rio Grande, back in 2003, Minute 308 recommended the establishment of binational basin-wide advisory body to assist the IBWC in managing treaty water. Participants at the IBWC’s 2005 Rio Grande Summit reaffirmed the need for such an advisory body, but there is yet to be any movement to that effect.

*New Water Sources*

The rapid development of new water sources and water augmentation falling outside the bounds of treaty-recognized water supplies is apt to need further definition of roles and responsibilities between the IBWC and other federal, state, local, and private actors managing water in the border area.

What is interesting about this set of actual and potential problems is that the 1944 water treaty is entirely adequate to the task of addressing these assorted issues. There is no problem on this list that cannot be resolved through the minute process within the spirit and letter of the treaty.

## Conclusion

The 1944 water treaty has attained a quasi-constitutional standing in U.S.-Mexico treaty water management practice that is quite rare when gauged against the practice and standing of the 600+ transboundary freshwater treaties (Transboundary Freshwater Dispute Database 2018) forged and enduring today. For that both countries should be grateful. It is doubtful that a treaty of this complexity and vitality could be written, much less signed and ratified, today. The great merit of the treaty lies not only in its many specific provisions for water allocation, reclamation, hydropower, and sanitation but in the fact that it remains a fundamentally political document that can be made to bend in the directions the governments mutually agree upon without altering its text. This fact makes the treaty more equitable and more resilient. The treaty is not perfect but its design ensures that it will remain one of the world's finest examples of binational cooperation in managing shared transboundary water resources.

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