

Part Five

Legal Aspects and Sectoral Dialogue



Barrel Cactus

Photo: Claudio Contreras

This section analyzes the legal precepts and the principles that the border fence initiative transgresses. It also explores, through the description of an exercise conducted at the workshop, the actions that different sectors of society might take to address the environmental threats posed by the fence.

LEGAL FRAMEWORK

SPECIALIST DISCUSSION

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INTRODUCTION

It is estimated that the construction and subsequent operation of the fence along the border between the United States and Mexico is an event that will have significant implications on the agreements and treaties in effect between both countries, as well as on the national legal frameworks that regulate the management and protection of natural resources. In the Legal Framework Discussion Group, these problems were analyzed as well as the possible alternatives for addressing them.

MAIN IMPACTS

From the beginning, the group identified the absence of a legal framework that contemplates the development and impacts of a project such as the construction of the fence. The discussion that followed, in general terms, revolved around two main topics: the impacts of the construction of the fence within the existing legal framework, and binational cooperation between both countries.

IMPACTS ON THE CURRENT LEGAL FRAMEWORK

At present, the legal framework is conformed by each country's legal framework, as well as by binational agreements, treaties and institutions, such as the IBWC/CILA, the La Paz Agreement and NAFTA among others. In the absence of an appropriate framework, the specialists found that the strongest and most flagrant violations in the existing framework will be at the international level, with regards to international treaties such as the Ramsar Convention on Wetlands and the North American Agreement for Environmental Cooperation by the CEC. They also identified violations to the La Paz Agreement in Articles 1, 6 and 7, as well as water agreements signed by the United States and Mexico. Regarding U.S. domestic legislation, violations of NEPA, the Clean Water Act and the Endangered Species Act, among others were identified.

A contextual element that exacerbates the legal impacts of a project such as the border fence is the waiver granted to the U.S. Department of Homeland Security for the implementation of programs and policies that seek to prevent terrorist incidents. In this scenario, certain guidelines of the U.S. legal framework, such as the requirement for Environmental Impact Assessments are waived, so it is not possible to solidly prove a violation of U.S. domestic laws.

BINATIONAL COOPERATION

With regards to the inexistence of a legal framework that can regulate a project such as construction of the border fence, the group discussed the status of the collaboration between the U.S. and Mexico – institutional as well as regarding regional or local initiatives – to address events or problems that take place in their shared border region and which may affect both countries. In this sense, the following aspects were discussed:

There is no supranational legal framework. The decisions made in one country have repercussions beyond its borders, which makes it necessary to have a binational legal framework that takes into account an integrated view of environmental and socioeconomic border problems.

International mechanisms for cooperation. Information on existing international cooperation mechanisms needs to be granted, in order to promote binational decision-making and activate them. New mechanisms for cooperation also needs to be created. As far as binational institutions, it was repeatedly stated that it is necessary to work with the North American Commission for

Environmental Cooperation, since it is an ideal organization for dealing with this binational problem.

Binational task forces. The group identified the need to form binational task forces where non-governmental organizations, government agencies and the public are represented. This led us to the discussion of the need to create a legal framework that promotes non-governmental cooperation, public hearings and lobbying. It was also stated that the existing legal mechanisms must be reinforced so they will work properly to prevent the continued violations to the spirit of the international cooperation agreements and treaties.

Another observation made was the need to *develop inter-governmental frameworks between City Governments on both sides of the border*, to promote cooperation and planning in order to address environmental problems from a local perspective. Examples of this type of cooperation is the agreements between sister cities in the United States and Mexico, the implementation of which - even though they lack the status of formal international treaties - enables the parties involved at the local level to generate a joint political force that may serve to exert pressure in Mexico City as well as Washington, D.C.

With regards to the *participation of civil society*, the group mentioned that there are several organizations in the U.S. that can support the opposition to the fence; among them, Environmental Defense. In Mexico, although there are some organizations, they are fewer in number, especially when it comes to environmental law; however, there are ranch settlements and civil society that would be willing to present a definite position.

Also discussed was the importance of working to *create legal mechanisms to promote the development of a cross-border environmental impact assessment*, based on the La Paz Agreement and NAFTA, in order to deal with these types of problems. The experts agreed that the issue of the border fence represents an opportunity that can serve to generate better mechanisms for environmental cooperation between both countries.

AVAILABLE INFORMATION

This discussion group identified violations to several laws and agreements, both domestic and international, caused by the impacts of the construction of the border fence. This verification exercise can be extended to other laws and agreements to complement the above information.

With regards to the mechanisms for international cooperation and the creation of binational task forces, there is a body of information generated

by academia, the existing binational organizations and institutions that cover the U.S. – Mexico border, as well as various groups that have developed initiatives for binational cooperation both at the regional and local levels along the border.

RESEARCH AND INFORMATION GAPS

In the absence of a legal framework to regulate the creation of projects such as the border fence, we discussed the need to develop research and generate information from perspectives that complement what already exists, with the purpose of conceptualizing and better understanding the potential impacts that projects of this nature generate, so they may be reflected in more inclusive and effective legal frameworks surrounding the environmental and socioeconomic problems at the border.

POSSIBLE SOLUTIONS TO POTENTIAL IMPACTS

In view of the imminent construction of the fence and the impossibility of having national or binational legal frameworks to foresee the multiple effects of this project and sanction accordingly, a course of action that becomes essential is to generate and circulate information regarding said impacts and how they affect the existing legal framework. This activity will require the support of academic institutions as well as groups that promote binational collaboration activities along the border.

GROUPS THAT ARE CURRENTLY WORKING ON THE SUBJECT OR THAT COULD WORK ON IT

There are various institutions and organizations along the border whose work and research agendas may directly or indirectly accommodate the topic of the construction of the border fence and its implications on the framework of environmental law. Among these are academic institutions on both sides of the border, such as the members of the Southwest Center for Environmental Research and Policy (San Diego State University, Arizona State University, New Mexico State University, the University of Utah, the University of Texas at El Paso) and their Mexican counterparts (Universidad Autónoma de Baja California, El Colegio de la Frontera Norte, Universidad Autónoma de Ciudad Juárez, Instituto Tecnológico de Ciudad Juárez and Instituto Tecnológico y

de Estudios Superiores de Monterrey), among others. There are also various groups that have undertaken initiatives for binational collaboration and which include representatives from Federal, State and Local Government, academic institutions, NGOs, as well as members from the community. Among these are the Binational Watershed Advisory Council (BWAC), the Committee on Binational Regional Opportunities (COBRO), the Paso del Norte Water Task Force and the Rio Grande / Río Bravo Basin Coalition, in addition to other task forces in various binational basins. There are also the Border 2012 Program Regional Task Forces.

CONCLUSIONS

Construction and operation of the border fence will be carried out in the absence of a national or international legal framework that is able to regulate the characteristics and potential effects of a project of this nature. This situation undoubtedly generates the problems discussed by the group, but on the other hand, it represents an important opportunity that must be seized to explore more complete and internationally-sanctioned regulatory frameworks regarding the conservation of natural resources along the U.S. – Mexico border, as well ways to implement them. This must be a collective effort, involving the various parties mentioned above.

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