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## The Role of State Sovereignty in U.S.-Mexican Treaty Law on Transboundary Water and Wildlife

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### ABSTRACT

Do environmental resources that are shared among international governments pose a challenge to state sovereignty? (Herein state is defined as, “A body politic, especially one constituting a nation” [American Heritage Dictionary 2000]). How are these challenges to sovereignty mitigated by international law? This chapter examines the treaty law that governs two natural resources that freely cross the U.S.-Mexican border—freshwater and wildlife. Both the United States and Mexico have turned to international law, most commonly in the form of major international treaties, to protect their interests in these resources. The chapter examines U.S.-Mexican treaties that concern transboundary wildlife and shared rivers, and this chapter shows that even while signing cooperative treaties, the states have gone to great lengths to protect and safeguard their sovereignty. The language of these treaties is oriented only to a limited extent to establishing cooperative regimes for resource management. More often, the treaty is dedicated to reinforcing national boundaries, protecting state sovereignty, and minimizing the influences of the neighboring country on domestic territory and national decision-

making. These findings provide insight into larger debates over the breakdown of state sovereignty in the face of globalization. Rather than being a symptom of the breakdown of national borders, international treaties, ironically, serve to reinforce state sovereignty.

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## La Función de la Soberanía del Estado en el Derecho de los Tratados entre Estados Unidos y México sobre el Agua y Especies Silvestres de la Zona Transfronteriza

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### RESUMEN

¿Representan los recursos ambientales compartidos entre gobiernos internacionales un desafío a la soberanía de los estados? (De aquí en adelante, se define el concepto de estado como “una entidad política, especialmente una que constituye una nación” según la edición 2000 del American Heritage Dictionary.) ¿Cómo se mitigan estos desafíos a la soberanía mediante el derecho internacional? En esta ponencia se analiza el derecho de los tratados que rige sobre dos recursos naturales que cruzan libremente la frontera entre los Estados Unidos y México — el agua dulce y la vida silvestre. Los Estados Unidos y México se han apoyado en el derecho internacional, más comúnmente por medio de los tratados internacionales, para proteger sus intereses en estos recursos. Esta ponencia analiza los tratados entre los Estados Unidos y México con respecto a la vida silvestre y los ríos compartidos de la zona transfronteriza y demuestra que, a pesar de la firma de tratados de cooperación, los estados han hecho todo lo posible por proteger y salvaguardar su soberanía.

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La redacción de estos tratados se orienta solamente de manera limitada al establecimiento de regímenes de cooperación para el manejo de los recursos. A menudo, un tratado se dedica a reforzar las fronteras nacionales, proteger la soberanía de los estados y reducir las afectaciones del país vecino sobre el territorio nacional y la toma de decisiones a nivel nacional. Los hallazgos del documento brindan un panorama de información hacia deliberaciones más profundas sobre la desintegración de la soberanía del estado ante la globalización. En lugar de ser un síntoma de la desintegración de las fronteras nacionales, los tratados internacionales, irónicamente, constituyen un recurso para reforzar la soberanía del estado.

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### INTRODUCTION

State sovereignty is one of the organizing principles of modern international law. The independence of nation-states and the freedom of national governments to act within their borders create a critical foundation of the state system. Despite sovereignty's solid place in international law, it remains a highly contested principle. Developing states defend their rights to sovereignty in an effort to prevent the intervention and imposition of authority from more powerful states, while wealthy states resist efforts of international organizations to limit their control over their domestic and economic affairs. At the same time, globalization scholars argue that the concept of sovereignty may be anachronistic because international trade, networks, and legal regimes are limiting the ability of independent states to manage their own affairs without international and external influence. The natural environment and transborder resources are frequently cited as threats to state sovereignty, while the legal principles of sovereignty are believed to hinder effective management and protection of transborder resources. This chapter explores the principle of sovereignty in U.S.-Mexican treaty law and how it affects shared natural resources, particularly freshwater and wildlife. How is sovereignty addressed in these treaties? Is state sovereignty weakened or reduced by international cooperation? Or do the terms of the treaty reconfigure but essentially strengthen sovereignty?

An examination of U.S.-Mexico water and wildlife treaties reveals that sovereignty plays out very differently in each case. In terms of shared freshwater resources, the majority of the law that governs the shared U.S.-Mexican rivers comes in the form of bilateral treaties. In these treaties, there is a progression from a strict interpretation of sovereignty and territorial rights to a more nuanced view of sovereignty and a greater flexibility towards seeing the river basins in question as unified wholes. Importantly, a binational governing agency – the International Boundary and Water Commission (IBWC) – was established to deal with the implications of sovereignty. The role of IBWC and the nature of its authority both limit and strengthen sovereignty in different ways.

In the case of wildlife, only one bilateral treaty between the United States and Mexico explicitly governs transboundary wildlife. Either regional or major global treaties constitute the remainder of the treaties signed by both countries. In contrast to the water treaties, wildlife treaties mention sovereignty less explicitly and establish a more cooperative spirit from the beginning. However, the treaties do not establish binational or supranational governing agencies and they allow both countries to retain control over the governance of the resource and the laws they create to implement the treaty terms. In the case of the United States and Mexico, the U.S. Fish and Wildlife Service has authority over U.S. wildlife and even transboundary wildlife shared with Mexico. In Mexico, the Secretaría de Medio Ambiente y Recursos Naturales (SEMARNAT) has similar powers over Mexican wildlife.

## SOVEREIGNTY AND TRANSBOUNDARY NATURAL RESOURCES

The concept of sovereignty involves both external and internal rights (Liftin 1998). External sovereignty is the formal equality of all nations in international law. Each nation is sovereign in that it has an equal say in the formation of treaties and when they participate in international governing agencies, such as the United Nations. Article 2 of the Charter of the United Nations makes this point clearly: “The Organization is based on the principle of the sovereign equality of all its Members.” Sovereign nations are allowed

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to act independently and to defend their interests in the international arena. There is no supranational governing agency above nations, and one of the basic rights of treaty law provides that no country can be subject to an international law without its consent (Birnie and Boyle 2002).

Internally, states have sovereign authority over their domestic affairs. The state is the only legitimate authority within its territory and has the right to govern; use force; introduce economic and development policies; and to establish education, infrastructure, and postal services pursuant to its own interests. Importantly for this discussion, internal sovereignty also includes the right to exploit the natural resources within a state's territory and to adopt its own environmental policy. Although both internal and external sovereignty are carefully guarded rights, it is important to note that the concept of sovereignty is in no way absolute, particularly within the modern realities of international law. Human rights laws, trade, war crimes, and international environmental laws all put pressure on and reduce the absolute right of a country to do whatever it chooses within its borders.

Despite the importance of sovereignty both in international law and to the states themselves, modern global problems increasingly seem to conflict with state sovereignty. Recent writings on globalization argue that the "state," as an organizing unit of the international system, is losing ground, gradually being replaced by supranational governing agencies, networks of multinational corporations, and non-governmental agencies (Slaughter 2004). Furthermore, some argue that globalization is reducing the importance of borders because telecommunication, culture, media, ideas, trade, people, and environmental effects freely move across borders. "Global values," (Meyer, et al. 1997) such as human rights, the elimination of nuclear weapons, free trade, and environmental protection, require privileging world cultural goals over a state's right to follow its own domestic policies.

Because of the transboundary nature of environmental problems, they are particularly viewed as a threat to sovereignty. Most environmental problems do not recognize state boundaries and states cannot prevent the effects of how another state influences the quality of its own land, water, and air. Borders are political demarcations

that human actors draw, enforce, and give meaning to (Liftin 1998). Before the 16th century, borders between nations were more likely to take the form of frontiers—often difficult or rugged terrain or large bodies of water that people could not easily cross. As the world became more populated and power became concentrated in the hands of local monarchs, political borders began to replace frontiers as the demarcation between countries. During this same time period, political power came to mean control over a specific territory and borders came to mark the limits of the authority of one political unit *vis a vis* its neighbors. While Western Europe became organized into separate nation-states by the end of the 18th century, this model was not transferred to the rest of the world until the middle of the 20th century. With the end of World War II and with the decline of colonialism, the former colonies were also divided into political units separated by borders (Kratochwil 1986).

International law began to emerge along with political borders near the end of the medieval period. Natural resources were among the first issues addressed in international law. The natural environment and natural resources do not obey borders; in most cases, transboundary resources flow freely across borders. As countries try to secure a constant and consistent supply of a given resource to industrialize or to provide for growing populations, the rights of neighboring countries to access a given transboundary resource can create conflicts (Haas and Sundgren 1993). Economic development and population density caused natural resources to become increasingly scarce, increasing competition between neighboring countries over shared resources.

In terms of sovereignty, this conflict over shared resources is depicted as a battle between the territorial sovereignty of one country and the territorial integrity of its neighbors (Berber 1959). Territorial sovereignty implies the right to complete control over the land within a country's borders. Territorial integrity is the right of any given country to an unaltered environment, or to a natural environment that has not been damaged by the actions of neighboring countries. Territorial integrity is also the right to not have internal supplies of land, water, or air damaged by the actions of neighboring countries. In its early formulations, territorial sovereignty was used to argue for complete authority and control over everything

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within a state's boundaries, from land to populations. The first official articulation of this right appears in the 1895 Harmon Doctrine, in which the U.S. Attorney General asserts the extent of the rights of the United States to the waters of the Rio Grande:

The fact that the Rio Grande lacks sufficient water to permit its use by the inhabitants of both countries does not entitle Mexico to impose restrictions on the United States which would hamper the development of the latter's territory or deprive its inhabitants of an advantage with which nature had endowed it and which is situated entirely within its territory. To admit such a principle would be completely contrary to the principle that the United States exercises full sovereignty over its national territory (21 Ops. Attorney General [1895] 274, 283).

In the Harmon Doctrine, the Attorney General asserts a claim to absolute territorial sovereignty and discounts restrictions on the freedom of the United States to use its territory and resources in any way it sees fit. These assertions of territorial sovereignty come into conflict with the complementary right of neighboring states to territorial integrity. If both of these rights are considered absolute, there can be no resolution of most transboundary resource conflicts.

Despite early claims to absolute territorial sovereignty, such as the Harmon Doctrine, throughout the 20th century states have shown a great willingness to compromise and work with neighboring states to develop equitable rights to shared resources. One solution that has emerged to resolve the inherent tensions between territorial sovereignty and territorial integrity is an understanding of "rights" and "responsibilities" (Wapner 1998). In most of the international law that governs the environment, states are given the right to exploit their domestic resources as they choose, but have the responsibility not to cause harm to neighboring states. This balance between rights and responsibilities is made clear in the 1972 Stockholm Declaration, the first major global treaty on the environment.

In Principle 21, the Stockholm Declaration says "states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own

resources pursuant to their own environmental policies.” The assertion of the sovereign right to exploit resources is a clear statement of the right to territorial sovereignty. But Principle 21 goes on to declare, “and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” This second half of Principle 21 limits sovereignty at the point of causing harm to neighboring states. The United Nations’ principles clearly assert the balance between rights to sovereign control of a territory and the responsibility not to harm the territory of other states. This principle has become so institutionalized in international environmental law that 20 years later, the Rio de Janeiro Declaration restated it almost verbatim, and this balance of rights and responsibilities appears throughout the water and wildlife treaties between the United States and Mexico.

Many authors that write on sovereignty and the environment have approached this from a different perspective—that of environmental protection (Lifitin 1998; Wapner 1998; Haas and Sundgren 1993). These authors argue that while transboundary resources threaten sovereignty, the right to sovereignty also threatens transboundary resources. In the case of water resources, the optimal use of a river often does not correspond to the sum of the interests of all the countries involved. Geologists, environmentalists, and recently even economists have argued that the optimal use of a river can only be achieved by looking at the entire basin as an integrated whole, rather than by dividing the river basin by political boundaries. In terms of migratory wildlife, a species can only be protected if all of the countries along its flight or migration path agree to work for its conservation. Strict hunting and capture laws in the country where a species spends its winters will be relatively powerless if the country where the species spends its summers does not adopt similar protection measures.

Despite apparent contractions of state sovereignty because of global problems, the natural environment, and the principles of rights and responsibilities in international law, the principle of state sovereignty remains a central component in international law. Sovereignty is reinforced and reconstructed through the examples of cooperation apparent in international environmental law. For

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instance, even the process of signing an environmental treaty reinforces state sovereignty in many ways. Externally, the process emphasizes that states, and only states, are the legal players in the international community. Only states can be parties to treaties, and other bodies (such as non-governmental organizations [NGOs] and individuals) must move through state channels to assert their demands on the international field. Furthermore, state sovereignty is even reinforced within the content of the environmental treaties, because while states will agree to certain restrictions and limits on what they or their populations can do within their territories, the state often asserts itself as the primary governing agency responsible for treaty compliance. Even when international governing institutions are created, states will either ensure that these bodies do not have authority over them without explicit agreement, or the states will have a central administrative role in these governing institutions.

However, asserting the idea that sovereignty continues to be a powerful and principle right that is not reduced by international environmental treaties does not necessarily imply that states are independent sovereign bodies unconnected from other states, or that the international field is anarchic, despite the absence of a supranational governing body. The world is witnessing the rise of a global community, with states as the primary actors. In addition to globalization through trade and communications, the beliefs and values of the world community penetrate state lines and influence both the people and the state itself (Meyer, et al. 1997; Frank, et al. 2000a; Goodman and Jinks 2003). Furthermore, states have long followed rules and norms of international diplomacy and law, and compliance with treaties is surprisingly high (Chayes and Chayes 1995). Nevertheless, states continue to protect their rights to sovereignty carefully, even when cooperating with other states on one of the most stateless forces—the natural environment.

## CASES: TRANSBOUNDARY WATER AND WILDLIFE

This chapter focuses on a comparative analysis of the treaty law that governs two transboundary natural resources that the United States and Mexico share. Transboundary resources are those natural resources that cross one or more national borders, such as freshwater, wildlife, clean air, and atmosphere. Freshwater supplies and wildlife are the transboundary resources that are examined in this discussion. Freshwater supplies include lakes, rivers, and aquifers, although in the U.S.-Mexican case, transboundary rivers are the primary shared water supply. Transboundary rivers are defined as any river in which any part of its entire flow is located in more than one country. These rivers include boundary rivers that form part of an international border, such as the Rio Grande/Río Bravo, and transboundary rivers that cross an international border, such as the Colorado River. The major and most-contested shared freshwater resources between the United States and Mexico include three rivers: the Tijuana River in southern California and northern Baja California; the Colorado River, which runs from Colorado through Arizona and into the Gulf of California between Sonora and Baja California; and the Rio Grande/Río Bravo, which runs from northern New Mexico to the Gulf of Mexico, forming the U.S.-Mexican border along its path between Texas and the four Mexican states of Chihuahua, Coahuila, Nuevo León, and Tamaulipas. The major treaties that govern these freshwater supplies were signed in 1889, 1906, 1933, 1944, and 1973. The IBWC has also established more than 300 smaller agreements, but only the major binational river treaties will be addressed here.

The joint management of these freshwater resources can be compared to the joint management of another transboundary resource—transboundary wildlife. Transboundary wildlife includes both migratory and border wildlife. Migratory wildlife consists of those birds, terrestrial animals, and marine animals that reside in two or more countries during any point in their migratory route or lifecycle. Border wildlife concerns animals that live along the border itself and cross the border freely, but do not necessarily migrate. There are hundreds of transboundary species between the United States and

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Mexico, but treaty law primarily governs migratory birds (particularly waterfowl), large game animals, and endangered species. The major wildlife treaties that deal with transboundary wildlife include a 1936 bilateral treaty, the 1940 Western Hemisphere Convention, the 1971 Ramsar Convention, and the 1973 Convention on International Trade in Endangered Species.

Although freshwater and wildlife are different resources in significant respects, their management poses similar challenges to state sovereignty. Sovereignty is challenged first by the nature of the two resources, and then by the cooperative regimes that are formed to manage the sharing of the resources. In the cases of both rivers and wildlife, the resources flow freely across the border and neither state can guarantee that the actions of its neighbor will not negatively affect the quality and quantity of its own portion of the joint resource without establishing some form of cooperative agreement. The cooperative agreements themselves can threaten state sovereignty, as well, by establishing supranational governance or by setting restrictions on the exploitation of the resource within domestic territory.

### TREATIES GOVERNING TRANSBOUNDARY FRESHWATER RESOURCES

Transboundary water law within the U.S.-Mexican border region progresses from early treaties that follow a strict reading of sovereignty to a more cooperative understanding of rights and responsibilities in later treaties. The earliest treaties define sovereignty as territorial sovereignty, a definition that often privileges the United States as the upstream country and limits Mexico's claims to the shared river resources. The first U.S.-Mexican river treaty created a binational governing agency, the International Boundary Commission (IBC) (the name was later changed to the International Boundary and Water Commission). The creation of such an agency threatens sovereignty to a certain extent, but the terms of the treaty clearly limit the authority of IBWC and ensure that neither state will be subject to new decisions without its explicit consent. Treaties signed in the early to mid-20th century focus on joint construction projects of major canals and dams. While these projects showcase

cooperation and partnership along the border, the treaties again divide authority over the completed projects. While the dams and canals were jointly built, in the end, they did not become truly “international.” Finally, in the most recent major river treaty between the United States and Mexico, there is much greater recognition of Mexico as a downstream neighbor with rights to an undamaged supply of freshwater. Although the treaty again lays out strict reservations on the rights granted to Mexico, it is nonetheless a greater acknowledgment of downstream rights than is apparent in the earlier treaties.

### *1889 Convention on Boundary Waters*

The 1889 treaty that created IBC was the first river treaty signed between the United States and Mexico. IBC was the world’s first binational governing agency to govern a river. Its role was to first monitor and resolve conflicts over the precise location of the border, particularly in the region of the Rio Grande, because the river would often shift over time, and second to act as a governing agency for any other disputes that may have arisen between the United States and Mexico over their rights to the Rio Grande.

The 1889 treaty makes it clear that while IBC was a binational governing body in many ways, it did not have true authority over either the United States or Mexico. The treaty states that the “International Boundary Commission shall have exclusive jurisdiction in the case of said differences or questions.” However, both states retained the right to reject the decisions of IBC in Article VII. “If both Commissioners shall agree to a decision, their judgment shall be considered binding upon both Governments, unless one of them shall disapprove it within one month reckoned from the day on which it shall have been pronounced.” The formation of a binational governing agency reduces sovereignty to some extent, and yet each country’s assertion of their right to approve and disapprove the binational governing agency’s rulings reinforces sovereignty. This treaty is extended by conventions in 1895, 1896, 1897, 1898, 1899, and 1900; the nature and name of IBC is changed in a 1944 treaty.

*1906 Convention Between Mexico and the  
United States for the Distribution of Waters of  
the Rio Grande*

The next water treaty between the United States and Mexico was in 1906. In this treaty, the United States does allocate a specific amount of water to Mexico. The treaty lays out specific amounts of water that the U.S. guarantees to deliver to Mexico every year through the Rio Grande. In addition to establishing a guaranteed amount of water that the downstream country shall receive, the treaty establishes an annual delivery schedule of how much water will be flowing downstream every month.

However, while the treaty acknowledges Mexico's water rights to the extent that it guarantees some flow every year, the treaty is equally explicit in its pronouncement that Mexico does not have legitimate rights or claims to the water. In Article IV, the treaty states:

The delivery of water as herein provided is not to be construed as a recognition by the United States of any claim on the part of Mexico to the said waters; and it is agreed that in consideration of such delivery of water, Mexico waives any and all claims to the waters of the Rio Grande for any purpose... and also declares fully settled and disposed of, and hereby waives, all claims heretofore asserted or existing, or that may hereafter arise, or be asserted, against the United States on account of any damages alleged to have been sustained by the owners of the land in Mexico, by reason of the diversion by citizens of the United States of waters in the Rio Grande.

Downstream rights are recognized only to the extent of guaranteeing a certain amount of water, but only if Mexico waives any further claim to the water, as well as any rights to prevention of damage on the part of the United States. This point is reiterated in other sections of the treaty, as well. In the 1906 treaty, sovereignty is made explicit, and the upstream country (the United States) is outspoken in resisting any limitations on its sovereignty and rights to exploit its river as it sees fit.

### *1933 Convention Between the United States of America and the United Mexican States for the Rectification of the Rio Grande*

In 1933, Mexico and the United States signed their first joint construction treaty. This treaty, while relatively minor, is significant in certain respects. The main goal of the treaty is to build a permanent canal for the Rio Grande both to relieve flooding problems and to stabilize the border between the two countries. The canal was to be constructed jointly, in one of the first major joint building projects along a U.S.-Mexican river. However, despite the joint, bilateral nature of the project, the treaty once again explicitly defines the specific rights and jurisdictions of each country *vis a vis* the canal. Article 8 makes this point clearly: “The construction of works shall not confer on the contracting parties any property rights in or any jurisdiction over the territory of the other. The completed work shall constitute part of the territory and shall be the property of the country within which it lies.” As Article 8 outlines, although the countries will collaborate in building the canal, the canal itself will not be under binational control once completed. Rather, each country will have full jurisdiction over its half of the canal. That is not to say, however, that the treaty does not establish at least partial joint governance. Indeed, IBC is given authority over the canal, although this governance does not go so far as to constitute truly binational governance. Each country retains the right to approve the decisions of IBC, thereby protecting their sovereignty and their rights to control their domestic territory.

### *1944 Treaty Between the United States of America and Mexico Relating to the Waters of the Colorado and Tijuana Rivers, and of the Rio Grande (from Ft. Quitman, Texas, to the Gulf of Mexico)*

The next major water treaty between the United States and Mexico, and arguably the most important natural resource treaty signed between the two countries, was established in 1944. This treaty was intended to “fix and delimit the rights of the two countries” regard-

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ing all three major rivers that cross the U.S.-Mexican border: the Tijuana, Colorado, and Rio Grande. While the treaty itself is similar in nature to the 1906 treaty in that it is primarily an allocation treaty, there are important differences. The 1944 treaty is significantly more cooperative in spirit and the nature of sovereignty is subtler and less focused on strict water rights. In the 1944 water treaty, sovereignty is not treated as explicitly as it is in the 1906 treaty. The nature of sovereign rights has also softened somewhat, although domestic claims to a state's rightful share of a river are still given priority over internationally shared demands. Both the upstream country (the United States) and the downstream country (Mexico) are accorded rights to the waters, and neither country is prioritized.

In light of earlier agreements, even the preamble to the treaty begins with a remarkable spirit of cooperation. It begins, "The Government of the United States of America and the Government of the United Mexican States: animated by the sincere spirit of cordiality and friendly cooperation which happily governs the relations between them... have resolved to conclude a treaty..." This spirit of "friendly cooperation" and happy governance stands in contrast to the preamble of the 1906 treaty, which states the goal is "to remove all causes of controversy between them in respect thereto, and being moved by considerations of comity, have resolved to conclude a Convention." At least on paper, by 1944, the United States and Mexico had moved from a position of reducing contention to one of encouraging binational cooperation.

In content, the 1944 treaty first changes the role (as well as the name) of IBC. Now known as the International Boundary and Water Commission, IBWC is charged with the "settlement of all disputes" that arise regarding this treaty, and "shall in all respects have the status of an international body." While IBWC is given supranational authority to a significant extent, each country retains true authority over its own half of the commission, and the commission does not have enforceable authority over either state. Rather, the governments of both nations must approve the commission's decisions. Much like the early structure of IBC, the establishment of a bina-

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tional commission reduces sovereignty, and yet the states reassert authority and independence from the decisions of the commission by requiring government approval of all IBWC decisions.

The treaty then goes on to reinforce the provisions of the 1933 treaty by providing for the joint construction of two dams and by guaranteeing each state jurisdiction over the constructed works in their territories, despite being jointly constructed:

The works constructed, acquired or used in fulfillment of the provisions of this Treaty and located wholly within the territorial limits of either country, although these works may be international in character, shall remain, except as herein otherwise specifically provided, under the exclusive jurisdiction and control of the Section of the Commission in whose country the works may be situated.

As in the 1933 treaty, although the dams constructed by the provisions of the 1944 treaty are joint projects between the United States and Mexico, each country retains complete sovereign control over its own territory, including the international dams located within national boundaries.

Importantly, conceptualizing the rivers as complete systems and considering how best to manage the rivers binationally is introduced as are the interests of both nations for the first time. In article 8, the treaty also recognizes dual interests:

The two Governments recognize that both countries have a common interest in the conservation and storage of waters in the international reservoirs and in the maximum use of these structures for the purpose of obtaining the most beneficial, regular and constant use of the waters belonging to them.

While the acknowledgement of common interest does not equal the recognition of a dual goal of long-term conservation or environmental protection, it is nevertheless a significant change that the United States and Mexico are asserting common interests in their water management and that they are striving to address these issues in a binational and cooperative fashion.

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Finally, rights and responsibilities are introduced as a way of balancing the sovereignty interests of both states. Concerning the authority of IBWC, the treaty states that “the Commission shall have the power to authorize either country to divert and use water not belonging entirely to such country, when the water belonging to the other country can be diverted and used without injury to the latter and can be replaced at some other point on the river.” However, the text of the treaty then goes on to clarify that allowing one country to divert water does not confer upon that country *rights* to the water. Furthermore, like the 1906 treaty, the 1944 treaty is explicit at various points in the limits of the water rights granted to Mexico.

The right of state sovereignty is still a dominant feature in the 1944 treaty, although these rights are constructed and asserted in several different ways. First, while IBWC is granted the status of an international governing body, the commission itself is divided equally between representatives of the two countries who will represent and defend the interests of their respective nations. Second, while the treaty provides for the joint construction of new major infrastructural projects (specifically dams), these works will, like the earlier canal, be the exclusive property of the country in which they reside. Finally, rights and responsibilities are developed as a way to balance the competing claims of both countries to the shared rivers.

### *1973 Mexico-U.S. Agreement on the Permanent and Definitive Solution to the Salinity of the Colorado River Basin (IBWC Minute No. 242)*

The 1973 agreement on salinity in the Colorado River is the final major freshwater treaty between the United States and Mexico. In the late 1960s and early 1970s, the United States and Mexico recognized that the quality of the water in the Colorado that was reaching Mexico was a serious problem. Agricultural run-off, industry, and increasing domestic consumption in growing U.S. cities had caused the river’s salt level to rise. The salinity problem was one of the first major examples of U.S. actions creating serious negative consequences on the downstream reaches in Mexico. Resolving this

problem required a balance of the rights of the United States to use the water, and recognition of its responsibility to prevent harm to its downstream neighbor.

After a series of agreements by IBWC, the solution to the salinity problem was definitively agreed upon in 1973. The solution was that the United States guarantee a specific amount of water at a maximum level of salinity, thus securing the quality of water being delivered to Mexico in the Colorado. This solution is significant because downstream riparian rights are being extensively recognized. The agreement states:

With the objective of avoiding future problems, the United States and Mexico shall consult with each other prior to undertaking any new development of either the surface or the groundwater resources, or undertaking substantial modifications of present developments, in its own territory in the border area that might adversely affect the other country.

The agreement recognizes that the United States has the responsibility to guarantee that its downstream neighbor is unharmed by U.S. domestic activities. The requirement to prevent harm is acted upon in this treaty. Furthermore, the spirit of this agreement is clearly cooperative, and it addresses rivers as indivisible units more so than earlier treaties do.

The water treaties began with an understanding of the United States' absolute sovereignty over the upstream waters of the Rio Grande, Colorado, and Tijuana Rivers. In the mid-20th century, the joint construction projects, while international in nature, are ultimately reassigned to the authority of the country in which they are located. Similarly, while IBWC is in many ways a binational governing agency, the authority of the agency rests within the governments of each country and their representatives. Finally, as seen in this last treaty, by the late 20th century, Mexico's rights as a downstream riparian state are increasingly recognized, and the right of the United States to absolute territorial sovereignty is limited in that it cannot cause significant harm to its downstream neighbor.

## TREATIES GOVERNING TRANSBOUNDARY WILDLIFE RESOURCES

The governance structure developed in the treaties concerning transboundary wildlife in the United States and Mexico is significantly different than that of fresh water. First, the treaties have a much greater spirit of cooperation, and significantly less emphasis on sovereign rights over wildlife resources. Second, no binational governing agency is created to mirror IBWC. Instead, the U.S. Fish and Wildlife Service retains authority over U.S. wildlife and SEMARNAT retains authority over Mexican wildlife, even though these wildlife resources are migratory and transboundary. Third, there is only one binational treaty. The rest of the treaties are multinational and either regional or global. This is interesting because wildlife management is less a binational cooperative venture on the part of the United States and Mexico. Rather, each country is acting more or less independently in its decisions to enter multilateral treaties. This is partially due to the type of governance needed for the effective management of wildlife, as will be discussed later. Finally, the wildlife treaties in the early 20th century are similar to water treaties in that they list specific species to be protected and they focus on conserving the resource itself. By the late 20th century, there is a much greater emphasis on major environmental protection, particularly habitat protection.

### *1936 Convention for the Protection of Migratory Birds and Game Mammals*

The 1936 Convention for the Protection of Migratory Birds and Game Mammals between the United States and Mexico was one of the first treaties in the world to establish governance over migratory species that travel between two or more countries. The treaty first lays out a spirit of cooperation between the two countries and then outlines specific limits on the hunting and capture of specific species. Unlike the early water treaties, this first migratory bird treaty does not explicitly lay out rights to territorial sovereignty or rights to control domestic resources. It doesn't even provide balances between sovereign rights and the responsibility to prevent

harm. Instead, this convention begins with a spirit of cooperation and sustainable use of migratory species. "It is right and proper to protect the said migratory birds, whatever may be their origin, in the United States of America and the United Mexican States, in order that the species may not be exterminated," it reads. The treaty then lays out the limits on hunting and capture that will protect and conserve migratory species, and concludes with a list of migratory species covered by the treaty. Importantly, the treaty makes no mention of sovereignty or rights to exploit the resource as each country sees fit. It doesn't even mention prevention of harm. Protection of ecosystems and habitat conservation are also not addressed. The only way sovereignty comes into question is that the terms of the treaty are to be implemented by domestic laws, written and concluded by both countries independently. As well, no supranational governing agency is established. Instead, the terms are to be implemented independently and both countries are invited to present amendments in the future. In this treaty, sovereignty is neither expressly protected nor expressly threatened. State rights to exploit their natural resources as they see fit are not made explicit, but at the same time, no binational agency is given authority over the governance and management of migratory wildlife.

Surprisingly, given the many treaties that govern freshwater supplies, the 1936 treaty is the only binational migratory wildlife treaty between the United States and Mexico. All the other treaties that concern wildlife in both countries are either regional or global treaties that both countries signed unilaterally. The first of these treaties is the 1942 Western Hemisphere Convention.

### *1942 Western Hemisphere Convention*

The 1942 Western Hemisphere Convention is a significant treaty for several reasons. In terms of wildlife conservation, environmentalists have argued that widespread treaties that govern the entire habitat of the migratory cycle of a species are the best way to conserve and protect the species. In addition to being the first treaty of its kind, the Western Hemisphere Convention achieves widespread habitat preservation by bringing countries throughout the Americas together for the common goal of wildlife conservation. In content,

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the Western Hemisphere Convention is similar to the 1936 treaty between the United States and Mexico. It begins on a note of cooperation:

The governments of the American Republics, wishing 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...

Like the 1936 treaty, the Western Hemisphere Convention begins with an assertion that the countries have come together in a spirit of cooperation for the sake of conservation of wildlife, a goal they cannot achieve unilaterally. The remainder of the treaty is devoted to the creation of natural parks, nature and wilderness reserves, and limitations on hunting, especially of certain species outlined in the treaty's appendix. In terms of sovereignty, the treaty is again similar to the 1936 migratory birds treaty. The treaty does not create a supranational governing authority, but instead relies on domestic law-makers to create laws to implement the terms in each of their respective countries. The countries themselves are charged with the implementation of the treaty terms within their domestic laws. While sovereignty is not explicitly protected in treaty terms, the treaty does not create a supranational governing agency that would threaten sovereignty.

The remainder of the wildlife treaties signed by the United States and Mexico are major global treaties. Like the 1936 treaty and the Western Hemisphere Convention, these treaties all begin with a clear spirit of cooperation and do not create supranational governing agencies. Instead, countries are charged with the responsibility of managing their own wildlife and wildlife habitat according to the terms of the treaty.

### *1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention)*

The first of these major global treaties is the 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (known as the Ramsar Convention for the city in Iran where it was signed). The main action taken by the Ramsar Convention is the creation of a list of wetlands that are particularly important as waterfowl habitat. Each party to the treaty is responsible for first submitting a list of its important wetlands to be included on the main convention list, and each party is then responsible for the conservation and management of the wetlands it included on the list.

The Ramsar Convention also includes explicit safeguards of each country's sovereignty. In Article 2.3, sovereign rights are protected outright: "The inclusion of a wetland in the List does not prejudice the exclusive sovereign rights of the Contracting Party in whose territory the wetland is situated." Here, the convention is explicit that assigning a wetland to the list does not take that wetland out of the sovereign control of that country. Instead, the country remains responsible for domestic enforcement of the treaty terms, specifically for the conservation and protection of that wetland. Like the other wildlife treaties, Ramsar does not establish a supranational governing agency. At this point, 138 countries have signed the Ramsar Convention, including Mexico in 1986 and the United States in 1987.

### *1973 Convention on International Trade in Endangered Species*

The final global treaty for managing wildlife signed by both the United States and Mexico is the 1973 Convention on International Trade in Endangered Species (CITIES). The goal of this treaty was to protect endangered species. Endangered species pose a unique threat to sovereignty because the species themselves are not always transboundary. Protecting endangered species often requires international pressure on one or two countries that control the entire population of a species. Developed and developing countries also

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often clash over the protection of endangered species, many of which are located in Africa and South America. Although CITES does not explicitly concern U.S.-Mexican transboundary wildlife, it is significant for this discussion because it affects domestic exploitation of wildlife in both countries.

Like the Ramsar Convention, CITES establishes national governance in the spirit of international cooperation. "People and States should be the best protectors of their own wild fauna and flora..." and furthermore, "international cooperation is essential for the protection of certain species against overexploitation through international trade." This convention, like the earlier wildlife treaties, manages sovereignty by allowing states to retain control over their own resources while pushing for international cooperation. There are currently 164 parties to this treaty. Mexico signed in 1991 and the United States signed in 1974.

As these treaties illustrate, wildlife is managed in a significantly different manner than water resources are managed along the U.S.-Mexican border. The wildlife treaties exhibit a much greater emphasis on cooperation, which might suggest that countries are less guarded about their sovereign interests. But at the same time, these treaties do not create binational or supranational governing agencies, which are arguably the greatest threat to state sovereignty. While the water treaties demonstrate a greater defense of sovereignty, they also establish a governing agency that, to some extent, takes power away from the national governments.

The nature of both water and wildlife resources needs to be examined to account for the different treatment of sovereignty in the water and wildlife treaties. The vital nature of water resources may be what makes countries more cautious and guarded about their rights to water than they are about their rights to control wildlife. In addition to vital domestic consumption of freshwater, the exploitation of water resources is necessary for developmental and economic activity, while the hunting and capture of wild birds are primarily social and recreational activities. Another reason for the cooperative spirit of the bird treaties may be that unlike water, there is no upstream-downstream dimension to wildlife. On the other hand, no one country controls primary access to the resource, as an upstream country does in a river situation. The species migrate back

and forth between the two countries, and therefore any one country wanting to preserve its migratory wildlife needs the cooperation of all the other countries along the migration route.

## CONCLUSION

The transboundary freshwater treaties signed between the United States and Mexico are more careful to protect sovereign rights than wildlife treaties are, but they do allow for the establishment of a binational governing authority. Wildlife treaties, on the other hand, involve both a spirit of cooperation and reliance upon national governance of shared resources. As these treaties demonstrate, the international, cooperative management of these resources involves a reduction of sovereignty through the recognition of downstream rights, binational governance, and through international cooperation. At the same time, however, sovereign rights are made explicit at many points throughout the treaties and these rights are ultimately reinforced.

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