

## NOTES

### MILITARIZED PICNICS: A COMPARATIVE ANALYSIS OF PEACE PARKS AT THE U.S.-MEXICO AND U.S.-CANADIAN BORDERS

#### TABLE OF CONTENTS

INTRODUCTION .....	458
I. THE BORDERLANDS OF THE UNITED STATES: TWO PARKS, TWO BOUNDARIES, TWO REGULATORY AGENCIES .....	462
<i>A. Peace Parks at the Borderlands</i> .....	462
<i>1. Peace Arch Park</i> .....	464
<i>2. Friendship Park</i> .....	467
<i>B. The Sovereign State and the Creation of Borders</i> .....	473
<i>1. The United States-Canadian Border</i> .....	473
<i>2. The International Boundary Commission</i> .....	475
<i>3. The United States-Mexico Border</i> .....	477
<i>4. The International Boundary and Water Commission</i> ..	479
II. IMPEDIMENTS TO FRIENDSHIP PARK OPENING AS A TRULY BINATIONAL SPACE .....	480
<i>A. The Failed Attempt at a Binational Park at the United States-Mexico Border</i> .....	482
<i>B. Department of Homeland Security's Border Wall Construction Does Not Apply To Canada</i> .....	485
<i>C. Erosion of the International Boundary and Water Commission's Ability to Maintain Treaty Compliance</i> ..	487
III. TWO LEGAL PATHWAYS TO OPENING FRIENDSHIP PARK .....	491
<i>A. Legislative Action</i> .....	492
<i>B. An International Boundary and Water Commission Lawsuit Against Department of Homeland Security</i> .....	493
<i>1. Treaty Violations Regarding Boundary Monuments and Consulting Mexico</i> .....	495
<i>2. Violation of the Supremacy Clause</i> .....	498
CONCLUSION .....	502

## INTRODUCTION

*“There’s a lot at stake in these simple daily interactions at Friendship Park, not the least of which is the threat to the human dignity of innocent park visitors.” - Jill Holsin<sup>1</sup>*

Ordained Methodist minister, John Fanestil, began holding weekly Sunday services at Friendship Park in 2008.<sup>2</sup> A recreational area heavily fortified by fences and walls, Friendship Park sits at the southwestern tip of the U.S.-Mexico border.<sup>3</sup> In the center, a marble obelisk Boundary Monument #258 prominently defines the exact location where the two countries meet.<sup>4</sup> At this boundary monument, Fanestil conducts weekly “El Faro: the Border Church,” a weekly Sunday binational service, where he raises the symbolic bread and wine of tortillas and grape juice in front of a thick metal lattice fence.<sup>5</sup> At times, Border Patrol agents warn Fanestil that passing food to Mexican visitors on the other side of the fence could constitute a customs violation.<sup>6</sup>

Friendship Park is a half-acre plaza perched on a mesa overlooking the Pacific Ocean.<sup>7</sup> Intended as a space for leisurely

---

1. Jill Holsin, *Saving Friendship Park: A History of the San Diego Coalition Friends of Friendship Park*, in WOUNDED BORDER/FRONTERA HERIDA: READINGS ON THE TIJUANA/SAN DIEGO REGION AND BEYOND 127 (Justin Akers Chacon & Enrique Davalos eds., 2011).

2. *Id.* at 131-32.

3. *Id.* at 127.

4. *Monument 258*, FRIENDS OF FRIENDSHIP PARK: SAN DIEGO-TIJUANA, <https://www.friendshippark.org/monument> (last visited Jan. 2, 2021).

5. Holsin, *supra* note 1, at 132. More recently, either John Fanestil or Pastor Seth Clark conducts the Sunday services. See Markus Watson, *Episode 88: The Border Church, with Seth Clark*, MARKUS WATSON, (Dec. 8, 2020) [https://www.markuswatson.com/2020/12/08/the-border-church-with-seth-clark-088/?fbclid=IwAR2sbvNBNOBI4cK5dZfu\\_pEae-KaOKm0va40e5wPb5ubKldSO9JIVdb8X0A](https://www.markuswatson.com/2020/12/08/the-border-church-with-seth-clark-088/?fbclid=IwAR2sbvNBNOBI4cK5dZfu_pEae-KaOKm0va40e5wPb5ubKldSO9JIVdb8X0A).

6. Holsin, *supra* note 1, at 132.

7. *Visit from the US Side*, FRIENDS OF FRIENDSHIP PARK: SAN DIEGO-TIJUANA, <https://www.friendshippark.org/visitus#:~:text=Detailed%20Directions,acre%20Border%20Field%20State%20Park> (last visited Jan. 2, 2021).

gatherings, writer and activist Jill Holsin explains, “[V]isitors must wait outside the border wall 150 feet away from Friendship Park, seek permission to enter a locked gate, then be escorted by a border patrol agent into a ‘security zone,’ a five-foot tall pedestrian barrier that confines the space of the concrete circle of Friendship Park.”<sup>8</sup>

Peace Arch Park, a similar park located at the northwestern tip of the U.S.-Canadian border, started hosting an annual sunrise Easter service in 1931.<sup>9</sup> Clergy from both the United States and Canada along with hundreds of worshippers would congregate next to a 67-foot arch, freely strolling back-and-forth across the boundary line.<sup>10</sup> These services eventually transformed into the annual “Hands Across the Border,” held on the second Sunday of June. Today, “Hands Across the Border” continues to draw thousands of visitors to the international boundary for picnics, music, and ceremonial acts of binational friendship.<sup>11</sup>

Peace Arch Park is one of many binational parks along the U.S.-Canadian border, managed by the *state* governments on either side.<sup>12</sup> Meanwhile, the entire boundary line is overseen by the International Boundary Commission (“IBC”)—a regulatory agency within the Department of State—whose purpose is to maintain binational treaties and keep boundary lines fairly open with no walls or construction allowed within a ten-foot “border vista”<sup>13</sup> on either side of the line.<sup>14</sup>

---

8. Holsin, *supra* note 1, at 127.

9. RICHARD CLARK, SAM HILL’S PEACE ARCH: REMEMBRANCE OF DREAMS PAST 91 (2006).

10. *Id.* at 92-93; Phil Dougherty, *Peace Arch Park (Blaine)*, HISTORYLINK.ORG (Oct. 18, 2009), <https://www.historylink.org/File/9194>.

11. *Id.* at 192.

12. See *Peace Monuments related to US/Canadian Friendship*, PEACE.MARIPO.COM, [http://peace.maripo.com/p\\_us\\_canada.htm](http://peace.maripo.com/p_us_canada.htm) (last visited Feb. 5, 2021) (providing an extensive list of commemorations, gardens, and parks along the U.S.-Canadian border that celebrate the peace and friendship between the two countries). The parks are not managed by the United States or Canadian federal governments.

13. The IBC explains, “To make the boundary visible and unmistakable, we clear and maintain a swath called a vista that extends 3 meters (10 feet) on either side of the line through dense forests, over mountain ranges, across wetlands and highlands and some of the most rugged terrain North America has to offer. We also control all works done within the vista.” *The Boundary*, INT’L BOUNDARY

## 460 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

Although the IBC maintains the boundary line, the states of Washington and British Columbia cooperatively manage and maintain Peace Arch Park.<sup>15</sup> Visitors to Peace Arch Park can freely stroll underneath the commemorative arch—interacting with U.S. and Canadian visitors.<sup>16</sup> Visitors are not required to show a passport or go through customs, as long as they stay within the confines of parkland on either side of the border.<sup>17</sup>

Similarly, Friendship Park is overseen by Border Field State Park, which is owned by California.<sup>18</sup> Furthermore, the entire U.S.-Mexico boundary line is managed and maintained by a regulatory agency within the State Department, known as the International Boundary and Water Commission (“IBWC”).<sup>19</sup> However, due to Congressional legislation and Presidential executive orders since the 1990s, the federal Department of Homeland Security (DHS) has conducted border wall construction along the U.S.-Mexico boundary line,

---

COMMISSION, <http://www.internationalboundarycommission.org/en/about/the-boundary.php> (last visited Jan. 3, 2021) [hereinafter *The Boundary*].

14. *The Commission*, INT’L BOUNDARY COMMISSION, <http://www.internationalboundarycommission.org/en/about/commission.php> (last visited Jan. 3, 2021) [hereinafter *The Commission*] (“The United States Commissioner is appointed by the President and reports directly to the Secretary of State.”).

15. *See infra* note 43-44.

16. *International Peace Arch Park: Borders? What Borders?*, PAC. NORTHWEST WANDERERS, <https://www.pnwanderers.com/blog/international-peace-arch-park> (last visited Jan. 3, 2021) [hereinafter *What Borders?*].

17. *Id.* Both parks have been closed to the public since the COVID-19 pandemic hit in March 2020. However, Border Patrol, at times, has allowed activists to enter Friendship Park to tend the binational garden. *See* Alexandra Mendoza, *Friendship Park at the U.S.-Mexico Border will soon change and here’s why*, SAN DIEGO UNION TRIB. (Sept. 4, 2020, 7:58 PM), <https://www.sandiegouniontribune.com/news/border-baja-california/story/2020-09-04/the-friendship-park-and-the-binational-garden-will-be-transformed-before-imminent-renovation-of-the-wall>. In addition, newspaper reports from Peace Arch Park maintain that people are still using the park in large numbers despite the closures. *See* Renee Bernard, *Weddings Still Happening at Peace Arch Park Despite COVID-19 Closure*, NEWS 1130 (July 2, 2020, 9:39 PM), <https://www.citynews1130.com/2020/07/02/peace-arch-weddings/>.

18. *See generally* *Border Field State Park*, CAL. DEP’T OF PARKS AND RECREATION, [https://www.parks.ca.gov/?page\\_id=664](https://www.parks.ca.gov/?page_id=664) (last visited Jan. 4, 2021).

19. *See infra* Section I.B.4.

including at Friendship Park.<sup>20</sup> A border fence has been erected approximately three feet away from the monument—barring American and Mexican visitors from sharing the space.<sup>21</sup> Consequently, the construction also has led Boundary Monument #258 to be accessible only from the Mexican side.<sup>22</sup>

Other than Friendship Park, no binational park exists between the United States and Mexico because past attempts to create such a space along the boundary line have failed.<sup>23</sup> Furthermore, the Friendship Park experience is far from friendly. American visitors must receive permission from Border Patrol to enter through a foreboding gate.<sup>24</sup> Agents escort park visitors into a “security zone,” which ironically serves the purpose of recreation.<sup>25</sup> Visitors then peer through a thick mesh fence at Mexican beachgoers on the other side who enjoy a resort-like atmosphere in an upscale neighborhood known as Playas de Tijuana.<sup>26</sup>

This Note explores why two binational parks on the westernmost corners of the United States look so vastly different and posits that both border security and cultural understanding would increase if Friendship Park became as open and free to the public as Peace Arch Park. Part I describes the history of the parks, gives an overview of both borders and their respective treaties, and examines the two regulatory agencies that oversee the boundary lines: the International Boundary Commission (“IBC”) and the International Boundary and Water Commission (“IBWC”). Part II analyzes the legal challenges that keep Friendship Park a militarized zone unlike its Canadian counterpart. Part III analyzes two potential legal avenues for opening Friendship Park as a truly binational cultural space: (1) an act of Congress demanding policy changes that argue for Friendship Park to receive the same treatment as Peace Arch Park, or (2) a lawsuit

20. *See infra* Section II.B.

21. *See infra* Section III.B.

22. *See infra* Section III.B.

23. *See infra* Section II.A.

24. Holsin, *supra* note 1, at 127.

25. *Id.*

26. Jackson James Faber, *Becoming Friendship Park: The History of Border Field State Park 7* (Fall 2015) (unpublished M.A. thesis, San Diego State University) (on file with SDSUnbound, <https://digitallibrary.sdsu.edu/islandora/object/sdsu%3A2287>).

462 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

brought by the IBWC against DHS. By opening Friendship Park as a truly binational space, the efficacy of both regulatory agencies would increase, the federal government would have to adhere to U.S.-Mexico treaties, and an essential space for greater cultural understanding between the two countries would be created.

I. THE BORDERLANDS OF THE UNITED STATES: TWO PARKS, TWO BOUNDARIES, TWO REGULATORY AGENCIES

Peace Parks were originally created to quell tensions at borders where contentious national politics manifested in local form.<sup>27</sup> This section examines how peace parks came about and provides a framework for how borders either remain peaceful or become fractious. This section also provides a historical background of Peace Arch Park and Friendship Park, the U.S.-Canadian and U.S.-Mexico borders more generally, and the regulatory agencies that maintain the boundary line: the IBC and IBWC.

*A. Peace Parks at the Borderlands*

The World Conservation Union (“IUCN”), a conglomerate of governments and civil society organizations that has become a global authority on safeguarding the natural world, defines an international peace park “as an area formally dedicated to the protection of biological diversity . . . cultural resources, and [] the promotion of peace and co-operation.”<sup>28</sup> Peace parks actually date back to the 1700s when countries heralded them as ways to lessen conflict between bordering countries.<sup>29</sup> The modern peace park movement started with the Krakow Protocol, which inspired the creation of a peace park

---

27. See *infra* note 29.

28. IUCN – *A Brief History*, IUNC, <https://www.iucn.org/about/iucn-a-brief-history> (last visited Feb. 5, 2021) (discussing how the IUCN was established in 1948 and how it brings together governments and civil society organizations with an aim “to encourage international cooperation and provide scientific knowledge and tools to guide conservation action.”); Travis Vermeer, *A River Runs Through it: The Case for an International Peace Park on the U.S.-Mexico Border*, 36 HOUS. J. INT’L L. 287, 307 (2014) (citing Charles Chester, *Transboundary Protected Areas*, THE ENCYCLOPEDIA OF EARTH (Sept. 24, 2008, 7:24 PM), [https://editors.eol.org/eoearth/wiki/Transboundary\\_protected\\_areas](https://editors.eol.org/eoearth/wiki/Transboundary_protected_areas)).

29. Vermeer, *supra* note 28, at 311.

along the contentious Polish-Czechoslovakian border in 1932.<sup>30</sup> That same year, the United States Congress and the Canadian Parliament recognized their own Waterton-Glacier International Peace Park located between Montana and Alberta.<sup>31</sup>

Since then, conservationists have argued international parks provide numerous benefits, including enhanced cultural understanding and binational cooperation, which leads to greater border security.<sup>32</sup> Joint patrols between customs and immigration officials reduce illegal trade and increase tourism, which in turn boosts both economies.<sup>33</sup> Additionally, as more people gather at peace parks, the area becomes more visible, which tends to reduce crime.<sup>34</sup> However, the successful establishment of peace parks is directly related to the amount of cooperation that takes place between local, regional, and national organizations.<sup>35</sup>

While borders can provide spaces for displays of binational friendship, boundary lines also solidify a country's national identity.<sup>36</sup> As Michiel Baud and Willem Van Schendel explain, "[The] display of statehood symbolizes the effort of each state to maintain exclusive control of its half of the borderland, and in this respect the border is the ultimate symbol of its sovereignty."<sup>37</sup>

However, local political networks on both sides of a border can often circumscribe the power of the nation (represented by the federal government).<sup>38</sup> Tensions along the borderland are low when the local population and regional organizations unify with state interests.<sup>39</sup> On the other hand, an unruly borderland lacks this collaboration and unity. Baud and Schendel explain:

---

30. *Id.*

31. *Id.* Waterton-Glacier International Peace Park is a UNESCO World Heritage Site. *Id.*

32. *Id.* at 309.

33. *Id.* at 309-310.

34. *Id.* at 309.

35. *Id.* at 308.

36. Michiel Baud & Willem Van Schendel, *Toward a Comparative History of Borderlands*, 8 J. OF WORLD HIST. 211, 215 (1997).

37. *Id.* at 226.

38. *Id.* at 215.

39. *Id.* at 227.

## 464 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

In its attempt to enforce its sovereignty, the state is often exposed as weak because it oversteps the limits of its power and makes unrealistic claims to overlordship over civil society. The position of the regional elite weakens because it is exposed as an agent of the state rather than a protector of local rights and concerns. The usual policy in these cases is for the state to arm the regional elite and station troops in the borderland in an attempt to enforce state rule. If this policy of militarization is successful, the enforced variant of the quiet borderland ensues; if not, the borderland remains turbulent and disorderly despite the presence of an army of occupation, which may resort to a reign of terror.<sup>40</sup>

Baud and Van Schendel's framework for peaceful versus fractious border relationships is instructive when comparing Peace Arch Park and Friendship Park. Notably, tensions remain low along the U.S.-Canadian border and, consequently, the two countries share many binational parks.<sup>41</sup> In contrast, tensions between Mexico and the United States are high and, not surprisingly, they are unable to come together and create a binational park.<sup>42</sup> An examination of both parks reveal these sharp contrasts.

### 1. *Peace Arch Park*

Two separate parks jut up against the U.S.-Canadian border, both managed by their respective state governments: Peace Arch State Park in Blaine, Washington,<sup>43</sup> and Peace Arch Provincial Park in Surrey, British Columbia.<sup>44</sup> Visitors from either country can stroll back-and-

---

40. *Id.* at 228.

41. *See supra* note 12.

42. Holsin explains, "By the mid-1990s, the border between San Diego and Tijuana became ground zero in national debates about immigration control . . . Friendship Park marked the point where a new federally-funded border wall would begin." Holsin, *supra* note 1, at 128-29.

43. *Peace Arch Historical State Park*, WASH. ST. PARKS, <https://parks.state.wa.us/562/Peace-Arch>, (last visited Oct. 23, 2020) [hereinafter Peace Arch Park].

44. *Peace Arch Provincial Park*, BC PARKS, [http://bcparks.ca/explore/parkpgs/peace\\_arch/](http://bcparks.ca/explore/parkpgs/peace_arch/) (last visited Oct. 23, 2020) [hereinafter Peace Arch Provincial Park].



forth freely through each park and walk underneath a commemorative 67-foot concrete arch located exactly at the boundary line.<sup>45</sup>

Samuel Hill, a Washington Businessman, financed and erected the Peace Arch in 1921.<sup>46</sup> Thereafter, local residents in both Canada and the United States began envisioning a surrounding park.<sup>47</sup> They each raised funds to purchase land, charmingly collected by school children who helped with fundraising.<sup>48</sup> On the American side, the park was completed in 1932.<sup>49</sup> On the Canadian side, Peace Arch Provincial Park was dedicated in 1939.<sup>50</sup> Peace Arch Park currently boasts lush gardens with seasonal rhododendrons, azaleas, and dahlias; locals and tourists also use the space as a cultural symbol of friendship between the United States and Canada.<sup>51</sup>

The arch has not always been a space for peaceful gatherings.<sup>52</sup> Anti-Vietnam protestors used the park a few times at the end of the 1960s and the beginning of the 1970s. In 1969 over 4,000 students from Canada coalesced at the arch to protest a United States atomic blast scheduled at the Aleutian Islands.<sup>53</sup> The group blocked the international border on the Canadian side, impeding Americans from

---

45. *Peace Arch Park*, *supra* note 44.

46. Dougherty, *supra* note 10.

47. *Id.* The Peace Arch is listed on the National Register of Historic Places.

48. CLARK, *supra* note 9, at 279.

49. *Id.* at 288.

50. *Id.* at 282. In 1943, one man tried to negotiate having the Indian Reserve adjacent to Peace Arch Park become a picnic ground. Eventually, these native lands did become part of the park. *Id.* Native Americans also lived along the border region, including near Friendship Park. Anne Marie Tipton, 3. *History*, TRNERR 3-4, [http://trnerr.org/wp-content/uploads/2010/12/hs\\_curriculum\\_HISTORY-chapter.pdf](http://trnerr.org/wp-content/uploads/2010/12/hs_curriculum_HISTORY-chapter.pdf). While Native Americans present an important issue regarding the border and their sovereign rights, this topic is beyond the scope of this article.

51. *Peace Arch Park*, *supra* note 44.

52. Richard Clark mentions many contentious moments at Peace Arch Park, including: a prayer vigil for peace through nuclear disarmament in 1981; a peace march for nuclear awareness in 1988; Jesse Jackson's attacks on NAFTA at Peace Arch Park in 1992; and annual demonstrations for Leonard Peltier, a Native American man convicted of killing FBI special agents and who American native associations on both sides of the international border judged to be innocent. CLARK, *supra* note 9, at 356, 361, 362.

53. *Id.* at 347.

466 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

entering.<sup>54</sup> In 1970, a group of about 500 Canadian students vandalized the arch with black paint reading, “U.S. & Canadian Governments Abandon Border!”<sup>55</sup>

However, local American residents and politicians also allied on at least two occasions to advocate against the federal government’s control over Peace Arch Park. In 1956 the United States federal government passed a massive freeway bill, which among other actions meant Blaine would get its own freeway, but this necessitated erecting fences in the park.<sup>56</sup> Congressman Jack Westland protested the construction, stating on the floor of the House of Representatives:

More and more restrictions are being placed on the basic freedoms of the American people by the very Federal government which, according to our Constitution, is dedicated to preserve these freedoms . . .The International Peace Arch at Blaine, Wash[ington],. has existed since its dedication in 1921 without fences and without guards, both in the area administered by the State of Washington and the Province of British Columbia. Now, the Bureau of Public Roads is requiring that fences be constructed along the proposed interstate highway that will terminate at the United States-Canadian border in the middle of the park.<sup>57</sup>

Local American residents allied with the Congressman, the Blaine School District superintendent organized a petition signed by both children and adults.<sup>58</sup> Additionally, hundreds of protest letters and petitions were sent to the federal government.<sup>59</sup> Residents noted the park had become very popular, with more than 660,000 visitors annually.<sup>60</sup> By January 1964, Paul McKay, State Highway Department Director, told a newspaper that the proposal for border fences at the park had been scrapped.<sup>61</sup>

---

54. *Id.*

55. *Id.* at 348.

56. *Id.* at 344.

57. *Id.* at 345.

58. *Id.*

59. *Id.* at 345-46.

60. *Id.* at 346.

61. *Id.* at 347.

A similar attempt to build fences and expand the federal government's control on the American side occurred in the late 1990s when the United States General Services Administration ("GSA") wanted to expand their customs port of entry and alter the highway next to the park.<sup>62</sup> Once again, proposals were met with "a room packed with people [who] made it crystal clear to the federal government that they want[ed] Peace Arch Park left alone."<sup>63</sup> The opposition by American residents in Blaine against any incursions into the park persuaded the GSA to roll back its proposal.<sup>64</sup>

These two events of local residents on the United States side allying against incursions by the sovereign nation (here the federal government) illustrate Baud and Van Schendel's peaceful border dynamic.<sup>65</sup> Local American groups successfully pushed back on the sovereign's power, demanding residents and tourists enjoy an open unfenced binational park.

Today, Border agents do indeed patrol the area. After the events of 9/11 security increased: the United States government installed cameras, added extra aircraft to patrol the skies, and required those who traveled beyond the border to show a passport.<sup>66</sup> Nevertheless, no walls or fences exist inside the park.<sup>67</sup> As long as visitors remain within Peace Arch Park and exit through the same side they entered, they do not need to pass through customs.<sup>68</sup>

## 2. Friendship Park

In contrast, by the twenty-first century Friendship Park and its surrounding Border Field State Park located at the U.S.-Mexico border saw sentiments of xenophobia clash with the spirit of peace and friendship on the local level. Similar to Peace Arch Park, a monument was first erected at the boundary line. Namely, in 1851, American and Mexican surveyors, per their binational treaties, placed

---

62. *Id.* at 372.

63. *Id.*

64. *Id.*

65. *See generally supra* note 39.

66. Dougherty, *supra* note 46.

67. *What Borders?*, *supra* note 16.

68. *Id.*

468 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

a marble obelisk at the border of the two countries overlooking the Pacific Ocean.<sup>69</sup> During the 1800s, the monument became so popular that an estimated 100,000 tourists flocked to the border destination annually.<sup>70</sup> By the 1890s, surveyors needed to replace the monument with a new marble obelisk because visitors had chipped off and kept so many pieces as souvenirs.<sup>71</sup> The surveyors then surrounded the new boundary monument with an eleven-foot fence.<sup>72</sup> They labeled the monument #258 because it marked the last of the 258 monuments erected along the U.S.-Mexico land boundary line from El Paso, Texas to San Diego, California.<sup>73</sup>

In 1929, the United States Army created a base along the U.S.-Mexico border in San Diego, which encompassed Boundary Monument #258.<sup>74</sup> The area remained a military installation until 1961.<sup>75</sup> However, once the base decommissioned, a group named South Bay Historical Society spent nearly a decade championing internationalism and envisioned a public space at the boundary line shared between San Diego and Tijuana.<sup>76</sup> The Society petitioned local leaders to support a public park and in 1971 their efforts successfully convinced the federal government to transfer the property to the California Department of Parks and Recreation.<sup>77</sup> The 800-acre area was named Border Field State Park.<sup>78</sup>

Today, the park remains under state management, similar to the state park authority of Peace Arch Park in Blaine, Washington.<sup>79</sup> However, no similar park was created on the Mexican side. Instead,

---

69. Charles W. Hughes, *On the Boundary Line: The U.S. Military on California's Border with Mexico, 1849-1948*, REPORT PREPARED FOR CAL. PARKS AND RECREATION DEP'T, SAN DIEGO COAST DIST. 4 (July 2007).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. Charles W. Hughes, *An Historical Overview: Border Field and its Environs, 1769-1890*, REPORT PREPARED FOR CAL. PARKS AND RECREATION DEP'T 73 (Jan. 2009).

75. *Id.*

76. Faber, *supra* note 26, at 6.

77. *Id.* at 8, 11-12.

78. *Visit Us*, *supra* note 7.

79. *Id.*

the area developed into a high-class seashore resort neighborhood called Playas de Tijuana—replete with a bullring, bars, and restaurants.”<sup>80</sup>

Nevertheless, a small circular space with Boundary Monument #258 in the middle became known as Friendship Park; the space was shared by both Americans and Mexicans.<sup>81</sup> In 1971, First Lady Pat Nixon personally dedicated the park.<sup>82</sup> During her visit, the border already had some rope and barbed wire strands along the boundary line, yet the First Lady famously told the crowds, “I hope there won’t be a fence here too long.”<sup>83</sup> Thereafter, Friendship Park and Border Field became a binational recreational area where people from both sides of the border enjoyed picnics, swam in the ocean between the two countries, and visited the boundary monument.<sup>84</sup>

From 1971 onward, however, a plethora of media reports described Friendship Park as a place of crime and smuggling.<sup>85</sup> Newspaper articles fueled the idea that the park was where people from Mexico could “illegally” walk onto the grass of Border Field State Park as Border Patrol agents looked on.<sup>86</sup> According to journalists, everything from the restrooms to the beaches were unclean due to a Mexican population who “took advantage” of all the park offered.<sup>87</sup> In 1978, a *Los Angeles Times* article titled “Cultural Clash” called Border Field a “Failed Experiment.”<sup>88</sup>

Moments of binational gatherings outside Border Field State Park did take place. For example, in the 1988 event, “Spectacle of Love at the Border,” two American locals married on opposite sides of the border.<sup>89</sup> At other times—unlike the alliances of the local American

---

80. Faber, *supra* note 26, at 7.

81. *Monument 258*, *supra* note 4.

82. Faber, *supra* note 26, at 73.

83. Brooke Binkowski, *45 Years in, the Border Wall at Friendship Park Changed But the Fellowship Hasn't*, VOICE OF SAN DIEGO (Aug. 18, 2016), <https://www.voiceofsandiego.org/topics/news/45-years-border-wall-friendship-park-changed-fellowship-hasnt/>.

84. *Id.*

85. Faber, *supra* note 26, at 15.

86. *Id.* at 17.

87. *Id.*

88. *Id.* at 15.

89. *Id.* at 33.

## 470 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

population at Peace Arch Park—the local American residents near Friendship Park found themselves feuding with each other.<sup>90</sup> In 1990 anti-immigrant protestors held monthly demonstrations called “Light Up the Border,” where they often clashed with counter-protesting human rights groups.<sup>91</sup>

By 1990, Friendship Park was described by the press as “a virtual war zone” where Border Patrol agents “confronted border criminals responsible for murders, rapes, and robberies of undocumented aliens as well as narcotics smuggling.”<sup>92</sup> Governor Pete Wilson capitalized on the rising nativist fears, launching a 1994 television campaign advertisement that featured immigrant families running along the I-5 freeway while the narrator bellowed “[t]hey keep coming, two million illegal immigrants in California.”<sup>93</sup>

As the U.S.-Mexico border and Friendship Park became ever more politicized, activists began to use Friendship Park as a symbolic vehicle to protest nativism and promote binational friendship and cultural understanding.<sup>94</sup> Starting in 2004, an interest group called *Border Encuentro* began to hold yoga classes, kite flying events, poetry readings, salsa dancing lessons, and planted a binational garden at the park.<sup>95</sup> Then in June 2008, a newly formed non-profit, “Friends of Friendship Park,” organized a vigil called “From Friendship to Hope—Gathering for the Future of the U.S.-Mexico Border,” bringing together twenty-seven groups, including faith-based organizations, environmental groups, and immigrant and human rights advocates.<sup>96</sup> Dozens gathered on both sides of the border fence, sharing stories and singing songs.<sup>97</sup>

Despite attempts to keep Friendship Park free and open to both Americans and Mexicans, the recreational area became ever more militarized, coinciding with government legislation to build a wall

---

90. *Id.*

91. *Id.* at 35.

92. *Id.* at 41.

93. *Id.* at 43.

94. *Id.* at 50.

95. Rebekah Sager, *Border Encuentro: A Happy Hour Divided by a Fence*, FOX NEWS (April 24, 2012), <https://www.foxnews.com/lifestyle/border-encuentro-a-happy-hour-divided-by-a-fence>.

96. Holsin, *supra* note 1, at 131.

97. *Id.*

along the U.S.-Mexico border.<sup>98</sup> The park started with a metal fence that separated the American and Mexican side with Boundary Monument #258 wedged between the two countries.<sup>99</sup> In 2008, the U.S. federal government began working on a secondary fence, extended the border wall into the sea, and increased patrols and security lights.<sup>100</sup> In 2009, Border Patrol shut down Friendship Park indefinitely to build another security fence around the space.<sup>101</sup> Activists protested and urged the park's reopening; they eventually succeeded.<sup>102</sup> Nevertheless, the fence remained around the American side of the park and Border Patrol tightly controlled the space, allowing only a few people to enter at one time.<sup>103</sup>

The most dramatic moment in the history of Friendship Park occurred on February 21, 2009, when Methodist Minister, John Fanestil, alongside "Friends of Friendship Park" planned a communion service and a twenty minute performance of Faure's *Requiem Mass* sung by choirs and soloists on both sides of the border.<sup>104</sup> One hundred and fifty participants gathered on the beach near the fence.<sup>105</sup>

The audience was met by fourteen border patrol agents dressed in full riot gear.<sup>106</sup> Jill Holsin described the scene:

Agents approached organizers and shouted in their faces, warning them not to approach the border fence. A group of six Minutemen had gathered amongst the group, and throughout the moving performance of the Requiem, used a bullhorn directed into the faces of the singers to shout anti-immigrant slogans and blow a shrill whistle. When neither police officers nor border patrol stepped in to separate the Minutemen from the crowd, ten volunteers came

---

98. See *infra* Section II.B.

99. *History*, FRIENDS OF FRIENDSHIP PARK, Photo 13, *Yoga thru the fence 2006*, <https://www.friendshipark.org/history> (last visited Jan. 3, 2021) (depicting what the fence looked like in 2006).

100. Faber, *supra* note 26, at 66.

101. *Id.*

102. *Id.* at 68.

103. *Id.*

104. Holsin, *supra* note 1, at 134-35.

105. *Id.* at 135.

106. *Id.*

## 472 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

forward to create a human wall to protect the singers from Minutemen who were now pushing forward, and had knocked over the music stand of the conductor. Children clung to their parents in fear; no one knew what would happen next. After the mass was sung, the gatherers circled around for communion. This time, Border Patrol raised their weapons and blocked John Fanestil from approaching the border wall to serve.<sup>107</sup>

In civil disobedience, Fanestil continued moving toward the wall and soon thereafter, Border Patrol detained him.<sup>108</sup>

After 2009, construction continued to change the look of Friendship Park. In 2011, DHS rebuilt the border fence approximately three feet further into United States' territory, which left Boundary Monument #258 only accessible on the Mexican side.<sup>109</sup> After 160 years, the monument suddenly was no longer shared between the countries.<sup>110</sup>

Seen through Baud and Van Schendel's theoretical border framework, the sovereign nation stationed troops in the borderland and resorted to what activists considered an arbitrary policy of militarization.<sup>111</sup> The construction of a fortified security zone at Friendship Park was accompanied by a heavy Border Patrol presence. Border Patrol agents then created their own rules, such as limiting visitors to thirty-minutes inside Friendship Park and restricting passing business cards through the fence.<sup>112</sup> Today, Friendship Park is open to visitors for a mere four hours only on weekends and Border Patrol only allows ten people inside at one time.<sup>113</sup>

---

107. *Id.*

108. *Id.*

109. E-mail from Maria Teresa Fernandez, Photographer and Member of "Friends of Friendship Park," to Barbara Zaragoza (Oct. 27, 2020, 9:40 AM PST) (on file with author along with accompanying photo of the 2011 construction).

110. *Id.*

111. Baud & Van Schendel, *supra* note 36, at 228.

112. Holsin, *supra* note 1, at 125, 127.

113. *Border Field State Park*, *supra* note 18. Additionally, photo on file with author shows the sign outside Friendship Park allowing only 10 visitors at one time.



### *B. The Sovereign State and the Creation of Borders*

The differences between a largely undefended Peace Arch Park and the heavily militarized Friendship Park are rooted in each of their respective histories. The borders of the United States were created during the nineteenth century when territorial competition defined North America.<sup>114</sup> In the south, the decline of the Spanish Empire and the United States' purchase of Louisiana from France solidified the country's goal to expand its territory as far West as possible.<sup>115</sup> In particular, the nativist concept of "Manifest Destiny" defined this vision.<sup>116</sup> "Manifest Destiny" justified settlers expanding the country's territory and bringing American culture to the west, as it was destined by God.<sup>117</sup> Its principal theme included the mission to bring American culture to the western region of the country.<sup>118</sup> To the North, however, the United States was the fledging country that sought both expansionism and independence from Great Britain, a colonial, more powerful country.<sup>119</sup> Therefore, although United States expansionist ideals were similar in the North and South, the treatment of the U.S.-Canadian border and the U.S.-Mexico border differed from the outset.

#### *1. The United States-Canadian Border*

The U.S.-Canadian boundary line stretches more than 5,525 miles and covers thirteen U.S. states and eight Canadian provinces.<sup>120</sup> The U.S.-Canadian border is considered the longest "undefended" border

---

114. RACHEL ST. JOHN, *LINE IN THE SAND: A HISTORY OF THE WESTERN U.S.-MEXICO BORDER* 15 (2011).

115. *Id.*

116. *Id.* at 17.

117. *Id.*

118. *See id.* at 16-17.

119. *The United States from 1789 to 1816, United States of America*, 29 *ENCYCLOPEDIA BRITANNICA* 220 (15th ed. 1993).

120. Stephen R. Kelly, *Good Neighbors, Bad Border*, *N.Y. TIMES* (Nov. 26, 2012), [https://www.nytimes.com/2012/11/27/opinion/good-neighbors-bad-border.html?\\_r=2](https://www.nytimes.com/2012/11/27/opinion/good-neighbors-bad-border.html?_r=2); Laura Mallonee, *The Invisible Security of Canada's Seemingly Chill Border*, *WIRED MAG.* (Apr. 1, 2016, 7:00 AM), <https://www.wired.com/2016/04/invisible-security-canadas-seemingly-chill-border/>.

## 474 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

in the world—no fences or walls exist between the two countries.<sup>121</sup> However, war and friction marked the first century of the northern border as America tried to gain its independence from Great Britain and expanded its territory.<sup>122</sup> Canada was under the colonial power of Great Britain, which fought the United States in the American Revolution, culminating in the Paris Peace Treaty of 1783.<sup>123</sup> The Paris Treaty, among other agreements, established the United States boundary from the Saint Croix River (between today's Maine and New Brunswick) to the Lake of the Woods (between Minnesota and Ontario).<sup>124</sup> Three decades later, the War of 1812 fought between Great Britain and the United States was caused largely due to the two countries' rivalry in the fur trade and for the conquest of Canada.<sup>125</sup> The war culminated in a stalemate: the Treaty of Ghent agreed to leave the two countries' borders unchanged from before 1812.<sup>126</sup>

The War of 1812 was the last outright hostility between the United States and Great Britain, but a series of treaties further refined the boundary line over many years, notably the Oregon Treaty of 1846

---

121. *Id.* The myth of an 'undefended' border may come from the early treaties that used the terms "free and open." C.P. STACEY, THE UNDEFENDED BORDER: THE MYTH AND THE REALITY 3 (CAN. HIST. ASS'N, HISTORICAL BOOKLET NO. 1, 1996), [https://cha-shc.ca/\\_uploads/5c38a87c593f8.pdf](https://cha-shc.ca/_uploads/5c38a87c593f8.pdf) (referring to people making speeches and writing editorials about the "undefended" border). The Paris Peace Treaty of 1783, Article 8 stated: "The navigation of the river Mississippi, from its source to the ocean, shall forever remain *free and open* to the subjects of Great Britain and the citizens of the United States." (emphasis added). The Paris Peace Treaty, Can.-U.S., art. 8, Sept. 30, 1783, 8 Stat. 80. The Jay Treaty of 1794, Article 3 allowed citizens of both countries to freely pass and repass certain boundary territories. The Jay Treaty, Can.-U.S., art. 3, Nov. 19, 1794, 8 Stat. 116. The Oregon Treaty of 1846, also used "free and open" to refer to the channel and straights at the Pacific Ocean. Boundaries (Oregon Treaty), Can.-U.S., art. II, June 19, 1846, 9 Stat. 869. However, the terms "free and open" were dropped from the 1908 and 1925 treaties. Note that the treaties between the United States and Mexico never used "free and open" language.

122. *See* C.P. Stacey, *supra* note 121, at 6.

123. *History*, INT'L BOUNDARY COMMISSION, <http://www.internationalboundarycommission.org/en/about/history.php>. (last visited Feb. 11, 2021) [hereinafter *History*, IBC].

124. *Id.*

125. *National Growth in the Early 19<sup>th</sup> Century, Canada*, 15 ENCYCLOPEDIA BRITANNICA 462 (15th ed. 1993).

126. *Id.*

extended the border to the Pacific Ocean.<sup>127</sup> Throughout two centuries, treaties mandated temporary commissions to survey the boundary line, including in 1858 and 1872; negotiations took place between Great Britain, Canada, and also with Russia along the Alaskan border.<sup>128</sup> Over twenty agreements shaped the border over time.<sup>129</sup>

In 1867, Great Britain granted independence to Canada, but the triangular relationship of Canada, the British Empire, and the United States continued for some time thereafter.<sup>130</sup> Canada remained part of the British Empire and diplomatic contacts with the United States were through the British Embassy in Washington until after the First World War.<sup>131</sup> Boundary precision became more important between the two countries during the twentieth century, and in 1908, a treaty codified a more complete demarcation from the Atlantic to the Pacific.<sup>132</sup>

## 2. *The International Boundary Commission*

The Boundary Waters Treaty of 1909 between the United States and Great Britain (on behalf of Canada) established a temporary International Boundary Commission (“IBC”), which would negotiate disputes regarding boundary waters and all other border issues relating to the United States and the Dominion of Canada.<sup>133</sup> The “1925 Treaty” ratified by both countries then established the IBC as a permanent body empowered to maintain a precise boundary line.<sup>134</sup> Article IV stated the commission’s purpose of “relocate[ing] and rebuild[ing] monuments which have been destroyed; to keep the

---

127. *History, IBC, supra* note 124.

128. *Id.*

129. *Id.*

130. STACEY, *supra* note 122, at 11, 13.

131. *Id.* at 13.

132. Treaty Between the United States of America and the United Kingdom Concerning the Boundary Between the United States and the Dominion of Canada from the Atlantic Ocean to the Pacific Ocean, Can.-U.S., Apr. 11, 1908, 35 Stat. 2003.

133. Robert A. MacKay, *The International Joint Commission Between the United States and Canada*, 22 AM. J. OF INT’L L. 292 (1928).

134. *History, IBC, supra* note 124.

476 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

border vistas open . . . and to determine the location of any point of the boundary line which may become necessary in the settlement of any question that may arise between the two Governments.”<sup>135</sup>

The IBC had an administrative function of approving permits along the border.<sup>136</sup> The agency also had an executive function of enforcing treaties between the countries.<sup>137</sup> Per the 1909 and 1925 treaties, the IBC would be composed of six Commissioners, three from each country.<sup>138</sup> Article XII of the 1909 Treaty said the Commissioners were impartial, rather than simply representing their respective governments.<sup>139</sup> In addition, the treaty gave the IBC a judicial role with the ability to investigate problems and act as a court of arbitration.<sup>140</sup>

The power of the IBC continued to expand over the decades, notably in two ways. First, at least five disputes still exist today over the American-Canadian maritime boundary line.<sup>141</sup> Because the countries have not been able to resolve these differences, the IBC manages two of these areas: the Juan de Fuca Strait and the Dixon

---

135. Treaty Between the United States of America and His Britannic Majesty, In Respect of the Dominion of Canada to Define More Accurately at Certain Points and to Complete the International Boundary Between the United States and Canada and to Maintain the Demarcation of That Boundary, Gr. Brit.-U.S., Feb. 24, 1925, 44 Stat. 2120 [hereinafter 1925 Treaty].

136. MacKay, *supra* note 133, at 293.

137. *Id.* at 303.

138. *Id.* at 292.

139. Richard Kyle Paisley, Cuauhtemoc Leon, Boris Graizbord & Eugene C. Bricklemeyer, Jr., *Transboundary Water Management: An Institutional Comparison Among Canada, the United States and Mexico*, 9 OCEAN AND COASTAL L.J. 177, 183 (2003).

140. *Id.*

141. See generally David H. Gray, *Canada's Unresolved Maritime Boundaries*, IBRU BOUNDARY AND SECURITY BULL. 61-69 (1997), <https://pdfs.semanticscholar.org/8ec3/a6f638941cbdce3e49aa7a3b8b149bec0e43.pdf> (The five disputed territories are: 1) Machias Seal Island (between Maine and New Brunswick) has a lighthouse occupied by Canada, but claimed by the United States; 2) the Strait of Juan de Fuca (between Washington state and British Columbia) has both countries declaring a fishing zone at the mouth of the strait as their own; 3) the Yukon-Alaska dispute (between Alaska and Yukon) at a small stretch of sea by the land boundary; 4) the Northwest Passage where Canada claims internal waters, while the US regards it as international waters; and 5) the Dixon Entrance (Alaska and British Columbia) where two waters are claimed by both Canada and the US).

entrance.<sup>142</sup> Second, the IBC is responsible for “border vistas,” which refers to a ten-foot area at the boundary line.<sup>143</sup> The International Boundary Commission Act of 1960 states:

. . . Any work or any addition to a work that is, after July 6, 1960, constructed or placed within ten feet of the boundary without the permission of the Commission may be removed and destroyed by the Commission or its members, officers, employees or agents, and the materials contained in the work or addition may be sold, given away or otherwise disposed of. . . . Except with the permission of the Commission, no person shall (a) construct or place within ten feet of the boundary any work or any addition to a work; or (b) enlarge any work that was on July 6, 1960 within ten feet of the boundary. . . . Except with the permission of the Commission, no person shall (a) pull down, deface, alter or remove a boundary monument erected or maintained by the Commission. . . .<sup>144</sup>

Although Peace Arch Park is managed by the respective states of Washington and British Columbia, if any problems were to arise between the countries over the boundary line, the IBC could potentially step in—upholding treaties between Canada and the United States as well as making decisions on all work done within the border vistas.

### 3. *The United States-Mexico Border*

Although the U.S.-Canadian border spans 5,525 miles, the U.S.-Mexico border is also expansive, extending 1,954 miles.<sup>145</sup> The boundary line begins at the Gulf of Mexico and follows the Rio Grande River for 1,255 miles.<sup>146</sup> From El Paso, Texas the land

---

142. *Id.* at 61-62.

143. *The Boundary*, *supra* note 14.

144. Int’l Boundary Commission Act, R.S.C., c. I-19, s. 1 (1960).

145. *The International Boundary and Water Commission – Its Mission, Organization and Procedures for Solution of Boundary and Water Problems*, INT’L BOUNDARY & WATER COMMISSION, [https://www.ibwc.gov/About\\_Us/About\\_Us.html#:~:text=As%20established%20by%20Treaties%20in,in%20the%20Gulf%20of%20Mexico](https://www.ibwc.gov/About_Us/About_Us.html#:~:text=As%20established%20by%20Treaties%20in,in%20the%20Gulf%20of%20Mexico) (last visited Feb. 11, 2021) [hereinafter IBWC Mission].

146. *Id.*

478 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

boundary proceeds westward to the Pacific Ocean for another 675 miles.<sup>147</sup>

The boundary line was established after the United States war with Mexico, which coincided with America's desire for expansion and the country's doctrine of "manifest destiny."<sup>148</sup> When war broke out between the two countries in 1846, United States forces aggressively reached Mexico City, occupying the capital in 1847.<sup>149</sup> A truce led the two countries to sign the Treaty of Guadalupe Hidalgo in 1848.<sup>150</sup> In keeping with the United States' expansionist ideals, the country demanded Mexico's territory.<sup>151</sup> In exchange for \$15 million, Mexico gave the United States the northern half of its land, which included today's New Mexico, Colorado, Arizona, and California.<sup>152</sup>

The Treaty of Guadalupe Hidalgo also mandated a joint survey to mark a boundary line.<sup>153</sup> Article V of the Treaty required each nation to appoint a commissioner and surveyor who would meet in San Diego; together they would make up the Joint United States and Mexican Boundary Commission.<sup>154</sup> The survey lasted seven years.<sup>155</sup> However, the United States hoped to secure more territory and in 1853 its efforts culminated in the negotiation of the Gadsden Treaty.<sup>156</sup> In exchange for another \$10 million, the United States gained additional territory in the southwest and, thereafter, the countries had to redraw the boundary line once more.<sup>157</sup>

Numerous times throughout the history of demarcating the U.S.-Mexico boundary line, questions arose as to the precise location of the line, particularly because the Rio Grande continually changed its course, often transferring agricultural tracts of land from one side of

---

147. *See id.*

148. St. John, *supra* note 114, at 17-18.

149. *Id.* at 19-20.

150. *Id.* at 21-22.

151. *Id.* at 20.

152. *Id.* at 22.

153. *Id.* at 21-22.

154. *Id.*

155. *Id.* at 23.

156. *Id.* at 35.

157. *Id.* at 35-36.

the river to another.<sup>158</sup> To address boundary and water issues, the Convention of March 1, 1889 created the permanent International Boundary Commission, which consisted of a United States and a Mexican section.<sup>159</sup> The name then changed many decades later with the 1944 Water Treaty; the commission was renamed to the International Boundary and Water Commission (“IBWC”).<sup>160</sup>

#### 4. *The International Boundary and Water Commission*

Many treaties laid out the purpose and power of the IBWC over 150 years. Article II of the 1889 Convention between the United States and Mexico established that the Presidents of both countries would appoint a Commissioner, a Consulting Engineer, interpreters, and other necessary government officials.<sup>161</sup> The Treaty also mandated each country consult and approve of decisions collaboratively. Article VIII stated, “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.”<sup>162</sup>

From 1889 onward, the IBWC alongside its Mexican counterpart—today known as CILA (*La Comision Internacional de Limites y Aguas*)—have overseen numerous binational treaties.<sup>163</sup> In 1944, the two countries ratified a Water Treaty, which was considered a landmark document of cooperation.<sup>164</sup> The treaty further solidified the IBWC’s purpose and power as a regulatory agency within the

---

158. *IBWC Mission*, *supra* note 145.

159. *Id.*

160. *See infra* note 166.

161. Robert J. McCarthy, *Executive Authority, Adaptive Treaty Interpretation, and the International Boundary and Water Commission, U.S.-Mexico*, 14 U. DENV. WATER L. REV. 197, 210 (2011).

162. Convention Between the United States and Mexico: Water Boundary, Mex.-U.S., art. VIII, Dec. 2, 1889, T.S. No. 241.

163. CILA has an IBWC website counterpart as well. Comisión Internacional De Límites y Aguas Entre México y Estados Unidos, Gobierno de México, <https://cila.sre.gob.mx/cilanorte/index.php>. The IBWC’s main headquarters are located in El Paso, Texas. CILA’s headquarters are located in Ciudad Juarez, Chihuahua, Mexico.

164. Paisley, *supra* note 139, at 188.

480 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

State Department, but Article 2 stated the IBWC shall in all respects have the status of an international body<sup>165</sup> Per the treaty, Commissioners held diplomatic status and the commission's personnel could freely carry out their observations, studies, and field work in the territory of either country.<sup>166</sup>

Finally, the United States and Mexico—unlike their U.S.-Canadian counterpart—ratified the “1970 Treaty” that resolved all pending boundary differences.<sup>167</sup> Since then, the IBWC has continued to collaborate with CILA because—like their IBC counterpart—the two countries are in regular need of negotiating water flows between the two countries as well as negotiating the precise location of the boundary line.<sup>168</sup>

## II. IMPEDIMENTS TO FRIENDSHIP PARK OPENING AS A TRULY BINATIONAL SPACE

Cooperation between the U.S. and its Canadian and Mexican counterparts at the boundary line have been an ongoing necessity. Waterways shift course and cause floods on either side of the border.<sup>169</sup> Boundary markers need replacing.<sup>170</sup> Human obstructions, such as retaining walls, impede proper recognition of the boundary line.<sup>171</sup> However, while the U.S.-Canadian border has had three decades of strong cooperation, the U.S.-Mexico border has included:

---

165. *Id.*

166. Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Mex.-U.S., Feb. 3, 1944, 59 Stat. 1219 [hereinafter 1944 Water Treaty].

167. *History of the International Boundary and Water Commission*, INT'L BOUNDARY & WATER COMMISSION, [https://www.ibwc.gov/About\\_Us/history.html](https://www.ibwc.gov/About_Us/history.html) (last visited Jan. 3, 2021).

168. See Minute No. 315: Adoption of the Delineation of the International Boundary on the 2008 Aerial Photographic Mosaic of the Rio Grande, INT'L BOUNDARY & WATER COMMISSION, Mex.- U.S., Nov. 5, 2009, [https://www.ibwc.gov/Files/Minutes/Minute\\_315.pdf](https://www.ibwc.gov/Files/Minutes/Minute_315.pdf).

169. See *What We Do*, INT'L BOUNDARY COMMISSION, <http://www.internationalboundarycommission.org/en/about/what-we-do.php> (last visited Jan. 3, 2021); *History of the International Boundary and Water Commission*, INT'L BOUNDARY & WATER COMMISSION, [https://www.ibwc.gov/About\\_Us/history.html](https://www.ibwc.gov/About_Us/history.html) (last visited Jan. 3, 2021).

170. *Id.*

171. *Id.*



(A) failed attempts at establishing a binational park, (B) intensive border wall construction, and (C) a lack of treaty compliance between the two countries.

Several factors have led to successful cooperation at the U.S.-Canadian border. In 2007, Dennis Schornack, the Commissioner of the U.S.-Canadian IBC, boasted that his regulatory agency provided effective boundary oversight thanks to: (1) the IBC's commitment to consensus; (2) a binationally balanced joint fact finding process based on science; (3) the independence of Commission-appointed study teams; (4) effective cross-border relationships built up over many years; (5) a focus on public engagement; (6) the skills and experience of the commissioners; (7) *the ability to depoliticize issues out of the limelight* and; 8) the capacity to take the time needed to reach consensus without outside pressure.<sup>172</sup> (emphasis added)

Commissioner Schornack ended his report by writing, "I believe the key is thinking small and local, watershed by watershed, strengthening local capacity to address and resolve issues. . . [W]e can avoid issues reaching our desk by helping local bodies solve problems at the early stages before they become full blown international disputes."<sup>173</sup>

Commissioner Schornack's report is revealing when compared to the U.S.-Mexico border. In particular, if the success of the IBC rests on depoliticizing issues, its IBWC counterpart at the U.S.-Mexico border has no such luxury. The national media and political rhetoric have landed the U.S.-Mexico border in the limelight for many decades.<sup>174</sup> Moreover, the focus on border security by legislators has impeded binational cooperation, which could facilitate the opening of Friendship Park.<sup>175</sup> One example is the continued failure to open a binational park at the U.S.-Mexico border even though such a park has existed between United States and Canada since 1932.<sup>176</sup>

---

172. Dennis Schornack & John Nevin, THE INT'L JOINT COMMISSION: A CASE STUDY IN THE MGMT. OF INT'L WATERS, at 18-22, <http://ciwr.ucanr.edu/files/169008.pdf> (last visited Jan. 3, 2021).

173. *Id.* at 24.

174. *See supra* note 42; *infra* note 186, 226, 259.

175. *See infra* note 185 (giving examples of Senator Kay Bailey Hutchinson and Representative Rob Bishop).

176. *See infra* Section II.A.

482 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

*A. The Failed Attempt at a Binational Park at the United States-Mexico Border*

The 1932 Waterton-Glacier International Peace Park at the U.S.-Canadian border has been cited many times as a model for binational cooperation that could also take place in the southwestern region.<sup>177</sup> In 1931, Rotary Clubs from Alberta, Canada, and Montana proposed an international peace park at the border and lobbied their governments for legislation.<sup>178</sup> The governments acted quickly and in 1932, Glacier National Park in northwestern Montana, and Waterton Lakes National Park, in Alberta, Canada, combined to establish the Waterton-Glacier International Peace Park.<sup>179</sup>

In 1935, a similar plan emerged between President Franklin Roosevelt and Mexico's President Manuel Avila Camacho for a U.S.-Mexico park that traversed 268 river miles and 3 million acres of contiguous parkland.<sup>180</sup> However, World War II brought other priorities and the idea was forgotten.<sup>181</sup>

Many decades later, in 2009, President Felipe Calderon introduced a resolution supporting an International Park at Big Bend National Park where both Mexico and the United States had created protected parkland.<sup>182</sup> In a joint statement, President Obama and

---

177. Eryn Gable, *75 Years on, Effort to Create U.S.-Mexico Park Hampered by Security Concerns*, N.Y. TIMES (June 24, 2010), <https://archive.nytimes.com/www.nytimes.com/gwire/2010/06/24/24greenwire-75-years-on-effort-to-create-us-mexico-park-ha-13949.html?pagewanted=1>.

178. Vermeer, *supra* note 28, at 317.

179. *Id.*

180. Gable, *supra* note 177.

181. *Id.*

182. *Id.* In 1944, the United States created the largest protected area of the Chihuahuan Desert in the United States, known as Big Bend National Park. Vermeer, *supra* note 28, at 296-97. The protected area was extremely bio diverse, including endangered animal and plant species such as the black-capped vireo and mosquito fish. *Id.* at 297. Big Bend National Park protects 78 species of mammals, 56 species of reptiles, and over 13 hundred species of birds. *Id.* Mexico followed suit in 1994 when President Salinas de Gotari declared the protected areas of Maderas del Carmen and Canon de Santa Elena regions. *Id.* Then in 2009, President Calderon issued a decree creating the 826,000-acre Ocampo Flora and Fauna Protected Area, which connected the Maderas del Carmen and Canon de Santa Elena. *Id.* at 300. The idea of this park was to protect biodiversity in this fragile desert region. *Id.* at 307.

President Calderon recognized the lands and acknowledged that such a park would make the border area more secure.<sup>183</sup> However, several politicians did not support the concept.<sup>184</sup> Senator Kay Bailey Hutchinson (R-Texas) alongside House Republicans, led by Representative Rob Bishop (R-Utah) cited the need for elevated border security.<sup>185</sup> The park never came to fruition.<sup>186</sup>

The U.S.-Canadian example at Waterton Lakes National Park could provide guidance. There, Customs and Border Protection said not much illegal immigration came through the park.<sup>187</sup> What's more, after the terrorist attacks of 9/11, DHS began tightening security at the *southern border*, but more individuals possibly associated with terrorism were actually found to have crossed through the U.S.-Canadian border.<sup>188</sup> In a report, the Cato Institute explained:

Zero people were murdered or injured in terror attacks committed on U.S. soil by special interest aliens who entered illegally from 1975 through the end of 2017. However, seven special interest aliens who initially entered illegally have been convicted of planning a terrorist attack on U.S. soil. They all entered illegally from Canada or jumped ship in American ports before the list of special interest countries even existed. None of them successfully carried out their attacks and none illegally crossed the Mexican border.<sup>189</sup>

---

183. Gable, *supra* note 177.

184. *Id.*

185. *Id.*

186. Instead of an international park, by 2017 conservationists sounded the alarm at the potential of a border wall erected in Big Bend National Park. Nigel Duara, *The Stunning Beauty of Big Bend National Park Stretches Across Two Countries. Could It Survive a Wall?*, L.A. TIMES (Feb. 3, 2017), <https://www.latimes.com/nation/la-na-border-wall-big-bend-2017-story.html>.

187. Gable, *supra* note 177.

188. Catherine E. Shoichet, *They Slipped Across the US Border with Explosives – from Canada*, CNN (Jan. 8, 2019, 8:09 PM), <https://www.cnn.com/2019/01/08/us/us-canada-border-terror/index.html>.

189. David J. Bier & Alex Nowrasteh, *45,000 “Special Interest Aliens” Caught Since 2007, but no U.S. Terrorist Attacks from Illegal Border Crossers*, CATO AT LIBERTY (Dec.17, 2018, 5:09 PM), <https://www.cato.org/blog/45000-special-interest-aliens-caught-2007-no-us-terrorist-attacks-illegal-border-crossers> (noting that in 1987 Walid Kabbani, a native of Lebanon, walked across the

## 484 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

Furthermore, the Canadian border has had its fair share of human smuggling and drug trafficking. In June 2019, federal authorities uncovered a human smuggling network that helped about 1,000 Chinese migrants cross the U.S.-Canadian border via Peach Arch Park.<sup>190</sup> A special agent in charge of Homeland Security Investigations (HSI) attributed the trafficking to Asian and East Indian organized crime.<sup>191</sup> Moreover, in September 2020 Customs and Border Protection said seizures of marijuana had increased throughout the year by 1,000% across sixteen U.S.-Canadian ports of entry with a value of \$100 to \$120 million.<sup>192</sup> Returning to scholars Baud and Van Schendel, they note:

Whenever a state applies restrictions on cross-border trade, it invites smuggling. Of course, smuggling is not confined to inhabitants of the borderland, nor does it involve all (or even most) of them. But it is most evident in the borderland, and this gives the entire border economy an air of stealth and subterfuge in the eyes of the state.<sup>193</sup>

Despite similar problems, the politicization of the U.S.-Mexico border propelled Congressional legislation on intensive border building in the South.<sup>194</sup> Yet no comparable border building has taken place at the northern border.<sup>195</sup> Border building is the primary reason

---

Canadian border illegally to deliver a bomb to his co-conspirators in the United States. He was arrested. Then Ahmed Ressay, Algerian-born, attempted to cross the Canadian border in 1999 with the aim of attacking the Los Angeles International Airport. From 1975 to 2017, a total of nine terrorists entered the U.S. illegally and only three did so along the Mexican border: Shain Duka, Britan Duka, and Eljvir Duka. They crossed as children with their parents in 1984 and were arrested as part of the planned Fort Dix terror attack that the FBI foiled in 2007).

190. Douglas Guan, *Alleged Human-Smuggling Scheme May Have Helped Hundreds Cross Through Peace Arch Park*, THE BELLINGHAM HERALD (June 24, 2019, 12:10 PM), <https://www.bellinghamherald.com/news/local/crime/article231904123.html>.

191. Luke Barr, *Drug Seizures Along Canadian Border Up 1,000%*, CBP SAYS, ABC NEWS (Sept. 16, 2020, 1:33 PM), <https://abcnews.go.com/Politics/drug-seizures-canadian-border-1000-cbp/story?id=73049477>.

192. *Id.*

193. Baud & Schendel, *supra* note 36, at 230-31.

194. *See infra* Section II.B.

195. *See supra* note 121-121.

2021]

MILITARIZED PICNICS

485

Friendship Park remains heavily fortified while Peace Arch Park does not.

*B. Department of Homeland Security's Border Wall Construction Does Not Apply To Canada*

A desire for strong federal control of the U.S.-Mexico border has been a refrain amongst politicians since at least 1996 when President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").<sup>196</sup> Within its many provisions, Section 102(a) and (b) related specifically to border wall construction at the *southern border only*.<sup>197</sup> Section (a) provided the Secretary of Homeland Security "shall take such actions as may be necessary to install additional physical barriers and roads . . . in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States."<sup>198</sup>

Section 102(b) of IIRIRA called for the installation of additional fencing, barriers, roads, lighting, cameras, and sensors specifically at the southwest border.<sup>199</sup> The section also allowed the Attorney General to waive the Endangered Species Act of 1973 and the National Environmental Policy Act of 1969 to ensure expeditious construction of the barriers.<sup>200</sup>

After 9/11, border security accelerated when the Homeland Security Act of 2002 dismantled the Immigration and Naturalization Service ("INS") and transferred border security exclusively into the control of DHS.<sup>201</sup> In 2005 the REAL ID Act expanded IIRIRA, allowing the federal government a broad waiver of any domestic laws that might impede the construction of barriers.<sup>202</sup> IIRIRA was again amended in 2006 with the Secure Fence Act, which authorized construction of a two-layered wall stretching about 850 miles of the

---

196. Kristi Sutton & Inan Uluc, *Donald Trump's Border Wall and Treaty Infringement*, 121 MEX. L. REV. 3, 7-8 (2019).

197. *Id.* at 7.

198. *Id.*

199. *Id.*

200. *Id.* at 7, 9.

201. Sutton & Uluc, *supra* note 197, at 9.

202. *Id.*

486 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

southern border.<sup>203</sup> Importantly, the Acts gave the Secretary of Homeland Security “the authority to waive all legal requirements . . . in such Secretary’s sole discretion, determined necessary to ensure expeditious construction of the barriers and roads under this section.”<sup>204</sup> Then, Section 102(c) limited judicial review of waiver decisions to solely constitutional claims.<sup>205</sup>

The waiver provisions were met with three domestic lawsuits challenging the expansive powers of the federal government at the border—all of which failed. In *Defenders of Wildlife v. Chertoff*, the court reviewed whether the Secretary of DHS’s waiver under the REAL ID Act was constitutional.<sup>206</sup> In particular, the plaintiffs argued wall construction would destroy biologically diverse environments.<sup>207</sup> The court held the legislative branch had laid down an intelligible principle to guide the Executive Branch and, therefore, the waiver was valid.<sup>208</sup>

In *Save our Heritage Organization v. Gonzalez*, the plaintiffs again attacked the constitutionality of Congress’ delegation of waiver authority.<sup>209</sup> The plaintiffs argued the government did not comply with several statutes, but the court once again upheld the waiver.<sup>210</sup> The court noted the significant authority of the executive branch in foreign affairs and its particularly broad powers at the border.<sup>211</sup>

Finally, in *County of El Paso v. Chertoff*, the plaintiffs challenged two waivers under the REAL ID Act that ignored dozens of federal laws covering over 500 miles of the U.S.-Mexico border.<sup>212</sup> The court once more upheld the waiver authority.<sup>213</sup> These three lawsuits

---

203. Chad C. Haddal, Yule Im & Michael John Garcia, CONG. RESEARCH SERV., RL33659, BORDER SECURITY: BARRIERS ALONG THE U.S. INT’L BORDER 9 (2009).

204. *Id.* at 23.

205. *Id.* at 13.

206. Sutton & Uluc, *supra* note 197, at 12.

207. *Id.*

208. *Id.* at 15.

209. *Id.* at 16.

210. *Id.*

211. *Id.*

212. *Id.* at 17.

213. *Id.*

eradicated any possibility of national laws contending with DHS's authority to construct fencing at the border.

Under these enactments, Friendship Park experienced a militarized assault of its serene space at the Pacific Ocean.<sup>214</sup> In 2008, DHS erected a secondary fence and significantly increased Border Patrol presence.<sup>215</sup> In 2009, the government shut down Friendship Park and constructed a fence around the entire area.<sup>216</sup> Even though activists demanded its re-opening and the federal government acquiesced, Friendship Park still remained a highly fortified recreational space.<sup>217</sup>

Meanwhile, the IBWC lodged its own protest against border construction, citing treaty violations. In 2007, the IBWC petitioned the DHS claiming the planned 700-mile fence along the U.S.-Mexico border possibly violated the 1970 Treaty.<sup>218</sup> Additionally, the IBWC requested DHS to submit their proposal details of the fence design.<sup>219</sup> However, there were no further news reports confirming whether DHS provided the proposals. Moreover, Mexican officials also submitted complaints. Specifically, CILA noted border wall barriers violated the 1970 Treaty, blocking transborder water movement that caused flooding on the Mexican side.<sup>220</sup> These complaints also seem to have been ignored.

*C. Erosion of the International Boundary and Water Commission's Ability to Maintain Treaty Compliance*

The ignored complaints lodged by the IBWC and CILA undermined its role as the overseer and arbiter of boundary issues.

---

214. Holsin, *supra* note 1, at 127.

215. Faber, *supra* note 26, at 66.

216. *Id.*

217. *Id.* at 68-69.

218. Michael Sung, *US-Mexico Border Fence May Violate Boundary Treaty*, JURIST (May 24, 2007, 9:37 AM), <https://www.jurist.org/news/2007/05/us-mexico-border-fence-may-violate/>.

219. *Id.*

220. John Burnett, *Mexico Worries that a New Border Wall Will Worsen Flooding*, NPR: KPBS (Apr. 25, 2017, 4:52 AM), <https://www.npr.org/2017/04/25/525383494/trump-s-proposed-u-s-mexico-border-wall-may-violate-1970-treaty>. See also *infra* note 278 (citing 1970 Treaty).

488 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

Due to a lack of treaty compliance by both countries, this erosion of authority over the boundary line has been particularly pronounced over many years, causing both economic and environmental concerns. For example, the 1944 Water Treaty requires Mexico to deliver 350,000 acre-feet of water per year into the Rio Grande from several rivers that feed it.<sup>221</sup> However, Mexico built dams on several rivers which held back water that was supposed to flow into the Rio Grande.<sup>222</sup> Even during normal conditions, Mexico has purportedly withheld water.<sup>223</sup> Consequently, critics contend that American farmers have lost billions of dollars because they are unable to irrigate their crops properly, while the Mexican farming industry has been able to expand.<sup>224</sup> Similarly, Mexican officials contend that the border wall barriers violate the 1970 Treaty by blocking transborder water movement causing flooding.<sup>225</sup> Hydraulics experts explain that a wall built in a floodplain acts like a dam, so that during torrential rains, the obstructions deflect water and worsen flooding.<sup>226</sup>

---

221. *Editorial: It's Time to Review the U.S.-Mexico Water Treaty*, THE MONITOR (Aug. 5, 2018), <https://www.themonitor.com/2018/08/05/editorial-its-time-to-review-the-us-mexico-water-treaty/>.

222. *Id.*

223. *Id.*

224. *Id.* The IBWC has been heavily criticized for its mismanagement of cross-border sewage that flows from Mexico into the United States at Imperial Beach, California. Critics say the regulatory agency is not doing enough to make Mexico comply with the 1944 Water Treaty, which states that the countries will work toward a solution. *See* Minute No. 320: General Framework for Binational Cooperation on Transboundary Issues in the Tijuana River Basin, INT'L BOUNDARY AND WATER COMMISSION 1, (Oct. 5, 2015), [https://www.ibwc.gov/Files/Minutes/Minute\\_320.pdf](https://www.ibwc.gov/Files/Minutes/Minute_320.pdf); Salvador Rivera, *California City Drops 'Sewage' Lawsuit Against Federal Government*, BORDER REP. (Jul. 9, 2020, 6:01 PM), <https://www.borderreport.com/news/california-city-drops-sewage-lawsuit-against-federal-government/>.

225. Burnett, *supra* note 220.

226. *Id.*; *See also* Melissa Del Bosque, *Trump's Border Wall Could Cause Deadly Flooding in Texas. Federal Officials Are Planning to Built it Anyway*, TEX. MONTHLY (Dec. 2018), <https://www.texasmonthly.com/news/trumps-border-wall-cause-deadly-flooding-texas-federal-officials-planning-build-anyway/> (describing how the IBWC initially sent complaints to DHS alongside CILA concerning border construction on flooding on the Mexican side, but then abruptly reversed course and sided with DHS).



A primary problem in enforcing the U.S.-Mexico treaties may be that nobody quite knows who oversees the IBWC. The IBWC has the status of an international body and considers itself an independent federal government agency.<sup>227</sup> As specified in the treaties, the State Department acknowledges responsibility for giving foreign policy guidance.<sup>228</sup> However, the State Department also stated that the IBWC is not considered a part of the Department since it has broad independence in administrative matters.<sup>229</sup> The State Department maintains that legislation would be needed to gain authority over the IBWC.<sup>230</sup> As a result, when treaty compliance between Mexico and the United States becomes an issue, the IBWC does not seem to have a branch of government that can definitively affirm its authority.

Interestingly, the U.S.-Canadian IBC tested the agency's authority in 2007 with *Leu v. International Boundary Commission*.<sup>231</sup> Here, Commissioner Schornack—who had lauded the successes of the U.S.-Canadian IBC—was fired by President George W. Bush.<sup>232</sup> Schornack sued the government arguing a lack of treaty compliance.<sup>233</sup> His lawsuit failed both in district court and on appeal, but the district court's opinion provided insight into how the judicial system viewed the IBC and its power.<sup>234</sup>

The controversy began when Shirley-Ann and Herbert Leu built a four-foot high retaining wall in their backyard near Blaine, Washington.<sup>235</sup> Although the wall existed within their property lines, the retaining wall encroached three feet into the twenty-foot "border vista" maintained by the IBC.<sup>236</sup> Commissioner Schornack contacted

---

227. McCarthy, *supra* note 161, at 201.

228. *Id.* at 202-203.

229. *Id.*

230. *Id.*

231. See *Leu v. Int'l Boundary Comm'n*, 523 F. Supp. 2d 1199 (W.D. Wash. 2007), *vacated and remanded by Leu v. Int'l Boundary Comm'n*, 605 F.3d 693 (9th Cir. 2010).

232. *Id.* at 1202.

233. *Id.* at 1202-03.

234. *Leu v. Int'l Boundary Comm'n*, 523 F. Supp. 2d at 1201, 1205-06; see also *Leu v. Int'l Boundary Comm'n*, 605 F.3d at 693-95.

235. *Leu v. Int'l Boundary Comm'n*, 523 F. Supp. 2d at 1201.

236. *Id.*

490 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

the Leus and requested they cease all work on their retaining wall.<sup>237</sup> The Leus's refused and then sued the IBC.<sup>238</sup> When Commissioner Schornack contacted the State Department, it informed him the IBC was independent from the State Department and therefore, the State Department had no authority.<sup>239</sup> The Commissioner sought legal counsel against the Leus from the Department of Justice and private attorneys.<sup>240</sup> When conflicts arose between the Justice Department and the private attorneys, the Office of the President of the United States asked Schornack to leave the private attorneys behind; Schornack refused and President George W. Bush fired him.<sup>241</sup> In response, Schornack wrote the President explaining he did not have authority to terminate an IBC Commissioner.<sup>242</sup> Schornack stated, "[A]ccording to the Treaty of Washington of 1925... new commissioners may only be appointed upon the death, resignation, or other disability" of a commissioner."<sup>243</sup>

The issue the court had to consider became whether the President could remove an IBC Commissioner per the 1925 treaty.<sup>244</sup> The court acknowledged the treaty language, suggesting the President's removal power indeed was restricted because the commissioners had a lifetime tenure.<sup>245</sup> The court stated "the language and purposes of the 1908 and 1925 Treaties support Commissioner Schornack's argument that he is insulated from the President's removal power."<sup>246</sup> Furthermore, the court explained the IBC "is an organization independent of the executive. Among other things, it is charged with resolving disputes between Canada and the United States over the location of the international boundary—a task that surely warrants independence from each country's political swings."<sup>247</sup> However, the court also

---

237. *Id.*

238. *Id.*

239. *Id.* at 1201.

240. *Id.*

241. *Id.* at 1201-02.

242. *Id.* at 1202-03

243. *Id.* at 1203 (citation omitted).

244. *See id.* at 1204.

245. *Id.* at 1207.

246. *Id.*

247. *Id.*

acknowledged that Article II of the United States Constitution endowed the President with the unique responsibility to conduct foreign relations.<sup>248</sup> The court affirmed that the IBC's duties undoubtedly involved matters of foreign affairs.<sup>249</sup> Thus, the court implied any IBC lawsuit challenging the authority of the President would likely lose.<sup>250</sup>

This district court lawsuit is instructive when considering treaty compliance for the IBWC. On the one hand, the President's authority likely cannot be questioned and if they chose to override treaties due to foreign affairs, the courts will likely uphold the executive branch's authority. On the other hand, the many years of treaty non-compliance has meant the United States has not been able to effectively cooperate with Mexico on vital issues affecting the border, such as flooding, irrigation, and border wall construction.

Nevertheless, could the fired Commissioner Schornack offer a solution to greater treaty compliance? When he stated the key to the IBC is thinking small and local, strengthening local capacity to address and resolve issues,<sup>251</sup> could an alliance of the IBWC with local politicians and organizations who are open to the idea of a truly binational Friendship Park also help create more effective treaty compliance between Mexico and the United States?

### III. TWO LEGAL PATHWAYS TO OPENING FRIENDSHIP PARK

The IBWC could play a pivotal role in opening Friendship Park as a truly binational space between the United States and Mexico by asking for similar authority over a "boundary vista." Currently, the Canadian IBC oversees disputed territory and a 1960 Act gives the IBC authority over a ten-foot border vista.<sup>252</sup> Although Friendship

---

248. *Id.* at 1209.

249. *Id.*

250. *See id.* On appeal, the court did not reach the question. Instead, the court held because the President of the United States was not a party to the lawsuit, they could not make a ruling. *See also* *Leu v. Int'l Boundary Commission*, 605 F.3d at 694-95.

251. *See* *Leu v. Int'l Boundary Comm'n*, 523 F. Supp. 2d at 1203.

252. *See supra* notes 143-144. Interestingly, journalist Sandra Dibble writes, "Both the U.S. and Mexican sides of the commission in 1906 recommended that their governments establish 60-foot strips along both sides of the international

492 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

Park is not disputed territory, the agency could argue for parity with the IBC in its authority over the line. This authority, of course, would have to be tailored to the particular Friendship Park location, but many parallels to Peace Arch Park could be made.

The IBWC could demand an open and undefended border vista on either side of Boundary Monument #258, maintained exclusively by the IBWC and CILA. An alliance with state and local entities, including Border Field State Park (which currently manages the park), the “Friends of Friendship Park,” and local politicians could further demand this ‘border vista’ be open to the public, similar to Peace Arch Park. Such an alliance could demand the opening of Friendship Park in two ways: (a) a Congressional Act that overrides DHS waivers specifically for Friendship Park, or (b) an IBWC lawsuit brought against DHS that argues for treaty compliance.

#### *A. Legislative Action*

The most direct path to transforming Friendship Park into a truly binational cultural space could be for Congress to enact legislation overriding the IIRIRA, the REAL ID, and the Secure Fence Act for specifically Friendship Park. Notably, some Friendship Park activists have already called for the repeal of DHS’s waiver authority.<sup>253</sup> Not only could opening Friendship Park provide a controlled experiment for whether peace parks can enhance security at the southern border, but the space could also become a beacon for cultural exchange. Further, opening Friendship Park could reduce nativist sentiments and enhance each nations’ understanding of two differing cultures—the

---

boundary forbidding private residences or similar constructions. A year later, President Theodore Roosevelt issued a proclamation ordering a 60-foot-wide strip to serve ‘as a protection against the smuggling of goods between the United States’ and Mexico.’ See Sandra Dibble, *Tijuana Residents Face Loss of Structures too Close to U.S. Border Fence*, SAN DIEGO UNION TRIB. (July 16, 2018, 5:00 AM), <https://www.sandiegouniontribune.com/news/border-baja-california/sd-me-border-wall-tijuana-20180712-story.html>.

253. See Pedro Rios, *Commentary: Desecration of Kumeyaay Lands Will Continue Unless Congress Acts with Urgency*, SAN DIEGO UNION TRIB. (July 16, 2020, 6:46PM), <https://www.sandiegouniontribune.com/community-voices-project/story/2020-07-16/commentary-congress-must-repeal-the-waiver-authority-to-protect-kumeyaay-cultural-legacy>.

2021]

MILITARIZED PICNICS

493

very reason why nations initially established international peace parks.<sup>254</sup>

In pressing for such legislation, the local population in the United States with a coalition of organizations on both sides of the U.S.-Mexico border could use Peace Arch Park as a marquee example of the need for parity. Notably, one demand for legislation could ask that, similar to the U.S.-Canadian IBC, so too the IBWC and the CILA could take over management of Friendship Park and create a “border vista” around Boundary Monument #258 where no obstruction can exist.

For this to happen, however, the broken unity between the local San Diego population would need to change.<sup>255</sup> As Baud and Van Schendel explain, supra-state, international political networks can effectively circumscribe the power of states.<sup>256</sup> However, instead of a display of statehood that exhibits control of its half of the borderland,<sup>257</sup> the coalition of forces would need to expel the federal government from the park in the same way unified locals at the U.S.-Canadian border refused to accept incursions into Peace Arch Park.<sup>258</sup> Furthermore, the IBWC would have to be willing to assert itself as an international body and work impartially with the locals of the region for a small opening within the boundary line.

*B. An International Boundary and Water Commission Lawsuit Against Department of Homeland Security*

Alternatively, the IBWC might be in the best position to champion the opening of Friendship Park through a lawsuit against DHS to comply with all relevant treaties.<sup>259</sup> The continued erosion of

---

254. Vermeer, *supra* note 28, at 310-11.

255. See Baud & Schendel, *supra* note 36, at 227 (explaining how a strong unity between the state, regional elite, and local people can help create a strong and peaceful borderland).

256. *Id.* at 226.

257. *Id.*

258. See *supra* Section I.A.1.

259. The IBWC can and does file complaints against treaty violators. The IBWC is currently in the middle of a lawsuit brought on its behalf by the U.S. Attorney’s Office, which concerns private wall builders, Fisher Industries & TGR Construction alongside a non-profit organization called “We Build the Wall.” The IBWC maintains that a private wall along the U.S.-Mexico border violates the 1970

494 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

the IBWC's role as treaty enforcer and its inability to properly manage the boundary due to DHS's waiver authority should prompt the IBWC to consider a lawsuit to judicially clarify its role. The lawsuit, by focusing specifically on the small area of Friendship Park, could provide a local focus that does not encompass the whole boundary line or larger issues such as water flows, flooding, and irrigation.

The lawsuit would specifically turn on the fact that Boundary Monument #258 currently is accessible to visitors exclusively on the Mexican side of the border.<sup>260</sup> The lawsuit could demand that Boundary Monument #258 should serve its treaty-mandated purpose of *marking* the boundary between the U.S. and Mexico, which can only be accomplished if the monument is unobstructed.

Granted, the IBWC would have to be cautious in its arguments because DHS could pose significant counter-arguments. For example, in 2011, when DHS constructed new walls three feet away from Boundary Monument #258, the Department's work remained within U.S. territory.<sup>261</sup> Article XVI of the 1848 Treaty of Guadalupe Hidalgo states: "Each of the contracting parties reserves to itself the entire right to fortify whatever point within its territory, it may judge proper so to fortify, for its security."<sup>262</sup> A similar article exists in the 1944 Water Treaty. Article 23 states:

Construction of the works built in pursuance of the provisions of this Treaty shall not confer upon either of the two countries any rights either of property or of jurisdiction over any part whatsoever of the territory of the other. These works shall be part of the territory and be the property of the country wherein they are situated.<sup>263</sup>

---

Treaty because the wall will impact river flows. See Dina Arevalo, *Feds: Private Border Wall Violates International Treaty, but Mitigation Possible*, THE MONITOR (May 7, 2020), <https://www.themonitor.com/2020/05/07/feds-private-border-wall-violates-international-treaty-mitigation-possible/>.

260. *Monument 258*, *supra* note 4.

261. See E-mail from Maria Teresa Fernandez, *supra* note 109 (explaining a new "fence" is installed very close to the monument).

262. Peace, Friendship, Limits, and Settlement (Treaty of Guadalupe Hidalgo), Mex.-U.S., art. XVI, Feb. 2, 1848, 9 Stat. 922 [hereinafter 1848 Treaty].

263. 1944 Water Treaty, *supra* note 166, at art. 23.

These Treaties emphasize that each country has a right to build and manage their sovereign property as they wish. However, the binational treaties between Mexico and the United States *also* contain articles that: (a) give the IBWC exclusive management over boundary monuments and the boundary line, and (b) explain each sovereign must consult one another and receive approval if obstructions on one sovereign's property impact the other sovereign's property.<sup>264</sup> These treaty articles provide strong arguments for granting exclusive oversight of the boundary line to the IBWC and to open Friendship Park as an unobstructed area shared by both countries.

*1. Treaty Violations Regarding Boundary Monuments  
and Consulting Mexico*

When the United States and Mexico agreed to re-survey the boundary line in 1882, they gave the IBC broad powers concerning the boundary monuments.<sup>265</sup> Article III of the Convention Between the United States of America and the United States of Mexico stated:

The International Boundary Commission shall be required and have the power and authority to set in their proper places along the boundary line between the United States and Mexico, from the Pacific Ocean to the Rio Grande, the monuments heretofore placed there under existing treaties, whenever such monuments shall have become displaced; to erect new monuments on the site of former monuments when these shall have been destroyed, and to set new monuments at such points as may be necessary, and be chosen by joint accord between the two Commissioner Engineers-in-Chief.<sup>266</sup>

This article confirms IBWC's role of defining and demarcating the location of the U.S.-Mexico boundary line through the use of boundary monuments. However, because Boundary Monument #258

---

264. See *infra* notes 275-276.

265. Convention Between the United States of America and the United States of Mexico, Mex.-U.S., July 29, 1882, INT'L BOUNDARY & WATER COMMISSION, [https://www.ibwc.gov/Files/TREATY\\_OF\\_1882.pdf](https://www.ibwc.gov/Files/TREATY_OF_1882.pdf); Providing For an International Boundary Survey to Relocate the Existing Frontier Line Between the Two Countries West of the Rio Grande, Mex.-U.S., July 29, 1882, 22 Stat. 986.

266. Convention Between the United States of America and the United States of Mexico, U.S.-Mex., July 20, 1882, INT'L BOUNDARY & WATER COMMISSION, [https://www.ibwc.gov/Files/TREATY\\_OF\\_1882.pdf](https://www.ibwc.gov/Files/TREATY_OF_1882.pdf).

496 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

is accessible only on the Mexican side of the border, the monument no longer serves its defined purpose of demarcating the international border.<sup>267</sup>

The IBWC could also point to its on-going treaty revisions, enacted through “Minutes,” many of which address the IBWC’s power over boundary monuments. In particular, Article 24 of the 1944 Water Treaty empowers the IBWC to record new treaty provisions through Minutes.<sup>268</sup> After the IBWC and the CILA negotiate these Minutes, the agencies forward copies to their respective governments.<sup>269</sup> For the United States, a Minute becomes officially approved if Congress does not object within thirty days.<sup>270</sup> Once approved by each country, the Minutes become binding law on both governments.<sup>271</sup>

Currently, the IBWC continues to issue Minutes.<sup>272</sup> Specifically, three Minutes confirm the IBWC’s mandate to oversee the boundary monuments by thoroughly addressing the demarcation and maintenance of international land markers.<sup>273</sup> These Minutes clearly delineate that the IBWC should have full oversight over Boundary Monuments collaboratively with CILA. Unfortunately, none of the Minutes specifically concern Boundary Monument #258. Therefore,

---

267. Minute No. 302: Enhanced Demarcation and Monumentation of the International Boundary at International Boundary River Bridges and Land Boundary Ports of Entry, INT’L BOUNDARY AND WATER COMMISSION 1, (Dec. 13, 1999), [https://www.ibwc.gov/Files/Minutes/Minute\\_320.pdf](https://www.ibwc.gov/Files/Minutes/Minute_320.pdf); *Joint Report of the Principal Engineers Concerning the Demarcation of the International Boundary at the Border Ports and the International Bridges Along the United States/Mexico Border*, INT’L BOUNDARY & WATER COMMISSION 1 (Dec. 10, 1999).

268. Steven G. Ingram, *In a Twenty-First Century “Minute,”* 44 NAT. RESOURCES J. 163, 165 (2004).

269. *Id.*

270. *Id.*

271. Paisley, *supra* note 139, at 189.

272. *See Minutes between the United States and Mexican Sections of the IBWC*, INT’L BOUNDARY & WATER COMMISSION, [https://www.ibwc.gov/Treaties\\_Minutes/Minutes.html](https://www.ibwc.gov/Treaties_Minutes/Minutes.html) (last visited Jan. 3, 2021).

273. *Id.* The three Minutes are: (1) No. 244, “Maintenance of the International Land Boundary Monuments” enacted in 1973; (2) Minute No. 249, “Placement of Markers on the Land Boundary” enacted on July 14, 1975; and (3) Minute No. 302 “Enhanced Demarcation and Monumentation of the International Boundary at International Boundary River Bridges and Land Boundary Ports of Entry” enacted in 1999. *Id.*



the IBWC's powers to manage and control at Friendship Park would be implicit at best.

However, the IBWC's strongest argument in a lawsuit against DHS would highlight that Mexico has repeatedly complained about border wall construction.<sup>274</sup> Three separate treaties insist that if any obstructions might affect the other country, the affected country must be consulted before that obstruction is built. First, Article V of the 1848 Treaty of Guadalupe Hidalgo states: "The Boundary line established by this Article shall be religiously respected by each of the two Republics, and no change shall ever be made therein, except by the express and free consent of both nations, lawfully given by the General Government of each, in conformity with its own constitution."<sup>275</sup>

Second, Article 2 of the 1944 Water Treaty re-iterates the 1848 treaty and states, "Neither Section shall assume jurisdiction or control over the works located within the limits of the country of the other without the express consent of the Government of the latter."<sup>276</sup>

Third, the 1970 Treaty, Article IV, paragraph B(2) states:

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

---

274. Burnett, *supra* note 220. Mexico could also consider suing the United States in the International Court of Justice. This is not unprecedented. Mexico has sued the United States before, notably the Avena Case in 2004 where the International Court of Justice found the United States to have breached its obligations under Article 36 of the Vienna Convention to provide several dozen Mexican nationals accused of crimes timely consular protection. See *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, I.C.J.: SUMMARY OF JUDGMENT 2 & 15 (2004), <https://www.icj-cij.org/public/files/case-related/128/8190.pdf>. However, Texas disregarded the ICJ ruling and executed at least three Mexican nationals several years later. See Tom Dart, *Texas intent on executing Mexican despite warning over bilateral ties*, THE GUARDIAN (Jan. 17, 2014, 14:20 PM), <https://www.theguardian.com/world/2014/jan/17/texas-mexican-execution-tamayo-kerry>.

275. 1848 Treaty, *supra* note 262, at 795.

276. 1944 Water Treaty, *supra* note 166.

498 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

compensate for the damages sustained by the other Contracting State.<sup>277</sup>

To make these treaty provisions binding, Article 24(c) of the 1944 Water Treaty explicitly empowers the joint international agency to “carry into execution and prevent the violation of the provisions of those treaties and agreements entrusted to its jurisdiction.”<sup>278</sup> Nevertheless, a question remains—as left open by *Leu v. International Boundary Commission*—of whether these treaties are binding law. If the court ruled these treaties are binding, then construction by DHS at Friendship Park would be a direct treaty violation unless DHS received approval from both the IBWC and the Mexican government.

## 2. Violation of the Supremacy Clause

As a preliminary matter, an IBWC lawsuit could be based on a violation of the United States Constitution, which is also a requirement mandated by the IIRIRA when suing DHS over security and wall construction at the border.<sup>279</sup> First, through Article 24(c) of the 1944 Water Treaty, the IBWC has standing to sue DHS in a court of law.<sup>280</sup> The article states, “[E]ach Commissioner shall invoke when necessary the jurisdiction of the courts or other appropriate agencies of his country to aid in the execution and enforcement of these powers and duties.”<sup>281</sup>

Second, the IBWC could argue DHS violated the Supremacy Clause of the Constitution, which states, “[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>282</sup>

---

277. Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary, Mex.-U.S., Nov. 23, 1970, 80 Stat. 271 [hereinafter 1970 Treaty].

278. 1944 Water Treaty, *supra* note 166, at 43.

279. *See supra* note 205 (Section 102(c) limited judicial review of waiver decisions to solely constitutional claims).

280. 1944 Water Treaty, *supra* note 166, at 43.

281. *Id.*

282. U.S. CONST. art. VI.

The Supremacy Clause designates treaties as having the same constitutional effect as statutes and, therefore, must be upheld.<sup>283</sup> However, this argument could face several challenges. The Supreme Court divided international treaties into two types: self-executing and non-self-executing.<sup>284</sup> Self-executing treaties automatically constitute binding federal law that are enforceable in United States courts.<sup>285</sup> Non-self-executing treaties, conversely, are treaties that are not enforceable in the courts without prior legislative implementation.<sup>286</sup> In addition, courts apply the “last-in-time” rule where treaties and federal statutes have equivalent status and if they conflict, the last treaty signed or the last statute enacted prevails.<sup>287</sup>

Controversy exists as to whether the treaties between the United States and Mexico are self-executing or non-self-executing. Sutton and Uluc explain the 1944 and 1970 treaties “are self-executing and undoubtedly possess power as the ‘supreme law of the land.’”<sup>288</sup> These authors say the Senate and the President ratified the treaties and, therefore, the federal government is obligated to enforce them.<sup>289</sup> On the other hand, scholar Robert McCarthy maintains the 1944 Water Treaty is non-self-executing.<sup>290</sup> He argues the Protocol of the 1944 Water Treaty says the treaty cannot overstep persons and property within the territorial limits of the United States.<sup>291</sup> His argument, however, is weak because the Protocol addresses the respective territories of each country, not the actual boundary line, which is overseen by the IBWC.<sup>292</sup> Nevertheless, these conflicting

---

283. *Id.*

284. Sutton & Uluc, *supra* note 196, at 20.

285. McCarthy, *supra* note 161, at 284.

286. Carlos Manuel Vazquez, *Treaties as Law of the Land: the Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 628 (2008).

287. *Id.* at 625.

288. Sutton & Uluc, *supra* note 196, at 20.

289. *Id.* at 21.

290. McCarthy, *supra* note 161, at 284-85.

291. *Id.* at 285.

292. However, McCarthy does state: “Obviously, then, the President may and must require compliance with a non-self-executing treaty within the executive branch, and to that end should employ any available constitutional or statutory authorities.” *Id.* at 284.

## 500 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

theories demonstrate that it is unclear whether the treaties are self-executing or non-self-executing. Since the courts have never ruled on the issue, a lawsuit brought by the IBWC could force the judicial branch to decide the legal parameters of the treaties.

The U.S.-Mexico binational treaties, however, do strongly point to being self-executing not only because the Senate and the President ratified the treaties, but also because it includes Minutes, which have the binding force of law if not contested by Congress within thirty days.<sup>293</sup> Therefore, the President, the Senate, and Congress have agreed to the treaties and Minutes as binding law.

The courts would also have to consider the “last-in-time” rule. The IIRIRA of 1996 came after the 1944 and 1970 treaties.<sup>294</sup> Furthermore, the REAL ID Act (2005) and the Secure Fence Act (2006) came after the Minutes regarding demarcation and maintenance of Boundary Monuments, including Minute 244 (1973) and Minute 302 (1999).<sup>295</sup> Scholars Sutton and Uluc dismiss this, explaining that “as originally dictated, the terms between the IIRIRA and the treaties were not overtly inconsistent.”<sup>296</sup>

An IBWC lawsuit could indeed argue that the treaties, starting with the Treaty of Guadalupe Hidalgo, give each country full control to fortify their territory as they wish.<sup>297</sup> However, the congressional acts do not conflict with these treaty articles because the acts allow DHS waivers to construct border walls *within* U.S. territory.<sup>298</sup> This is not inconsistent with the treaties because the issue does not turn on construction along United States territory, but rather on the shared boundary line between both countries and how much area this might include.<sup>299</sup> If the U.S.-Canadian border provides guidance, the area maintained by *both* countries would be a ten-foot border vista.<sup>300</sup>

Here, the court should rule that the President of the United States, per the Supremacy Clause of the United States, must abide by the

---

293. Ingram, *supra* note 268.

294. Sutton & Uluc, *supra* note 196, at 20.

295. *See supra* note 273.

296. Sutton & Uluc, *supra* note 196, at 20.

297. *See supra* note 262-263.

298. *Id.*

299. Sutton & Uluc, *supra* note 196, at 20.

300. *The Boundary*, *supra* note 14.

treaties the executive branch has ratified. As McCarthy correctly points out, even if the court holds the IBWC's treaties and Minutes to be non-self-executing, it has still been ratified by the President and Senate or accepted by Congress.<sup>301</sup>

Such a lawsuit could still confront a strong counterargument from DHS, which would likely say Boundary Monument #258 still demarcates the boundary line because, per treaty, DHS has constructed the fencing exclusively on American land.<sup>302</sup> Furthermore, in keeping with the treaties that say both the IBWC and CILA should have free access to both sides of the boundary in order to do their work, DHS has constructed a door next to the Boundary Monument so that both parties can move back and forth between the line and do their work effectively.<sup>303</sup>

Furthermore, as shown through the *Leu v. International Boundary Commission* lawsuit,<sup>304</sup> the courts could hold that both the legislative and executive branches can at any time override these treaties. Therefore, due to the broad powers given to both Congress and the President over foreign affairs, any power the IBWC maintains over the boundary line could be overridden. Alternatively, the President or Congress could grant such a border vista at Friendship Park, move the border walls several feet further from the Boundary Monument and grant the IBWC and CILA continued free access, but still not allow Mexican and United States park visitors to freely cross between the boundary line. Such a ruling would further erode the IBWC's power, lead to continued lack of treaty compliance, and further deteriorate the relationship with Mexico.

Meanwhile, a positive determination by a court could clarify and even empower the IBWC by ruling: (1) the IBWC treaties are self-

---

301. McCarthy, *supra* note 161, at 286.

302. *See supra* note 109.

303. DHS constructed a door into the border wall, which has become known as the "Door of Hope" and was ceremonially opened several times from 2013 to 2017 by activists. *See* Greg Moran, *Border Gate Opens, Briefly, for Rare Reunions and a Wedding*, SAN DIEGO UNION TRIB. (Nov. 18, 2017, 4:45 PM), <https://www.sandiegouniontribune.com/news/watchdog/sd-me-border-gate-20171118-story.html>.

304. *See supra* note 231 (In 2011, DHS rebuilt the border fence approximately three feet further into United States' territory, which left Boundary Monument #258 only accessible on the Mexican side).

## 502 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 51

executing, (2) the IBWC is an impartial body charged with resolving disputes over boundary issues and must act to address and resolve the complaints lodged by Mexico, and (3) per the Supremacy Clause, the President is bound by the treaties enacted by the executive branch. A court could then conclude the IBWC should have a ‘border vista’ at Friendship Park and Boundary Monument #258 should be clear of obstruction between Mexico and the United States.<sup>305</sup> This could lead the way to greater binational cooperation as well as greater local autonomy over the border region, similar to that experienced at Peace Arch Park.

## CONCLUSION

The IBWC, as both a regional and international non-political organization, is in a strategic position to pioneer the request for the opening of Friendship Park to the public on both sides of the border. Further, the IBWC could request to have an open border vista where individuals can pass back and forth and have the boundary monument stand between both countries. As a threshold issue, the IBWC in its capacity could bring forward a lawsuit against DHS in which a court could decide on (1) whether the IBWC treaties are self-executing or non-self-executing and (2) whether treaty minutes, as binding law, could override federal laws, such as the DHS waiver provisions in the IIRIRA.<sup>306</sup>

The IBWC’s influence, however, can only go as far as the local border community allies with the IBWC and pressures the federal government. As the IBC has shown at the U.S.-Canadian line, the strength regional organizations have in complying with international treaties rests with a strong alliance between local, regional, state, and international groups.<sup>307</sup> While activists at Friendship Park would like to see a space that mirrors the unfenced openness of Peace Arch Park, their activities are at odds with the strong nativist sentiments expressed by other local American residents as well as politicians who prefer the federal government take a strong stand for border

---

305. See *Monument 258*, *supra* note 4. The “Friends of Friendship Park” explain, “Monument 258 stands as the physical and symbolic centerpiece of what was clearly designed to be an open, binational plaza.” *Id.*

306. See *supra* Section II.A.

307. Vermeer, *supra* note 28, at 308.

2021]

MILITARIZED PICNICS

503

militarization. Ironically, this stance is the very reason why international peace parks were created at borders—to lessen friction between countries and increase security through a public binational space that promotes cultural understanding, collaboration, and cooperation.<sup>308</sup>

*Barbara Zaragoza\**

---

308. *See* Vermeer, *supra* note 28, at 311.

\* J.D. Candidate, California Western School of Law, 2022; Associate Writer, *International Law Journal*; B.A., cum laude, International Studies from The American University; M.A. Russian and East European Studies from Stanford University; M.A. History from Harvard University. Barbara would like to thank faculty advisor, Professor Pooja Dadhania, for invaluable wisdom, mentorship, and feedback. Thanks also to Professor William Aceves, Professor James Cooper, Maria Teresa Fernandez and Daniel Watman of “Friends of Friendship Park,” IBWC Public Affairs Officer Lori Kuczmanski, Peace Arch Park Ranger Rickey Blank, and the ILJ editorial team, especially Sasha Ramirez, Johanna Brandsen, and Sarah Yesil. And finally, for unwavering support through this law school journey, thanks goes to Bobby Zaragoza as well as Nadia, Sofia, and Mimi.