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Border of Water, Border of Law: Río Bravo/Rio Grande Boundary Adjudications Since 1884

PETER L. REICH[†]

I. INTRODUCTION

This essay traces how the Mexico-U.S. water boundary, which began as a geographic feature, ended as a legal doctrine. While many scholars have studied various aspects of the border, including its history, economics, politics, and sociology, few have examined its most obvious topographical fact: the Río Bravo/Rio Grande.¹ That lacuna may stem from the fact the physical river and the political boundary are not always the same, so riverine demarcation has been a complicated process which has defined the border in conjunction with its other characteristics. Demonstrating the difficulties of the delineation, this project begins an analysis of the binational decisions by which, for over a century, the International Boundary Commission

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1. See PETER L. REICH, *THE LAW OF THE UNITED STATES-MEXICO BORDER: A CASEBOOK* 3–9 (2017) (integrating theoretical, social scientific, and regional research on the border); see also PAUL GANSTER & DAVID LOREY, *THE U.S.-MEXICAN BORDER INTO THE TWENTIETH CENTURY* (2008); *THE U.S.-MEXICO TRANSBORDER REGION: CULTURAL DYNAMICS AND HISTORICAL INTERACTION* (Carlos G. Vélez-Ibañez & Josiah Heyman eds., 2017) (providing non-legal overviews of border issues); Donald W. Peters, *The Rio Grande Boundary Dispute in American Diplomacy*, 54 SW. HIST. Q. 412 (1951) (describing negotiations over the river boundary through 1950); Robert J. McCarthy, *Executive Authority, Adaptive Treaty Interpretation, and the International Boundary and Water Commission, U.S.-Mexico*, 14 U. DENV. WATER L. REV. 197 (2011) (detailing the statutory authority for, and administrative problems of, river boundary management).

(IBC) and its post-1944 successor, the International Boundary and Water Commission (IBWC), have allocated ownership of *bancos* (sandbar islands).²

First, the article sets up a theoretical construct framing rivers as contestation sites whereby analysis of a series of cases reveals underlying structural patterns in dispute resolution. Next, it discusses the specific geographical and social context of an uncontrollable river which has challenged both the assessments of experts and the needs of local populations. The project continues with a description of the binational legal framework for which Roman law became a common language. The core of the essay then evaluates *banco* adjudication in practice, based on Boundary Commission reports and “minutes” (agreements on specific controversies).³ Disputes were settled amicably, with one notable exception: the Chamizal arbitration regarding a *banco* lying between Ciudad Juárez, Chihuahua, and El Paso, Texas. Finally, the essay explains why the binational decision to channelize some of the river with concrete may have prevented unpredictable physical changes, but has not eliminated contestation, as a recent cross-border shooting case demonstrates.

II. THEORETICAL CONSTRUCT

Varying theories generated by the problematic legal situation of rivers, and the application of structuralism to international law, all provide valuable lenses through which to view Río Bravo/Rio Grande boundary adjudications. Referring to European imperialism in Africa and the New World, historian Lauren Benton identifies rivers as “treacherous places” of colonial contestation between maritime and upcountry communities.⁴ Conquerors attempting to penetrate the interior by river confronted not only harrowing rapids but powerful rivals, both foreign and local, who did not acknowledge any particular country’s legal “rights” to possession and occupation.⁵ Authorities’ difficulties in imposing control on riverine areas have also occurred in

2. The author is currently preparing an extended study of the *banco* adjudications in the context of international legal history.

3. COMISIÓN INTERNACIONAL DE LÍMITES ENTRE MEXICO Y LOS ESTADOS UNIDOS, SECCION MEXICANA, MONUMENTACIÓN DE BANCOS EN EL RÍO BRAVO DEL NORTE (O RIO GRANDE) EJECUTADA CONFORME A LA CONVENCION DE BANCOS DEL 20 DE MARZO DE 1905, SEGUNDA SERIE, BANCOS NÚMEROS 59 A 89, AÑOS DE 1910–12 (1912); www.ibwc.state.gov/Files/Minutes.

4. See LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400–1900, at 41, 103 (2010).

5. *Id.*

non-colonial contexts, such as that of the Seine in revolutionary Paris, where official attempts to suppress banditry and gambling were regularly eluded, and water access disputes between millers and other users resisted governmental intervention.⁶ It is easy to see how administrative problems could only be magnified when rivers were declared to be hard boundaries between nations but still remained hotbeds of contention.

The model of legal structuralism illuminates how endemic riverine conflicts have been resolved. According to this school of thought, distinctive rhetorical patterns and strategies characterize particular doctrines.⁷ In other words, the law is a language system in which legal source materials (court decisions, professional writings) reveal similarities beneath the surface of what may at first appear to be opposing positions.⁸ For example, the European imperial powers employed Roman legal concepts such as *terra nullius* (land without an owner) to justify their claims against competitors from the West, who also accepted these identical terms of discourse.⁹ As will be seen, the management of the geographically and socio-politically problematic *banco* disputes can also be understood as an application of the structuralist approach.

III. GEOGRAPHICAL AND SOCIETAL CONTEXT

Before demonstrating how the Boundary Commission employed an international legal language facilitating conflict reduction, a description of the specific topography and governmental process in the border region will clarify why territorial controversies took place. The Río Bravo/Rio Grande at times meanders slowly, and at others shifts rapidly, depending upon the sub humid or arid characteristics of the landscape through which it flows.¹⁰ Loops in the river were constantly being cut off, creating new *bancos* on one side or the other.¹¹ After the 1848 Treaty of Guadalupe Hidalgo designated the riverline as the international boundary, these isolated parcels became the subjects of sovereignty disputes, and residents were forced either to abandon them

6. RICHARD COBB, *PARIS AND ITS PROVINCES, 1792–1802*, at 57–86 (1975).

7. DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* 7, 289 (1987).

8. Justin Desautels-Stein, *International Legal Structuralism*, 8 *INT'L THEORY* 201, 208, 211 (2016).

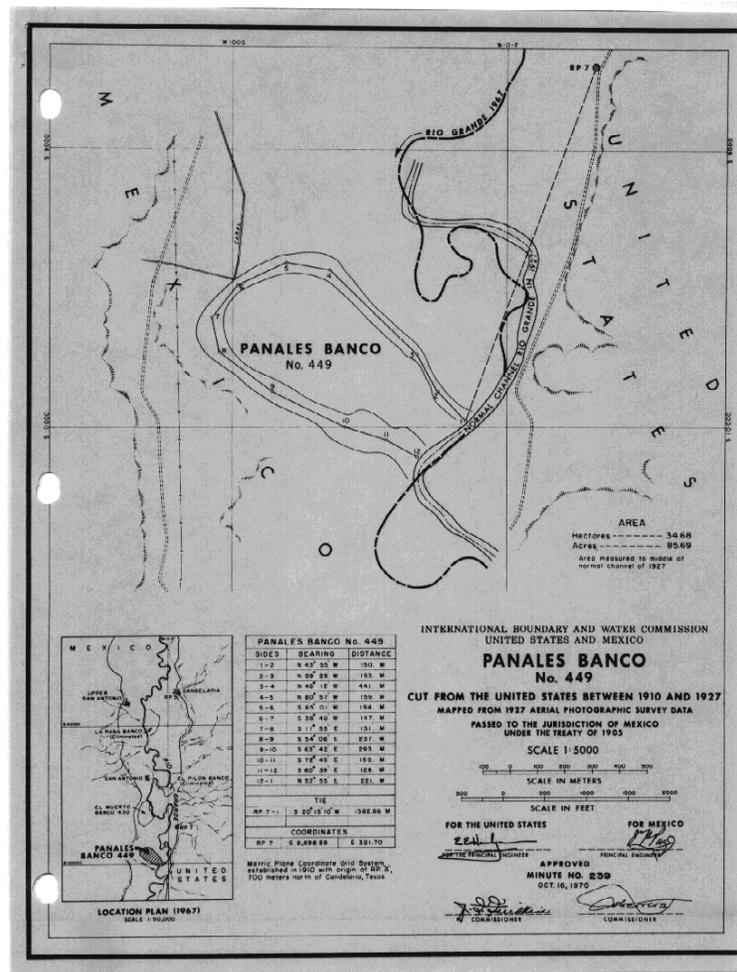
9. BENTON, *supra* note 4, at 59.

10. JERRY E. MUELLER, *RESTLESS RIVER: INTERNATIONAL LAW AND THE BEHAVIOR OF THE RIO GRANDE* 123–24 (1974).

11. JOHN W. HOUSE, *FRONTIER ON THE RIO GRANDE: A POLITICAL GEOGRAPHY OF DEVELOPMENT AND SOCIAL DEPRIVATION* 37–39 (1982).

or to suffer uncertain status.¹² The *bancos* became refuges for bandits and smugglers, making the determination of their nationality even more urgent for authorities of both nations.¹³

FIGURE 1: CONTEMPORARY MAP OF THE PANALES BANCO, SHOWING HOW THE RIO GRANDE'S CHANGING COURSE ISOLATED THE PARCEL ON A DIFFERENT SIDE OF THE RIVER.¹⁴



12. *Id.* at 39; see Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, art. 5, Feb. 2, 1848, 9 STAT. 922 (designating the Río Bravo/Río Grande as the boundary).

13. See HOUSE, *supra* note 11.

14. IBWC Minute No. 239 (Oct. 16, 1970), available at <https://www.ibwc.gov/Minutes/Min.239pdf>.

In addition to the natural geography of the region, the professional collaboration between Mexican and U.S. officials charged with administering the boundary contributed to the context of the *banco* adjudications. For example, in the late nineteenth century, consuls and local bureaucrats in the borderlands cooperated to interdict cross-border criminal activity and to extradite prisoners over whom one of the countries preferred to exert jurisdiction.¹⁵ Similarly, the willingness of both governments to enforce the boundary itself ended centuries of violence between Mexican and regional Native American communities by preventing the latter from using the U.S. side as a temporary haven.¹⁶ This traditional partnership informed the adjudications at multiple levels, influencing the legal and hydrological models that lawyers and engineers used to settle disputes.¹⁷

IV. LEGAL FRAMEWORK

The diplomats and lawyers addressing Mexico-U.S. water boundary questions found a unifying discourse in the longstanding legal doctrines of *accretion* and *avulsion*. According to classical Roman law, alluvial additions, or accretion (also called alluvion), altered a riverine boundary, while rapid shifts in the watercourse, or avulsion, did not.¹⁸ Both the civil law and common law traditions incorporated these concepts, which appear in mid-nineteenth-century Mexican and U.S. treatises well prior to the beginning of the *banco* adjudications.¹⁹

This doctrinal framework for *banco* adjudication was complemented by a series of binational treaties and conventions. In 1848, the Treaty of Guadalupe Hidalgo ending the Mexican-U.S. War delineated the Río Bravo/Rio Grande and a short portion of the

15. DANIEL S. MARGOLIES, SPACES OF LAW IN AMERICAN FOREIGN RELATIONS: EXTRADITION AND EXTRATERRITORIALITY IN THE BORDERLANDS AND BEYOND, 1877–1898, at 27–28, 333 (2011).

16. LANCE R. BLYTH, CHIRICAHUA AND JANOS: COMMUNITIES OF VIOLENCE IN THE SOUTHWESTERN BORDERLANDS, 1680–1880, at 21 (2012).

17. DONALD WORSTER, AN UNSETTLED COUNTRY: CHANGING LANDSCAPES OF THE AMERICAN WEST 36 (1994) (discussing the international scientific language employed by nineteenth-century water engineers).

18. GAIUS, THE INSTITUTES OF GAIUS 270 (William M. Gordon & Olivia F. Robinson trans., 1988); FRITZ SCHULZ, CLASSICAL ROMAN LAW 363 (reprint 1992) (1951).

19. JUAN SALA, SALA MEXICANO 62–63 (1845); JOSEPH K. ANGELL, LAW OF WATERCOURSES 53–57, 60–61 (5th ed. 1854); see also JOAQUÍN ESCRICHE, DICCIONARIO RAZONADO DE LEGISLACIÓN Y JURISPRUDENCIA 149, 335–36 (1852) (standard Spanish legal dictionary with entries for *aluvión* and *avulsión*).

Colorado River as the international river boundary.²⁰ U.S. Attorney General Caleb Cushing, in an 1856 official opinion, considered that the accretion and avulsion doctrines applied squarely to any disputes over the borderline's location, citing to civil law and common law sources.²¹ Having created the International Boundary Commission (IBC) to conduct joint surveys in 1882, the two countries signed a convention in 1884 to maintain the riverine border as the center of the "normal channel," and reaffirmed the applicability of the Roman legal principles.²² A further convention in 1905 modified the 1884 agreement by retaining only the deepest river channel as the boundary after the formation of *bancos* by course changes, and "eliminated" (allocated) land thus cut off by transferring it to the country to which it was now attached, so long as the parcel was less than 250 hectares (617 acres) in size or had fewer than 200 inhabitants.²³ Based on this system, the IBC began the complicated process of surveying and assigning *bancos* to the respective nations.²⁴

V. BANCO ADJUDICATION IN PRACTICE

Implementing these accords between 1906 and 1941, the IBC eliminated 172 *bancos*, transferring approximately two thirds of the land at issue to the United States and one third of it to Mexico.²⁵ From 1941 to 1967 the proportion was reversed, with slightly over half the acreage becoming Mexican.²⁶ These decisions were facilitated by a cooperative attitude on the part of both countries, and the mutually understood language of Roman law.

The successful proceedings of the Commission were facilitated by extensive collaboration among binational personnel: the joint crews sent out to gather information about *banco* formation and the commissioners themselves. An example of teamwork within a Mexican-U.S. surveying unit took place during 1910-11 field

20. Treaty of Peace, *supra* note 12; *see also* HOUSE, *supra* note 11.

21. Arcifinious Boundaries, 7 Op. Att'y Gen. 175, 179-180 (1858).

22. Convention Between the United States of America and the United States of Mexico Touching the International Boundary Line Where It Follows the Bed of the Rio Grande and Rio Colorado, U.S.-Mex., arts. I, II, Nov. 12, 1884, 24 Stat. 1011. In 1944 the IBC was renamed the International Boundary and Water Commission. MCCARTHY, *supra* note 1, at 211.

23. Convention Between the United States and Mexico for the Elimination of the Bancos in the Rio Grande from the Effects of Article II of the Treaty of November 12, 1884, U.S.-Mex., arts I, II, Mar. 20, 1905, 35 Stat. 1863.

24. *See* MUELLER, *supra* note 10.

25. *Id.*

26. *Id.* at 40.

operations, when a U.S. leveler made a one-half-meter mistake in calculating the elevation between Rio Grande City and Roma, Texas, and the error was caught and corrected without incident by his Mexican counterpart.²⁷ These skilled technicians were viewed as a resource by the Commission, which regularly consulted them on the advisability of creating *bancos* artificially by cutting off bends in the river.²⁸ The IBC also recorded testimony from local residents on the consequences of allocating a particular *banco* to one side or the other, as when El Paso County wanted to acquire land through such cutoffs, or when shifting a *banco* to grant Mexican citizens water access might inconveniently isolate a U.S. pumping plant.²⁹ Based on such information-gathering, the commissioners could recommend a reasoned course of action, such as when the two governments split the cost of a fence along the boundary running through certain *bancos*.³⁰

Expert data collection by engineers and their assessment by the Commission generally resulted in agreement as to whether a given *banco* was formed by border-altering accretion or less consequential avulsion. In the 1907 case of the Soliseñito *banco* near Matamoros, Tamaulipas, the Mexican engineer argued that the land, originally in Texas, had become part of Mexico by accretion, while his U.S. counterpart disagreed.³¹ After receiving vague testimony from a local resident, the Commission allocated the Soliseñito to the Mexican side because “the Commissioners will always assume that ... prior change was caused by gradual erosion and deposit ... unless said prior avulsive change can be conclusively proven by reliable surveys and well qualified witnesses and the usual evidence on the ground....”³² Due to the 1905 Convention’s “elimination” provision for *bancos* smaller than 250 hectares, its members often agreed not to apply the accretion/avulsion rule.³³ Thus, when the Culebrón (“Never-ending Snake”) *banco* of 75.2 hectares was cut from Mexico by avulsion, they left it on the American side in 1946, while when the Panales

27. DEPARTMENT OF STATE, PROCEEDINGS OF THE INTERNATIONAL BOUNDARY COMMISSION UNITED STATES AND MEXICO, AMERICAN JOINT REPORT OF THE CONSULTING ENGINEERS ON FIELD OPERATIONS OF 1910–11, at 16 (1913).

28. IBC Minute No. 44 (June 11, 1924), available at <https://www.ibwc.gov/Files/Minutes/Min44.pdf>.

29. IBC Minute No. 43 (June 6, 1924), available at <https://www.ibwc.gov/Files/Minutes/Min43.pdf>; IBC Minute No. 56 (May 4, 1925), available at <https://www.ibwc.gov/Files/Minutes/Min56.pdf>.

30. IBC Minute No. 15 (Nov. 27, 1923), available at <https://www.ibwc.gov/Files/Minutes/Min15.pdf>.

31. COMISIÓN, *supra* note 3, at 44.

32. *Id.* at 44–45.

33. House, *supra* note 11, at 38–39.

("Honeycombs;" see Figure 1) and Loma del Pinto *bancos* of 34.7 and 37.3 hectares, respectively, were similarly cut from the United States they allocated them to Mexico in 1970.³⁴

Yet one case, the Chamizal controversy regarding a *banco* between Ciudad Juárez and El Paso, became the exception that sorely proved the rule of binational collaboration.³⁵ In 1895, the countries attempted to address their dispute over whether the land had passed to the United States through accretion or, as Mexico claimed, remained its own because the change was avulsive.³⁶ The matter went to international arbitration in 1910, but the United States outright rejected the Canadian judge's decision to divide the land.³⁷ At last, in 1963, U.S. President John F. Kennedy settled the issue diplomatically, conceding most of the *banco* to Mexico as a gesture of international goodwill.³⁸ The parties then agreed to prevent further watercourse changes by relocating the area channel into a concrete culvert (see Figure 2).³⁹ While the Chamizal dispute was not formally concluded according to the accretion and avulsion doctrines, a recent Mexican treatise on Roman law states that avulsion was in fact the basis for the settlement, thus contextualizing it within the shared discourse governing the other *banco* adjudications.⁴⁰

VI. CONCLUSION

Practical cooperation and the adoption of a common legal language were both manifestations of the equal willingness on the part of Mexico and the United States to overcome their riverine boundary conflicts. In this aim, of course, the countries were not unique. According to one study of Latin American international relations,

34. IBWC Minute No. 183 (Sept. 24, 1946), *available at* <https://www.ibwc.gov/Files/Minutes/Min183.pdf>; IBWC Minute No. 239 (Oct. 16, 1970), *available at* <https://www.ibwc.gov/Files/Minutes/Min239.pdf>.

35. DEPARTMENT OF STATE, PROCEEDINGS OF THE INTERNATIONAL (WATER) BOUNDARY COMMISSION, UNITED STATES AND MEXICO, *EQUITABLE DISTRIBUTION OF THE WATERS OF THE RIO GRANDE* 45 (1903).

36. *Id.*

37. SHELDON B. LISS, *A CENTURY OF DISAGREEMENT: THE CHAMIZAL CONFLICT, 1864–1964*, 34–35 (1965).

38. *See id.*; ALAN C. LAMBORN & STEPHEN P. MUMME, *STATECRAFT, DOMESTIC POLITICS, AND FOREIGN POLICY MAKING: THE EL CHAMIZAL DISPUTE* (1988) (focusing primarily on diplomatic negotiations and policy aspects of the controversy). This author's current study of the *banco* adjudications delves more deeply into the legal arguments over *El Chamizal* and their basis in Roman, Spanish, French, Mexican, and U.S. law.

39. IBWC Minute No. 214 (Aug. 28, 1963), *available at* <https://www.ibwc.gov/Files/Minutes/Min214.pdf>.

40. JOSÉ DE JESÚS LEDESMA URIBE, ET AL., *DERECHO ROMANO I* (2015).

nations have often resolved territorial disputes because stable borders encourage mutually beneficial trade and regional economic integration, and that is doubtless true elsewhere in the world.⁴¹ In the Mexico-U.S. situation, congenial on-the-ground collaboration and the unifying discourse of Roman law evidenced the mutual desire that the *banco* adjudications yield positive results, (notwithstanding the unusually circuitous denouement of the Chamizal conflict). Significantly, the cases coincided with a late-nineteenth- and early-twentieth-century business boom in the Mexico-Texas border region, enhanced by generally cooperative international relations and advantageous financing laws on both sides.⁴² In this sense the accretion and avulsion doctrines constituted a structure which mediated controversy and clearly contributed to a climate favoring economic development.

This is not to say that all contestation of the boundary was ended by the *banco* adjudications and the Chamizal channelization. One recent scholar has asserted that the latter “sanitized” Mexico-U.S. tensions which surface via graffiti on the culvert’s banks, constituting dissent by those people unable to cross the border freely.⁴³ And in a recent U.S. Supreme Court case, the family of a Mexican boy shot on the south side of the culvert by a U.S. Border Patrol agent standing on the other side was allowed to continue its lawsuit based on the Fourth and Fifth Amendments, showing that keeping the Rio Grande from changing course has hardly ended its role as a site of conflict.⁴⁴ Still, the *banco* adjudication process remains a model for binational compromise, though it has not necessarily benefited all border stakeholders equally.

41. Beth Simmons, *Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes*, 46 J. CONFLICT RESOLUTION 829, 847 (2002).

42. ALICIA M. DEWEY, PESOS AND DOLLARS: ENTREPRENEURS IN THE TEXAS-MEXICO BORDERLANDS, 1880–1940, at 239 (2014).

43. BRIAN J. MCNELLY, *La Frontera and El Chamizal: Liminality, Territoriality, and Visual Discourse*, in THE RESPONSIBILITIES OF RHETORIC (Michelle Smith & Barbara Warnick eds., 2010).

44. *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (per curiam).

FIGURE 2. PRESIDENT AND MRS. JOHNSON VIEW THE NEWLY CHANNELIZED RIO GRANDE SECTION AT THE CHAMIZAL. ASSOCIATED PRESS, DEC. 13, 1968. REPRINTED IN *HERNANDEZ V. MESA*, 137 S.Ct. 2003 (2017) (BREYER, J., DISSIDENTING).

