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U.S.-Mexico Environmental Treaty Impediments to Tactical Security Infrastructure along the International Boundary

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ABSTRACT

The rapid construction of security infrastructure along the U.S. border with Mexico has proceeded as a unilateral initiative of the U.S. federal government under the authority of the 2005 REAL ID Act and the 2006 Secure Fence Act. While various objections to tactical infrastructure development have been raised, little attention has been given to the potentially complicating effects of the international boundary, water, and environmental agreements to which the two nations are party. At least six agreements—including the 1970 Boundary Treaty, the 1944 Water Treaty, and the 1983 La Paz Agreement—have bearing on the construction of tactical security infrastructure along the international boundary with Mexico. This article argues that these various agreements are not trivial when considered in light of customary international law and do limit the unilateral implementation of tactical security infrastructure by U.S. federal authorities in ways that should be conducive to greater consultation and coordination with Mexico in the implementation of these measures.

I. INTRODUCTION

The rapid construction of security infrastructure along the U.S.-Mexico border has proceeded as a unilateral initiative of the U.S. government under the authority of the 2005 REAL ID Act[1] and the 2006 Secure

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1. The REAL ID Act became law as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005). Among its various provisions, the Act authorizes the Secretary of the Department of Homeland Security (DHS) to waive any domestic legislation that may prevent the deployment and construction of security infrastructure along the international boundaries of the United States. For discussion of these issues, see MICHAEL JOHN GARCIA ET AL., CONG. RESEARCH SERV., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF H.R. 418, THE REAL ID ACT OF 2005, *available at* http://epic.org/privacy/dv/REAL_ID_CRS_ANALYSIS.pdf.

Fence Act.[2] The statutory mandate to complete the 700 miles of authorized fencing and other measures will most certainly not be achieved on schedule, as the project has been stalled in several locations by spirited civic opposition to the implementation of these authorized security works. Such opposition has been particularly energized in the Lower Rio Grande Valley where fencing and other obstructions threaten to isolate many residents in what is virtually a no man's land between the fence and river that forms the international boundary.[3]

Various objections have been raised to fencing and other boundary security measures at the domestic level,[4] many of which have focused on the adverse environmental impacts associated with the fencing project and on critiquing the near blanket authority given to the Secretary of the Department of Homeland Security (DHS) under the 2005 REAL ID Act to waive domestic legislation that impedes the construction of tactical security infrastructure.[5] Critics have also focused on the human rights of migrants attempting to penetrate or evade the new bar-

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2. The 2006 Secure Fence Act instructs the Secretary of DHS to take all necessary and appropriate actions "to achieve and maintain operational control over the entire international land and maritime borders of the United States." The Act amends section 102(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to mandate double-layer reinforced fencing at various locations along the U.S. border with Mexico, for a total of 670 miles of additional fencing along the southern boundary of the United States. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (Oct. 26, 2006).

3. *Good Neighbours Make Fences*, ECONOMIST, Oct. 2, 2008.

4. On border fencing, see KIM VACARIU & JENNY NEELEY, ALTERNATIVES AND MITIGATION FOR BORDER SECURITY INFRASTRUCTURE IN AREAS OF CRITICAL ECOLOGICAL CONCERN: RECOMMENDATIONS OF THE BORDER ECOLOGICAL WORKSHOP II (2006); Marta Tavares, *Fencing Out the Neighbors: Legal Implications of the U.S.-Mexico Border Security Fence*, HUM. RTS. BRIEF, Spring 2007, at 33. Additional concerns have been raised with respect to U.S. unilateral initiatives to clear unwanted riparian vegetation such as Carrizo cane to improve visibility on the U.S. side of the river; DHS has chosen to use the herbicide imazapyr, whose ecological and public health effects are not fully understood. The proposed spraying of a 1.1-mile strip along the Rio Grande at Laredo, Texas has alarmed many local residents and may pose a hazard to the city of Nuevo Laredo's potable water intake on the river. Mexico has raised objections to the herbicide spraying and the project has recently been delayed by a lawsuit filed by Rio Grande Legal Aid challenging the project. *See* Miguel Timoshenkov, *NL Not Sold on Herbicide*, LAREDO MORNING TIMES, Mar. 19, 2009; *The Border's* "*Agent Orange*" *Controversy*, FRONTERA NORTESUR, Mar. 31, 2009; Billie Greenwood, *11th Hour Reprieve Today for 1 Mile of Planet Earth!*, ALLVOICES.COM, Mar. 25, 2009, *available at* www.allvoices.com/contributed-news/2818721-11th-hour-reprieve-today-for-1-mile-of-planet-earth.

5. BRIAN P. SEGEE & JENNY L. NEELEY, DEFENDERS OF WILDLIFE, ON THE LINE: THE IMPACTS OF IMMIGRATION POLICY ON WILDLIFE AND HABITAT IN THE ARIZONA BORDERLANDS (2006); Juliet Eilperin, *Environmental Laws to Be Waived for Fence; Lawmaker Accuses Administration of Abusing Authority to Build Barrier at Mexican Border*, WASH. POST, Apr. 2, 2008, at A4.

riers.[6] However, little attention has been given to the potentially complicating effects of the international boundary, water, and environmental agreements to which the two nations are party should Mexico choose to press its rights at the level of international law. These agreements include the 1970 Boundary Treaty,[7] the 1944 Water Treaty,[8] the 1936 Migratory Bird Convention,[9] the 1940 Western Hemisphere Convention,[10] the 1983 La Paz Agreement,[11] and the 1993 North American Agreement on Environmental Cooperation (NAAEC).[12] Mexico's formal protests referencing environmental concerns have to date been largely disregarded by U.S. officials.[13]

There is good reason, however, to take a careful look at these international commitments as they affect or potentially impact fixed infrastructure development along the international boundary. As international treaties and protocols, these agreements enjoy a legal standing that may supersede the authority of most domestic legislation. These obligations are reinforced at the level of customary international law by the Vienna Convention on the Law of Treaties (Vienna Conven-

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6. Tavares, *supra* note 4, at 35. R

7. Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary, U.S.-Mex., Nov. 23, 1970, 23 U.S.T. 371 [hereinafter 1970 Boundary Treaty], *available at* http://www.ibwc.state.gov/Files/1970Treaty.pdf.

8. Treaty Relating to Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.-Mex., Feb. 3, 1944, 59 Stat. 1219 [hereinafter 1944 Water Treaty], *available at* http://www.ibwc.state.gov/Files/1944Treaty.pdf.

9. Convention for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311 [hereinafter 1936 Migratory Bird Convention], *available at* http://www.fws.gov/le/pdffiles/mexico_mig_bird_treaty.pdf.

10. Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193 [hereinafter 1940 Western Hemisphere Convention], *available at* http://sedac.ciesin.columbia.edu/entri/texts/wildlife.western.hemisphere.1940.html.

11. Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, U.S.-Mex., Aug. 14, 1983, 35 U.S.T. 2916 [hereinafter 1983 La Paz Agreement], *available at* http://www.semarnat.gob.mx/presenciainternacional/fronteranorte/Documents/Marco%20Legal/007_Mex-EUA_Convenio_Proteccion_Medio_Ambiente_Fronterizo_CONVENIO%20DE%20LA%20PAZ%201983_ing.pdf.

12. North American Agreement on Environmental Cooperation, U.S.-Mex.-Can., Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC], *available at* http://www.worldtradelaw.net/nafta/naaec.pdf.

13. *See* Manuel Roig-Franzia, *Mexico Calls U.S. Border Fence Severe Threat to Environment*, WASH. POST, Nov. 16, 2007, at A24, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/11/15/AR2007111502272.html.

tion), concluded in 1969.[14] U.S. domestic security measures undertaken on the border since the tragic events of September 11, 2001,[15] for all their sovereign justification, are not exempt from these international obligations. Failure to abide by these agreements could prove costly to the United States in terms of its international prestige and complicate future efforts to move forward on matters related to environmental cooperation that affect U.S. citizens at the border and in the interior as well. Such concerns are particularly relevant in view of the Obama administration's expressed objective of restoring America's commitment to engaging the international community and Latin America on security solutions.[16]

This article comments on the implications of these agreements for border security infrastructure; it distinguishes agreements presently in force that have been ratified by the U.S. Senate from executive agreements of lesser standing that may impact border security or reinforce security-relevant applications of other ratified treaties and protocols. The article begins with a brief review of the relevance of the Vienna Convention for gauging a U.S. domestic security justification for exception from international treaty obligations, and follows with discussion of the actual or potential applications for security infrastructure arising from various bilateral treaties and executive agreements to which the United States and Mexico are party.

II. THE VIENNA CONVENTION ON THE LAW OF TREATIES AND U.S. BORDER SECURITY

Any consideration of the legal obligations of the United States and Mexico with reference to their formal bilateral and multilateral agreements should be framed at least in part within the basic obligations of states under the 1969 Vienna Convention on the Law of Treaties (Vienna Convention). The Convention was adopted on May 22, 1969, and opened

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14. Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679, 115 U.N.T.S. 331 [hereinafter Vienna Convention], *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

15. CHAD C. HADDAL ET AL., CONG. RESEARCH SERV., BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER 1–2 (2009), *available at* http://www.fas.org/sgp/crs/homesec/RL33659.pdf.

16. During his presidential campaign, President Barack Obama promised to "rebuild diplomatic links throughout the hemisphere through aggressive, principled, and sustained diplomacy in the Americas from Day One," and to "bolster U.S. interests in the region by pursuing policies that advance democracy, opportunity, and security and will treat our hemispheric partners and neighbors with dignity and respect." BarackObama.com, Organizing for America, Foreign Policy, www.barackobama.com/issues/foreign_policy/index_campaign.php (scroll down to On Latin America and the Caribbean) (last visited Mar. 29, 2010).

for signature on May 23, 1969, by the United Nations Conference on the Law of Treaties.[17] On April 24, 1970, the United States signed, but never ratified, the Vienna Convention, regarding it officially as a formal expression of customary international law anent the obligations of states in honoring treaty obligations.[18] Mexico signed the Convention on May 23, 1969, and ratified it on September 25, 1974.[19]

While the United States has never formally acceded to the Vienna Convention, its provisions certainly carry substantial force with the international community of nations—90 nations have now ratified the agreement, including Mexico[20]—and failure to comply with these well-accepted principles is certainly damaging to the prestige of any nation. The U.S. Department of State asserts that "[t]he United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties."[21] The fact the United States agrees that the Convention constitutes a set of best practices recognized by the international community is by no means immaterial to how the United States conducts itself in the international arena.[22]

Several provisions of the Vienna Convention are relevant to a consideration of U.S. treaty obligations to Mexico. First, article 4 indicates that "the Convention applies only to treaties and agreements which are concluded by States" after the Convention enters into force with regard to such States.[23] This language means that the major international boundary treaties and conventions, as well as the water and conservation treaties concluded by the United States and Mexico, are not officially covered by the Vienna Convention except as an expression of today's customary international law. The agreements in question include the 1970 Boundary Treaty, the 1944 Water Treaty, the 1936 Migratory Bird Treaty, the 1940 Western Hemisphere Convention, and certain executive agreements including the 1983 La Paz Agreement and the 1993 NAAEC. The fact that the United States is still not a signatory means that the Vi-

17. *See* United Nations, Treaty Collection, Chapter XXIII, Law of Treaties, Vienna Convention on the Law of Treaties, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (last visited Mar. 29, 2010).

18. *Id.*

19. *Id.*

20. *Id.*

21. U.S. Dep't of State, Frequently Asked Questions, Vienna Convention on the Law of Treaties, Is the United States a Party to the Vienna Convention on the Law of Treaties?, http://www.state.gov/s/l/treaty/faqs/70139.htm (last visited Mar. 29, 2010).

22. *Id.*; *see also* Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431 (2003).

23. Vienna Convention, *supra* note 14, art. 4. R

enna Convention applies to the U.S.-Mexico boundary, water, and natural resource agreements only in the manner of customary international law.

Second, the Vienna Convention limits the circumstances that justify any unilateral exclusion from the obligations of a treaty to which a state is party. Specifically, as the Convention stipulates in article 46:

> A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.[24]

Article 60 of the Vienna Convention further establishes that "[a] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."[25] Article 62, section 1 stipulates:

> A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of the treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.[26]

Article 62, section 2 states:

> A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.[27]

The combined effect of the provisions of articles 60 and 62 is to set a very high penalty and a very high bar to any party's unilateral non-compli-

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24. Vienna Convention, *supra* note 14, art. 46. **R**
25. *Id.* art. 60.
26. *Id.* art. 62.1.
27. *Id.* art. 62.2.

ance with treaty obligations, even when the circumstances surrounding its application may have changed.

There is good reason to suppose that the obligation to honor the terms of the treaties under discussion applies to both the United States and Mexico at least at the level of customary international law. As the Vienna Convention applies to the implementation of U.S. security policy at its boundaries, article 46 suggests that a state's argument that domestic consideration of national security trumps an international treaty obligation is suspect unless that violation was evident prior to the agreement in question and concerned an internal law of fundamental importance. By this standard, the United States has no basis for asserting a national security imperative for disregarding extant environmental and boundary treaty obligations to Mexico. Even the youngest of the agreements under discussion here—the NAAEC—was signed seven years prior to the dramatic U.S. border security buildup after 2001. The fact that the United States has raised just one domestic security concern prior to or after September 11, 2001, related to this suite of agreements—waiving the application of domestic enabling legislation for the 1936 Migratory Bird Convention—would seem to lay this issue to rest. To date, the United States has not claimed a fundamental change of circumstances with regard to any of the agreements under discussion.[28] Let us turn, then, to a consideration of the terms of the key boundary, water, and natural resource agreements to which the United States and Mexico are party in order to ascertain their implications for U.S. security infrastructure along their shared boundary.

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28. Any U.S. claim of "fundamental change of circumstances" would appear to be most strongly supported by the Vienna Convention's article 62, which justifies a change if "(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty." Vienna Convention, *supra* note 14, art. 62.1. R

The United States might well argue that at the time of its treaty agreements with Mexico affecting environmental and conservation values at the border, it implicitly presumed a certain state of tranquility and absence of threat that has since been fundamentally altered by the events of September 11, 2001. The United States has not formally articulated such a position to date regarding its treaty obligations to Mexico with reference to the Convention; such a position may well be deemed unnecessary, considering that the United States is not a signatory to the Convention. If the Convention is held not to apply, and only the state of customary law existing prior to and separate from the Convention applies, a very large window may open for the U.S. government to assert such a claim of fundamental change of circumstances.

III. ESTABLISHED TREATIES AND CONVENTIONS

Treaties, as contracts among nations, may take a wide variety of forms but acquire their standing in good measure according to the level of authority that stands behind each contracting party. In the case of the United States, a treaty is constitutionally understood as an international contract entered into by the President that is also ratified by a two-thirds majority of the U.S. Senate.[29] At least four U.S. treaties involving territorial boundary matters or environmental concerns are relevant to a consideration of U.S. obligations to Mexico arising from boundary security infrastructure: the 1970 Boundary Treaty, the 1944 Water Treaty, the 1936 Migratory Bird Convention, and the 1940 Western Hemisphere Convention. Only the last of these is a multilateral agreement, while the others are bilateral agreements.

A. 1970 Boundary Treaty

The Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary (1970 Boundary Treaty) stands as one of the most important agreements between the United States and Mexico in the twentieth century. Concluded seven years after the 1963 Chamizal Convention[30] settled the most important remaining boundary dispute between the two countries, the 1970 Boundary Treaty has the force of law in both countries and provides a formula for the adjustment of future boundary disputes arising from the meandering of the Rio Grande and Colorado Rivers in the limitrophe reach of these international boundary rivers.

The provisions of the 1970 Boundary Treaty that have recently drawn attention in the context of U.S. boundary security infrastructure development are found in article IV. Article IV restricts the parties from unilaterally developing, without consent, any works that would impede the drainage of water to the rivers or otherwise alter the location of the boundary that follows the center of the rivers. Article IV.A specifies:

> Each Contracting State, in the limitrophe sections of the Rio Grande and Colorado River, may protect its bank against erosion and, where either of the rivers has more than one channel, may construct works in the channel or channels that are com-

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29. *See* U.S. CONST. art. II, § 2, cl. 2 (stating that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."). For further comment, see GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 560–61 (4th ed. 1992).

30. Convention for the Solution of the Problem of the Chamizal, U.S.-Mex., Aug. 29, 1963, 15 U.S.T. 21, *available at* http://untreaty.un.org/unts/1_60000/21/10/00040467.pdf.

> pletely within its territory in order to preserve the character of the limitrophe channel *provided, however, that in the judgment of the Commission the works that are to be executed under this paragraph do not adversely affect the other Contracting State through the deflection or obstruction of the normal flow of the river or of its flood flows*.[31]

Article IV.B(1) states:

> Both in the main channel of the river and on the adjacent lands to a distance on either side of the international boundary recommended by the Commission and approved by the two governments, *each Contracting State shall prohibit the construction of works in its territory which, in the judgment of the Commission, may cause deflection or obstruction of the normal flow of the river or of its flood flows.*[32]

Article IV.B(2) continues:

> If the Commission should determine that any of the works constructed by one of the two Contracting States in the channel of the river or within its territory causes such adverse effects on the territory of the other Contracting State, the Government of the Contracting State that constructed the works shall remove them or modify them and, by agreement of the Commission, shall repair or compensate for the damages sustained by the other Contracting State.[33]

The DHS's construction of barriers along the lower Rio Grande River as authorized by the 2006 Secure Fence Act prompted the U.S. Section of the International Boundary and Water Commission (IBWC)[34] to issue a note to the DHS reminding it of these treaty obligations in May 2007.[35] The DHS, prodded by U.S. Senator John Cornyn of Texas,[36] subse-

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31. 1970 Boundary Treaty, *supra* note 7, art. IV.A (emphasis added). R

32. *Id.* art. IV.B(1) (emphasis added).

33. *Id.* art. IV.B(2).

34. The International Boundary and Water Commission (IBWC) of the United States and Mexico was originally established in 1889 as the International Boundary Commission. IBWC is comprised of two national sections each operating under the authority of its respective foreign ministry. The IBWC exercises exclusive jurisdiction for administration and interpretation of the boundary and water treaties and conventions between the United States and Mexico. *See* 1944 Water Treaty, *supra* note 8; *see also* Stephen P. Mumme, *Innovation and Reform in Transboundary Resource Management: A Critical Look at the International Boundary and Water Commission, United States and Mexico*, 33 NAT. RESOURCES J. 93 (1993). R

35. *US-Mexico Border Fence May Violate Boundary Treaty*, JURIST, May 24, 2007, *available at* http://jurist.law.pitt.edu/paperchase/2007/05/us-mexico-border-fence-may-violate.php.

quently consulted with IBWC and agreed to incorporate some of the DHS barriers into planned improvements to the Rio Grande River levee system,[37] as the 1970 Boundary Treaty permits each country to maintain the levees on its side of the river.[38] However, this solution has been complicated by federal financing regulations and inter-governmental conflicts,[39] raising doubts as to whether the barrier-levee will actually be built and creating the possibility that barriers may be erected inside the flood plain south of the levees.[40]

The U.S. Section of the IBWC continues to consult with its Mexican counterpart on river effects of U.S. barriers; however, apart from engineering estimates, the pace with which the DHS has proceeded with barrier construction has not permitted in-depth study of barrier effects on the river under either normal or flood conditions.[41] Moreover, the U.S. has not directly consulted with Mexico on its barrier designs.[42] Article IV.B(1) of the 1970 Boundary Treaty plainly states that constructed works must not, in the judgment of the IBWC, deflect or otherwise obstruct the normal or flood flows of the river.[43] This, together with article IV.B(2), implies that the two countries should agree on the distance from the river where these works may be located.[44] While these judgments are presumably to be made using technical considerations, the possibility of disagreement exists, leaving it to the IBWC and the respective govern-

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36. Press Release, Cornyn Asks Homeland Security Chief to Consider Proposed Valley Levee Plans (Nov. 8, 2007), http://cornyn.senate.gov/public/ (follow "Press" hyperlink; then follow "News Releases" hyperlink; then enter November 2007 in the "Browse by" drop-down menu; then scroll down to press release title hyperlink) (last visited Mar. 30, 2010).

37. Press Release, Cornyn: DHS Approval of Levee Plan a Testament to Local-Federal Cooperation (Feb. 8, 2008), http://cornyn.senate.gov/public/ (follow "Press" hyperlink; then follow "News Releases" hyperlink; then enter February 2008 in the "Browse by" drop-down menu; then scroll down to press release title hyperlink); *Funding is Set on Levee-Fence for Hidalgo*, MY SA NEWS, May 5, 2008, http://www.mysanantonio.com/news/MYSA050608_borderfence_EN_36d1c4a_html9076.html.

38. 1970 Boundary Treaty, *supra* note 7. R

39. Allen Essex, *Proposal for Levee Wall Draws Fire from Cameron County Residents*, VALLEY MORNING STAR, Feb. 20, 2008; Christopher Sherman, *Movable Border Fence Awaits Approval*, ASSOCIATED PRESS, July 18, 2008, *available at* http://www.valleycentral.com/news/story.aspx?id=161075; Laura B. Martinez, *DHS Rejects Cameron County's Border Fence/Levee Project*, BROWNSVILLE HERALD, Aug. 19, 2008, *available at* http://www.brownsvilleherald.com/news/border-89290-dhs-fence.html.

40. *See* SIERRA CLUB, PROTECT TEXAS-MEXICO BORDERLANDS FROM THE BORDER WALL NOW! (2008), http://www.texas.sierraclub.org/Conservation/BorderLands20080731.pdf.

41. *Id.*

42. Manuel Roig-Franzia, *Mexico Calls U.S. Border Fence Severe Threat to Environment*, WASH. POST, Nov. 16, 2007, at A24.

43. 1970 Boundary Treaty, *supra* note 7, art. IV.B(1). R

44. *Id.* art. IV.B(2).

ments to agree on locations along the river where works are not technically justifiable with reference to article IV of the 1970 Boundary Treaty. The important fact here is that these determinations must be made with mutual consent—not by a unilateral determination.[45]

In sum, the 1970 Boundary Treaty places significant constraints on the location of security infrastructure—indeed, any infrastructure—along the limitrophe reach of the international rivers. Such constraints cannot be unilaterally ignored even where security considerations are used as justification for infrastructure development.

B. 1944 Water Treaty

The Treaty Relating to Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande Between the United States of America and Mexico (1944 Water Treaty) allocates the waters of the two major international rivers between the two countries, stipulates the order of priorities for the use of these waters, provides for the construction of dams and other water infrastructure on the treaty rivers, and establishes a bi-national commission comprised of two national sections to oversee the Treaty's application.[46] To date, critics of the 2006 Secure Fence Act have paid little attention to the 1944 Water Treaty in relation to the problem of border security infrastructure. This neglect may be due to the fact that the sections of the 1944 Water Treaty dealing with the Rio Grande River and the Colorado River have nothing to say about security as such and focus on the delivery and storage of treaty water as allocated by the agreement.

One section of the 1944 Water Treaty, however, may indirectly bear on the nature and design of border infrastructure—article 3, which specifies the priority of uses of treaty water, provides:

> In matters in which the Commission may be called upon to make provision for the joint use of international waters, the following order of preference shall serve as a guide:
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> 1. Domestic and municipal uses.
> 2. Agriculture and stockraising.
> 3. Electric power.
> 4. Other industrial uses.
> 5. Navigation.
> 6. Fishing and hunting.

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45. The requirement that decisions on the suitability and location of works in or near the river channel are to be based on mutual consent arises from the consistent reference in article IV to the Commission as the authoritative judge of the technical sufficiency of the works. *See id.* art. IV.

46. *See* 1944 Water Treaty, *supra* note 8. R

> 7. Any other beneficial uses which may be determined by the Commission.[47]

This guide to the order of preferences for treaty water uses clearly envisions the use of the international rivers for fishing and hunting, suggesting a conservation function for treaty water. Conservation is certainly not a high priority, nor has any subsequent extrapolation or interpretation of the 1944 Water Treaty spelled out any specific bi-national commitment for such use of water.[48] Still, there is no question that the water of the Colorado and the Rio Grande has been steadily used for conservation purposes since the 1944 Water Treaty was signed. Along the Rio Grande, for example, considerable investment has been made in developing natural reserves, wetlands, and conservation areas along the river that are sustained wholly or in part by the river waters and are vital for the maintenance of migratory wildlife inhabiting or transiting the riparian zone.[49] In fact, bi-national and tri-national attention to the maintenance of critical transboundary wildlife corridors is embodied in several multilateral agreements and has intensified in recent years.[50]

An argument can be made that if the 1994 Water Treaty recognizes and prioritizes the use of water for conservation functions—as implied with fishing and hunting—then barriers impeding the migration of wildlife species that require access to this water adversely affect an intended purpose of the water unless otherwise agreed by the two countries. This notion of implied treaty obligations is well established in customary international law,[51]and in the specific case of the 1944 Water Treaty, has been given important effect in the resolution of the salinity crisis of the Colorado River.[52] There, the United States accepted, in practice, Mexico's argument that article 3's stipulation of domestic and municipal uses and agriculture as the first and second highest priorities,

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47. *Id.* art. 3.

48. The IBWC has concluded no subsequent agreement, or Minute (as its implementing agreements are known), directly interpreting the meaning of article 3's priority for fishing and hunting. *See* Int'l Boundary & Water Comm'n, Minutes Between the United States and Mexican Sections of the IBWC, http://www.ibwc.state.gov/Treaties_Minutes/Minutes.html (last visited Mar. 31, 2010).

49. SIERRA CLUB, *supra* note 40. R

50. *See generally* NAAEC, *supra* note 12; Memorandum of Understanding Establishing the Canada/Mexico/United States Trilateral Committee for Wildlife and Ecosystem Conservation and Management, U.S.-Mex.-Can., Apr. 9, 1996, *available at* http://www.trilat.org/general_pages/tri_mou.pdf. R

51. *See* VON GLAHN, *supra* note 29. R

52. *See* Int'l Boundary & Water Comm'n, *Minute No. 242: Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River*, 15 NAT. RESOURCES J. 2 (1975).

respectively, for the use of treaty water trumped an explicit declaration in the Treaty's article 11 that Mexico agree to accept waters in the Colorado River "whatever their origins."[53] The final settlement expressed in the IBWC's Minute 242[54] embraces a solution accepting the need for parity of salinity in treaty water below Imperial Dam that clearly honors the priorities found in the 1944 Water Treaty's article 3.[55]

Another article of the 1944 Water Treaty that is relevant to the construction of national security infrastructure is article 17 pertaining to the uses of the channels of the international rivers.[56] Article 17 expressly states that "[t]he use of the channels of the international rivers for the discharge of flood or other excess waters shall be free and not subject to limitation by either country. . . . "[57] Clearly directed at flood control, this provision expresses the principle that barriers erected along the river by any country may not impair the flood containment functions of the river channel in a manner that would damage or harm the neighboring country. In this respect, the obligation found in the 1970 Boundary Treaty to maintain the integrity of boundary and boundary river channels and the requirements found in article 17 of the 1944 Water Treaty are mutually reinforcing.

Finally, the 1944 Water Treaty explicitly entrusts the bi-national IBWC to interpret and apply its provisions, and does not allow one or the other country to proceed unilaterally in interpreting its text. Article 24(c) of the Treaty empowers the IBWC as an international body to "carry into execution and prevent the violation of the provisions of those treaties and agreements" entrusted to its jurisdiction. Section (d) of the same article confers on the Commission the authority "to settle all differences that may arise between the two Governments with respect to the interpretation or application of this Treaty. . . ."[58] This language suggests that Mexico could raise the issue of the Treaty's effects on U.S. tactical security infrastructure through its national section of the IBWC, and that the IBWC has the authority to examine the question and seek a solution.

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53. 1944 Water Treaty, *supra* note 8, art. 11(a). R

54. Int'l Boundary & Water Comm'n, Minute No. 242, Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River, U.S.-Mex., Aug. 30, 1973, 12 I.L.M. 1105 (1973), *available at* http://www.ibwc.state.gov/Files/Minutes/Min242.pdf.

55. Herbert Brownell & Samuel D. Eaton, *The Colorado River Salinity Problem with Mexico*, 69 AM. J. INT'L L. 255, 268–69 (1975).

56. 1944 Water Treaty, *supra* note 8, art. 17. R

57. *Id.*

58. *Id.* art. 24(b).

In sum, the 1944 Water Treaty may apply to any adverse effect that U.S. fencing or other tactical security infrastructure would have on the viability of transboundary wildlife or riparian habitat where access to river water is concerned. The general importance of the 1944 Water Treaty as a cornerstone of U.S.-Mexican relations suggests that this consideration cannot be easily ignored should Mexico choose to raise it at the level of the IBWC.

C. 1936 Migratory Bird Convention

The Convention for the Protection of Migratory Birds and Game Mammals (1936 Migratory Bird Convention) focuses narrowly on the protection of migratory birds crossing the international boundary "by means of adequate methods which will permit, in so far as the respective high contracting parties may see fit, the utilization of said birds rationally for purposes of sport, food, commerce and industry."[59] As amended in 1972, the agreement specifically protects 40 species of migratory birds ranging from various types of geese and ducks to loons, sea gulls, owls, trogans, pelicans, eagles, hawks, herons, and egrets, to name a few.[60]

The 1936 Migratory Bird Convention applies to boundary security infrastructure principally through the potentially adverse effect of said infrastructure on wetlands and water bodies in the international reach of the boundary rivers. Article II of the Convention commits the contracting parties to "establish laws, regulations and provisions" including "[t]he establishment of refuge zones in which the taking of such birds will be prohibited."[61] In the United States, the 1936 Migratory Bird Convention's provisions are implemented by the Migratory Bird Treaty Act of 1918.[62] The Department of Homeland Security apparently considers the Migratory Bird Treaty Act a hindrance to border fence construction; the DHS included domestic enabling legislation for the Act among the laws the Secretary waived in 2008 to build the fence segment at San Diego.[63]

While narrow in its application, the 1936 Migratory Bird Convention appears to at least indirectly reinforce a bi-national obligation of the parties to protect and preserve riparian habitat that sustains the movement of migratory avian species across the border. In this respect, the Convention adds force to other agreements, including the 1944 Water Treaty and those discussed below.

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59. 1936 Migratory Bird Convention, *supra* note 9, art. I. R
60. *Id.* at Agreement Supplementing the Agreement of February 7, 1936, Mar. 10, 1972.
61. 1936 Migratory Bird Convention, *supra* note 9, art. II(B). R
62. 16 U.S.C. §§ 703–711 (2006).
63. HADDAL ET AL., *supra* note 15, at 43, 46. R

D. 1940 Western Hemisphere Convention

The Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (1940 Western Hemisphere Convention), was signed in 1940 and entered into force in 1942.[64] As many as 19 nations of the Western Hemisphere, including the United States and Mexico, are parties to the agreement. The principal purpose of the Convention, as stated in its preamble, is "to protect and preserve in their natural habitat representatives of all species and genera of their native flora and fauna, including migratory birds, in sufficient numbers and over areas extensive enough to assure them from becoming extinct through any agency within man's control."[65]

Several elements of the 1940 Western Hemisphere Convention are applicable to the potential impacts of boundary security infrastructure on environmental values in the border area. Article IV requires the contracting governments to "maintain the strict wilderness reserves inviolate, as far as practicable, except for duly authorized scientific investigations or government inspection, or such uses as are consistent with the purposes for which the area was established."[66] The term "strict wilderness reserves" is defined broadly in article I.4 to denote "[a] region under public control characterized by primitive conditions of flora, fauna, transportation and habitation wherein there is no provision for the passage of motorized transportation and all commercial developments are excluded."[67] Article VI provides that the "[c]ontracting Governments agree to cooperate among themselves in promoting the objectives of the present Convention. To this end they will lend proper assistance, consistent with national laws, to scientists of the American Republics engaged in research and field study."[68]

As applied to the border region, the 1940 Western Hemisphere Convention extends to more than a dozen federally protected wildlife refuges and parks on both sides of the border. Included in the United States, for instance, are the Buenos Aires and Cabeza Prieta National Wildlife Refuges, and the Organ Pipe and Chiricahua National Monuments (all located in Arizona), as well as Big Bend National Park and a number of smaller reserves in Texas including the Lower Rio Grande

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64. 1940 Western Hemisphere Convention, *supra* note 10. R

65. *Id.* pmbl., para. 1; for discussion, see Kelly Hoffman, *The Role of State Sovereignty in U.S.-Mexican Treaty Law on Transboundary Water and Wildlife*, *in* THE U.S.-MEXICAN BORDER ENVIRONMENT: TRANSBOUNDARY ECOSYSTEM MANAGEMENT 273, 292–93 (Kelly Hoffman ed., 2006).

66. 1940 Western Hemisphere Convention, *supra* note 10, art. IV. R

67. *Id.* art. I.4.

68. *Id.* art. VI.

Valley National Wildlife Reserve.[69] These areas, many of which are directly affected by the Secure Fence Act's border security infrastructure program,[70] all arguably qualify for protection under the Convention. The obligation of the contracting parties to cooperate in promoting the Convention's objectives supports and legitimizes any demand Mexico may make related to the need for dialogue concerning the sustainable management of protected areas, especially those sustaining transboundary migratory species of interest to both countries and to others within the Western Hemisphere. The fact that the Convention is a broad-based multilateral treaty also raises the stakes of unilateral non-compliance.

In sum, the 1940 Western Hemisphere Convention clearly enjoins its signatories to cooperate in preserving wilderness and protected areas in the border area. Any unilateral measures adversely affecting these protected areas would appear to require some form of bi-national consultation and a formal justification consistent with the terms of the Convention.

IV. EXECUTIVE AGREEMENTS

Executive agreements—compacts between the United States and one or more nations that the President is not required to submit to the U.S. Senate for ratification (as is required of treaties by the U.S. Constitution)—take a number of forms ranging from agreements that follow from the obligations of a treaty or domestic legislation, to simple agreements at the presidential level, to those requiring some form of congressional approval or implementation.[71] From the perspective of customary international law, executive agreements may be viewed as treaties by the international community; from the perspective of the United States, with which they are usually associated, they are often viewed as less binding, or otherwise contingent on the discretionary commitment of the incumbent President. In the case of the environmental impacts of security infrastructure along the border, at least two such agreements have either a direct or indirect bearing on U.S. obligations to Mexico: the 1983 La Paz Agreement and the 1993 North American Agreement on Environmental Cooperation (NAAEC).

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69. U.S. Dep't of the Interior, U.S.-Mexico Border Field Coordinating Comm., Natural and Cultural Resource Areas Along the U.S.-Mexico Border, http://www.cerc.usgs.gov/FCC/resource-areas.htm (last visited Mar. 30, 2010).

70. SIERRA CLUB, *supra* note 40; HADDAL ET AL., *supra* note 15, at 31–32. R

71. VON GLAHN, *supra* note 29, at 483. R

A. 1983 La Paz Agreement

The Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area (1983 La Paz Agreement), signed in 1983 by the United States and Mexico, is today the principal protocol prescribing and promoting bilateral environmental cooperation along the U.S.-Mexico border.[72] Signed by Presidents Ronald Reagan and Miguel de la Madrid, the agreement enjoys the status of an executive agreement and falls into the category of one that requires congressional approval for its implementation.[73] As such, it has endured now for more than 25 years, surviving both Republican and Democratic presidential administrations in the United States and both the Institutional Revolutionary Party and National Action Party administrations in Mexico. The La Paz Agreement has been strengthened by the North American Free Trade Agreement (NAFTA), which led to successful bi-national efforts to reinforce and broaden the implementation of the La Paz Agreement through various programs.[74] As an executive agreement, the La Paz has acquired substantial legitimacy and broad support within the border community and the environmental sector in both countries.

The unilateral development of border security infrastructure has been criticized for violating the letter and the spirit of the 1983 La Paz Agreement.[75] Several of the Agreement's articles are relevant to this critique. Article 1 stipulates that the two countries "agree to cooperate in the field of environmental protection in the border area on the basis of equality, reciprocity and mutual benefit."[76] Under terms of article 7, "[t]he Parties shall assess, as appropriate, in accordance with their respective national laws, regulations and policies, projects that may have significant impacts on the environment of the border area, so that appropriate measures may be considered to avoid or mitigate adverse environ-

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72. 1983 La Paz Agreement, *supra* note 11. Article 4 of the La Paz Agreement defines its geographical reach to extend 100 kilometers south and 100 kilometers north of the international boundary. R

73. VON GLAHN, *supra* note 29, at 483. R

74. These programs include the Integrated Border Environmental Program (IBEP) (1992–94), the Border XXI Program (1995–2000), and the current Border 2012 Program (2003–12). For discussion of IBEP and the Border XXI Program, see Alan D. Hecht et al., *Sustainable Development on the U.S.-Mexican Border: Past Lessons, Present Efforts, Future Possibilities*, *in* THE U.S.-MEXICAN BORDER ENVIRONMENT 15, 25–35 (Paul Ganster ed., 2002), *available at* http://scerp.org/pubs/m3c2.pdf.

75. *See* Ana Córdova & Carlos A. de la Parra, *Reflections on Transboundary Conservation: Examining Institutions and Redefining Binational Collaboration*, *in* CONSERVATION OF SHARED ENVIRONMENTS: LEARNING FROM THE UNITED STATES AND MEXICO (Laura López-Hoffman et al. eds., 2009).

76. 1983 La Paz Agreement, *supra* note 11, art. 1. R

mental effects."[77] Article 18, however, states that "[a]ctivities under this Agreement shall be subject to the availability of funds and other resources to each Party and to the applicable laws and regulations in each country."[78]

The duties imposed upon the parties by the 1983 La Paz Agreement are soft obligations in that they encourage parties to cooperate and coordinate their efforts "for the protection, improvement and conservation of the environment and the problems which affect it," and to "prevent, reduce and eliminate sources of pollution" in the border area.[79] The parties are also required to assess the environmental impact of projects that may have a "significant impact[ ] on the environment of the border area."[80] While these "activities" are to be subject "to the applicable laws and regulations in each country,"[81]—a condition that limits the binding scope of the La Paz Agreement—the Agreement does establish a substantial requirement to cooperate with the other party in matters of environmental concerns in the border region and clearly recognizes a binational interest in the border environment that ranges across a broad scope of environmental concern, including conservation of fauna and flora.[82] These provisions have the effect of calling into question unilateral activities clearly detrimental to environmental conditions of interest to both countries, establishing a legitimate interest of the neighboring party in such developments, and lending limited support to the obligations established in other bilateral and multilateral agreements pertaining to transboundary conservation. The Agreement also requires an environmental assessment of "laws, regulations and policies, [and] projects"[83] impacting the border environment and, while such assessment may be undertaken by the nation in which the projects are located, it is clear that the other party has a legitimate interest in the assessment, its findings, and any mitigating measures that may be considered on the basis of the assessment.

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77. *Id.* art. 7.

78. *Id.* art. 18.

79. *Id.* arts. 1–2.

80. *Id.* art. 7.

81. *Id.* art. 18.

82. Some have argued that the La Paz Agreement is strictly focused on pollution, but this is not the case. Article 1 plainly refers to environmental conservation as an aim of the agreement. 1983 La Paz Agreement, *supra* note 11, art. 1. Moreover, during the 1996 to 2000 implementation phase known as the Border XXI Program, two of the nine working groups were focused wholly or in part on conservation. *See* U.S. ENVTL. PROT. AGENCY, MEX. SECRETARIAT ENV'T, NATURAL RES. & FISHERIES, U.S.-MEXICO BORDER XXI PROGRAM: PROGRESS REPORT 1996–2000 (2001). R

83. 1983 La Paz Agreement, *supra* note 11, art. 7. R

In sum, the 1983 La Paz Agreement, though an executive agreement, is an accord of considerable standing that has endured more than a quarter century. It conveys obligations that in the eye of the international community may call into question the U.S. right to proceed unilaterally with environmentally harmful boundary security measures in the absence of proper regard for Mexico's legitimate interest in environmental cooperation and mitigating environmental harms under the Agreement. The Agreement has been used effectively in the past to challenge other proposed infrastructure projects in the border area presenting potential hazards to Mexico.[84] The fact that the United States has declined to answer repeated Mexican diplomatic queries and expressions of environmental concern related to the effect of U.S. boundary security infrastructure on bilateral obligations under the La Paz Agreement suggests the United States may not have an adequate legal response to Mexico's concerns.[85]

B. 1993 North American Agreement on Environmental Cooperation

The North American Agreement on Environmental Cooperation (NAAEC), concluded in August 1993,[86] is one of the two side agreements associated with NAFTA. The NAAEC is a multilateral agreement between Canada, Mexico, and the United States. U.S. participation in the NAAEC was approved by a majority vote of both houses of Congress.[87] The NAAEC commits the three North American nations to a broad agenda of environmental cooperation and authorizes the NAAEC's Secretariat, the Commission for Environmental Cooperation (CEC), based in Montreal, Canada to conduct investigations and factual inquiries into allegations of failure to enforce national environmental legislation brought by ordinary citizens, advocacy organizations, and governments.[88]

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84. The Mexican government's opposition to the siting of a radioactive waste depository at Sierra Blanca, Texas, was based on the 1983 La Paz Agreement. *See* Anne Marie Mackler, *Final Decision on Sierra Blanca Expected this Month*, FRONTERA NORTESUR, Oct. 1998, http://www.nmsu.edu/~frontera/old_1998/oct98/1098env.htm. More recently, opponents to the reopening of the controversial ASARCO smelter at El Paso, Texas, cited the La Paz Agreement as one of several rationales for keeping the plant closed. *Polluting El Paso smelter to close for good*, SIERRA CLUB GRASSROOTS SCRAPBOOK, Feb. 11, 2009, http://sierraclub.typepad.com/scrapbook/2009/02/polluting-el-paso-smelter-to-close-for-good.html.

85. Córdova & de la Parra, *supra* note 75; HADDAL ET AL., *supra* note 15, at 31. R

86. NAAEC, *supra* note 12. R

87. The U.S. House of Representatives voted 234 to 200 in favor of NAFTA; and the U.S. Senate ratified by a 61 to 38 vote. *See* Joseph F. DiMento & Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented*, 10 GEO. INT'L ENVTL. L. REV. 651, 674 (1998).

88. NAAEC, *supra* note 12. R

While the NAAEC arguably contains a number of provisions that touch upon environmental problems associated with boundary security infrastructure, its citizen-initiated investigative functions are rendered impotent in matters of border security due to the DHS's waiver authority conferred by the REAL ID Act of 2005.[89] However, certain other provisions may be indirectly relevant to these problems. For example, the CEC's responsibility for spotlighting the conservation of North American transboundary species, as expressed through its wide-ranging program for North American Biodiversity,[90] reinforces cooperative programs advanced by the Trilateral Committee, an international initiative of the wildlife protection agencies of the three countries. The CEC and the Trilateral Committee have identified "species of common conservation concern"[91] for special attention and heightened protection by the parties. These efforts are justified, in part, with reference to the Western Hemisphere Convention.

The effect of NAAEC, then, is to formally commit the three member nations to environmental cooperation in general and to accentuate

89. The NAAEC authorizes the CEC to investigate and report on any environmental matter related to the functions of the Agreement with the approval of the tri-national Council formed pursuant to the Agreement. *Id.* art. 13. The CEC may consider citizen-initiated allegations of a member state's failure to effectively enforce its domestic environmental law. In the case of U.S. border security infrastructure, if the DHS Secretary exercises waiver authority under the REAL ID Act, that determination effectively legalizes U.S. nonenforcement of U.S. domestic law, including any domestic enabling legislation associated with treaty obligations that the Secretary chooses to waive. Under these circumstances, any allegation that DHS failed to enforce U.S. domestic environmental law or treaty enabling legislation would most likely be set aside by the CEC for two reasons: first, because the waiver legalizes nonenforcement of such domestic law; and second, because as the CEC's authority to conduct a factual investigation of the matter requires a two-thirds vote of the CEC Council, which consists of the environmental ministers of the three North American nations. *See* NAAEC, *supra* note 12, arts. 14–15. It seems unlikely that Canada and Mexico would press the issue in a situation where domestic environmental law is legally waived for purposes of national security. R

90. CEC's mandate to protect North American biodiversity is found in article 10 of NAAEC. *See* NAAEC, *supra* note 12, art. 10. Biodiversity conservation in North America has been a CEC priority since its inception. CEC's work in this area includes conserving species and spaces of common concern, vaquita porpoise recovery and monarch butterfly protection, strengthening wildlife enforcement, and establishing a North American Marine Protected Areas Network. *See* COMM'N FOR ENVTL. COOPERATION, 2008 OPERATIONAL PLAN (2008). A description of its activities in the area of transboundary species is found in COMM'N FOR ENVTL. COOPERATION, CONSERVATION OF MIGRATORY AND TRANSBOUNDARY SPECIES: SPECIES OF COMMON CONSERVATION CONCERN IN NORTH AMERICA (Oct. 18, 2000) [hereinafter CEC, CONSERVATION OF MIGRATORY AND TRANSBOUNDARY SPECIES], *available at* http://www.cec.org/files/pdf/BIODIVERSITY/SCCC-final-e.pdf. R

91. *See* CEC, CONSERVATION OF MIGRATORY AND TRANSBOUNDARY SPECIES, *supra* note 90.

the importance of multilateral and bilateral environmental obligations. In those areas where U.S. boundary security infrastructure can be shown to impact transboundary migratory species,[92] especially endangered species like the ocelot and species of common conservation concern like the black bear, gray wolf, and Sonoran pronghorn,[93] adverse unilateral action in the absence of prior consultation and consent by the participating parties may well be construed as an exercise of bad faith and a breach of conservation commitment by the United States. The NAAEC thus draws attention to national commitments under the 1940 Western Hemisphere Convention and accentuates the U.S. obligation to consult and cooperate with its neighbor states in developing boundary security infrastructure in a manner that minimizes adverse conservation impacts on protected fauna and flora.

V. TREATY OBLIGATIONS AND U.S. TACTICAL SECURITY INFRASTRUCTURE

With the exception of the DHS's cooperation with the IBWC on the 1970 Boundary Treaty issues mentioned above, it is difficult to know to what extent these international obligations have influenced the DHS's implementation of boundary tactical security infrastructure. Short of acknowledging its cooperation with the IBWC, the DHS has not otherwise recognized any international obligation in developing tactical security infrastructure along the boundary, nor has it been willing to cooperate with Mexico in matters pertaining to environmental or conservation considerations. The DHS has, however, shown some sensitivity to domestic environmental concerns in the context of the exercise of its waiver authority under the REAL ID Act. Following its April 3, 2008, waiver of some 30 environmental laws and regulations affecting security infrastructure development on the border,[94] the DHS rolled out a series of Environmental Stewardship Plans (ESP) aimed at deflecting U.S. domes-

92. In the Lower Rio Grande Valley National Wildlife Refuge alone, the DHS ESP Biological Resources Plan identifies two listed endangered species, the Gulf Coast jaguarundi and the ocelot, which it states are "likely to [be] adversely affect[ed]." U.S. DEP'T OF HOMELAND SEC. ET AL., ENVIRONMENTAL STEWARDSHIP PLAN FOR THE CONSTRUCTION, OPERATION, AND MAINTENANCE OF TACTICAL INFRASTRUCTURE ES-1 to -2 (July 2008), *available at* http://nemo.cbp.gov/sbi/rgv/pf225_rgv_esp.pdf.

93. *Id.*; *see also* CEC, CONSERVATION OF MIGRATORY AND TRANSBOUNDARY SPECIES, *supra* note 90; Karen Schmidt, *Biodiversity in Peril: Help for North America's Most Wanted Species*, TRIO (Comm'n for Envtl. Cooperation) Fall 2001 (listing the 17 terrestrial species of common concern), http://www.cec.org/Page.asp?PageID=122&ContentID=2461&SiteNodeID=461.

94. Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 73 Fed. Reg. 18,294 (Apr. 3, 2008).

tic criticism of the agency's insensitivity to environmental concerns.[95] The ESPs outlined environmental mitigation measures and best management practices across a spectrum of environmental issues including air quality, noise, water resources, and biological resources to include fauna and flora, as well as cultural resources and socio-economic concerns.[96]

While the border fence ESPs in no way acknowledge international treaty obligations, they may at least partially satisfy certain concerns associated with the international conservation commitments to which the United States is party. The ESPs arguably constitute a limited form of environmental impact assessment. However, whether these ESPs satisfy either the letter or spirit of the obligations found in the 1940 Western Hemisphere Convention or the 1983 La Paz Agreement is questionable.[97] The ESPs clearly fail to rise to the standard of environmental impact statements, which would be required under the U.S. National Environmental Policy Act[98] and which the DHS waivers render inapplicable. The ESPs also fail to incorporate any level of bi-national consultation concerning the nature of the tactical infrastructure pursued by the DHS.

The U.S. failure to consult with Mexico on the environmental impacts of border security infrastructure cannot be attributed to inactivity on the part of the Mexican government. As some have observed, Mexico's Secretariat of Foreign Relations has sent five diplomatic notes to either the U.S. Embassy in Mexico or directly to the U.S. Department of State questioning the development of security infrastructure along the border without receiving a formal response from the State Department.[99] The head of Mexico's Environment Secretariat (SEMARNAT) has held informational talks with the head of the U.S. Department of the Interior, and has had at least one discussion with Secretary Michael Chertoff while he headed the DHS.[100] All of this has apparently been of no avail, though it is possible such conversations may have influenced the DHS's decision to pursue ESPs for different segments of fence construction along the border. Canadian authorities have been similarly ignored by the DHS.[101]

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95. CPB.gov, Environmental Waiver/Environmental Stewardship Plan (ESP) Information (Dec. 9, 2008), http://cbp.gov/xp/cgov/border_security/ti/ti_docs/esp_information.xml (last visited Apr. 1, 2010).

96. *See* CPB.gov, TI Environmental Information by Sector, http://cbp.gov/xp/cgov/border_security/ti/ti_docs/sector/ (last visited Apr. 1, 2010).

97. Córdova & de la Parra, *supra* note 75, at 11.

98. National Environmental Policy Act of 1969 (NEPA); 42 U.S.C. §§ 4321–4370f (2006).

99. *Id.*

100. *Id.*

101. *See* HADDAL ET AL., *supra* note 15, at 31. R

VI. CONCLUSION

This article has shown that certain provisions of international agreements regarding boundary, water, and environmental matters to which the United States and Mexico are party may limit the implementation of U.S. tactical security infrastructure along their common boundary. These obligations are not trivial when viewed from the perspective of customary international law. As seen above, the Vienna Convention requires compliance with treaty obligations even when the circumstances surrounding its application may have changed. The United States is not a party to the Vienna Convention; however, it chooses to accept most of its provisions as a faithful representation of customary international law. As such, the Convention's provisions shore up the obligations expressed in U.S. treaties and agreements with other nations. Even in this context, the heightened interest in U.S. border security since the tragic events of September 11, 2001, does not in itself constitute a sufficient rationale for failing to honor its treaty obligations to Mexico along the border.

It is doubtful that these international obligations and commitments would, by themselves, persuade the United States to significantly modify or abandon its boundary security infrastructure program beyond the accommodation it has already made to the 1970 Boundary Treaty. Should Mexico advance any treaty claims, the United States may well resort to the argument that it is not bound by the Vienna Convention, since it never ratified the document. In addition, the United States could claim that the events of September 11, 2001—when viewed in the context of the Vienna Convention's article 62—establish a fundamental change of circumstances justifying U.S. fence construction and other tactical border security infrastructure. Any chance that Mexico would press forward with arguments demanding the United States comply with its water and conservation treaty commitments in the context of more pressing bi-national concerns is most likely minimal in view of Mexico's considerable economic and security dependence on its northern neighbor.

This article has shown, however, that a number of criticisms of U.S. unilateral development of tactical security measures at the boundary can be mounted on the basis of existing bi-national and multilateral agreements, and should Mexico choose to pursue these arguments, it would have a legitimate basis in customary international law. The 1970 Boundary Treaty obligates the United States to consider Mexico's concerns with regard to the effects of any constructed works on the flow of the Rio Grande and Colorado Rivers in their boundary reach and strongly implies that Mexico's assent is necessary as to the location of these works north of the boundary. The 1944 Water Treaty recognizes

the importance of fishing and hunting as a claim related to the potential uses of the waters of the boundary rivers, and in so doing it links the preservation and protection of transboundary wildlife and riparian habitat to the Treaty. The 1936 Migratory Bird Convention and the 1940 Western Hemisphere Convention taken together reinforce the notion of a bi-national obligation to maintain the quality of natural reserves along the border and preserve transboundary wildlife habitats in a manner that allows the movement of wildlife across the international boundary.

Two executive agreements, the 1983 La Paz Agreement and the NAAEC, also indicate a U.S. obligation to take environmental concerns into account and consult with Mexico where planned security infrastructure may adversely impact shared environmental commitments. The La Paz Agreement anchoring U.S.-Mexico bilateral cooperation for environmental protection along the border clearly stipulates that the parties assess the adverse environmental impacts of projects in the border area and consider measures to mitigate these impacts. In the case of the border fence, a very good argument can be made that this action simply cannot be done unilaterally, necessitating bilateral cooperation. The NAAEC in turn reinforces the La Paz Agreement through its general commitment to trilateral environmental cooperation and supports both the La Paz Agreement and other existing treaties through its biodiversity mandate and programs aimed at protecting the transboundary movement of wildlife and the protection of species of fauna and flora throughout North America.

In light of the obligations of nations under customary international law as expressed in the Vienna Convention, the United States appears to have little justification for exempting itself from its environmental treaty commitments, notwithstanding its legitimate national security interests. The terrible events of September 11, 2001, compelling as they are, are no license to neglect contractual agreements with neighboring states. To the contrary, they accentuate the positive linkage between international cooperation and national security and the value of exploring potential synergies in advancing environmental and security objectives. These arguments are sure to resonate with the international community, particularly those signatories to the Vienna Convention. At the very least it would seem the United States has a legal obligation to discuss these issues with Mexico and consult with Mexico in an effort to find more effective means of achieving boundary security while preserving the conservation values to which both nations have committed. In its present failure to acknowledge its security infrastructure related treaty obligations to Mexico, the United States' reputation is certain to suffer and may well face significant Mexican resistance to future cooperation in environmental and other areas.