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# Rio Grande Designs: Texans' NAFTA Water Claim Against Mexico

By  
Paul Stanton Kibel\* & Jonathan R. Schutz\*\*

## I.

### INTRODUCTION:

#### AT THE CONFLUENCE OF COMMON RESOURCES AND PRIVATE INTERESTS

The Rio Grande River basin is 180,000 square miles, runs from Colorado to the Gulf of Mexico, and forms more than 1,200 miles of the border between Mexico and the United States of America.<sup>1</sup> Although the headwaters of the Rio Grande lie in Colorado, all of the major tributaries to the Rio Grande's border section originate in Mexico. In contrast, all of the major tributaries to the Colorado River – which flows south from the Rocky Mountains to the Sea of Cortez (or Gulf of California) in Mexico – are in the United States.

Various treaties govern the relationship between the United States and Mexico. In 1944, the United States and Mexico entered into a treaty to allocate the waters of the Rio Grande and Colorado Rivers ("1944 Rivers Treaty").<sup>2</sup> In

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1. Mary E. Kelly, *Water Management in the Binational Texas/Mexico Rio Grande Rio Bravo Basin*, in HUMAN POPULATION AND FRESHWATER RESOURCES: U.S. CASES AND INTERNATIONAL PERSPECTIVES, YALE SCHOOL OF FORESTRY AND ENVIRONMENTAL STUDIES BULLETIN 107, 116 (Karin M. Krchnak ed., 2002).

2. Norris Hundley, *The Politics of Water and Geography: California and the Mexican-American Treaty of 1944*, 36 PACIFIC HISTORICAL REVIEW 209, 209 (1967) [hereinafter *Politics of*

1994, the North American Free Trade Agreement ("NAFTA") approved by Canada, Mexico and the United States went into effect. Chapter 11 of NAFTA established a set of new protections for foreign investors in each of the three signatory countries. While many bilateral investment treaties protect against direct appropriation by the government, NAFTA's Chapter 11 investor protection provisions went beyond the traditional direct appropriation language to establish a new right for private foreign investors to claim compensation for government acts that are "tantamount" to direct appropriation.<sup>3</sup> Although its expansion of traditional notions of appropriation did not receive much attention at the time of the NAFTA negotiations, Chapter 11 has become increasingly controversial during the past decade of implementation. Private business interests have used Chapter 11 to seek payment from foreign national governments for the enforcement of policies and legislation designed to protect public health and depleted natural resources, arguing that such policies and legislation adversely affect the profitability of their investments and are therefore tantamount to expropriation. This use of Chapter 11 has provoked widespread criticism from environmental groups throughout North America.

A recent case has arisen at the legal and policy confluence of the historical dispute over the bi-national allocation of Rio Grande waters and NAFTA's new expansive investor protection provisions. In 2004, a group of landowners and a water company from Texas' Rio Grande Valley in the United States (collectively referred to herein as the "Texans") filed a notice of intent to submit a claim against Mexico under NAFTA's Chapter 11. The thrust of the Texans' claim is that Mexico failed to release the quantities of Rio Grande water required under the 1944 Rivers Treaty and that Mexico therefore must reimburse the Texans for economic damages resulting from this alleged improper withholding.<sup>4</sup>

Significantly, the 2004 filing of the Texans' NAFTA water claim against Mexico came on the heels of the United States Court of Federal Claims' 2001 *Tulare Lake* decision in which the federal government was ordered to compensate a group of farmers in California for economic damages suffered when out-of-stream diversions for irrigation were reduced to preserve critical aquatic habitats for fish species protected under the United States Endangered Species Act ("ESA").<sup>5</sup> The legal basis for this decision was a finding that the government's in-stream flow requirements to protect endangered fisheries

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*Water*]. The 1944 Rivers Treaty can be found at 59 U.S.C. § 1219 (1946) [hereinafter *Treaty*].

3. INT'L INST. FOR SUSTAINABLE DEV. and WORLD WILDLIFE FUND, PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA'S CONTROVERSIAL CHAPTER ON INVESTOR RIGHTS 7-8 (2001) [hereinafter *Private Rights*]; J. Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 GOLDEN GATE U. L. REV. 465, 471 (1999).

4. Request for Arbitration Under the Rules Governing the Additional Facility for the Administration of Proceedings by the International Center for Settlement of Investment Disputes and the North American Free Trade Agreement between Bayview Irrigation District et al, and The United States of Mexico (Jan. 19, 2005).

5. *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (Fed. Cl. 2001).

constituted a compensable “taking” under the Fifth Amendment of the United States Constitution.<sup>6</sup> The attorneys that represented the California farmers in the *Tulare Lake* ESA litigation now represent the Texans in their NAFTA Rio Grande claim. As such, the scenario that now presents itself is in essence a test case to see whether the water-related takings argument accepted in *Tulare Lake* can be expanded and elevated to apply in the international context of the 1944 Rivers Treaty and NAFTA. A recent article on the Rio Grande Chapter 11 case in *High Country News*—a news magazine on resource issues in the American west—ran with the headline “Texas Water Case is Takings on Steroids.”<sup>7</sup> With good reason, environmental and trade communities in North America are keeping a close watch on how this claim plays out.

Our article begins with an analysis of the historical context and key provisions in the 1944 Rivers Treaty between Mexico and the United States. Next, we explain the expropriation claims process established by NAFTA’s Chapter 11 and describe the environmental controversy that has arisen over its implementation. We follow with an account of the Texans’ NAFTA water claim against Mexico, including an analysis of this claim’s relation to the *Tulare Lake* decision and parallel dispute resolution proceedings at the International and Boundary Waters Commission.

At the end of this review, our finding is that the Texans’ NAFTA water claim against Mexico is not well-founded from either a legal or a public policy standpoint. This finding is based on a close reading of the operative language in the 1944 Rivers Treaty and NAFTA’s Chapter 11; on differences between the domestic law context of the *Tulare Lake* case and the public international law context of the bi-national Rio Grande dispute; and finally, and on a subsequent 2005 judicial decision in the United States that greatly discredited the *Tulare Lake* holding.<sup>8</sup>

## II.

### DIVVYING UP THE RIO GRANDE AND COLORADO: 1944 RIVERS TREATY

#### A. Historical Context for the 1944 Rivers Treaty

Although the mainstem of the Rio Grande River originates in the United States, the river is mostly dry where it becomes the bi-national border until the Rio Conchos enters the United States at Presidio, Texas. The Rio Conchos is the largest Rio Grande tributary, contributing thirty-five to forty percent of the Rio Grande’s flows from the point of confluence.<sup>9</sup> All of the major tributaries to the

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6. *Id.* at 319.

7. Paul Krza, *Texas Water Case is ‘Takings’ on Steroids*, HIGH COUNTRY NEWS, Feb. 21, 2005, at 1).

8. *Klamath Irrigation District v. United States*, 67 Fed. Cl. 504 (Fed. Cl. 2005).

9. TEX. CTR. FOR POLICY STUDIES, *THE DISPUTE OVER SHARED WATER OF THE RIO GRANDE/RIO BRAVO, A PRIMER* 7 (2002) [hereinafter *Primer*]. The Rio Conchos basin makes up about 14% of the Rio Grande Basin.

Rio Grande's border section originate in Mexico.

Mexico-United States controversies over the waters of the Rio Grande began as early as 1873 with the Chamizal dispute. This dispute was a boundary conflict caused when the Rio Grande shifted and cut off 600 acres of Mexican land, essentially placing these formerly Mexican lands within United States territory. After several decades of diplomatic sparring, the matter was eventually arbitrated by the International and Boundary Waters Commission ("IBWC"). The IBWC was established by Mexico and the United States in 1889 to provide a forum to help resolve trans-border river disputes.<sup>10</sup> In 1911, the IBWC awarded about two-thirds of the land at issue to Mexico, but the United States "refused to abide by the decision."<sup>11</sup> The dispute continued until 1963, when President John F. Kennedy finally agreed to settle it according to the 1911 IBWC compromise proposal.<sup>12</sup>

A subsequent dispute involving the Rio Grande's waters arose in 1888, when low rainfall combined with upstream diversions to cause water shortages in Texas and Mexico.<sup>13</sup> The affected Texan parties successfully lobbied Congress to pass a joint resolution in 1890, requesting that then President Benjamin Harrison negotiate a solution between Mexico and the United States.<sup>14</sup> Mexico's position was that excessive diversions by American users caused the shortages.<sup>15</sup> The conflict continued until 1894 when drought exacerbated the problem and Mexico's Minister of Foreign Affairs presented the United States Secretary of State with a claim for \$35,000,000 in damages.<sup>16</sup>

As early as 1896, the IBWC was involved in efforts to create a bi-national water apportionment scheme for the Rio Grande.<sup>17</sup> With the IBWC's assistance, a treaty between Mexico and the U.S. was signed in 1906 allocating 60,000 acre-feet ("af") of the Rio Grande to Mexico, and the remainder to the United States.<sup>18</sup> The United States' position was that the 1906 treaty did not create Mexican rights to Rio Grande water under international law and, instead, simply reflected a gesture of friendship and equity.<sup>19</sup> Though not an official acknowledgement of Mexico's existing water rights, the 60,000 af allocation in

10. 26 U.S.C. § 1512 (1889); *Treaty*, *supra* note 2, art. 2.

11. NORRIS HUNDLEY, JR. DIVIDING THE WATERS: A CENTURY OF CONTROVERSY BETWEEN THE UNITED STATES AND MEXICO, 98 (1966) (hereafter *DIVIDING THE WATERS*).

12. THE HANDBOOK OF TEXAS ONLINE, <http://www.tsha.utexas.edu/handbook/online/articles/CC/nbc1.html>; *see also* <http://austin.episd.org/ephstory/quadchamizal1.htm> and [http://www.epcc.edu/ftp/Homes/monicaw/borderlands/14\\_chamizal\\_dispute.htm](http://www.epcc.edu/ftp/Homes/monicaw/borderlands/14_chamizal_dispute.htm).

13. *DIVIDING THE WATERS*, *supra* note 11, at 21-22.

14. *Id.*

15. *Id.*

16. *Id.* at 22. Mexico's damages claim was the impetus for the Harmon opinion. *See infra*, note 47.

17. *Id.* at 24.

18. *Id.* at 29-30. Essentially, the U.S. agreed to construct the Elephant Butte reservoir and provide Mexico with 60,000 af annually from this reservoir. *Id.* at 29.

19. *Id.* at 29, 71.

the 1906 treaty was based on Mexico's existing uses.<sup>20</sup> The question of existing uses would arise again in later treaty negotiations regarding the Rio Grande.<sup>21</sup>

In the 1920s, the debates over a domestic Colorado River Compact among American western states presented another potential opportunity to consider the question of apportionment of trans-border river waters with Mexico. In 1928, the United States Congress approved legislation that included federal ratification of the Colorado River Compact, which had been previously signed by representatives of seven states in 1922.<sup>22</sup> The Compact allocated the total flow of the Colorado River between the upper basin (consisting of the states of Colorado, Wyoming, Utah and New Mexico) and lower basin (consisting of the states of California, Nevada and Arizona), and left approximately 1.5 million af ("maf") of the estimated total 16.5 maf of annual Colorado River flow unapportioned between the upper basin and lower basin, presumably to satisfy Mexico's claims.<sup>23</sup> Although this 1.5 maf of Colorado River water was left unapportioned under the Compact, little effort was made by the United States at the time to ground Mexico's rights to the Colorado or other trans-boundary rivers (e.g., the Rio Grande) in treaty obligations.<sup>24</sup> Mexican concerns in this regard were rebuffed.<sup>25</sup>

In early 1941, Mexico again pressed for a clearer quantification of its rights to shared rivers (e.g., the Colorado, Rio Grande, and Tijuana) and submitted a draft of a comprehensive waters treaty to the United States.<sup>26</sup> At this point in time, the United States was more inclined to negotiate than it had been previously, in part due to its Good Neighbor Policy.<sup>27</sup> The Good Neighbor Policy originated with United States President Franklin Roosevelt, who "took office determined to improve relations with the nations of Central and South America."<sup>28</sup> It emphasized "cooperation and trade rather than military force to maintain stability in the hemisphere"<sup>29</sup> and "represented an attempt to distance the United States from earlier interventionist policies . . ."<sup>30</sup> The Policy also came into play because the United States was firmly backing the United Nations

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20. *Politics of Water*, *supra* note 2, at 214.

21. *DIVIDING THE WATERS*, *supra* note 11, at 98.

22. The Compact can be found at 42 Stat. 171 (1921).

23. NORRIS HUNDLEY JR., *WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST* 183, 185 (1975) [hereinafter *WATER AND THE WEST*].

24. *Id.* at 176-77, 204.

25. *Id.* at 175, 204.

26. *DIVIDING THE WATERS*, *supra* note 11, at 99.

27. *Id.* at 100.

28. U.S. Dep't of State, <http://www.state.gov/t/pa/ho/time/id/17341.htm> (last visited Nov. 1, 2006). "In his inaugural address on March 4, 1933, Roosevelt stated: 'In the field of world policy I would dedicate this nation to the policy of the good neighbor—the neighbor who resolutely respects himself and, because he does so, respects the rights of others.' Roosevelt's Secretary of State, Cordell Hull, participated in the Montevideo Conference of December 1933, where he backed a declaration favored by most nations of the Western Hemisphere: 'No state has the right to intervene in the internal or external affairs of another.'" *Id.*

29. *Id.*

30. *Id.*

organizational conference taking place in San Francisco. Due to its support of the United Nations conference, the United States "wanted the friendship and cooperation of the Latin-American nations and was then removing outstanding issues that would endanger its policy."<sup>31</sup> The IBWC assisted Mexico and the United States in the negotiations.<sup>32</sup>

The Rio Grande portion of the treaty, described in detail below, was quickly negotiated both because some of the issues had been resolved earlier in 1906, and because the United States stood to gain flood control rights and hydroelectricity.<sup>33</sup>

In contrast, the allocation of the Colorado proved the most contentious aspect of the negotiations. In its initial draft, Mexico sought recognition of its right to 3.5 maf of Colorado flow.<sup>34</sup> The United States negotiators' initial starting point was that the treaty should be based on Mexico's present uses (which were less than 1.5 million af), while Mexico argued that additional allocations were needed to provide for its anticipated future uses of Colorado River water.<sup>35</sup> Within the United States, the proposed treaty was opposed principally by California.<sup>36</sup> California argued that 1.5 maf was far in excess of Mexico's historical use and that Mexico should only be allocated the amount it used prior to the construction of Hoover Dam, or about 700,000 af per year in the early 1930s.<sup>37</sup>

California's more aggressive position, however, was not ultimately embraced by the United States negotiators, since the latter were confident it would be rejected by Mexico.<sup>38</sup> In sharp contrast to the 3.5 maf Mexico initially sought, the United States made a counter-offer to grant Mexico 900,000 af of Colorado water plus \$15,000,000.<sup>39</sup> Mexico then countered with an offer of two maf.<sup>40</sup> In response, the United States offered Mexico 1.25 maf, assuming that Mexico would receive up to two maf because of return flow<sup>41</sup> below the All-American Canal intake.<sup>42</sup> Mexico countered with 1.7 maf. The United States

31. DIVIDING THE WATERS, *supra* note 11, at 159.

32. *Id.* at 131.

33. *Id.* at 131-32. Ironically, at the time of the Treaty, many felt that the Treaty was negotiated for the benefit of Texas. *Politics of Water*, *supra* note 2, at 211. By sending 1.5 maf/year to Mexico from the Colorado, more water could be sent from Mexico down the Rio Grande. *Id.* at 212. Some went as far as to say that "California was sacrificed on the altar of Texas and the Good Neighbor policy." *Id.*

34. DIVIDING THE WATERS, *supra* note 11, at 102.

35. *Id.* at 102-03.

36. *Politics of Water*, *supra* note 2, at 209. California was concerned that any amount of surplus Colorado River water that went to Mexico would diminish its entitlement. DIVIDING THE WATERS, *supra* note 11, at 105.

37. *Politics of Water*, *supra* note 2, at 210, 213-14; WATER AND THE WEST, *supra* note 23, at 296.

38. DIVIDING THE WATERS, *supra* note 11, at 108, 110, 126.

39. *Id.* at 102.

40. *Id.* at 103.

41. Return flow refers to water that returns to its source supply after being diverted away and used.

42. DIVIDING THE WATERS, *supra* note 11, at 132. As its name suggests, the All American

then offered 8 percent of lower basin diversions plus 750,000 af.<sup>43</sup> Finally the United States made a flat offer of 1.5 maf.<sup>44</sup> Except for California, all of the Colorado basin states approved of the State Department's offer.<sup>45</sup>

This offer was incorporated into the final text of the 1944 Rivers Treaty, which was next sent to the United States Senate for ratification. Senators from Nevada joined those from California in opposing the agreement.<sup>46</sup> California cited the 1895 opinion issued by then United States Attorney General Judson Harmon in which Harmon argued that the United States, as the upper riparian nation, was not accountable to Mexico, the lower riparian nation, and was entitled to exercise "total sovereignty" over all of the upper basin river resources in its territory. Those states favoring the 1944 Rivers Treaty pointed to numerous international water allocation treaties that contained provisions contradicting Harmon's opinion.<sup>47</sup> In the end, California's efforts to block the agreement were unsuccessful and the United States Senate approved the 1944 Rivers Treaty by a vote of seventy-six to ten.<sup>48</sup>

Most of the Mexican professionals and Foreign Affairs Department representatives attending the Mexican Senate's hearing on the Treaty found the treaty reasonably favorable to Mexico's interests.<sup>49</sup> The agreement quantified Mexico's right to an amount of Colorado River water that seemed sufficient for Mexico's present purposes – an improvement over the previous lack of any quantified rights.<sup>50</sup> However, worries remained regarding the absence of specific provisions ensuring the quality of water provided to Mexico.<sup>51</sup> These worries would later prove warranted when much of the Colorado water sent by the United States to Mexico contained such elevated saline levels that the water was unusable for irrigation or drinking.<sup>52</sup> Despite these unresolved water quality concerns, Mexico's Senate voted unanimously to ratify the 1944 Rivers Treaty.<sup>53</sup> Historian Evan Ward observed that, "[M]exican politicians knew that if they pressed for a standard of water quality, then the quantity would surely be reduced. Put another way, those with the most to lose economically and politically insisted on letting the next generation grapple with issues related to

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Canal ("AAC") was constructed to be located entirely in the U.S., replacing the Alamo Canal, which ran through both the U.S. and Mexico. The AAC was authorized in 1928 and completed in 1942. The AAC delivers Colorado River water to California's Imperial Valley.

43. *Id.* at 133.

44. *Id.*

45. *Id.* at 134.

46. *Id.* at 139.

47. *Id.* at 146. The Harmon opinion was written by Attorney General Judson Harmon in 1895. It stated that the U.S. had total sovereignty over the resources within its borders. WATER AND THE WEST, *supra* note 23, at 81.

48. DIVIDING THE WATERS, *supra* note 11, at 163.

49. *Id.*

50. *Id.* at 166.

51. *Id.* at 168.

52. EVAN R. WARD, BORDER OASIS: WATER AND THE POLITICAL ECOLOGY OF THE COLORADO RIVER DELTA, 1940-1975, 67 (2003).

53. DIVIDING THE WATERS, *supra* note 11, at 169.



water quality.”<sup>54</sup>

### B. The Colorado Salinity Crisis and its Aftertaste

While the Colorado salinity crisis did not directly concern the Rio Grande, an understanding of the crisis and its legacy is required to appreciate the broader historical context of Mexico-United States water conflicts and the Texans' current damages claim against Mexico under NAFTA's Chapter 11. The United States has generally complied with the obligations set forth in the 1944 Rivers Treaty to deliver specified quantities of Colorado River flow to Mexico. It is not so clear, however, whether the quality of the Colorado River water delivered to Mexico complies with the Treaty's requirements.

Significantly, the 1944 Rivers Treaty does not contain provisions expressly mandating certain water quality levels either for Rio Grande water delivered by Mexico to the United States, or for Colorado River water delivered by the United States to Mexico. Mexico initially suggested the inclusion of such water quality provisions in the agreement but the United States succeeded in keeping them out.<sup>55</sup> As Marc Reisner observed: “By treaty we had promised them a million and a half acre-feet of water. But we hadn't promised them *usable* water.”<sup>56</sup> According to water historian Norris Hundley Jr., a common American response to these water quality concerns was to argue that Mexico could not complain about the quality of water it received because it had been granted more water under the 1944 Rivers Treaty than it deserved.<sup>57</sup>

Mexico, of course, had a much different view of the water quality issue. The discussions leading up to the 1944 Rivers Treaty recognized Mexico's past, present and anticipated future use of Colorado River water for irrigation and domestic drinking water supply, and the treaty itself noted that water was needed by Mexico for domestic, agricultural, and livestock use.<sup>58</sup> Therefore, Mexico's position was that if poor quality rendered the water provided by the United States unfit for these purposes, then deliveries of such water were inconsistent with the assumptions and terms of the 1944 Rivers Treaty.<sup>59</sup>

Colorado River water quality emerged as a major bi-national issue in the early 1960s when Lake Powell began filling behind Glen Canyon Dam in Utah. The filling caused less water than normal to be released, thereby reducing the Colorado River flow downstream of the new impoundment.<sup>60</sup> In addition to the decreased water flow, the Wellton-Mohawk Irrigation and Drainage District in

54. WARD, *supra* note 52, at 91.

55. DIVIDING THE WATERS, *supra* note 11, at 157.

56. MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER 7 (1993); see also DIVIDING THE WATERS, *supra* note 11, at 155, 157.

57. *Politics of Water*, *supra* note 2, at 212-213; WATER AND THE WEST, *supra* note 23, at 316.

58. WARD, *supra* note 52, at 67, 103-04.

59. *Id.*

60. David H. Getches, *Competing Demands for the Colorado River*, 56 COLO.L.REV 413, 462 (1985).

Arizona began discharging saline wastewater into the Colorado River.<sup>61</sup> Salinity levels in the lower Colorado River soared, which caused dire conditions in the agricultural lands in Mexico along the lower Colorado River.<sup>62</sup> The drinking water supply in many Baja communities in Mexico was also threatened by the Colorado River's rising salt concentrations.<sup>63</sup> One 1961 study, for example, revealed that the City of Mexicali's salinity level was 2,500 parts per million ("ppm") – greatly exceeding the 1,500 ppm salinity limit used at the time by the World Health Organization to determine potability.<sup>64</sup>

In May 1964, about four hundred Mexican farmers protested outside the United States Consulate in Mexicali.<sup>65</sup> They trailed a coffin filled with salt, and held signs reading "Salt us first – talk to us later."<sup>66</sup> They also hung a large banner from a building across the street from the consulate that read "Enough Salinity Already."<sup>67</sup>

The salt protests eventually led the IBWC to work with the United States and Mexico on a possible solution. The interim result was the 1965 issuance of Minute 218 in which the United States agreed to construct a drainage channel from Wellton-Mohawk to Morelos Dam to reduce saline discharges into the Colorado River.<sup>68</sup> However, pursuant to Minute 218, Mexico was still charged for waters delivered, regardless of their salinity levels, as set forth under the quantitative arrangements of the 1944 Rivers Treaty.<sup>69</sup> As such, Minute 218 was not well-received among Mexicali Valley farmers and, moreover, the Wellton-Mohawk drainage channel had only a modest impact on improving salinity levels.<sup>70</sup>

In 1971, Mexican President Luis Echeverría responded to American intransigence by threatening to sue the United States in the International Court of Justice ("ICJ") for violations of the 1944 Rivers Treaty.<sup>71</sup> Historian Norris Hundley Jr. opined at the time, "It is almost assured that no Tribunal of Arbitration will support the United States so long as it looks to fulfill the treaty by giving Mexico unusable water."<sup>72</sup> Similarly, legal scholars at the Universidad Nacional Autonoma de Mexico's Center for International Relations concluded that Mexico was almost certain to prevail if the matter was brought before the ICJ.<sup>73</sup>

In a speech to the United States Congress in 1972, Mexican President Luis

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61. *Id.*

62. Ward, *supra* note 52, at 67.

63. *Id.* at 67.

64. *Id.* at 73.

65. *Id.* at 84.

66. *Id.*

67. *Id.*

68. *Id.* at 59.

69. *Id.* at 85.

70. *Id.*

71. *Id.* at 108.

72. *Id.* at 104.

73. *Id.* at 109.

Echeverría contrasted the United States' lack of commitment to resolving the Colorado salinity crisis with the resources being committed to the ongoing war in Vietnam.<sup>74</sup> Echeverría asked "why the United States does not use the same boldness and imagination that it applies to solving complex problems with its enemies to the solution of simple problems with its friends."<sup>75</sup> According to historian Evan Ward, by giving such speeches, "Echeverría successfully transformed a regional issue into an international platform for Mexican nationalism."<sup>76</sup>

The prospect of ICJ litigation, as well as the increasingly unpleasant international profile of the crisis, eventually persuaded the United States to enter into a more comprehensive salinity-control resolution with Mexico in August 1973.<sup>77</sup> The commitments of the United States under the August 1973 agreement were codified with the passage of the Colorado River Salinity Control Act in 1974.<sup>78</sup>

Mexico's experience with the Colorado salinity issue has colored trans-border water resource relations with the United States concerning implementation of the 1944 Rivers Treaty. From the Mexican perspective, the United States violated the agreement with impunity for decades and was only persuaded to stop under the threat of international litigation and when confronted with broad international pressure. Moreover, the United States never assumed responsibility for the economic damages to farmers in Baja California caused by this alleged longstanding noncompliance.

### *C. The 1944 Rivers Treaty Apportionment Regime*

More than sixty years after its adoption, the 1944 Rivers Treaty remains the primary document governing the respective rights of United States and Mexico to the international river courses shared by the two nations.<sup>79</sup>

The agreement allocates to the United States one-third of the flow reaching the Rio Grande from the Rio Conchos, San Diego, San Rodrigo, Escondido, and Saldado Rivers and the Las Vacas Arroyo.<sup>80</sup> This one-third is not to be less than 350,000 acre-feet (af) annually averaged over a five-year period.<sup>81</sup> The five-year cycle is considered terminated, all debts are deemed to be paid in full, and a new five-year cycle begins "[w]henver the conservation capacities assigned to the United States in at least two of the major international reservoirs, including the

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74. *Id.*

75. *Id.* at 60-61.

76. *Id.* at 61.

77. *Id.* at 116, 118-19.

78. *Id.* at 117-19.

79. Memorandum in Support of United States' Motion to Dismiss Counts 1-4 & 7-8, *Consejo de Desarrollo Economico de Mexicali, AC v. United States*, 20 (D. Nev. September 19, 2005)(NO. CV-S-05-0870-KJD-GWF) [hereinafter *U.S. Attorney Brief*].

80. *Treaty*, *supra* note 2, at 1226-27.

81. *Id.*

highest major reservoir, are filled with water belonging to the United States.”<sup>82</sup>

The 1944 Rivers Treaty provides an exception to Mexico’s prescribed obligations to deliver Rio Grande water. Specifically, the agreement states that in times of “extraordinary drought,” which make “it difficult for Mexico to make available the run-off of 350,000 acre-feet annually[,] . . . any deficiencies existing at the end of the . . . five-year cycle shall be made up in the following five year cycle . . .”<sup>83</sup> The 1944 Rivers Treaty, however, does not define the circumstances that constitute “extraordinary drought” or what would make it “difficult” for Mexico to deliver the specified quantities of water.<sup>84</sup>

In terms of dispute resolution, the 1944 Treaty created a set of procedures that reflected the view that disagreements concerning compliance with the agreement should be resolved primarily, and if possible, through diplomatic channels.<sup>85</sup> Specifically, Article 2 of the Treaty states:

The application of the present Treaty, the regulation and exercise of the rights and obligations which the two Governments assume thereunder, and the settlement of all disputes to which its observance and execution may give rise are hereby entrusted to the International Boundary and Water Commission, which shall function in conformity with the powers and limitations set forth in this Treaty . . . Wherever there are provisions in this Treaty for joint action or joint agreement by the two Governments . . . it shall be understood that the particular matter in question shall be handled by or through the Department of State of the United States and the Ministry of Foreign Relations of Mexico.<sup>86</sup>

Article 2 of the 1944 Rivers Treaty establishes the IBWC as the international forum for determining the rights and obligations of each party under the agreement.<sup>87</sup> Specifically, the 1944 Rivers Treaty provides the IBWC with the power and duty:

To settle all differences that may arise between the two Governments with respect to the interpretation or application of this Treaty, subject to the approval of the two Governments. In any case in which the Commissioners do not reach an agreement, they shall so inform their respective governments reporting their respective opinions and the grounds therefor and the points upon which they differ, for discussion and adjustment of the difference through diplomatic channels and for application where proper of the general or special agreements which the two Governments have concluded for the settlement of controversies.<sup>88</sup>

The 1944 Rivers Treaty grants the IBWC the authority to resolve disputes over water diversions from the Rio Grande River. Article 9 of the 1944 Rivers Treaty states:

(d) The Commission shall have the power to authorize either country to divert

82. *Id.* at 1227-28.

83. *Id.* at 1227. There are similar provisions for when the U.S. is unable to deliver water from the Colorado River to Mexico. *Id.* at Art. 10.

84. *Primer*, *supra* note 9, at 5.

85. *U.S. Attorney Brief*, *supra* note 79, at 18.

86. *Treaty*, *supra* note 2, at 1223.

87. *Id.* at 1222-25; *see also U.S. Attorney Brief*, *supra* note 78, at 12, 13, 20.

88. *Treaty*, *supra* note 2, at 1256.

and use water not belonging entirely to such country, when the water belonging to the other country can be diverted and used without injury to the other and can be replaced at some point on the river.

(e) The Commission shall have the power to authorize temporary diversion and use by one country of water belonging to the other, when the latter does not need it or is unable to use it, provided that such authorization or the use of such water shall not establish any right to continue to divert it.

(f) In case of the occurrence of an extraordinary drought, in one country with an abundant supply of water in the other country, water stored in the international storage reservoirs and belonging to the country enjoying such abundant water supply may be withdrawn, with the consent of the Commission, for the use of the country undergoing the drought.<sup>89</sup>

#### *D. Operation of the Rio Grade Apportionment Regime*

Prior to the recent NAFTA claim by the Texans, the United States Department of State and Mexico's Ministry of Foreign Affairs, not private actors with affected economic interests, enforced compliance with the terms of the 1944 Rivers Treaty through government-to-government consultations.<sup>90</sup>

Until the 1992 to 1997 five-year cycle, Mexico and the United States experienced relatively few disputes regarding compliance with the Rio Grande apportionment and delivery provisions of the 1944 Rivers Treaty. In fact, during the pre-1992 period Mexico often delivered water in excess of its obligations. While the initial five-year cycle ended in 1958<sup>91</sup> with a Mexican deficit of 476,461 af,<sup>92</sup> Mexico's delivery in the next five-year cycle was "was more than sufficient enough to cover the water delivery deficit" from the previous five-year period.<sup>93</sup> Similarly, in the third five-year period Mexico delivered 32,270 af in excess of the five-year obligation of 1,750,000 af.<sup>94</sup> From 1968 to 1992, Mexico did not incur a deficit in any five-year period.<sup>95</sup> As of 1992, therefore, Mexico's delivery obligations were considered paid in full and a new five-year cycle began.<sup>96</sup> Therefore, from 1953 to 1992, Mexico met its delivery obligations in all but one five-year cycle, which occurred in the early 1950s during a severe drought.<sup>97</sup>

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89. *Id.* at 1234-35.

90. *U.S. Attorney Brief*, *supra* note 78, at 15-17.

91. IBWC, Minute 234, 1 (Dec. 2, 1969); IBWC, REPORT OF THE UNITED STATES SECTION INTERNATIONAL BOUNDARY AND WATER COMMISSION: DELIVERIES OF WATERS ALLOTTED TO THE UNITED STATES UNDER ARTICLE 4 OF THE UNITED STATES - MEXICO WATER TREATY OF 1944 2 (April 2002) [hereinafter *Deliveries of Water Allotted*].

92. *Id.* at 2.

93. *Id.* at 2-3.

94. *Id.* at 3.

95. IBWC, UPDATE OF THE HYDROLOGIC, CLIMATOLOGIC, STORAGE AND RUNOFF DATA FOR THE UNITED STATES IN THE MEXICAN PORTION OF THE RIO GRANDE BASIN: OCTOBER 1992-SEPTEMBER 2001 2-3 (April 2002) [hereinafter *IBWC Update*].v

96. *Id.* at 2.

97. LAURA BROCK, MARY E. KELLY & KAREN CHAPMAN, TEX. CTR. FOR POLICY STUDIES, LEGAL & INSTITUTIONAL FRAMEWORK FOR RESTORING INSTREAM FLOWS IN THE RIO

For the 1992 to 1997 and 1997 to 2002 five-year cycle periods, however, Mexico claimed that drought conditions prevented it from delivering the amounts of Rio Grande water specified in the 1944 Rivers Treaty.<sup>98</sup> There is conflicting evidence as to whether Mexico's reduced delivery of Rio Grande water was due entirely to hydrological drought considerations, or whether such reductions were also due in part to increasing demands for Rio Grande water by farmers and cities in Baja's Mexicali Valley. An IBWC report concluded that rainfall in the Rio Grande tributaries during the 1993 to 1999 period was not "appreciably below normal," despite a finding that "below-average rainfall conditions occurred in each of the tributary watersheds during several of the years since 1993."<sup>99</sup> The same report also stated that rainfall in the Rio Conchos Basin, the major Rio Grande tributary, was about fifty-five percent of normal in 1994 and about seventy percent of normal in 1995, while relatively normal in 1993, 1996, and 1997.<sup>100</sup> Another IBWC report states that in 1999, the Rio Conchos Basin and Salado Basin reservoirs were at twenty-six percent and eleven percent of storage capacity, respectively.<sup>101</sup> The average rainfall for the Rio Conchos Basin between 1995 and 1999 was the lowest it had been since the late 1940s and early 1950s.<sup>102</sup> Crop losses in Mexico in 1995 to 1996 were estimated at 600,000 acres of sorghum, corn, bean, and wheat, while Texas citrus sugar cane and vegetable growers in the lower Rio Grande region also suffered crop loss.<sup>103</sup> Given these accounts, it is difficult to ascertain precisely whether hydrological conditions prevented Mexico from meeting its delivery obligations.

Mexico also asserted that sedimentation in the storage reservoirs had reduced storage capacity and thus prevented it from potentially releasing water to fulfill its obligations.<sup>104</sup> This reduced storage capacity affected how quickly Mexico could practically "pay back" the water debt it had begun accumulating. The 1944 Rivers Treaty does not offer a clear timeframe for when an accumulated water debt needs to be paid back, nor does it indicate whether Mexico is entitled to hold enough water in its reservoirs to meet its own water

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GRANDE: FORT QUITMAN TO AMISTAD 24 (March 2001) [hereinafter *Legal and Institutional Framework*]; Kelly, *supra* note 1, at 139; MARY E. KELLY, TEX. CTR. FOR POLICY STUDIES, THE RIO CONCHOS: A PRELIMINARY OVERVIEW 24 (2001), available at <http://www.texascenter.org/publications/rioconchos.pdf> [hereinafter *The Rio Conchos*].

98. Krza, *supra* note 7; MARY E. KELLY & KAREN CHAPMAN, TEX. CTR. FOR POLICY STUDIES, SHARING THE WATERS: U.S. AND MEXICO MUST COOPERATE 1 (May 2002) (stating that it was not practical for Mexico to "rapidly" repay its deficit to the U.S.); *Primer*, *supra* note 9, at 8, 13.

99. *IBWC Update*, *supra* note 95, at 7.

100. *Id.* at Figure 11.

101. *Deliveries of Waters Allotted*, *supra* note 91, at 4.

102. Kelly, *supra* note 1, at 126, Figure 4, 139; *The Rio Conchos*, *supra* note 97, at Figure 5, 25. "For example, the average annual amount of water entering the La Boquilla reservoir in the period 1935-1992 was . . . 1.043MAF; during the drought period of 1993 to 1999, it was . . . 0.699MAF. *Id.* at 8.

103. Kelly, *supra* note 1, at 125.

104. *Legal & Institutional Framework*, *supra* note 97, at 24.

demands in times of drought. It also does not specify whether, under drought conditions, Mexico has the right to delay a "pay back" as long as it delivers the required amounts at some point within a subsequent five-year cycle.

The 1992 to 1997 cycle ended with a deficit of 1,023,849 af.<sup>105</sup> Relying on the drought provisions of the 1944 Rivers Treaty, Mexico carried this debt over to be repaid in the 1997-2002 cycle. At the end of the 1997-2002 cycle, once again in reliance on the agreement's drought provisions, Mexico's cumulative deficit had grown to 1.3 million af.<sup>106</sup>

Mexico's invocation of its drought rights in the 1992 to 1997 and 1997 to 2002 cycles led to consultations between Mexico and the United States at the IBWC to resolve how and when Mexico would pay back the water debt that it had accumulated. IBWC proceedings then led to high-level discussions between the federal Mexican and United States governments. In 2003, Mexico and the United States reached an understanding wherein Mexico agreed to deliver 400,000 af – 50,000 more than required in non-drought years under the 1944 Rivers Treaty – by the end of the cycle year ending in October 2004. The 2003 agreement made significant progress on the water debt, and by October 2004 Mexico had reduced its deficit to 716,670 af for Rio Grande deliveries to the United States.<sup>107</sup>

With the IBWC's assistance, Mexico and the United States continued to work towards a more complete and permanent resolution. On March 10, 2005, the IBWC issued a press release announcing that such a resolution had been reached.<sup>108</sup> The IBWC press release was entitled *USIBWC Commissioner Announces Resolution of Mexico's Rio Grande Water Debt* and explained:

Commissioner Arturo Q. Duran of the United States Section of the International Boundary and Water Commission (USIBWC) welcomed the announcement made by Secretary of State Rice in Mexico City today that the United States and Mexico have reached an understanding that will effectively eliminate Mexico's Rio Grande water debt by the end of this water year (September 30, 2005). Resolution of the water debt has been a top priority for President George W. Bush due to the impacts on the Lower Rio Grande communities in Texas and the ramifications for compliance with the 1944 Water Treaty . . .

The understanding, based on the recommendation of Duran and his counterpart, Commissioner Arturo Herrera Solis of the Mexican Section of the Commission,

105. *IBWC Update*, *supra* note 95, at 3.

106. OFFICE OF THE SPOKESMAN FOR THE U.S. DEPT. OF STATE, WATER DEBT, FACT SHEET (March 10, 2005)[hereinafter *Water Debt*].

107. Press Release, USIBWC, USIBWC Commissioners Announces Resolution of Mexico's Rio Grande Water Debt (March 10, 2005) [hereinafter *USIBWC Press Release*], available at <http://www.ibwc.state.gov/PAO/CURPRESS/2005/WaterDelFinalWeb.pdf>. This progress, however, did not satisfy some of the stakeholders in Texas, including Texas Agricultural Commissioner Susan Combs. Combs urged the federal U.S. government to halt Colorado River water deliveries and all other foreign aid to Mexico until full restitution was made. Clint Shields, *H2owe: South Texas Area Thirsty for Water from Mexico*, FISCAL NOTES, October 2003, available at <http://www.riograndewaterplan.org/H2owe.php>. Combs declared: "It is time to look at reprisals, and I believe that all options should be on the table." *Id.*

108. *USIBWC Press Release*, *supra* note 107.

provides for water transfers as well as additional deliveries in order to pay off the entire debt . . .

Based on implementation of the understandings reached, the United States and Mexico will consider that Mexico's water debt is completely eliminated.<sup>109</sup>

On March 10, 2005, at the Mexico City meeting where the resolution was reached, United States Secretary of State Condoleezza Rice remarked: "I am pleased that we have reached a mutual understanding on the transfer of a sum of water that will cover Mexico's debt to the United States under our 1944 Water Treaty, thus ensuring continued cooperation in the management of precious natural resources to the mutual benefit of both economies."<sup>110</sup>

The IBWC-brokered resolution between Mexico and the United States was silent, however, in terms of whether or how the resolution might affect the Texans' pending NAFTA water claim against Mexico.

### III.

#### NAFTA'S CHAPTER 11:

#### EXPANSIVE PROTECTIONS FOR FOREIGN PRIVATE INVESTORS

Many bilateral investment treaties protect foreign investors against direct appropriation by host countries. The provisions of NAFTA's Chapter 11, however, significantly expanded the traditional investor protections against appropriation in existing bilateral investment agreements.<sup>111</sup>

In recent years, a considerable body of scholarly legal work has been undertaken to track the implementation and operation of NAFTA's Chapter 11. This article will not attempt to duplicate or comprehensively analyze these works but, rather, will point to the controversial nature of Chapter 11. Generally, critics of Chapter 11 take issue with its broad definitions of investment and appropriation, its dispute resolution mechanisms, and its impact on domestic regulation.

At the outset, it is important to draw a distinction between the basis for the environmental critiques of NAFTA Chapter 11 specifically and the basis for environmental critiques of trade liberalization in general. They are not one and the same, despite the fact that some of the same groups and stakeholders that have criticized NAFTA Chapter 11 have also raised questions about the environmental impacts of the broader international trade liberalization agenda. As John Echeverria, Executive Director of the Georgetown Environmental Law & Policy Institute, wrote in a 2003 article in *THE ENVIRONMENTAL FORUM*:

The significance of Chapter 11 has been difficult for the public and environmental policy experts alike to grasp – in large part because it is one

109. *Id.*

110. *Water Debt*, *supra* note 105.

111. Public Citizen, *NAFTA's Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005*, 1-3 (Feb. 2005) [hereinafter *NAFTA's Threat*]; *Private Rights*, *supra* note 3, at 7-8.



component of a larger agreement focused on trade. Not surprisingly, criticism of NAFTA Chapter 11 has been confused with opposition to free trade policies (such as reductions in tariffs), with supporters of Chapter 11 characterizing criticism of Chapter 11 as an anti-free trade position. In fact, some environmental groups criticize both free trade policies and the investor-state litigation process. In terms of substantive law and policy, however, the debate over the merits of Chapter 11 is entirely distinct from the debate over the merits of reducing barriers to trade in goods and services. One can be a free trader, and still be very concerned about Chapter 11.<sup>112</sup>

The distinction noted by Echeverria explains why politicians in the United States who are generally pro-NAFTA and pro-trade liberalization have sought to restrict the scope of NAFTA Chapter 11. As Lori Wallach, an attorney with Public Citizen, observed, an amendment put forth in 2004 by United States Senator John Kerry reflected an effort to limit NAFTA's investor-to-state claim process:

Right now, in the context of the fast-track authority debate in Congress, there is a group of pro-NAFTA, pro-free trade, and pro-fast-track senators and congressmen who are in favor of a fundamental pruning of the investor-to-state substantive and procedural rights, to address what they see as major flaws with the existing rules. Ironically, if you would ask Senator Kerry, he would say that he sees this as saving NAFTA from itself.

...

[Senator Kerry] sees the issue as kind of a metastasizing tumor in NAFTA; that if he does not put some boundaries on it, it is going to take down the whole notion of trade. . . .<sup>113</sup>

In highlighting the distinction between more focused environmental concerns about NAFTA Chapter 11 and broader environmental concerns about trade liberalization, we are not suggesting that the latter concerns do not merit serious consideration. Rather, we note the distinction here to emphasize that the debate over the particular merits and performance of NAFTA Chapter 11 has at times been distorted and misunderstood because of its relation to the larger environmental debate over trade liberalization.

#### *A. Chapter 11's Definition of Investment*

NAFTA's Chapter 11 protects investors from each NAFTA signatory country, and investments from the economic effects of certain government measures. Because Chapter 11's protections only apply to investors, its definition of "investment" is pivotal. Under NAFTA, "investment" means:

(a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the

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112. John D. Echeverria, *The Real Contract on America*, THE ENVIRONMENTAL FORUM, July/Aug. 2003, at 28, 31.

113. *Roundtable Discussion on Domestic Challenges if Multilateral Investment Treaties are Interpreted to Expand the Compensation Requirements for Regulatory Expropriations Beyond a Signatory State's Domestic Law*, 11 N.Y.U. ENVTL. L.J. 208, 246 (2002) [hereinafter *Roundtable Discussion*].

original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise; (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise; (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d); (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.<sup>114</sup>

NAFTA also clarifies that the following categories of economic interest do not qualify as an investment for the purposes of Chapter 11's protection:

(i) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or (j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h) . . . "<sup>115</sup>

Notwithstanding NAFTA Chapter 11's list of those interests that do not qualify as an "investment," the chapter has been criticized for its ambiguous and potentially broad definition.<sup>116</sup> For instance, without further guidance, it is unclear what types of economic activities/relationships are covered (or not covered) by "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise," property "acquired in the expectation or used for the purpose of economic benefit or other business purposes," or "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory." An expansive reading of this language could potentially cover almost any economic undertaking where a private investor has the reasonable expectation of earning profits.<sup>117</sup>

### *B. Measures Deemed Tantamount to Expropriation Under NAFTA*

Article 1110 of NAFTA prohibits a Party from directly or indirectly nationalizing or expropriating<sup>118</sup> "an investment of an investor of another Party

114. North American Free Trade Agreement, U.S.-Can.-Mex, art. 1139, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

115. *Id.*

116. Echeverria, *supra* note 112, at 35.

117. *Id.* at 33 (stating "[Chapter 11] authorizes investors to challenge virtually any kind of government action, at any level, that impinges on the profitability of investments").

118. "NAFTA provides little guidance concerning the meaning of 'expropriation' or 'nationalization.' Neither term is defined in the agreement." Kevin Banks, *NAFTA's Article 1110 – Can Regulation be Expropriation*, 5 NAFTA L. & BUS. REV. AM. 499, 510 (1999); *see also*

in its territory or tak[ing] a measure *tantamount* to nationalization or expropriation of such investment (expropriation), except: (a) for a public purpose; (b) on a nondiscriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs two through six.”<sup>119</sup> Where an expropriation does occur, compensation is determined by the fair market value of the investment.<sup>120</sup>

Much of the criticism of Article 1110 has focused on the uncertainties as to the scope and meaning of the phrase “tantamount to nationalization or expropriation.” The use of the term “tantamount” in this context suggests that compensation may be required for government acts other than nationalization and expropriation of assets, but Article 110 does not indicate what these other acts might entail. For example, what if a member state adopts a new regulation prohibiting the sale of a previously permitted product due to new information about public health risks? Or, what if a member state adopts a new regulation prohibiting the export of a natural resource due to domestic supply concerns? Such regulatory actions could conceivably give rise to claims by adversely affected foreign investors on the grounds that such measures are “tantamount” to nationalization or expropriation.

### C. Chapter 11's Treatment of Dispute Settlement Mechanisms

The absence of provisions in NAFTA Chapter 11 that ensure adequate mechanisms for public access and public participation has been widely criticized.<sup>121</sup> To settle disputes, Chapter 11 allows a private investor to initiate arbitration directly against a Party. This investor-to-state dispute resolution is contrasted by the state-to-state model set forth in the 1944 Rivers Treaty. The party submitting the claim to arbitration may select from three sets of rules to

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Francisco Orrego Vicuna, *Regulatory Expropriations in International Law: Carlos Calvo, Honorary NAFTA Citizen*, 11 N.Y.U. ENVTL. L.J. 19, 28-29 (2002) (stating that an abstract definition distinguishing between regulatory acts that are permissible from those that amount to expropriation “is probably unworkable” and that there is “no single view on the matter”); Ethan Shenkman, *Could Principles of Fifth Amendment Takings Jurisprudence be Helpful in Analyzing Regulatory Expropriation Claims Under International Law*, 11 N.Y.U. ENVTL. L.J. 174, 177 (2002) (stating that some tribunals have looked to customary international law to give meaning to the term “expropriation”); Wagner, *supra* note 3, at 517 (stating that NAFTA does not define “measures tantamount to . . . expropriation”).

119. NAFTA, *supra* note 113, art. 1110 (emphasis added). Although some view the reference to “tantamount” as expanding the concept of expropriation for NAFTA claims, Banks points out that “a measure tantamount to an expropriation is one that is effectively or functionally equivalent to an expropriation.” Banks, *supra* note 117, at 513; see also Shenkman, *supra* note 117, at 177-78 and Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENVTL. L.J. 64, 86.

120. NAFTA, *supra* note 113, art. 1110(2).

121. Echeverria, *supra* note 111, at 28, 37 (stating “The Chapter 11 litigation process accords third parties none of the intervention rights, either by right or as a matter of court discretion, that exist under U.S. court rules. Given the frequency with which government policies relating to environmental issues affect the interests of third parties, and the frequency with which government officials fail to defend third-party interests in environmental cases, intervention rights have proven vital to the enforcement of environmental standards.”).

govern the arbitration: (a) the ICSID Convention,<sup>122</sup> (b) the Additional Facility Rules of the ICSID,<sup>123</sup> or (c) the UNCITRAL Arbitration Rules.<sup>124</sup> The results of Chapter 11 arbitration proceedings are binding on the parties and no procedure for appeal or review is specifically provided.<sup>125</sup> Additionally, Chapter 11 does not expressly provide for public access or public participation in arbitration proceedings, and the findings of the tribunal are only made public if both parties agree.<sup>126</sup>

The Chapter 11 arbitration process is further criticized for how the arbitration panels are comprised. Panelists on NAFTA Chapter 11 arbitration panels are normally selected from a roster comprised of professionals who have expertise in international trade law; they are selected based on their "objectivity, reliability and sound judgment."<sup>127</sup> However, "no particular qualifications [are] specified for a tribunal member."<sup>128</sup> Each party chooses one arbitrator, who by definition is not an independent judge insulated from political pressures, and a third is agreed upon by both parties.<sup>129</sup> However, the role and responsibilities of the arbitrators are uncertain. As Meg Kinear, General Counsel and Director of the Trade Law Bureau for Canada's Department of Foreign Affairs and International Trade, noted during a 2004 symposium on multilateral investment agreements held at New York University School of Law:

[I]s a party-appointed arbitrator meant to be an aggressive advocate of the position of that party? Or are they meant to be at the opposite end of the spectrum – a neutral judge-like character, who simply applies the facts to the law in a neutral way once appointed? Are they something in between? Do they have a responsibility for getting out the position of the party who appointed them, and yet in deciding in a fair and neutral way? There's no guidance in NAFTA about what their role is.<sup>130</sup>

Another criticism of Chapter 11's investor-to-state claim procedure is that it does not provide for the diplomatic balancing of international issues found in state-to-state dispute resolution regimes.<sup>131</sup> Kinear further observed:

In the state-to-state situation there are two states, with a whole panoply of interests between them, political and economic. All of that is relevant to how they

122. ICSID refers to "the Convention on the Settlement of Investment Disputes between State and Nationals of Other States (1966)." The Convention is administered by the World Bank in Washington D.C. *Id.*

123. The Additional Facility Rules of the ICSID are available at <http://www.worldbank.org/icsid/facility/facility.htm>.

124. NAFTA, *supra* note 113, art. 1120; *Roundtable Discussion*, *supra* note 112, at 226.

125. Shenkman, *supra* note 117, at 181; *Private Rights*, *supra* note 3, at 11.

126. *Private Rights*, *supra* note 3, at 11; Wagner, *supra* note 3, at 474, 483.

127. NAFTA, *supra* note 113, art. 2009(2). Typically, panelists are private lawyers. Martin Wagner, *Trading Human Rights for Corporate Profits: Global Trade Policy Weakens Protection for Health, the Environment, RACE, POVERTY AND THE ENVIRONMENT*, Summer 2004, at 26.

128. *Roundtable Discussion*, *supra* note 113, at 227.

129. NAFTA, *supra* note 113, art. 1123; *Private Rights*, *supra* note 3, at 39; *Roundtable Discussion*, *supra* note 112, at 227; Vicki Been, *Does an International "Regulatory Takings" Doctrine Make Sense*, 11 N.Y.U. ENVTL. L.J. 49, 60 (2002).

130. *Roundtable Discussion*, *supra* note 113, at 227.

131. *Id.* at 214, 228.

come into the dispute, and the fact that they want to keep and preserve a certain continuing relationship. The interpretation of an obligation that a state, as a signatory to a treaty, puts forward one day may well rebound on them the next day. So there is a real interest in having a comprehensive, logical, and systematic approach to the interpretation of the substantive obligations. That is not necessarily there in the investor-state context.<sup>132</sup>

Lori Wallach, another panelist at the 2004 symposium, echoed Kinear's point:

[In the investor-to-state model] it is a private party with a particular interest—stockowners' profits, for instance—trying to have an interpretation about their narrow interests, relative to a whole set of public issues.<sup>133</sup>

In a similar vein, Martin Wagner of the environmental group Earthjustice has commented:

[I]t is clear that the procedure surrounding the investor-state process is one-sided, lacks transparency and does not have the safeguards to the public provided by domestic court processes. Further, the basic legitimacy of the process is challenged by the ability of foreign investors to bypass local laws and legal processes in favor of international rights and processes domestic businesses do not enjoy . . . In short, the investor-state process as currently designed and implemented is shockingly unsuited to the task of balancing private rights against public goods in a legitimate and constructive manner.<sup>134</sup>

#### *D. Chapter 11 As a Sword Instead of a Shield*

Another source of controversy regarding Chapter 11 concerns the threat of Chapter 11 arbitration claims being used to preemptively attack domestic regulatory standard-setting and enforcement decisions rather than as a protective defense.<sup>135</sup>

Gustavo Alanis-Ortega, President of the Mexican Environmental Law Center (Centro Mexicano de Derecho Ambiental), notes that the perceived negative impacts of Chapter 11 include "the chilling effect on regulators and the use of its provisions as a weapon by some multinational corporations against environmental protection . . ."<sup>136</sup> The Joint Public Advisory Committee of the North American Commission for Environmental Cooperation reached the same conclusion in a briefing paper: "[T]he provisions [of Chapter 11] have gone from being tools of last-resort protection from unfair treatment to weapons of choice for preventing or attacking unfavorable regulations – they have gone from shield to sword."<sup>137</sup>

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132. *Id.* at 228.

133. *Id.* at 234.

134. *Private Rights*, *supra* note 3, at 46.

135. *Id.* at 16; Wagner, *supra* note 3, at 466 (stating that it is "unprecedented" for companies to use protections against foreign expropriation to challenge government measures protecting health and the environment); *NAFTA's Threat*, *supra* note 111, at 79.

136. Gustavo Alanis-Ortega, *Citizens Panel Sees Faults and Suggests Reform*, THE ENVIRONMENTAL FORUM, July-Aug. 2003, at 38.

137. INT'L INST. FOR SUSTAINABLE DEV., *NAFTA'S CHAPTER 11 AND THE ENVIRONMENT: A BRIEFING PAPER FOR THE CEC'S JOINT PUBLIC ADVISORY COMMITTEE* (June 2002).

Aaron Cosbey, environmental economist and senior advisor for trade and investment at the International Institute for Sustainable Development in Winnipeg, noted in a 2005 essay:

The substantive provisions of Chapter 11 are being tested in the early years of the agreement by imaginative claimants who seek to stretch its intended interpretations to afford ever greater protections for investors. Those protections may come at the expense of other public policy objectives . . . Moreover, as such claims notch up victories, the mere *threat* of a Chapter 11 suit may constitute an attractive weapon in the arsenal of firms looking to forestall or weaken regulations that affect them.<sup>138</sup>

According to Martin Wagner, the threat of a Chapter 11 arbitration claim is “now a routine lobbying instrument.”<sup>139</sup> This lobbying instrument is particularly strong because claimants are not required to make public the notice of intent to submit a claim to arbitration, and thus, the claims receive limited public scrutiny.<sup>140</sup> Furthermore, not only have investors claimed that government measures violated Chapter 11’s investment rules, but some now have claimed that “when a government breaches [any] international obligations, it [] also breaches Chapter 11’s obligation to treat investors in accordance with minimum international standards.”<sup>141</sup> Observers are concerned that the threat of liability for government regulation will induce governments to back off on environmental regulation and enforcement.<sup>142</sup>

#### *E. Catalyst For IISD Model Agreement*

Dissatisfaction with the substantive and procedural provisions of NAFTA’s Chapter 11 (as well as other current and proposed international investment treaties) has prompted proposals for new rules and dispute resolution mechanisms that should be included in multilateral investment agreements. The Canada-based International Institute for Sustainable Development (“IISD”) released one of the most thoughtful and comprehensive of these proposals in April 2005. The *IISD Model International Agreement on Investment for Sustainable Development* (“*IISD Model Agreement*”) contains the types of

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138. Aaron Cosbey, *The Road to Hell? Investor Protections in NAFTA’s Chapter 11*, in INTERNATIONAL INVESTMENT FOR SUSTAINABLE DEVELOPMENT 168 (Lyuba Zarsky ed., Earthscan 2005) (italics in original).

139. *Private Rights*, *supra* note 3, at 16.

140. *Id.* at 42.

141. *Id.* at 17. Section 1105(1) of NAFTA states that “each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

142. *Roundtable Discussion*, *supra* note 113, at 220, 234 (stating that the threat of paying for Chapter 11 claims is “the sword of Damocles of the prospect of the federal treasury of a particular government being really put at risk by a particular company’s claim. Frankly, this has more of a chilling effect than the prospect of actual damages being paid out. So you have the *Ethyl* case in Canada, where Canada ultimately reversed its ban on the gasoline additive MMT and paid a small amount of compensation to avoid the overhanging sword of the huge threatened compensation”); *NAFTA’s Threat*, *supra* note 111, at 81 (stating that successive Chapter 11 NAFTA claims will “chill public interest policies.”).

clarifying and balancing provisions that many have alleged the text of NAFTA's Chapter 11 now lacks and needs. The introduction to the *IISD Model Agreement* explains:

The current model for investment agreement was developed in the political context of the 1950s and 1960s – a period characterized by fear of the spread of communism and concern for the impacts of decolonization on business interests in newly independent developing countries. Given this origin, the initial agreements were singularly focused on just one aspect of the investment process: the protection of foreign capital and investments . . .

...

[T]he arbitration process developed to address disputes under the agreements – with the primary focus on investor-state arbitrations – turned out in recent years to be rife with conflicts of interest, and failed to meet the same basic criteria of legitimacy, transparency and accountability applied to the national dispute settlement processes it now routinely displaces . . .

...

Whatever its merits at the time, the model for IIAs [international investment agreements] developed 50 years ago no longer meets the needs of the global economy in the 21<sup>st</sup> century.<sup>143</sup>

A summary of all the provisions in the *IISD Model Agreement* is beyond the scope of this article, but the provisions that pertain to matters at issue in the Texans' NAFTA claim concerning Rio Grande water resources merit our attention.

First, in terms of the definition of an "investment," Article 2(C)(v)(b) of the *IISD Model Agreement* requires that "there is a significant physical presence of the investment in the host state."<sup>144</sup> This "significant physical presence" requirement is also bolstered by Article 4(2), which provides that "A Party may deny the benefits of this Agreement to an investor of another party . . . if the enterprise has no substantial business activities in the territory of the other Party. . ."<sup>145</sup>

Second, the *IISD Model Agreement* seeks to articulate a more balanced legal relationship between the goals of investor protection and sustainable development. Article 14(D) states that "Investors and investments shall not manage or operate the investments in a manner that circumvents international environmental, labor and human rights obligations to which the host state and/or home state are Parties"<sup>146</sup> and Article 18(E) provides that "A host state may initiate a counterclaim before any tribunal established pursuant to this Agreement for damages resulting from an alleged breach of this Agreement."<sup>147</sup> Additionally, Article 25(B) establishes that "In accordance with customary

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143. INT'L INST. FOR SUSTAINABLE DEV., *IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT* v (2005).

144. *Id.* at 2.

145. *Id.* at 4.

146. *Id.* at 10.

147. *Id.* at 11.

international law and other general principles of international law, host states have the right to take regulatory or other measures to ensure that development in their territory is consistent with the goals and principles of sustainable development”<sup>148</sup> and Article 34(C) states that “The Parties hereby re-affirm their obligations under international environmental and human rights agreements to which they are a Party.”<sup>149</sup>

Third, the *IISD Model Agreement* contains several recommendations to improve dispute resolution mechanisms. Article 40 calls for the creation of a permanent and independent Dispute Settlement Body (DSB), and provides the DSB with the sole authority to select panelists to hear dispute resolution cases.<sup>150</sup> Article 40(h) calls for the creation of an appellate division within the DSB, composed of full-time individuals with recognized expertise in the “matters covered by this Agreement” (which includes sustainable development law and policies).<sup>151</sup> Article 46(A) requires that all documents relating to the dispute resolution process (including “pleadings, evidence and decisions”) shall be available to the public.<sup>152</sup> Finally, Article 48 is entitled “Governing law in disputes” and 48(k) provides in pertinent part that “When a claim is submitted to a panel or an appeal tribunal, it shall be decided in accordance with this Agreement, national law of the host state, and the general principles of international law.”<sup>153</sup>

It remains to be seen what impact the *IISD Model Agreement* will have on the implementation of NAFTA’s Chapter 11 or on negotiations over other multilateral investment treaties. Regardless of its potential future impact, however, the text of the *IISD Model Agreement* is useful in itself for identifying the ways that existing multilateral investment treaties and provisions could be interpreted or revised to respond to human health, environmental protection and public accountability concerns.

#### IV.

##### TEXANS’ NAFTA CLAIM FOR UNDELIVERED RIO GRANDE WATER

The Texans submitted their notice of intent to seek arbitration under Chapter 11 on August 27, 2004 and later submitted their request for arbitration on January 19, 2005.<sup>154</sup> Pursuant to the arbitration options set forth in Chapter

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148. *Id.* at 14.

149. *Id.* at 18.

150. *Id.* at 21.

151. *Id.*

152. *Id.* at 24.

153. *Id.* at 25.

154. Texans’ Notice of Intent to Submit a Claim to Arbitration Under Section B, Chapter 11 of the North American Free Trade Agreement (2004) [hereinafter *NOI*], <http://naftaclaims.com/Disputes/Mexico/Texas/TexasNoticeOfIntent.pdf>. Texans’ Request for Arbitration Under the Rules Governing the Additional Facility for the Administration of Proceedings by the International Centre for Settlement of Investment Disputes and the North American Free Trade Agreement between Bayview Irrigation District et al., and The United Mexican States (2005)



11, the Texans elected to proceed under the Additional Facility Rules of the ICSID in their request for arbitration.<sup>155</sup>

The Texans base their claim on Mexico's alleged violations of Articles 1102, 1105, and 1110 of NAFTA. The Texans assert that they possess the "fully adjudicated exclusive legal right to withdraw 1,227,596 acre-feet of water annually from the lower Rio Grande River"<sup>156</sup> and allege the following to support their claim that such claimed rights were damaged:

Under the 1944 Rivers Treaty, the United States is entitled to receive one-third of the Rio Grande's flow in the main channel, but such one-third must not be less than 350,000 af annually.<sup>157</sup>

From 1992 to 1997, Mexico delivered only 726,151 acre-feet of water, 1,023,849 less than required under the 1944 Rivers Treaty. During the same period, the Texans allege nearly 4,350,000 af of water was stored in 12 Mexican reservoirs to meet Mexico's own demands; and through October of 1999, another 5,900,000 af of water was stored in the reservoirs.<sup>158</sup>

By diverting the water that belonged to the Texans, the Texans allege that Mexico has thereby nationalized or expropriated, or taken a measure tantamount to nationalization or expropriation, of the Texans' investment, without compensation and due process in violation of Article 1110 of NAFTA (Article 1110 claim).<sup>159</sup>

From 1997 to 2000, Mexico delivered only 407,088 af of water to the United States and by October 2002, Mexico's total deficit was 1,476,181 af.<sup>160</sup>

From 1992 to 2002, Mexico captured and diverted "an investment (approximately 1,013,056 af of irrigation water) located in Mexico and owned by Claimants."<sup>161</sup> By diverting this water for use by Mexican farmers, Mexico increased its agricultural production and harmed the Claimants' agricultural production. The Texans allege that in doing so Mexico treated United States investors' investments less favorably than it treated its own investors' investments and thereby violated Article 1102 of NAFTA (Article 1102 claim).<sup>162</sup>

Satellite photos taken by the Texas Agriculture Commissioner of Mexican reservoirs and irrigated cropland show that Mexico possessed sufficient water to fulfill its Treaty obligations.<sup>163</sup>

Based on these allegations and arguments, the Texans contend that Mexico had adequate water to fulfill its water delivery obligations under the 1944 Rivers Treaty but simply chose not to deliver it.

The thrust of the Texans' Chapter 11 claim is the allegation that they are

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[hereinafter *Notice of Arbitration*],

[http://naftaclaims.com/Disputes/Mexico/Texas/TexasClaims\\_NOA-19-01-05.pdf](http://naftaclaims.com/Disputes/Mexico/Texas/TexasClaims_NOA-19-01-05.pdf).

155. *Notice of Arbitration*, *supra* note 154, at 3.

156. *NOI*, *supra* note 153, at 1.

157. *Id.* at 4-5. Throughout the rest of the NOI, the Texans assert they are the legal owners of the right to divert 1,013,056 af of water from the Rio Grande.

158. *Id.* at 6; *Notice of Arbitration*, *supra* note 154, at 36.

159. *NOI*, *supra* note 154, at 4.

160. *Id.* at 7; *Notice of Arbitration*, *supra* note 154, at 36.

161. *NOI*, *supra* note 154, at 3.

162. *Id.*; *Notice of Arbitration*, *supra* note 154, at 32-33.

163. *Id.*; *NOI*, *supra* note 153, at 7.

the legal owners of 1,219,521 af of irrigation water that was wrongfully diverted from the Rio Grande by Mexico, "the expropriation and diversion of which has severely damaged the ability of Texans and the farmers they represent to produce crops."<sup>164</sup> The Texans claim they possess an "integrated investment" under the definition of Article 1139(g) of NAFTA that allegedly includes:<sup>165</sup>

[R]ights to water located in Mexico; facilities to store and distribute this water for irrigation and domestic consumption; irrigated fields and farms; farm buildings and machinery; and ongoing irrigated agricultural businesses. Claimants have invested millions of dollars in an integrated water delivery system, including pumps, aqueducts, canals, other facilities for the storage and conveyance of their water to the land on which it is used . . . Each Claimant's Investment is entirely predicated on this right to receive water located in Mexican tributaries.<sup>166</sup>

Between 1992 and 2002, the Texans allege that "nearly \$1 billion has been lost in decreased business activity and that 30,000 jobs have been precluded."<sup>167</sup> The value of the irrigation water at issue was estimated to be worth \$350 to \$730 per af.<sup>168</sup> Allowing for losses of 25 percent for evaporation, diversion, and transportation, the total loss for depriving the Texans of 914,641 af of water (1,219,521 af minus 25 percent equals 914,641) at this estimated value ranges from \$320,124,350 to \$667,687,930.<sup>169</sup> As relief, the Texans seek compensation for the expropriated water (\$320,124,350 to \$667,687,930) or the economic losses caused by Mexico's less favorable treatment of the Texans' investments (\$667,687,930), including interest from October 2002 and costs.<sup>170</sup>

#### *A. Tulare Lake as Prelude*

Later in this article we will analyze the merits of the Texans' water claim against Mexico under Chapter 11 and the 1944 Rivers Treaty. We will also consider the relation of the Texans' NAFTA water claim to the parallel IBWC proceedings on the question of Mexico's compliance with its Rio Grande water delivery obligations under the 1944 Rivers Treaty. However, prior to this analysis, some discussion of recent developments in United States law on "takings" is required, for these domestic legal developments served as a catalyst for and precursor to the filing of the Texans' NAFTA water claim against Mexico.

Two of the three attorneys representing the Texans in their NAFTA water

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164. *Id.*; *NOI*, *supra* note 154, at 7.

165. *Notice of Arbitration*, *supra* note 154, at 27.

166. *Id.*

167. *NOI*, *supra* note 154, at 7.

168. *Id.* at 8; *Notice of Arbitration*, *supra* note 153, at 39. These figures are based on John R. C. Robinson's study *Alternative Approaches to Estimate the Impact of Irrigation Water Shortage on Rio Grande Valley Agriculture* (May 17, 2002). Robinson is an associate economics professor at Texas A&M University.

169. *Notice of Arbitration*, *supra* note 154, at 39. Because Claimants originally alleged they were the owners of 1,013,056 af, they originally alleged damages in the amount of \$265,927,200 to \$554,648,150. *NOI*, *supra* note 154, at 8.

170. *Notice of Arbitration*, *supra* note 153, at 39.

claim against Mexico previously served as lead counsel for California farming interests in a domestic lawsuit against the United States that alleged the appropriation of water by the federal government without adequate compensation. This lawsuit led by Nancie Marzulla and Roger Marzulla resulted in a 2001 decision by the United States Court of Federal Claims in the case of *Tulare Lake Basin Storage District v. United States* ("Tulare Lake").<sup>171</sup> In examining the results of the *Tulare Lake* litigation, one can find the strategic genesis of the subsequent Rio Grande NAFTA litigation.

In *Tulare Lake*, the federal National Marine Fisheries Service ("NMFS") had issued a biological opinion concluding that the operation of California's State Water Project ("SWP") and the federal Central Valley Project ("CVP") would jeopardize the existence of the Delta smelt and Chinook salmon, both protected under the federal Endangered Species Act ("ESA"). NMFS issued reasonable and prudent alternatives ("RPAs") to avoid jeopardizing the species. A 1985 agreement requires the California Department of Water Resources ("DWR") to coordinate its operation of the SWP with the federal operation of the CVP to ensure compliance with the ESA.<sup>172</sup> Due to this agreement, DWR's operation of the SWP is subject to the consultation requirements of the ESA. Here, DWR was required to implement the RPAs adopted by NMFS, and this implementation reduced the amount of water delivered to the SWP and CVP, which in turn resulted in a reduction of water availability of approximately 0.11% and 2.92% for Tulare Lake Basin Water Storage District and Kern County Water Agency, respectively.<sup>173</sup> The plaintiffs themselves did not possess water right permits, but held delivery contracts with DWR who was the permit holder.<sup>174</sup>

The plaintiffs in *Tulare Lake* alleged that the reduction in water deliveries amounted to a taking of property under the Fifth Amendment of the United States Constitution.<sup>175</sup> The United States argued, *inter alia*, that plaintiffs' water rights were subject to limitations such as the public trust and reasonable use doctrines under California law that allowed for the protection of fish and wildlife.<sup>176</sup> The United States also argued that the delivery reductions reflected these limitations, and that by implementing background principles of state law, compensation was unnecessary.<sup>177</sup>

In a 2001 decision, Judge John Weise of the United States Court of Federal Claims held that the action by the federal government constituted a taking of the

171. *Tulare Lake*, *supra* note 5.

172. Brian Gray, *The Property Right in Water*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1, 5 (2002); Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act and the Fifth Amendment*, 32 ENVTL. L. 551, 558-59 (2002).

173. Gray, *supra* note 172, at 5-6; Benson, *supra* note 172, at 560; Brittany K.T. Kauffman, Note, *What Remains of the Endangered Species Act and Western Water Rights After Tulare Lake Basin Water Storage District v. United States?*, 74 U. Colo. L. Rev. 837, 870, 875 (2003).

174. Benson, *supra* note 172, at 560; Kauffman, *supra* note 173, at 864.

175. *Tulare Lake*, *supra* note 5, at 314.

176. *Id.* at 320.

177. *Id.* at 317, 320.

plaintiffs' water rights occurred by the Federal Government and thus compensation was due.<sup>178</sup> Specifically, the court held that a physical taking had occurred because the plaintiffs lost their right to use the water, which amounted to a "complete extinction of all value" of the water right.<sup>179</sup> Because a physical taking had occurred, the United States Court of Claims found that compensation was required regardless of the degree of intrusion on the right.<sup>180</sup>

The 2001 *Tulare Lake* has proven controversial for several reasons. First, there are concerns that high-level staff involved in the dispute within the administration of United States President George W. Bush were highly sympathetic to the California farming plaintiffs' takings claims, and therefore not particularly troubled by the prospect of losing the case. For example, Gale Norton, the then Secretary of the United States Department of the Interior (which oversees NMFS' implementation of the ESA and the federal Bureau of Reclamation's operation of the CVP) under President Bush, has long advocated for an expansive interpretation of property rights and takings claims and a restricted interpretation of the ESA.<sup>181</sup> Similarly, the attorney that represented the United States in the *Tulare Lake* litigation, Assistant Attorney General Thomas Sansonetti, spent much of his earlier legal career representing industries seeking to limit environmental protection regulation such as the ESA.<sup>182</sup>

Gale Norton's and Thomas Sansonetti's role in the dispute did little to instill confidence among environmentalists that the United States would mount an effective and vigorous defense in the *Tulare Lake* litigation. Following the 2001 ruling, lawyers for the National Oceanic and Atmospheric Administration, the California Attorney General, the California State Water Resources Control Board, and a roster of prominent water law professors all urged the Bush Administration to appeal the decision.<sup>183</sup> Instead of appealing the *Tulare Lake* decision, the Bush Administration chose to settle with the plaintiffs in late 2004 for \$16.7 million.<sup>184</sup> The settlement was not viewed favorably by United States Congressman George Miller of California, former chairman of the House of Representatives Resources Committee: "[T]he Bush Administration had no reason to settle this case . . . [U]nfortunately, this is part of a larger pattern. No matter what the situation – a changing economy, severe drought, environmental crisis – the Bush Administration believes that the country's largest farms have a right to all the water they desire."<sup>185</sup>

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178. *Id.* at 314, 324.

179. *Id.* at 318-20.

180. *Id.* at 319.

181. John D. Echeverria, *Nominee's Interior Stress*, NAT'L L. J., Jan. 22, 2001.

182. *Bush Appointees Come with Biases*, ATLANTA-CONST. J., Jan. 20, 2002.

183. Mike Taugher, *U.S. Water Pact Makes Big Waves*, CONTRA COSTA TIMES, Jan. 18, 2005; Don Thompson, *Government Agrees to Reimburse District for Water Used to Save Fish*, ASSOCIATED PRESS, Dec. 21, 2004.

184. Press Release, Congressman George Miller, *Tulare Lake Settlement Could Have Devastating Consequences Warns Miller* (Dec. 22, 2004), available at <http://www.house.gov/georgemiller/press/re1122204.html>.

185. *Id.*

Second, there has been extensive scholarly criticism of the analysis relied upon by Judge Weise in his decision in *Tulare Lake*.<sup>186</sup> Brian Gray, a water law professor at the University of California's Hastings College of Law in San Francisco, has presented perhaps the most cogent critique of *Tulare Lake*. In his 2002 article entitled *The Property Right in Water*, Professor Gray states:

Judge Wiese acknowledged that all California water rights are subject to the requirement of reasonable use, the public trust doctrine, and principles of nuisance law, but he rejected the United States' argument that the plaintiffs' rights to water service were limited by these rules . . . 187

These laws "require a complex balancing of interests," Judge Wiese explained, and call for "an exercise of discretion for which this court is not suited . . ."188

In essence, the court decided that an appropriator is legally entitled to engage in (and has property rights to) any conduct that is authorized by its water rights permit or license. This interpretation oversimplifies – and therefore misapprehends – the nature of California water rights . . . 189

By declining to consider the effects of the reasonable use and public trust doctrines on SWP contractors' rights to full water service under conditions that would be likely to jeopardize two species of fish protected by the Endangered Species Act, the Court of Federal Claims thus abjured its first responsibility in a water rights taking case – to determine whether the plaintiffs in fact have 'property' capable of being taken by the government action at issue . . . 190

I have written previously on the history of reasonable use in California and have come to the conclusion that water rights are – and always have been – fragile. Rights of diversion, storage and use that are granted in permits, licenses, pre-1914 appropriative rights, and riparian rights are neither fixed nor vested. The California Supreme Court has long held that a use that was perfectly lawful when first recognized may not be lawful because changing circumstances render the use unreasonable. The changed circumstance may be a new, competing consumptive use of the water or it may be recognition of the cumulative effects of long-standing water uses on water quality, navigation, fisheries and other in situ uses . . . For our purposes, it is adequate simply to emphasize that this historical analysis must take place. If it does not – if the courts compel the government to compensate water users when the government acts to prevent an unreasonable use that is not part of the water right – then water users will receive a windfall.<sup>191</sup>

The points raised by Professor Gray and other critics of the *Tulare Lake* decision later found expression in a subsequent 2005 decision by Judge Francis Allegra of the United States Court of Federal Claims. In the case of *Klamath Irrigation District v. United States* ("Klamath Irrigation"), the Court faced another Fifth Amendment claim brought by Nancie Marzulla and Roger

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186. See Gray, *supra* note 171; Benson, *supra* note 171, at 576 (stating "In short, contrary to the Tulare court's assumption, the plaintiffs did not have a right to a specific amount of water. In California, no one does."); Kauffman, *supra* note 172, at 837; Cori S. Parobek, *Of Farmers' Takes and Fishes' Takings: Fifth Amendment Compensation Claims When the Endangered Species Act and Western Water Rights Collide*, 27 HARV. ENVTL. L. REV. 177 (2003).

187. Gray, *supra* note 172, at 8.

188. *Id.*

189. *Id.* at 9.

190. *Id.* at 11.

191. *Id.* at 16-17.

Marzulla, once again alleging that the federal government's enforcement of the ESA resulted in the uncompensated taking of farmers' property interest in water.<sup>192</sup> This time the farmers at issue were located in Oregon.

Rejecting Judge Wiese's approach, Judge Allegra held that the nature of the Oregon farmers' property interest in Klamath River water was informed by the extent of the farmers' water rights under Oregon water law.<sup>193</sup> He then proceeded to wade into Oregon water law to answer this question. A detailed analysis of the holding in *Klamath Irrigation* is beyond the scope of this article. What is critical, however, is that at the end of his analysis, Judge Allegra found that the farmers had failed to state a viable constitutional Fifth Amendment takings claim, and that it was doubtful whether they were entitled to any compensation under the terms of the contracts with the federal government. In reaching this conclusion, the opinion in *Klamath Irrigation* did much to distance itself from and discredit the previous *Tulare Lake* holding. Judge Allegra held:

In arguing, despite the foregoing, that the Bureau [of Reclamation] effectuated a taking of their contract rights, plaintiffs harken to this court's decision in *Tulare Lake Basin Water Storage District v. United States* [citation omitted] . . . [W]ith all due respect, *Tulare* appears to be wrong on some counts, incomplete in others, and distinguishable, at all events.

For one thing, *Tulare* failed to consider whether the contract rights at issue were limited so as not to preclude enforcement of the ESA. Rather, the court treated the contract rights possessed by the districts essentially as absolute, without adequately considering whether they were limited in the case of water shortage, either by prior contracts, prior appropriations or some other state law principle [citation omitted] . . . Thus, although the court noted that there were agreements between the United States and the State of California creating a coordinated pumping system, it did not examine those agreements to see whether they, like the district contracts here, limited the plaintiffs' rights derivatively. [citation omitted] . . . Rather, it focused on the districts' contracts with state agencies as if they were free-standing. [citation omitted] Nor did the court consider whether the plaintiffs' claimed use of the water violated accepted state doctrines, including those designed to protect fish and wildlife, finding that issue to be reserved exclusively to the state courts. [citation omitted] Because the state courts had not ruled on those issues, this court refused to rule on them as well. As a result, it awarded just compensation for the taking of interests that may well not exist under state law . . . 194

On these counts, this court disagrees with the approach taken in *Tulare* and concludes that decision lends no support to the views espoused by plaintiffs here . . . 195

[T]he court is mindful that [ ] this ruling may disappoint a number of individuals who have long invested effort and expense in developing their lands based on the expectation that the waters of the Klamath Basin would continue to flow, uninterrupted, for irrigation. But, those expectations, no matter how understandable, do not give those landowners any more property rights as against

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192. *Klamath Irrigation*, *supra* note 8.

193. *Id.* at 516-31.

194. *Id.* at 537-38.

195. *Id.* at 538.

the United States, and the application of the Endangered Species Act, than they actually obtained and possess. Like it or not, water rights, though undeniably precious, are subject to the same rules that govern all forms of property – they enjoy no elevated or more protected status.<sup>196</sup>

To the extent that the Texans intended to export aspects of the domestic *Tulare Lake* holding into their international Rio Grande NAFTA claim, this legal strategy is now greatly undermined by the holding in *Klamath Irrigation*. Moreover, as discussed below in section IV(C), there are additional considerations relating to diplomacy and foreign affairs that suggest the approach taken in *Tulare Lake* in regard to a purely domestic dispute would be highly inappropriate in the transborder context of the Mexico-United States Rio Grande dispute.

*B. Merits of Texans' Claim under Chapter 11 and 1944 Rivers Treaty*

A close examination of the relevant provisions of NAFTA Chapter 11 and the 1944 Rivers Treaty reveals that they do not support the Texans' Rio Grande claim against Mexico. The primary hurdle for the Texans will likely be establishing that they possess a quantifiable "investment" in Mexico under the 1944 Rivers Treaty, a prerequisite to establishing any potential claim to compensation under NAFTA Chapter 11.

First, as noted above, the terms of the 1944 Rivers Treaty do not provide Mexico with an unqualified obligation (and the United States with an unqualified right) to receive a specified amount of Rio Grande water in any particular calendar year or even in any particular five-year cycle. Rather, the terms of the 1944 Rivers Treaty specifically contemplate and expressly recognize that it may not be feasible for Mexico to deliver 350,000 af of Rio Grande water in any given year during periods of reduced rainfall. Furthermore, in such drought periods, it may not be feasible for Mexico to deliver a total of 1,750,000 af (average of 350,000 yearly over five years) over the course of any given five-year cycle.<sup>197</sup> The 1944 Rivers Treaty establishes a mechanism by which, when such drought conditions arise, Mexico is permitted to "carry over" the water debt accumulated during a previous five-year cycle for payment into the subsequent five-year cycle.<sup>198</sup> Moreover, the 1944 Rivers Treaty clearly identifies the IBWC as the forum to seek diplomatic resolution of disputes over the occurrence of drought conditions, the amount of any water debt accumulated, and the terms and timing of paying back any accumulated water debt.<sup>199</sup>

Therefore, to the extent that the Texans' "investment" derives from the

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196. *Id.* at 540.

197. *Treaty*, *supra* note 2, at 1227.

198. *Id.* There are similar provisions for when the U.S. is unable to deliver to Mexico water from the Colorado River. *Id.* at 1237-38.

199. G. GRAHAM WAITE, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES VOL. III 137 (Wells A. Hutchins ed., 1977); *U.S. Attorney Brief*, *supra* note 78, at 12.

United States' water entitlements under the 1944 Rivers Treaty, such investment is also subject to the conditions and limitations on the United States' entitlement set forth in the terms of the Treaty. Under the provisions of the 1944 Rivers Treaty, the United States' claim to Rio Grande water is subject to the right of Mexico to reduce deliveries for any given year or for any five-cycle when drought conditions arise, and to repay this water debt subject to terms and timetable established through the IBWC resolution process. Consistent with the 1944 Rivers Treaty, Mexico reduced its Rio Grande deliveries to the United States during the 1992 to 1997 and 1997 to 2002 cycles, accumulated a water debt, and then, with the IBWC's assistance, negotiated an agreement with the United States in March 2005 for repaying its accumulated water debt.<sup>200</sup> On September 30, 2005, the IBWC announced that, in accordance with the terms of the March 2005 agreement, "Mexico has delivered sufficient volumes of water to pay off the deficit in its entirety."<sup>201</sup>

The Texans' NAFTA water claim therefore seeks recognition of entitlements and rights under the 1944 Rivers Treaty that the United States does not even possess. The 1944 Rivers Treaty provides a mechanism by which accumulated water debts are repaid through enhanced water deliveries in subsequent cycle periods as determined by the IBWC or through state-to-state negotiations. Additional water deliveries, rather than monetary damages, are the remedy set forth in the agreement for making up previous under-deliveries. The notion of "investment" that underlies the Texans' NAFTA Chapter 11 claim for damages therefore disregards the circumscribed nature – in terms of quantities, remedies and dispute resolution procedures – of the United States' entitlements to Rio Grande water. More to the point, the Texans' blanket assertion that the 1944 Rivers Treaty entitled the United States to no less than 350,000 af annually amounts to a distorted oversimplification of the complex regime set forth by the Treaty.<sup>202</sup>

Second, Article 1139(h) of NAFTA provides that an "investment" under Chapter 11 can include "interests arising from the commitment of capital or other resources *in the territory* of a Party to economic activity *in such territory*" and Article 1139(i) states that an "investment" can include "contracts involving the presence of an investor's property *in the territory* of the Party."<sup>203</sup> The use of the phrase "in such territory" suggests that Chapter 11's protections were intended to deal with foreign investments or economic activities located in the host country against whom the Chapter 11 claim is brought, rather than investments or economic activities located in the home country of the foreign investors. Nevertheless, in the present NAFTA claim, the economic losses for which the Texans seek compensation relates to economic activities undertaken

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200. *USIBWC Press Release*, *supra* note 107.

201. Announcement, Int'l Boundary Water Comm'n (Sept. 30, 2005), <http://www.ibwc.state.gov/PAO/CURPRESS/2005/WaterDebtPaidFinal.pdf>.

202. *NOI*, *supra* note 154, at 4-5.

203. NAFTA, *supra* note 113, art. 1139 (emphasis added).



by the Texans in the United States rather than Mexico. In particular, the Texans seek compensation for losses associated with the following activities that appear to take place solely in Texas: "facilities to store and distribute this water for irrigation and domestic consumption; irrigated fields and farms; farm buildings and machinery; and ongoing irrigated agricultural businesses. . . integrated water delivery system, including pumps, aqueducts, canals, and other facilities for the storage and conveyance of their water to the land on which it is used."<sup>204</sup>

The Texans allege that such Texas-based activities fall within the scope of Chapter 11's investment protections because they constitute an "integrated" investment under Article 1139(g) of NAFTA that is closely related to Rio Grande water provided from Mexico.<sup>205</sup> Article 1139(g) does not use the term "integrated" investment but instead provides that an "investment" under Chapter 11 can include "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes."<sup>206</sup> In essence, the Texans appear to argue that they obtained an independent legal right to receive a certain quantified amount of Rio Grande water from Mexico because of their anticipation and desire to continue receiving such an amount and use it for their economic gain. Such reasoning, however, is flawed; similar to *Klamath Irrigation*, expectation and hope alone do not create an ownership interest.<sup>207</sup>

The Texans' contention here calls to mind the claim rejected by Judge Allegra in *Klamath Irrigation*. Judge Allegra recognized that the plaintiffs had made investments based on the expectation of interrupted diversions of Klamath River waters, but clarified: "[T]hose expectations, no matter how understandable, do not give those landowners any more property rights . . . than they actually obtained and possess. Like it or not, water rights, though undeniably precious, are subject to the same rules that govern all forms of property . . ."<sup>208</sup> This analysis seems equally on point in evaluating the merits of the Texans' claim to a property interest in Mexico's delivery of specified quantities of Rio Grande water.

Third, since the 1944 Rivers Treaty is between the Government of Mexico and the Government of the United States, it is unclear whether the Texans have proper standing to enforce the terms of the Treaty or in fact possess any rights under the Treaty. In private contract law, an intended third-party beneficiary may, under certain circumstances, have standing to enforce the terms of a contract between other parties. It is highly questionable, however, whether the enforcement standing occasionally afforded to third-party beneficiaries under private contract law provides a proper basis for the Texans to seek enforcement of United States' rights against another sovereign nation under the terms of an

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204. *Notice of Arbitration*, *supra* note 153, 27.

205. *Notice of Arbitration*, *supra* note 153, 28, 29, 35.

206. NAFTA, *supra* note 113, art. 1139.

207. *Klamath Irrigation District*, *supra* note 8, at 540.

208. *Id.*

international treaty. Such an extension of the third-party beneficiary standing would seem particularly unwarranted given that the United States has already pressed and resolved its Rio Grande rights against Mexico under the 1944 Rivers Treaty through IBWC proceedings.

Notably, the issue of private enforcement of 1944 Rivers Treaty rights was addressed in domestic litigation currently pending over the rights of Mexican farmers to groundwater in the transborder Mexicali Valley aquifer. In the case of *Consejo de Desarrollo Economico de Mexicali et al. v. United States of America* ("Consejo"), the United States Department of Justice ("DOJ") submitted a brief to the federal District Court on September 19, 2005 arguing:

It is well-established that absent a provision specifically contemplating the right to enforce the terms of a treaty by an entity or individual other than the parties, only the sovereigns involved may enforce treaty provisions, and any such discussions take place through diplomatic channels . . . 209

The 1944 Treaty did not create private rights of action for individuals.<sup>210</sup>

If the 1944 Rivers Treaty is not susceptible to private enforcement by Mexican farmers against the United States, then presumably it is also not susceptible to private enforcement by Texas farmers against Mexico.

Finally, the expansive notion of "investment" that underlies the Texans' NAFTA water claim is at odds with the ruling made by the Chapter 11 arbitration panel in *Methanex Corporation v. United States of America* ("Methanex").<sup>211</sup> The Chapter 11 claim in *Methanex* was brought by a manufacturer of methanol, one of the main ingredients in methyl tertiary-butyl ether ("MTBE").<sup>212</sup> MTBE is a gasoline additive that was banned by the State of California because releases of the additive from underground storage tanks and pipelines contaminated drinking water resources.<sup>213</sup> In a decision issued on August 7, 2002, the *Methanex* panel dismissed claims for compensation for damages on the grounds that Methanex Corporation did not constitute an "investor" under Chapter 11 because its investments in the production of methanol were insufficiently linked with California's ban on MTBE.<sup>214</sup> Methanex Corporation had argued its methanol investments fell within Chapter 11's scope because these investments were "affected" by the MTBE ban.<sup>215</sup> For reasons adhering to Judge Allegra's opinion in *Klamath District*, the *Methanex* panel rejected the "affected" standard as insufficient, reasoning that an endless

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209. *U.S. Attorney Brief*, *supra* note 78, at 17 (citing *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980); *United States v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990); *United States v. Valot*, 625 F.2d 308, 310 (9th Cir. 1980).

210. *U.S. Attorney Brief*, *supra* note 79, at 17.

211. *Methanex Corp. v. United States*, First Partial Award on Jurisdiction and Admissibility (NAFTA Ch. 11 Arb. Trib., Aug. 7, 2002), <http://www.state.gov/documents/organization/12613.pdf>.

212. *Id.* at 14.

213. *Id.* at 15.

214. *Id.*

215. *Id.*

number of parties could be potentially affected by any government measure.<sup>216</sup>

The “integrated investment” argument put forth by the Texans in their NAFTA Rio Grande claim is akin to the “affected by” argument previously put forth by Methanex Corporation. The Texans essentially maintain that they had a property interest in Mexico’s delivery of certain quantities of Rio Grande water because the Texans’ economic activities in the United States were adversely impacted when these quantities of water were not delivered. The *Methanex* NAFTA panel ruling suggests that the Texans’ circular reasoning here should be rejected.

### *C. Parallel IBWC Dispute Resolution Proceedings*

Aside from the hurdles presented by the language contained in Chapter 11 and the 1944 Rivers Treaty, the Texans’ NAFTA water claim may also be hindered by the IBWC’s longstanding efforts to resolve the Rio Grande water debt dispute between Mexico and the United States. Two issues arise when parallel IBWC proceedings are invoked. The first aspect relates to whether a NAFTA Chapter 11 panel has proper jurisdiction over the Rio Grande dispute, and the second relates to, even if it has jurisdiction, whether the NAFTA Chapter 11 panel should properly defer to the IBWC’s findings and resolution for determining Mexico’s compliance with the 1944 Rivers Treaty.

#### *1. Questions of Jurisdiction*

In terms of jurisdiction, previous Chapter 11 arbitration panels have not found their jurisdiction lacking on the grounds that other non-NAFTA international agreements and forums also pertain to the subject matter giving rise to the underlying Chapter 11 claim. For example, *Pope & Talbot Inc.*, a U.S. timber company, filed a claim against Canada in 1999 that involved certain restrictions imposed pursuant to the United States-Canada Agreement on Trade in Softwood Lumber and which was related to disputes before the World Trade Organization and the United States International Trade Commission.<sup>217</sup> The involvement of other international treaties and forums did not cause the *Pope & Talbot* Chapter 11 panel to decline the arbitration submission, which eventually led to a ruling against Canada.<sup>218</sup> Similarly, S.D. Meyers, another U.S. company, filed a Chapter 11 claim in 1998 against Canada in response to Canada’s imposition of an interim ban on the export of polychlorinated biphenyls (“PCBs”) based on the provisions of the Basel Convention on the

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216. *Id.*

217. Statement of Claim Under the Arbitration Rules of the United Nations Commission of International Trade Law and the North American Free Trade Agreement, *Pope & Talbot Inc. v. Government of Canada*, United Nations Commission on International Trade Law, March 25, 1999.

218. *Pope & Talbot v. Canada*, Interim Award (NAFTA Ch. 11 Arb. Trib., June 26, 2000), <http://www.dfait-maeci.gc.ca/tna-nac/documents/pubdoc7.pdf>; *Pope & Talbot v. Canada*, Award on the Merits of Phase 2 (NAFTA Ch. 11 Arb. Trib., Apr. 10, 2001), [http://www.dfait-maeci.gc.ca/tna-nac/documents/Award\\_Merits-e.pdf](http://www.dfait-maeci.gc.ca/tna-nac/documents/Award_Merits-e.pdf).

Control of Transboundary Movements of Hazardous Wastes ("Basel Convention").<sup>219</sup> In issuing a decision against Canada, the *S.D. Meyers* NAFTA arbitration panel did not find that the dispute resolution provisions contained in the Basel Convention restricted the availability of the Chapter 11 dispute resolution process.<sup>220</sup>

Although the *Pope & Talbot* and *S.D. Meyers* rulings provide some support for the conclusion that parallel IBWC proceedings should not deprive a Chapter 11 arbitration panel of jurisdiction over the Texans' Rio Grande NAFTA claim against Mexico, there are other considerations that suggest the jurisdictional question should be revisited in this instance.

First, the *Pope & Talbot* and *S.D. Meyers* decisions have both been subject to criticism for their disregard of the provisions of other non-NAFTA international agreements and the ongoing proceedings of other non-NAFTA international tribunals. A February 2005 report by the organization Public Citizen noted that the *Pope & Talbot* decision:

... further complicate[s] a monumental trade dispute that already is being heard in a variety of venues at once ... One of the criticisms of the investor-to-state process is that it allows a narrow private interest to trump what might be a contrary public interest. When a government considers initiating a state-state enforcement proceeding, it must consider how the action could implicate other national goals or interests, and balance the immediate potential commercial gain for U.S.- based business interests against long-term, broader interests – such as the possibility of creating jurisprudence that might be turned against the country in a later dispute. Not so with investor-state proceedings.<sup>221</sup>

On the subject of the *S.D. Meyers* ruling, the same report states:

In this case, Canada explicitly raised its obligations under a multilateral environmental agreement (the Basel Convention) as a justification for its Interim Order, temporary PCB export ban, and attempts to develop domestic PCB treatment capacity. This case proves a concern raised by environmentalists during the debate about NAFTA's approval: what would happen when NAFTA's expansive rules required governments to act in violation of their obligations in the scores or environmental treaties that many countries, including the NAFTA nations, have signed?<sup>222</sup>

Although the considerations noted above may not have been given much credence at the time of the *Pope & Talbot* and *S.D. Meyers* panels, such considerations now merit closer attention in light of growing concerns regarding the Chapter 11 process.

Second, the particular dispute resolution language in the 1944 Rivers Treaty leave little doubt that Mexico and the United States identified the IBWC as the appropriate international forum where disputes over non-compliance with

219. *S.D. Meyers v. Canada*, Statement of Claim (NAFTA, Ch. 11 Arb. Trib., Oct. 30, 1998), <http://www.dfait-maeci.gc.ca/tna-nac/documents/myers3.pdf>.

220. *S.D. Meyers v. Canada*, Partial Award (NAFTA, Ch. 11 Arb. Trib., Nov. 13, 2000), [http://www.dfait-maeci.gc.ca/tna-nac/documents/myerscanadapartialaward\\_final\\_13-11-00.pdf](http://www.dfait-maeci.gc.ca/tna-nac/documents/myerscanadapartialaward_final_13-11-00.pdf).

221. Public Citizen, NAFTA CHAPTER 11 INVESTOR-STATE CASES: LESSONS FOR THE CENTRAL AMERICA FREE TRADE AGREEMENT 41 (Feb. 2005).

222. *Id.* at 44.

Rio Grande delivery obligations should be settled. Article 2 of the 1944 Rivers Treaty states, "The application of the present Treaty, the regulation and exercise of the rights and obligations which the two Governments assume there under, and the settlement of *all* disputes to which its observance and execution may give rise are hereby entrusted to the International Boundary and Water Commission."<sup>223</sup> Moreover, Article 9(f) of the Treaty specifically provides the IBWC with the authority to resolve delivery disputes related to drought conditions. As discussed above, the IBWC brokered a resolution in March 2005 between Mexico and the United States in which, according to the IBWC, "Mexico's water debt [was] completely eliminated."<sup>224</sup> Should a NAFTA Chapter 11 panel later rule that Mexico must pay damages in addition to the negotiated water deliveries agreed to in March 2005, this ruling could be viewed as repudiation of, or at a minimum a reopening of, the current IBWC resolution.

Third, in the above-discussed pending domestic case of *Consejo*, the DOJ recently advocated for an expansive view of the IBWC's dispute resolution authority.<sup>225</sup> More specifically, the DOJ contended that the domestic court lacked jurisdiction because the IBWC is the exclusive forum to resolve disputes under the 1944 Rivers Treaty:

The 1944 Treaty, like many international agreements, foresaw the need for an implementation and dispute resolution mechanism. Article 2 of the 1944 Treaty assigns responsibility for application of the Treaty and the regulation and exercise of the rights and obligations which devolve upon the U.S. and Mexican governments thereunder to the IBWC . . . 226

In the 1944 Treaty, the United States and Mexico created a dispute resolution procedure consistent with the view that the disputes under the 1944 Treaty are to be resolved through diplomacy. Article 24(d) could not be plainer in this regard, empowering the IBWC "[t]o settle all differences that may arise between the two Governments with respect to the interpretation or application of this Treaty. . . 227

In negotiating the apportionment of water on three international rivers, the governments of the United States and Mexico necessarily made policy determination and tradeoffs to arrive at a result that both governments considered acceptable. Furthermore, the governments empowered the IBWC to settle any disputes arising under the Treaty.<sup>228</sup>

Such arguments were presented in *Consejo* in an effort to persuade the federal district court that it lacked jurisdiction to hear the Mexican farmers' claim against the United States. The same arguments also support the contention that a NAFTA Chapter 11 panel may lack proper jurisdiction to hear the Texan farmers' Rio Grande claim against Mexico. In particular, since the Texans lack standing to directly enforce or seek damages under the terms of the 1944 Rivers Treaty before the IBWC, should NAFTA Chapter 11 be interpreted to provide

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223. *Treaty*, *supra* note 2, art. 2.

224. *USIBWC Press Release*, *supra* note 107.

225. *U.S. Attorney Brief*, *supra* note 79.

226. *Id.* at 13.

227. *Id.* at 18.

228. *Id.* at 20.

the Texans with a backdoor route to seek such enforcement and damages?

## *2. Questions of Deference*

Apart from the more legalistic question of whether a Chapter 11 arbitration panel has proper jurisdiction to hear the Texans' Rio Grande claim, there are other reasons why a Chapter 11 panel should properly exercise its discretion and defer to the IBWC's findings and resolution in evaluating the underlying merits of the Texans' NAFTA water claim. As discussed above, the Texans' NAFTA water claim against Mexico is merely the latest chapter in the long history of implementation of the 1944 Rivers Treaty. The IBWC is in a much better position than a NAFTA arbitration panel to take proper account of this history when considering the question of Mexico's compliance with the Treaty's obligations.

For instance, for many decades the United States met its Colorado River quantitative delivery obligations (under the 1944 River Treaty) to Mexico by providing water with saline levels so high that it was unsuitable for drinking or irrigation. The IBWC was actively involved in monitoring and seeking a resolution to this problem. To this day, the United States has not financially compensated Mexico for the damages to Mexican farmers and cities resulting from its contamination of the Colorado River.

As another example, IBWC records establish that prior to 1992, Mexico delivered quantities of Rio Grande water to the United States that were in excess of Mexico's obligations (and the United States' rights) under the 1944 Rivers Treaty. Although this amounted to a windfall for the Texans that received and used this excess water, Mexico did not receive any credit for such excess deliveries under the 1944 River Treaty's water accounting regime.

As the institutional memory of joint implementation of the 1944 Rivers Treaty, the IBWC is uniquely positioned to determine how the United States' more recent claims regarding Mexico's Rio Grande delivery obligations fit into such historical events as the Colorado River salinity crisis and Mexico's excess Rio Grande deliveries during the 1953 to 1992 period.

Moreover, the role of the United States Department of State and Mexico's Ministry of Foreign Relations within the IBWC is also relevant. It ensures that, by seeking the resolution of disputes under the 1944 Rivers Treaty, the IBWC takes account not only of water resource issues but also other foreign policy matters. For instance, in recent years there have been extensive diplomatic efforts between Mexico and the United States to address the economic conditions in Mexico that underlie the problem of illegal Mexican immigration into the United States. A sudden and severe reduction in Rio Grande water deliveries to border farms and cities in northern Mexico could create unemployment, health problems and disruption that contribute to existing immigration pressures. Within the IBWC context, these considerations can be accounted for in the positions staked out by the United States Department of State and Mexico's Ministry of Foreign Relations. In contrast, these

considerations would likely fall outside the narrow investment scope of inquiry of the Chapter 11 panel.

The DOJ forcefully pressed this point in its briefing of *Consejo*. The United States argued that permitting Rio Grande allocation and delivery disputes to be resolved by private parties outside the IBWC, rather than through a state-to-state diplomatic process, “would inherently encroach upon the Executive Branch’s prerogative of conducting the foreign affairs of the United States . . .”<sup>229</sup> and “would undermine the ability of the [United States] Section of the IBWC to effectively carry out the foreign policy of the United States government.”<sup>230</sup> The same objection could rightfully be raised by Mexico in response to the Texans’ NAFTA water claim.

As such, even if a NAFTA Chapter 11 panel has jurisdiction to hear the Texans’ Rio Grande claim, there remains the issue of whether it sets a wise policy course when a NAFTA Chapter 11 panel second-guesses the IBWC-brokered March 2005 diplomatic resolution reached by Mexico and United States. This course would take the Chapter 11 process beyond the narrow sphere of investment and into the complex sphere of foreign affairs – where it was not designed and is ill-suited to go.

## V.

### CONCLUSION: A STRAINED CLAIM THAT MERITS REJECTION

In March 2003, McGill University Faculty of Law in Montreal, Quebec hosted a two-day conference entitled GREENING THE FTAA?: TOWARDS THE PROTECTION OF ECOLOGICAL INTEGRITY IN OUR HEMISPHERE. The event, organized by Environmental Law McGill, brought together leading international scholars to evaluate efforts to integrate environmental protection and natural resource conservation concerns into the ongoing negotiations for a treaty to establish a Free Trade Area of the Americas (“FTAA”). One of the central topics covered was whether NAFTA’s investor-to-state claims procedure should be carried forward in the FTAA. In his closing remarks, conference director William Amos observed:

[T]he FTAA is clearly a trade and investment agenda. In large measure, this amounts to a property rights protection agenda. The logic of NAFTA Chapter 11 is the apotheosis of a broader plan to entrench property rights protections as the foundation for an economic union of the Americas. The FTAA is manifestly not being driven by an environmental agenda, or even a sustainable development agenda. So, as our governments move towards a significant shift in the hemisphere’s political and economic landscape, I think civil society needs to take

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229. *U.S. Attorney Brief*, *supra* note 79, at 17. This same brief argues that “[t]he dispute resolution procedure mandated in the 1944 Treaty does not involve the courts. The Treaty contains no provision allowing judicial review of the determinations of the IBWC concerning the implementation of Treaty-based rights. Indeed, the text of the 1944 Treaty demonstrates that neither the United States nor Mexico had any intent that domestic courts would resolve conflicts concerning the apportionment of the transboundary rivers governed by the Treaty.” *Id.* at 18.

230. *Id.* at 21.

a long hard look at the bases upon which we seek to build this community.<sup>231</sup>

Amos' comments highlight that the debate over Chapter 11's investor-to-state process has implications well beyond NAFTA. Concerns about Chapter 11 raise more fundamental questions about the emerging relationship and tensions under international law between protection for private investments and protection for trans-border natural resources, and between international trade/investment treaties and international environmental treaties. Concerns about Chapter 11 also force consideration of whether the existing forums to resolve conflicts between private investments and common natural resources are adequate, and whether there are more appropriate forums that should be used or created if they do not yet exist.<sup>232</sup>

The Texans' NAFTA water claim against Mexico sheds light on these broader themes, by providing a less theoretical context in which to consider the investor protection regime established pursuant to Chapter 11. In the context of the pending Rio Grande dispute, one sees how a broad interpretation of private investor rights under Chapter 11 would undermine the efforts of the IBWC and the governments of Mexico and the United States to equitably interpret the provisions of the 1944 Rivers Treaty. One sees how the Chapter 11 process is now being used to advance an expansive concept of fixed entitlements to water that has been rejected here in the United States and is at odds with the 1944 Rivers Treaty's more flexible regime. One sees how poorly situated and unqualified NAFTA arbitration panels are to engage in the resolution of complex questions of foreign affairs involving compliance with international environmental treaties and the management of border natural resources such as water. One sees how parties whose interests are at stake in the Rio Grande NAFTA claim – such as cities and farmers in Northern Mexico and water conservation groups – are outsiders in the Chapter 11 proceedings without rights of intervention or guarantees of participation.

In sum, there are numerous sound legal and policy reasons to reject the Texans' claim against Mexico for the alleged non-delivery of Rio Grande water. Moreover, a close examination of the Texans' Rio Grande claim demonstrates that NAFTA Chapter 11 is itself flawed from a textual standpoint. The fact that the current provisions of Chapter 11 should be amenable to an interpretation that results in the rejection of the Texans' claim does not indicate that such provisions are adequate. To the contrary, Chapter 11's vague and overly broad definitions of investment and appropriation, non-recognition of other international forums and sources of international law, and absence of

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231. Conference Proceedings to Greening the FTAA?: Towards the Protection of Ecological Integrity in Our Hemisphere, Conference at McGill University 75 (March 17-18, 2003), <http://www.law.mcgill.ca/elmftaaconference/eng/documents/proceedings.pdf>.

232. Echeverria, *supra* note 111, at 39 ("A radically different approach would be to embrace the need for, and perhaps the inevitability of, a comprehensive system of international dispute resolution, to address not only investment issues but a whole host of other issues as well. But to be consistent with democratic ideals, this approach would require rethinking the entire international law-making process.").



meaningful public participation and appeal procedures, invite strained compensation claims such as those put forth by the Texans. Given the uncertainty inherent in Chapter 11 investor-state litigation, even when faced with strained compensation claims, nations may choose to settle, either by paying damages or refraining from the government action that gave rise to such claims, rather than risking a significant damages award. To avoid this possibility, NAFTA Chapter 11 should not serve as a template for future investment treaties.