

(COURTESY TRANSLATION)

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**BEFORE THE HONORABLE TRIBUNAL ESTABLISHED PURSUANT  
TO CHAPTER XI OF THE NORTH AMERICAN FREE TRADE  
AGREEMENT**

**BAYVIEW IRRIGATION DISTRICT AND OTHERS,  
CLAIMANTS**

**v.**

**UNITED MEXICAN STATES,  
RESPONDENT**

**ICSID CASE NO. ARB(AF)/05/1**

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**MEMORIAL ON JURISDICTION**

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|      |   |    |
|------|---|----|
| I.   | INTRODUCTION .....  | 1  |
| II.  | PROCEDURAL HISTORY .....  | 3  |
| III. | STATEMENT OF FACTS .....  | 5  |
|      | A. The Rio Bravo River .....  | 6  |
|      | B. The 1944 Water Treaty .....  | 7  |
|      | C. Binational Allotments of the Waters of Rio Bravo Under the Water Treaty .....  | 9  |
|      | D. The Extended Period of Drought in Mexico .....   | 11 |
|      | E. Ownership of Rivers in Mexico .....  | 15 |
|      | F. The Nature of the Claimants’ Rights to Use Water Under Texas Law .....   | 17 |
| IV.  | LEGAL SUBMISSIONS .....   | 22 |
|      | A. Mexico’s Consent to arbitration .....  | 22 |
|      | B. The NAFTA and specifically the investment chapter, is based on a territorial principle of jurisdiction .....                                   | 24 |
|      | C. The claims must be dismissed because no claimant has an investment in Mexico .....   | 28 |
|      | D. The Tribunal lacks competence to rule on the rights and obligations of Mexico and the United States pursuant to the Water Treaty of 1944 ..... | 34 |
|      | E. The claims are untimely .....  | 38 |
|      | F. The claimants have not complied with mandatory procedural requirements .....   | 40 |
|      | 1. Section B does not authorize class actions .....   | 44 |
|      | 2. The claimants have failed to provide documents to fulfill evidentiary requirements of the NAFTA and the Additional Facility Mechanism .....    | 47 |
|      | a. No evidence of the claimants’ nationality was provided .....   | 48 |
|      | b. It has not been confirmed that Messrs. Marzulla are duly authorized to represent the juridical persons .....                                   | 49 |

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V. RELIEF REQUESTED..... 50

## **I. INTRODUCTION**

1. Pursuant to Article 45 of the ICSID Additional Facility Arbitration Rules (the “Arbitration Rules”), Mexico requests a ruling that the Tribunal lacks competence and jurisdiction to hear the dispute<sup>1</sup> and/or that the claims are inadmissible, and that it render an award to that effect.

2. There are several jurisdictional deficiencies in the claim. Some are sufficient to dismiss the claim entirely, while others would require the dismissal of many of the claimants from the consolidated arbitral proceeding. Some of the defects cannot be remedied:

a) *The claim falls outside the scope of NAFTA in light of its object and purpose:* None of the claimants have an investment in Mexico and as such, none of them are investors of a Party.

As an expression of the three NAFTA Parties’ sovereign will, NAFTA is explicitly premised upon the principle of territoriality. Pursuant to rules of customary international law contained in the Vienna Convention on the Law of Treaties (the “Vienna Convention”), NAFTA is binding on each Party within its own territory, as defined by NAFTA Article 201. Mexico cannot assume obligations nor try to create rights with respect to the territory and internal legal orders of the United States or Canada, nor can the United States or Canada purport to create obligations within Mexican territory or with respect to its internal legal order. It is obvious that Mexico cannot create property rights within U.S. territory. If such rights exist, it is because they have been established by the U.S. legal system and are only valid within its territory.

Each Party exercises full sovereignty over its natural resources. Each, in the exercise of its sovereign will, may choose to create a different regime with respect to the ownership, use, and exploitation of natural resources.<sup>2</sup>

Chapter Eleven in particular, only applies to investments of investors of a Party in the territory of another Party, and to the investors of another Party insofar as they have

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1. This case involves 43 claims that have been consolidated pursuant to agreement between the parties. The respondent shall refer to this group of claims as “the claim” and shall distinguish between each individual claim when necessary.

2. One example is the treatment offered by each Party to petroleum resources. The Mexican Constitution’s reservation of all petroleum resources to the patrimony of the State is a good example of this. The United States and Canada have chosen different regimes for petroleum resources.

made such investments.<sup>3</sup> Specifically, Chapter Eleven applies to investments by U.S. investors in Mexico and to the investors that have made such investments.

If a Party creates a property right in its internal legal order, which is limited to its territory, and if an investor of another NAFTA Party acquires such a property right and it is an investment pursuant to the definition set out in Article 1139 and is encompassed by Chapter Eleven, then both the investor and the investment are covered by the protections in Section A of that chapter. If an investor considers that the State has breached an obligation pertaining to the protection provided by the treaty, it may invoke the dispute settlement mechanism provided in Section B of Chapter Eleven.

However, in this case the rights the claimants allege to possess and that they allege were affected by Mexico, if they exist, were created by the U.S. legal system and as such, they are only valid within U.S. territory. Therefore, they are not an investment as defined by Article 1139, in relation to Article 1101. In this case, none of the claimants have been able to identify an investment in Mexican territory; none of them even allege that they have a property right in Mexico in an asset located in Mexico. Therefore, none of the provisions of Chapter Eleven are applicable to the claimants or to the rights that they allege to have. The claim therefore falls outside the scope of the treaty, and accordingly, outside of the jurisdiction of this Tribunal.

b) *The claim is outside the scope of NAFTA by reason of the nature of the treaty:* The breaches of NAFTA alleged by the claimants are based exclusively on the argument that Mexico breached obligations established in the Treaty Between the United States of America and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande entered into by Mexico and the United States in 1944 (the “Bilateral Water Treaty” or the “Water Treaty of 1944”, interchangeably).

The NAFTA does not provide a remedy that allows individuals to claim alleged violations by one of the Parties of other treaties or laws. The Bilateral Water Treaty has its own dispute settlement mechanism, which can only be invoked by Mexico and the United States. The United States has not invoked it to allege a breach of the Treaty by Mexico, and therefore, there is no finding that Mexico breached any of its obligations.

Even supposing that a breach of the Bilateral Water Treaty could give rise to a breach of NAFTA (which is not admitted), this Tribunal does not have competence to find whether or not Mexico breached its obligations under the Bilateral Treaty and cannot presume such a situation. On the contrary, it is obligated to presume that Mexico has fulfilled its international obligations.

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3. With respect to Articles 1106 and 1114, Chapter Eleven only applies with respect to all the investments in the territory of one Party, but neither is relevant to this case.

c) *In any case, the claim is untimely and is thus inadmissible.* Further, even if the claim were within this Tribunal's jurisdiction (which is also not admitted), the actions cited by the Claimants as the basis for their complaints all occurred over three years before the Request for Arbitration, meaning that the right of action established in Section B of Chapter Eleven has expired.

3. Finally, there are a number of fatal deficiencies in the individual claims that have been consolidated into this proceeding. For example, the claimants have not provided (i) the identity of the water users that the 17 irrigation district claimants purport to represent; (ii) evidence of nationality of the claimants who are natural persons; nor (iii) evidence that the corporate claimants have authorized the Marzulla firm as their representative in these proceedings. The Respondent emphasizes that the Request for Arbitration represents, by agreement reached between the parties, a consolidation of 43 purported claims by individuals and corporate entities, and is not a "class action" in the U.S. domestic legal sense. It is therefore incumbent on the Tribunal to ensure that each individual claim has been sufficiently validated as eligible to go forward and to dismiss any claim that is not.

4. The second section below reviews the procedural history of the arbitration. The third section reviews the facts that Mexico believes are crucial to a full understanding of the context of the claims, including the history of the development of the Mexican-U.S. relationship on the sharing of the Rio Bravo river; the content of the Bilateral Water Treaty; the severe drought that afflicted the region as of 1992 and the joint efforts of Mexico and the United States to resolve a series of concerns regarding distribution of the water; the Mexican legal system under which water from rivers belongs exclusively to the Mexican federal government; and the nature of the rights to use water for irrigation granted to the Claimants by the State of Texas. The fourth section contains Mexico's legal submissions, and the fifth, the relief requested by the Mexican government.

## **II. PROCEDURAL HISTORY**

5. The Claimants filed a joint Notice of Intent to Submit a Claim to Arbitration on 27 August 2004. On 9 September of the same year, the General Directorate of Foreign Investment of the Secretariat of Economy of Mexico requested that the claimants present the information necessary to fulfill the requirements of the NAFTA. Specifically, the Secretariat requested that they identify an investment in Mexico of each claimant within the meaning of Article 1139. The legal representatives of the claimants provided certain additional information on 1 October of the same year. After having analyzed the additional information, by letter dated 11 November, 2004, the General Directorate of Foreign Investment warned the claimants that they had not fulfilled the necessary NAFTA requirements. In particular, it was explained that they had not demonstrated that they owned or controlled an investment in Mexico within the meaning of the treaty. The letter indicated that the Secretariat was willing to initiate negotiations once the requested information was complete. The Secretariat also expressed its willingness to agree to

consolidate the claims, for which it also required all the information requested. It urged the claimants to fulfill these requirements.<sup>4</sup>

6. On 19 January 2005, the claimants filed their Request for Arbitration with the ICSID. The Government of Mexico received the request on 1 February 2005.

7. On 17 February 2005, the ICSID requested certain information from the Claimants, including authorizations to act on behalf of each of the claimants identified in the Request for Arbitration and the legal status of the irrigation districts.

8. On 4 March 2005, Mexico requested the ICSID to reject the Request for Arbitration because it was notoriously inadmissible, explaining:

- a) The dispute is outside of the scope of the authorization granted to the Center pursuant to Article 2 of the ICSID Additional Facility Rules (“Additional Facility Rules”) because:
  - i) it does not arise directly from an investment as required by paragraph (a) of this article, given that it does not involve an investment in the territory of Mexico, as required by Chapter Eleven of the NAFTA; and
  - ii) neither does it fall under Article 2(b) because it does not arise from a transaction – commercial or any other nature – between Mexico and the claimants.
- b) Mexico had not consented – nor does it consent – to arbitration:
  - i) Mexico has only consented to be bound by arbitration under the terms of Article 1122. Given that the claim is outside of the scope of NAFTA, it also falls outside of the scope of the consent expressed in that article;
  - ii) Mexico has only consented to submit to arbitration claims that arise directly from an investment, pursuant to Chapter Eleven (Investment) of the NAFTA, its related provisions and other free trade agreements or Bilateral Investment Treaties to which it is a Party. It has not consented to submit to arbitration for any other type of claims.

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4. See the following correspondence: Official document no. DGIE.04.145 dated 9 September, 2004, addressed to Messrs. Marzulla and Wallace; letter from Marzulla & Marzulla dated 1 October, 2004, addressed to the General Directorate of Foreign Investment (DGIE); Official document no. 04.205, dated 11 November, 2004, addressed to Messrs. Marzulla and Wallace; letter from Marzulla & Marzulla dated 12 November, 2004 addressed to the DGIE; official document no. DGIE.04.209, dated 16 November, 2004 addressed to Messrs. Marzulla and Wallace; letter from Marzulla & Marzulla dated 18 November, 2004 addressed to DGIE; official document no. DGIE.04.217 dated 23 November, 2004 addressed to Messrs. Marzulla and Wallace. Exhibit R-1. Mexico provided the ICSID a copy of the official documents from the DGIE with its official document no. DGCJN.511.13.117.05 dated 4 March, 2005.

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- c) The claimants are attempting to submit to arbitration a dispute pertaining to the Bilateral Water Treaty, despite the fact that that Treaty has its own exclusive mechanism for the settlement of disputes that arise from that Treaty, which can only be invoked by Mexico and the United States.
- d) The alleged investors have not satisfied the requirements of NAFTA Article 1119.

Mexico reaffirms the content of this letter.

9. On 7 March 2005, the claimants' counsel submitted a letter responding to the ICSID's request for information dated 17 February.

10. On 14 March 2005, the ICSID requested the claimants to provide, for each, authorizations to act on behalf of each of the persons identified as claimants, in addition to the Notice of Intent required by NAFTA Article 1119. On 7 April, 2005 the claimants provided certain documents in response to the ICSID. On the 13<sup>th</sup> of that month they presented an authorization for one more claimant.

11. On 11 May 2005, the ICSID requested confirmation concerning certain persons identified as claimants, as well as clarification regarding the nature of the irrigation districts. On 20 May 2005, Claimants' counsel responded to the ICSID's 14 March and 11 May letters. In addition, counsel notified the withdrawal of three of the claimants' claims.

12. On 1 July 2005, the ICSID approved access to the Additional Facility Mechanism and registered the claim.

13. On 22 August 2005, Mexico requested the ICSID confirm that Mexico's 4 March letter was placed on the record and would be provided to the Tribunal once it was constituted. In addition, it informed the ICSID and the Claimants that it would be submitting an objection to jurisdiction and that it would treat the Claimants' Request for Arbitration as an offer to consolidate the claims.

14. On 15 December 2005, the ICSID constituted the Tribunal and the arbitral proceedings were initiated.

15. On 14 February 2006, the parties held the First Session with the Tribunal.

16. Mexico would like to emphasize that the record demonstrates that Mexico put the Claimants on notice of the fundamental problems with their claims at an early stage. Regardless, the Claimants have persisted in pursuing the claims, and they have done so at their own risk.

### **III. STATEMENT OF FACTS**

17. It is vital for the Tribunal to be aware of the background of the Mexico-U.S. relationship regarding the use of water from rivers along the border, the nature of water rights, and the manner in which the claimants came to be given allocations of rights to use water for irrigation within Texas. All of the information contained in this section is a matter of public record.



18. Indeed, much of the history of the Mexican-U.S. water relationship is described in the very same decisions of the Texas courts that granted the Claimants their allotments of water use. The Tribunal should therefore infer that the Claimants are well aware of this information.

**A. The Rio Bravo River<sup>5</sup>**

19. The Rio Bravo river begins in the United States in the Rocky Mountains of southern Colorado, flows from Colorado through New Mexico, reaches Texas near El Paso, Texas, and Ciudad Juarez, Chihuahua, creating the border between the U.S. and Mexico in a general southeasterly direction to the Gulf of Mexico near Brownsville, Texas and Matamoros, Tamaulipas. The Rio Bravo divides the countries along the border of the states of Texas and Chihuahua, Coahuila, Nuevo Leon, and Tamaulipas.

20. The border between Mexico and the U.S. is one of the largest in the world. It is 3,141 km long, of which 2,019 km run along the Rio Bravo. Historically, both countries have faced difficulties in determining their border. The Treaty of Guadalupe Hidalgo signed on 2 February 1848 established the border between the countries at the Bravo and Colorado Rivers.<sup>6</sup> Afterwards, problems arose due to the natural direction of Rio Bravo's current. On 12 November, 1884 a dividing line was established in the Convention between the United States of America and the United States of Mexico Touching the International Boundary Line Where it Follows the Bed of the Rio Colorado.

21. In 1889 the countries entered into the Convention to Facilitate the Execution of the Principles Contained in the Treaty of 12 November, 1884 and to Avoid Difficulties Caused by Changes in the River Basin of Northern Rio Bravo and Rio Colorado (*Convención para Facilitar la Ejecución de los Principios Contenidos en el Tratado del 12 de Noviembre de 1884 y Evitar las Dificultades Ocasionadas con Motivo de los Cambios que Tienen Lugar en el Cauce de los Ríos Bravo del Norte y Colorado*), which established the International Boundary Commission, whose function was to resolve the disputes or border issues caused by changes in the water beds, construction around the riverbeds, or for any other reason.<sup>7</sup> The Treaty had a term of fifteen years and was successively renewed until its validity was extended indefinitely by the agreement dated 21 November, 1900, under which the Commission became a permanent body and was able to continue exercising its duties.<sup>8</sup>

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5. Known in the U.S. as the Rio Grande.

6. *Tratado de Paz, Amistad, Límites y Arreglo Definitivo entre la República Mexicana y los Estados Unidos de América*. Available at <http://tratados.sre.gob.mx/>.

7. Available at <http://tratados.sre.gob.mx/>

8. *Convención que Prorroga Indefinidamente el Plazo Estipulado en el Artículo IX de la Convención del 1° de marzo de 1889, Prorrogado por las Convenciones del 1° de octubre de 1895, del 6 de noviembre de 1896, del 29 de octubre de 1897, del 2 de diciembre de 1899, a fin de que la Comisión Internacional de Límites pueda continuar examinando y decidiendo los casos a ella sometidos*. Available at <http://tratados.sre.gob.mx/>.

22. In the nineteenth century, the Rio Bravo was navigable and flowed freely. However, extensive agricultural development on both sides of the Rio Bravo – particularly on the U.S. side – eventually gave rise to efforts to manipulate the river’s natural flow. On 21 May, 1906, Mexico and the United States ratified the Rio Bravo Convention, relating to the waters of the Rio Bravo above Fort Quitman, Texas (which is 160 km southeast of El Paso).<sup>9</sup> The Convention provided that the United States would distribute to Mexico 60,000 acre-feet of water annually after the construction of a dam on the U.S. side.<sup>10</sup>

23. In the Convention of February 1, 1933, the two Governments entered into the “*Convención para la Rectificación del Río Bravo del Norte (Grande) en el Valle de Juárez – El Paso*” under which they agreed to jointly construct, operate and maintain the Rio Bravo Rectification Project, which straightened and stabilized the 249 km river boundary through the El Paso-Juárez Valley

## **B. The 1944 Water Treaty**

24. On 3 February 1944, Mexico and the United States entered into the Bilateral Water Treaty<sup>11</sup>, in order to clarify the rights and obligations of each of the Parties with respect to the Rio Bravo, Colorado, and Tijuana. The provisions of the Treaty regulate the joint management by the United States and Mexico of the rivers and provide: i) an order of preferences with respect to the use of waters (use for domestic, municipal, agriculture, and cattle farming purposes; electric energy; other industrial uses; navigation; fishing and hunting; and for any other beneficial use determined by the Commission); ii) a clear basis for the distribution of waters for each country; iii) commitments to jointly carry out hydraulics projects for improved use of water; iv) construction and operation of international dams; and v) an obligation to take action for cleaning the river water.

25. The Treaty recognized the International Boundary Commission established by the Convention of 1889 and conferred upon it the status of an international body. The Bilateral Water Treaty changed the name of that entity to the International Boundary and Water Commission (“CILA”, under its Spanish initials), which it has currently, and expanded its jurisdiction and responsibilities.

26. The CILA consists of a United States Section and a Mexican Section. It has central offices located in Ciudad Juárez, Chihuahua and El Paso, Texas, as well as offices in various points along the border. The Bilateral Water Treaty provides that when provisions call for joint action or joint agreement by the two Governments, those matters are to be by or through the Mexican Secretariat of Foreign Relations and the U.S. Department of State.<sup>12</sup> . Each Section of

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9. Available at <http://tratados.sre.gob.mx/>.

10. See Articles I and II.

11. Exhibit R-2. Available at <http://tratados.sre.gob.mx/>.

12. Article 2.

the CILA is under the charge of a Commissioner. Provisions of the Treaty establish powers and duties of the CILA with respect to water distribution, construction of hydraulics projects, water purification, dispute settlement, etc.

27. In the Bilateral Water Treaty, Mexico and the United States were careful to preserve their sovereignty over their own territories. Article 23 provides:

Construction of the works built in pursuance of the provisions of this Treaty shall not confer upon either of the two countries any rights either of property or of jurisdiction over any part whatsoever of the territory of the other. These works shall be part of the territory and be the property of the country wherein they are situated. However, in the case of any incidents occurring on works constructed across the limitrophe part of a river and with supports on both banks, the jurisdiction of each country shall be limited by the center line of such works, which shall be marked by the Commission, without thereby changing the international boundary.

Each Government shall retain, through its own Section of the Commission and within the limits and to the extent necessary to effectuate the provisions of this Treaty, direct ownership, control and jurisdiction within its own territory and in accordance with its own laws, over all real property--including that within the channel of any river--rights of way and rights in rem, that it may be necessary to enter upon and occupy for the construction, operation or maintenance of all the works constructed, acquired or used pursuant to this Treaty.

Furthermore each Government shall similarly acquire and retain in its own possession the titles control and jurisdiction over such works.

28. Both Sections of the CILA constantly coordinate to in supervising projects in a joint and permanent manner, and to identify and evaluate in a timely manner the problems that might arise from the application of the treaty. As provided in Article 2, the CILA is the authority through which all disputes are to be resolved:

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.

[Emphasis added]

Article 24 adds that it is a power of the CILA:

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

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respective governments reporting their respective opinions and grounds therefore 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.

[Emphasis added]

29. The CILA website explains:

*En el caso del surgimiento de un problema, las autoridades locales pueden llevar el asunto a la atención de la Sección de la Comisión de su respectivo país. Si el problema cae dentro de la jurisdicción de la CILA, ésta puede llevar a cabo las investigaciones correspondientes y elaborar recomendaciones a los dos países para su solución. Los resultados son regularmente presentados en forma de Informes Conjuntos en español e inglés por los Ingenieros Principales, para ser considerados por los Comisionados. Posteriormente la CILA documenta su decisión formal mediante la firma de un Acta en ambos idiomas y son atestiguadas por los Secretarios respectivos de la Comisión. Dentro de un período de tres días posteriormente a su firma, el Acta es enviada a la Secretaría de Relaciones Exteriores en México y al Departamento de Estado en Washington, para su aprobación la cual deberá ocurrir dentro de los 30 días siguientes a la fecha de la firma. Una vez aprobada por ambos gobiernos, el Acta de la CILA se convierte en una obligación para cada país, siendo éstos responsables de su implementación, ya sea directamente o por medio de las dependencias de un país o del otro, bajo la supervisión de la CILA.<sup>13</sup>*

### **C. Binational Allotments of the Waters of Rio Bravo Under the Water Treaty**

30. The Water Treaty does not purport in any manner to confer rights or obligations on any private parties, only on the States and the CILA, which is an international entity:

- It identifies the “rights and obligations which the two Governments assume thereunder;”
- It prescribes how the water is to be “allotted to the two countries;”
- It requires the CILA to “keep a record of the waters belonging to each country;” and

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13. See [www.sre.gob.mx/cila](http://www.sre.gob.mx/cila).

- It provides that the CILA will “settle all differences that may miss between the two Governments with respect to the interpretation or application of this Treaty, subject to the approval of the two Governments.”<sup>14</sup>

31. The claimants themselves have acknowledged that the purpose of the Treaty is “to fix and delimit the rights of the two countries with respect to the waters,” and that “the Treaty allocated to the United States” a determined volume of water from those rivers.<sup>15</sup>

32. The treaty provides for the distribution of the waters of the Rio Bravo from Fort Quitman, Texas to the Gulf of Mexico.<sup>16</sup> Water is allocated to the two countries in the following manner:

A). - To Mexico:

a).- All of the waters reaching the main channel of the Rio Bravo from the San Juan and Alamo Rivers, ;

b).- One-half of the flow in the main channel of the Rio Bravo under the principal international storage dam, so long as that flow is not expressly assigned to either Party.

c).- Two-thirds of the flow in the main channel of the Rio Bravo from the measured Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers, and the Las Vacas Arroyo.

d).- One-half of all other flows occurring in the main channel of the Rio Bravo downstream from Fort Quitman and the main lower international dam.

B). - To the United States:

a).- All of the waters reaching the main channel of the Rio Bravo from the Pecos and Devils Rivers, Goodenough Spring and Alamito, Terlingua, San Felipe and Pinto Creeks.

b).- One-half of the flow in the main channel of the Rio Bravo under the principal international storage dam, so long as that flow is not expressly assigned to either Party.

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14. Water Treaty, Articles 2, 4, 9(j), 24(d) (emphasis added).

15. Request for Arbitration, ¶ 63 (emphasis added).

16. In addition to the distribution of water from the Rio Bravo, the treaty also addresses the distribution of water from the Colorado and Tijuana Rivers. With respect to Rio Colorado, Mexico is assigned 1,500,000 acre-feet a year, which may be increased in volume to 1,700,000 acre-feet if there are additional amounts in the river system (Article 10 (c) ). With respect to the Tijuana River, it provides that the Commission shall submit for approval all recommendations of the two governments for the equal distribution of the waters in the Tijuana River system between the two countries (Article 16).

c).- One-third of the flow reaching the main channel of the river originating from the Rivers Conchos, San Diego, San Rodrigo, Escondido, Salado and Arroyo las Vacas; and provides that this third shall not be less, as an average amount in cycles of five consecutive years, than 431,721,000 cubic meters (350,000 acre-feet) annually.

d).- One-half of all other flows occurring in the main channel of the Rio Bravo downstream from Fort Quitman and the main lower international dam.<sup>17</sup>

33. Both Parties committed themselves to joint construction of (i) three international storage dams in the main channel of the Rio Bravo to store and regulate most of the river's annual drainage; and ii) dams and other projects necessary for the diversion<sup>18</sup> of the river<sup>19</sup>. . Two such dams have been built, the Falcon and the Amistad<sup>20</sup>. The two resulting reservoirs are jointly owned and operated by the two countries, and the water stored is assigned to the ownership of each country; for this purpose the CILA maintains hydric accounting.<sup>21</sup>

#### **D. The Extended Period of Drought in Mexico**

34. Pursuant to the Treaty, Mexico is committed to allocating to the United States one third of the water that arrives to the main river current of Rio Bravo, which comes from the Ríos Conchos, San Diego, San Rodrigo, Escondido, Salado and Arroyo las Vacas, all of them located

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17. An acre-foot is the amount of water considered to cover one acre of land with one foot of water and amounts to approximately 326,000 gallons. The Dispute Over Shared Waters of the Rio Grande/Rio Bravo: A Primer, Texas Center for Policy Studies, July 2002, at p. 1 ("Dispute Primer"). Exhibit R-3, at 0095. Also available at [www.texascenter.org/borderwater](http://www.texascenter.org/borderwater); also see Mary E. Kelly, The Rio Conchos: A Preliminary Overview, Texas Center for Policy Studies, Jan. 2001, at p. 24, R-4, at 0134. Available at [www.texascenter.org](http://www.texascenter.org).

18. Article 1(d) of the treaty states 'To divert' means:

the deliberate act of taking water from any channel in order to convey it elsewhere for storage, or to utilize it for domestic, agricultural, stockraising, or industrial purposes whether this be done by means of dams across the channel, partition walls, lateral intakes, pumps or any other methods.

19. The costs of construction, operation and maintenance of each of the international storage dams are to be prorated between the two Governments in proportion to the capacity allotted to each and the corresponding benefits received. Article 5.II.

20. In fact, with respect to Rio Bravo, the treaty went into effect in 1953 with the operation of the Falcon dam.

21. See Article 5 paragraph II Article 8 paragraph b. Also see: About the IBWC: The International Boundary and Water Commission, Its Mission, Organization and Procedures for Solution of Boundary and Water Problems. Exhibit R-5. Available at [http://www.ibwc.state.gov/html/about\\_us.html](http://www.ibwc.state.gov/html/about_us.html).

entirely in Mexican territory. The volume to be provided may not be less, collectively, on average, and in consecutive five-year cycles than 432 cubic meters (350,000 acre-feet). Nonetheless, in the event of extraordinary drought preventing Mexico from providing the allotted amounts to the United States, the deficiencies existing at the end of a five-year cycle can be made up during the following five-year cycle.<sup>22</sup>

35. The applicability of the exception became relevant when the lower Rio Bravo basin went into prolonged drought beginning in October 1992.<sup>23</sup> The existence of this drought is well documented. For example, a 2002 analysis prepared by the House Research Organization of the Texas House of Representatives reported that Mexico's water storage in its portion of the international reservoirs had dropped to less than 10 percent of capacity and in the Rio Conchos basin was down to less than 20 percent of capacity.<sup>24</sup> According to a 2002 study by the Texas Center for Policy Studies:

The Palmer Drought Severity Index [citation omitted] shows that the Lower Rio Grande Valley is currently in "extreme" drought. All northern Mexican states and the Lower Rio Grande Valley have been declared drought disaster areas several times within the past nine years [citation omitted]... In June 2002, the Mexican federal government declared 50 of the 62 cities in Chihuahua (including many in the Sierra Tarahumara) disaster areas, making them eligible to receive federal relief funds.<sup>25</sup>

36. A newsletter published by the U.S. Section of the CILA early 2002 stated:

The International Boundary and Water Commission (IBWC) witnesses the effects of drought daily. The IBWC operates two major international storage reservoirs on the Rio Grande – Amistad Dam and Falcon Dam. This spring, water levels in Amistad were 31% of normal conservation capacity while Falcon was at 10% – levels approaching all-time lows.<sup>26</sup>

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22. Article 4.B.

23. See *Distribución de Aguas Internacionales en La Frontera Norte: Cierre de ciclos y eliminación del déficit*, Comisión Nacional del Agua, 22 Aug. 2005, (*Distribución de aguas*) at p. 11. Exhibit R-6, at 0149.

24. *Behind the U.S.-Mexico Water Treaty Dispute*, Texas House of Representatives, House Research Organization, No. 77-7, 30 April 2002, at p. 5. Exhibit R-7, at 0162.

25. Dispute Primer, p. 2, Exhibit R-3, at 0096 (citing, *inter alia*, U.S. Department of Agriculture and *Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación*). "The Palmer Drought Severity Index," NOAA Drought Information Center. Exhibit R-8. Available at <http://www.drought.noaa.gov/palmer.html>. The Palmer Drought Severity Index is used by the U.S. National Oceanic and Atmospheric Administration (NOAA).

26. "Drought Grips Rio Grande," *The Boundary Marker*, International Boundary and Water Commission, Spring 2002. Exhibit R-9.

37. The drought obviously affected Mexico's ability to distribute water in northern Mexico, but also it affected its ability to make its quantity of water deliveries contemplated under the Bilateral Water Treaty. At the end of the 1992-1997 cycle (30 September 1997), Mexico was to have delivered a total of 1.75 million acre-feet of water to the United States. However, at the end of that cycle, there was a deficit of approximately 1.024 million acre-feet.<sup>27</sup>

38. A question thus arose as to precisely what amount of water should be delivered by the end of cycle 26 that began in October 1997. The United States argued that Mexico was obliged to pay the water deficit from the past cycle (25) and complete the deliveries for the cycle 26. Mexico's view, on the other hand, was that it was required to only repay the deficit of cycle 25 and that any deficit it might incur in that next cycle was not due until the cycle thereafter.<sup>28</sup>

39. In late 1997, Mexico and the United States entered into discussions concerning the elimination of the water deficit under the auspices of the CILA. After extended negotiations and several partial deliveries had been made, in February 2005, Mexico offered the United States 210,785 acre-feet (260,000,000 cubic meters) from the Amistad reservoir – combined with 56,750 acre-feet (70,000,000 cubic meters) previously offered from the Falcon reservoir, as well as 145,928 acre-feet (180,000,000 cubic meters) of water owned by Mexico stored in international water dams, and an additional 149,980 acre-feet (185,000,000 cubic meters) to close cycles 25 and 26, and in order to make a timely delivery of cycle 27 (2002-2007). The United States agreed that Mexico had covered its water deficits from 1992-1997 and 1997-2002, and the cycles were declared closed.<sup>29</sup>

40. U.S. Secretary of State, Condoleezza Rice announced that Mexico and the United States had reached a final agreement on the water deficit:

In the spirit of effective bilateral cooperation, 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>30</sup>

A Fact Sheet the U.S. State Department issued announced:

Mexico has met the minimum average volume required under the treaty in the first two years of the current water accounting cycle (2002-2007),

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27. Dispute Primer, p. 5, Exhibit R-3, at 0099. Also see [Distribución de Aguas Internacionales en La Frontera Norte: Cierre de ciclos y eliminación del déficit](#), Comisión Nacional del Agua, 22 Aug. 2005, at p. 11. Exhibit R-6, at 0149 (stating the deficit was 1,262,000,000 cubic meters).

28. Id., p. 5, at 0099.

29. *Distribución de aguas*, at p. 20. Exhibit R-6, at 0153.

30. "Water Debt," Fact Sheet, Office of the Spokesman, U.S. Department of State, 10 March 2005. Exhibit R-11. Also available at <http://www.state.gov/r/pa/prs/ps/2005/43220.htm>.



and as of February 26 had delivered 125,840 A/F to be applied to the treaty requirement for year three of the current cycle.<sup>31</sup>

The agreement anticipated that Mexico would deliver an additional 236,726 acre-feet of water (29 million cubic meters) from the six tributaries before the end of September 2005, which would be the end of the third year of the 2002-2007 five-year cycle.<sup>32</sup>

41. On 30 September 2005, the two Sections of the CILA issued press releases announcing the payment in full of the water deficit that had been generated between 1997 and 2002. The press release issued by the Mexican Section of the CILA reported: “Mexico has fulfilled its commitment to eliminate its deficit in Rio Grande water deliveries to the United States” and had “delivered sufficient volumes of water to pay off the deficit in its entirety...the Acting Commissioner of the Mexican section of the Commission...pronounced the issue resolved...thanks to the excellent willingness of both parties and the successful negotiations...”. Similarly, the U.S. section of the Commission announced: “Mexico has fulfilled its commitment to eliminate its deficit in Rio Grande water deliveries to the United States” and “delivered sufficient volumes of water to pay off the deficit in its entirety”. In so doing, the Acting Commissioner of the U.S. Section of the Commission pronounced the issue “resolved”.<sup>33</sup>

42. Throughout this entire period of drought, Mexico continued to make efforts to provide the United States with water. Despite the drought affecting the basin, Mexico provided the United States an average of 189,000 acre-feet (233,000,000 cubic meters).<sup>34</sup> In fact, from October 2000 to September 2004, Mexico actually provided an annual average of 429,453 acre-feet of water (607,434,000 cubic meters), which is 40% greater than the amount required under the treaty.<sup>35</sup>

43. There is a history of problems between Mexico and the United States with respect to Rio Bravo. These problems are precisely the origin of the CILA and numerous international agreements. These conflicts have always been resolved in a spirit of international cooperation. In the present case, notwithstanding the description of the reasons why Mexico incurred a water deficit with the United States, the existence of the deficit in no way constitutes a breach of the Bilateral Water Treaty: it is a situation addressed in the treaty which itself provides mechanisms for the resolution of disputes.

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31. Id.

32. Id.

33. Press release from the Mexican section of the CILA, dated 30 September 2005. Also see “Mexico Pays Rio Grande Water Deficit,” CILA press release, 30 September 2005, Exhibit R-12.

34. See *Distribución de Aguas*, p. 12. Exhibit R-6, at 0149.

35. Id.

44. In this context, the countries had a difference of opinion with respect to the correct interpretation of the relevant provisions of the treaty, which was resolved in the same spirit of cooperation that has prevailed for over a century, without a claim of a breach of the Treaty ever having been made nor needed to be resolved through the dispute settlement mechanism provided in the Treaty. To the contrary, Mexico and the United States held meetings to discuss the deficit issue and the parties reached a solution.<sup>36</sup>

#### **E. Ownership of Rivers in Mexico**

45. In their letter dated 7 April 2005, the claimants stated, “Under Mexican law, water may both be privately owned and appropriated by private persons”<sup>37</sup>, which is incorrect in the case of Rio Bravo.

46. Article 27 of the Mexican Constitution provides that “the ownership of lands and waters within the boundaries of the national territory, originally belongs to the Nation...” and, even though the Nation has the right to transfer ownership, thus creating private property, further in the article (paragraph five) it is provided that “waters from its rivers and direct and indirect tributaries are property of the Nation, from the point at which the first permanent, intermittent or torrential waters begin, through to where they flow into the ocean, lakes, lagoons, or marshes owned by the Nation...”. In paragraph six, Article 27 provides that “the domain of the Nation” over rivers, among other national property described in paragraph five, “is inalienable and inextinguishable and the exploitation or use of such resources [waters from rivers], by individuals or by companies established under Mexican law, cannot be carried out except through concessions, granted by the Federal Executive, in accordance with the rules and conditions prescribed by laws”.<sup>38</sup> (Emphasis added)

47. The Law of National Waters<sup>39</sup> implements the above-mentioned constitutional provisions and regulates the exploitation and use of the national waters. Article 3, sections I and 16 confirm that national waters are those identified in paragraph 5 of Article 27 of the constitution. Article 16 also confirms that a concession is required for exploitation or use (with the exception of the exploitation and use by manual means for domestic use, pursuant to the provisions of Article 3, paragraph I and 17 of the law), and adds that the regimen of national ownership of waters continues even when those waters, through the construction of projects, are diverted from the original riverbed, have their flow impeded, or are treated. The law establishes the requirements and conditions to obtain a concession and the formalities must be complied with. Article 22 specifies that the concession granted does not guarantee the existence or permanence of the concessioned water.

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36. Id, p. 26, at 0156.

37. Letter from Messrs. Marzulla, 7 April, 2005, p. 4.

38. Constitution of the United Mexican States. Available at <http://www.ordenjuridico.gob.mx/Constitution/cn16.pdf>.

39. Available at [http://www.ordenjuridico.gob.mx/Federal/PE/PR/Leyes/01121992\(1\).pdf](http://www.ordenjuridico.gob.mx/Federal/PE/PR/Leyes/01121992(1).pdf)

48. The General Law of National Assets similarly indicates in Article 3, paragraph I that national assets are those listed in the fifth paragraph of the constitution, which, pursuant to Articles 6, paragraph I and 9, are subject to the public domain of the Federation, and therefore, are exclusively under the jurisdiction of the Federal authorities. Article 16 adds, “[t]he concessions, permits, and authorizations over assets subject to public domain of the Federation do not create ownership rights [*“derechos reales”*]; they simply grant a right of use and exploitation before the administration and without prejudice to third parties, pursuant to the rules and conditions provided by the law and title of concession, permit, or appropriate authorization”<sup>40</sup>.

49. Article 23 of the Law of National Waters provides that concessions granted for specific uses – urban, agricultural, creation of electric energy and other productive activities -, are regulated in the sixth section of the law. To obtain a concession for agricultural use, either for a natural or a juridical person, it is necessary to have the title or possession of the lands for livestock, or forestry, respectively, that are in the Mexican territory (Articles 23 and 48 of the law). However, pursuant to Article 27 of the Constitution, no foreign person can, for any reason, acquire direct control of lands and waters that are located in a belt within one-hundred kilometers of the border.

50. Of course, none of the claimants even argue that they have a property right in Mexico, whether in land, water, or any other assets. The Secretariat of Economy requested that they present a copy of the property title or other document that proves that each one has the direct or indirect ownership or control of the investment allegedly affected<sup>41</sup>. None of the claimants did so, and for the aforementioned reasons, they would not have been able to. They cannot have the ownership of the waters of Rio Bravo, and in lacking agricultural, livestock or forest lands in Mexico, they could not have obtained a concession for the exploitation or use of waters. In sum, pursuant to Mexican law, the claimants not only do not have and cannot have a property right over the waters of Rio Bravo, they cannot even have a concession. In fact, in the Public Registry of Water Rights there is no evidence that any of the claimants have a concession for the use or exploitation of water<sup>42</sup>.

51. There is no investment in the Mexican territory over which the claimants have ownership or direct or indirect control.

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40. Available at [http://www.ordenjuridico.gob.mx/Federal/PE/PR/Leyes/20052004\(1\).pdf](http://www.ordenjuridico.gob.mx/Federal/PE/PR/Leyes/20052004(1).pdf)

41. Official Document No. DGIE.04.145, 9 September, 2004 from the General Directorate of Foreign Investment, addressed to Messrs. Marzulla y Wallace. See Exhibit R – 1.

42. See Memorandum No. BOO.02.03.-201, 6 April, 2005 from the management of the Registry of Water rights. Exhibit R-13.

## **F. The Nature of the Claimants' Rights to Use Water Under Texas Law**

52. In the United States, unlike Mexico, the right of private persons to use water from rivers and lakes generally is governed by state rather than federal law.<sup>43</sup> Indeed, when it ratified the Water Treaty, the U.S. Senate set forth the following understandings it had regarding the agreement:

That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States.<sup>44</sup>

Accordingly, the distribution of water to users within the territorial limits of Texas was left to the State of Texas.

53. Soon after ratification of the Water Treaty, severe drought conditions in the early 1950s led to the filing of various lawsuits seeking to have Texas courts determine the rights to the U.S. waters in the lower Rio Bravo region. Because of that situation and the completion of the Falcon dam, in 1956 the State of Texas initiated a court proceeding – in the nature of an interpleader action – through which it, in effect, delegated its authority to allocate water use rights to the Texas courts. That litigation culminated in a ruling of the Texas Court of Appeals entitled *The State of Texas et. al, v. Hidalgo County Water Control & Improvement District No. 18 et. al*, 443 S.W.2d 728, 730 (Tex. Civ. App. 1969).<sup>45</sup> This decision adjudicated the water rights on the river system lying immediately below the Amistad dam and extending to the mouth of the Rio Bravo, a region known as the Middle and Lower Rio Grande Basin. The ruling allocated water rights in the region for municipal, industrial and domestic uses, as well as for farm irrigation. Irrigation rights were, however, the source of the greatest controversy.<sup>46</sup>

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43. See 78 Am Jur. 2d Section 31 (West Group 2002).

44. Senate Session to Ratify the Treaty Between the United States of America and Mexico Respecting the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, S. Res. 79<sup>th</sup> Cong., 59 Stat. 1219 (1945). Exhibit R-14, at 0210.

45. Exhibit R-15.

46. The Supreme Court of the State of Texas adopted as its own the decision to of the Texas Appeals Court stating that the lands down the length of the lower part of Rio Bravo, granted to Texas by Mexico and Spain, do not carry with them accessory irrigation rights, since neither Mexico nor Spain granted river ownership rights over those lands. Between the Parties that were benefited from this decision, are the Districts of Texas, and the rights for the distribution of water were (and continue to be) based exclusively on the power of the *State of Texas*. See *State of Texas et al v. Valmont Plantations et al*, 355 S.W. 2d 502 (Tex. 1962), *aff'ming* 346 S.W. 2d 853 (Tex App. 1961) (“Valmont Plantations”). Exhibit R-16.

54. The claimants' rights to water originate from a certificate of adjudication arising from the *Hidalgo* decision.

55. The *Hidalgo* decision discussed at length the history of water rights issues on the U.S. side of the Rio Bravo. In particular because this decision is the source of the Claimants' purported property interests, it is useful to examine the perspective of the court on the nature of what the United States, and through it Texas, received as a result of the Water Treaty:

The Rio Grande extends 1,120 miles from Fort Quitman to the Gulf and although numerous attempts were made to promulgate a treaty dividing the waters between the two nations, such attempts were not successful until 1944. Before that time, however, extensive agricultural development had taken place in the Rio Grande delta on both sides of the river but particularly on the left bank or American side. This development was almost entirely dependent upon irrigation from waters of the Rio Grande. The river as it flowed southward from Fort Quitman assumed different characteristics from those exhibited in Colorado and New Mexico. The region bordering the river and the territory supplying its waters, such as they were, were largely arid in nature and possessed desert characteristics. The larger portion of the water reaching the delta comes from Mexican sources such as the San Juan, Alamo, Conchos, San Diego, San Rodrigo, Escondido, the Salado and Las Vacas Arroyo. These tributaries carry far more water into the Rio Grande than do the American streams -- the Pecos, Devil's River, Goodenough Spring, Alamito, Terlinguia, San Felipe and the Pinto creeks.

The treaty between the United States and Mexico, ratified in 1945, related to the waters of three international streams, namely, the Rio Grande, the Colorado and the Tijuana. Possibly due to this circumstance or the greater agricultural development on the American side, the treaty provided for a 58% (American) and 42% (Mexican) division of the Rio Grande waters [footnote omitted]. This, despite the fact that it could be logically argued that each nation should be entitled only to that portion of an international stream as had been drained from its territory. Three proposed storage dams were mentioned in the treaty, one to be located in the section between Santa Helena Canyon and the mouth of the Pecos River, one between Eagle Pass and Laredo, Texas (Piedras Negras and Nuevo Laredo in Mexico), and a third in the section between Laredo and Roma, Texas (Nuevo Laredo and San Pedro de Roma in Mexico). Provision was made for the omission of one or more of the stipulated dams by agreement of the parties and the construction of such additional dams as might be determined by the International Boundary and Water Commission with the approval of the contracting governments. The Falcon dam and reservoir, now constructed, is situated in the section between Laredo and Roma, Texas. Since the filing of this suit, a second dam known as Amistad has been completed. It is situated below the confluence of the Devil's River and the Rio Grande.

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The construction of dams along the Rio Grande and the impounding of waters that otherwise would have flowed to the sea, particularly during flood periods, undoubtedly increased materially the amount of water that was available for irrigation of lands on the American side of the river. The State of Texas had neither control over nor official part in the construction of the Rio Grande storage dams nor does it regulate or control the release of waters from the treaty reservoirs.

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As a result of the promulgation of the treaty and the construction of the dams in accordance therewith, the State of Texas received considerably more water for irrigation purposes than it had been using from the free flowing river and also received a larger percentage of the Rio Grande waters than it would have received had such waters been divided upon a fifty-fifty basis or under a plan which would allocate to each country those waters which flowed over or were drained from its territory into the river.<sup>47</sup>

56. In the *Hidalgo* litigation, the trial court had created five categories of water users, sorted according to the basis of their claims. One of the categories was for parties with uses that the trial court believed were protected under the Water Treaty. After careful evaluation, the Texas Court of Appeals rejected this categorization in its entirety, stating:

The existence of the treaty cannot be ignored as an important factual circumstance in this case, but the United States did not by the treaty confer on anyone a right emanating from the central government to make use of the waters of the Rio Grande. The judgment is modified so as to eliminate the No. III or treaty classification.<sup>48</sup>

[Emphasis added]

57. The Court of Appeals only recognized two categories: the first included parties that had a colorable legal claim under the Texas appropriation statutes or whose rights had been otherwise recognized by the State.<sup>49</sup> The second included users that had an “equitable” claim because they

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47. *Hidalgo*, ps. 735-36. Exhibit R-15, at 0219-0221.

48. *Hidalgo* at 742. Exhibit R-15, at 0226.

49. Because of the *Valmont Plantations* decision discussed above, no party had a valid claim based on common law riparian rights. See R-16. See also *Hidalgo*, pp. 731-739. Exhibit R-15, at 0216, 0223. The Claimants’ citations to U.S. case law and writings regarding riparian rights are completely irrelevant to their own situation.

had been using water for irrigation in good faith.<sup>50</sup> The persons in the first (legal) category were granted, proportionately, 1.7 times more water than those in the second (equitable) category.<sup>51</sup>

58. As part of its ruling, the court also found that the Rio Bravo did not have a natural flow, but rather was under the complete control of the U.S. and Mexican governments. This in turn made meaningless a number of prior grants of water rights that had been based on natural flows of water, for example, those based on the expectation of periodic flooding, which were annulled.<sup>52</sup>

59. Finally, the court stated that, 60 days after its decision became final, the administration of the water rights addressed in the decision would revert to the Texas Water Rights Commission.<sup>53</sup> The Water Rights Commission subsequently therefore had the authority to amend the certificates of adjudication issued under the court's authority, as reflected in some of the documentation submitted by the Claimants.

60. As can be seen, the Claimants' ability to use water from the Rio Bravo for irrigation derived exclusively from the law of Texas. Indeed, under current Texas law, water imported by a river from outside of the State is considered "state water;" surface water is owned by the state; and any "water right" to use it must be acquired from the State.<sup>54</sup>

61. Under Texas law the Claimants are not assured a fixed amount of water. Rather, the certificates of adjudication (which are one form of water right) provide a maximum amount of water which the holder is "not to exceed."<sup>55</sup>

62. The Texas Commission on Environmental Quality (TCEQ), the State government agency that currently administers the State's water rights, has notified the public that holder of water rights cannot be assured they will receive the specified amount of water, stating:

... [A]ll perpetual appropriated rights have these features in common...

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50. The law in Texas today recognizes both categories as "Class A" and "Class B", respectively, which specifically refer to the classification established in the *Hidalgo* case, from which they originate. See 30 Texas Administrative Code § 303.2 (22). Exhibit R-20.

51. *Hidalgo*, p. 748. Exhibit R-15, at 0230.

52. *Id.* at 737-738, at 0221-0223.

53. *Id.* at 761, at 0242.

54. Texas Water Code §§ 11.002, .021; Rights to Surface Water in Texas, Texas Natural Resource Conservation Commission (now Texas Commission on Environmental Quality), May 2002 rev. at p. 1. R-19, at 0247.

55. See, e.g., Certificate of Adjudication, Cameron County Irrigation District No. 6 (stating "Holder is authorized to divert and use a maximum of not to exceed 54,781,925 acre-feet of water per annum..."). Exhibit R-18.

They do not guarantee that this water will always be available to you.  
(Only adequate rainfall and springflows can ensure that.)<sup>56</sup>

63. Specifically, the allocation of water from the Amistad and Falcon dams depends on the water storage level in those reservoirs. Texas law forbids the “watermaster”, the person authorized by the State to manage water rights in a particular place, from allocating any water until the “operating reserve” is at least 75,000 acre-feet.<sup>57</sup> In fact, if the “operating reserve” falls to zero acre-feet, the watermaster is authorized to make a “negative allocation” from the users’ accounts in order to replenish it.<sup>58</sup> Thus, Texas has retained the right take back water from holders of a certificate of adjudication.

64. In this regard, the Request for Arbitration misstates the Claimants’ rights to water. For example, the Request asserts that Cameron County Irrigation District No. 2 “is the exclusive owner of the annual right to the use of 147,823.650 acre-feet” of water under the 1944 Treaty.”<sup>59</sup> However, in 2003 the Cameron County Irrigation District No. 2 itself submitted a proposal for the Border Environment Cooperation Commission (an organization jointly created by the Mexican and U.S. governments to protect and preserve the environment in the border region) proposing two water conservation improvement projects, which stated:

The District’s irrigation water right is 147,823.65 ac-ft per year.  
However, this water right is “as-available” and the actual water available to the District varies from year to year. In 2002 the District’s allocation was 35,000 ac-ft.<sup>60</sup>

65. Thus, Cameron County Irrigation District No. 2 itself has acknowledged that under Texas law an ostensible right to use water for irrigation does not guarantee receipt of a specific quantity of water.<sup>61</sup> Rather, the Claimants have permits from the State of Texas under which they are granted a proportionate share of the water that is available in their region.

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56. Rights to Surface Water in Texas, p. 2. Exhibit R-19, at 0269.

57. Texas Administrative Code § 304.3 (15) Exhibit R-20, at 0283.

58. Texas Administrative Code § 303.22. Exhibit R-20, at 0280.

59. Request for Arbitration, dated 19 January 2005, received by the Secretariat of Economy of Mexico on 1 February of the same year (hereinafter “Request for Arbitration”), para. 3.

60. Border Environment Cooperation Commission, Cameron County Irrigation District No. 2, Texas, Two Water Conservation Improvement Projects, Replacement of River Pumping Plant and Construction of Interconnect System, *available at* [http://www.cocef.org/aproyectos/ExComCameronCounty2003\\_09ing.htm](http://www.cocef.org/aproyectos/ExComCameronCounty2003_09ing.htm). Exhibit R-21.

61. A report on water management of the Rio Grande observed:

...[T]he Rio Grande in Texas is “over-appropriated”: that is, paper water rights exceed the firm annual yield of the river/reservoir system. State

Footnote continued on next page



66. Finally, there is no indication in *Hidalgo* that the court or the State of Texas sold water rights to the Claimants or other parties. On the contrary, the case demonstrates that permits were granted for free.

#### **IV. LEGAL SUBMISSIONS**

##### **A. Mexico's consent to arbitration**

67. Redfern and Hunter have defined the consent of the disputing Parties as the “cornerstone” of modern arbitration: “This element of consent is essential. Without it, there can be no valid arbitration”<sup>62</sup>. Consent is a fundamental prerequisite of the competence of any arbitral tribunal:

An arbitral tribunal may only validly determine those disputes that the parties have agreed that it should determine. This rule is an inevitable and proper consequence of the voluntary nature of arbitration. In consensual arbitration, the authority or competence of the arbitral tribunal comes from the agreement of the parties; indeed, there is no other source from which it can come. It is the parties who give to what is essentially a private tribunal the authority to decide disputes between them; and the arbitral tribunal must take care to stay within the terms of this authority. The rule to this effect is expressed in several different ways. Sometimes it is said that an arbitral tribunal must conform to the mission entrusted to it; or that it must not exceed its mandate; or that it must stay within its terms of reference, competence or authority. Another way of expressing the rule (which is followed in this book) is to state that an arbitral tribunal must not exceed its jurisdiction (this term being used in the sense of mandate, competence or authority).<sup>63</sup>

Reisman, Craig, Park & Paulsson add:

Arbitration is a consensual process. This means that...because they derive their powers from the arbitration agreement, arbitrators must

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law requires a minimum reserve of water in the system to satisfy municipal water rights and, thus, in times of low storage levels irrigation users may not receive their full allotment.

Mary E. Kelly, [Water Management in the Binational Texas/Mexico Rio Grande/Rio Bravo Basin](http://www.yale.edu/environment/publications/bulletin/107pdfs/107kelly), Yale F & ES Bulletin, at p. 136. Exhibit R-22, at 0325. Available at [www.yale.edu/environment/publications/bulletin/107pdfs/107kelly](http://www.yale.edu/environment/publications/bulletin/107pdfs/107kelly).

62. Redfern, Alan and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3d ed., Sweet & Maxwell (London 1999), pp. 4 and 6.

63. *Id.*, p. 260.

*The Spanish version is the original and prevails over this document in all respects*

respect the parties' mandate as to the scope of the subject matter falling within their mission...<sup>64</sup>

68. This principle has been confirmed by tribunals established under Chapter Eleven. Specifically, the first Tribunal in the case *Waste Management v. The United Mexican States (Waste Management I)* stated:

The essential constituent elements which constitute the institution of arbitration are the existence of a conflict of interests, and an agreement expressing the will of the parties or a legal mandate, on which the constitution of an Arbitral Tribunal is founded. This assertion serves to confirm the importance of the autonomy of the will of the parties, which is evinced by their consent to submit any given dispute to arbitration proceedings. Hence, it is upon that very consent to arbitration given by the parties that the entire effectiveness of this institution depends.<sup>65</sup>

69. Even though arbitration under NAFTA and private arbitration differ, the nature of both is essentially consensual. In effect, Article 1121 requires, as a prerequisite for the submission by a disputing investor of a claim to arbitration on his own behalf, and if applicable, on behalf of an enterprise that is a juridical person that the investor owns or controls directly or indirectly, that they consent to arbitration in accordance with the procedures set out in the Agreement. The Parties offered to consent to the submission of a claim to arbitration only in accordance with the procedures set out in the Agreement, as stated in Article 1122:

Article 1122: Consent to arbitration

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement. [Emphasis added.]

70. The NAFTA Parties did not agree to submit all claims that could possibly arise under NAFTA to investor-State arbitration, and even less, to submit claims derived from other international agreements.

71. The Tribunal established pursuant to the NAFTA in the case *Marvin Roy Feldman Karpa v. United States of Mexico*, noted: "...NAFTA, and a particular part of NAFTA at that, delivers the only normative framework within which the Tribunal may exercise its jurisdictional authority..."<sup>66</sup>.

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64. Reisman, Michael, et al., *International Commercial Arbitration Cases, Materials and Notes on the Resolution of International Business Disputes*, The Foundation Press (New York, 1997), p. 1174.

65. *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2. Arbitral Award, 2 June, 2000, pp. 12 and 13, § 16.

66. *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision, ¶¶ 61 and 62. Also see the Award in the case *Robert Azinian and others v. United Mexican States*, ¶¶ 81 and 82.

72. Therefore, to allow a claim submitted by a private investor alleging that a Party has breached its obligations under NAFTA, a Tribunal must be certain that it has jurisdiction *ratione materiae* under NAFTA. In other words, the claim must pertain to an investment, in terms of the scope of application of NAFTA Chapter Eleven and the offer of the Respondent Party to consent to arbitration.

73. As explained in Sections IV.B, IV. C and IV.D, the claimants do not have an investment in Mexico, which is why the dispute that they allege falls outside of the scope of application of the NAFTA. Mexico has not consented, nor does it consent, to allow the claim to be submitted to arbitration. For the same reason, this claim does not directly originate from an investment, as required by the Additional Facility Rules.

74. In its Request for Arbitration, the claimants also indicate, alternatively, that their claim fulfills the requirements of Articles 2(b) and 4(3)(b) of the Additional Facility Rules<sup>67</sup>. However, Mexico's agreement to submit disputes under the Additional Facility Rules is given in terms of NAFTA Chapter Eleven.

75. Mexico has only consented to submit to arbitration disputes that arise directly from an investment, carried out in Mexican territory by investors of another NAFTA Party. Mexico has not consented, nor does it consent, to submit any other types of disputes to arbitration, and therefore article 2(b) of the Additional Facility Rules is inapplicable.

76. In addition, the Tribunal can appreciate that the claim alleged in the Request for Arbitration does not even arise from a commercial or any other type of transaction between the Mexican State and the claimants.<sup>68</sup> There is simply no transaction.

77. It is in this way that the Tribunal lacks competence to solve the dispute and must dismiss it in its entirety.

**B. The NAFTA and specifically the investment chapter, is based on a territorial principle of jurisdiction**

78. Under international law, the United States lacks jurisdiction to regulate, create and distribute rights within Mexican territory, whether they are private property rights in water or any other type; similarly, Mexico lacks the authority to do so within the United States. Neither Mexico nor the United States has asserted otherwise. The determination of water and property rights within Mexico is governed by the law of Mexico, in the same manner as the determination of water and property rights within U.S. territory is governed by the law of the United States.

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67. Request for Arbitration, ¶ 57.

68. The transactions identified in the request for arbitration were carried out in the United States with U.S. authorities and persons, not with Mexico.

79. The NAFTA itself is based upon the concept of territoriality. This is reflected in the Treaty's preambular language, its objectives and its substantive provisions. For example, Article 102, Objectives, states:

1. The objectives of this Agreement ... are to:

(a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;

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(c) increase substantially investment opportunities in the territories of the Parties;

(d) provide adequate and effective protection ...of intellectual property rights in each Party's territory;

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(Emphasis added.)

Article 201 defines "territory" for each Party, and a review of the substantive provisions of the agreement in various sections demonstrate that, in effect, the agreement is based on the principle of territorial jurisdiction of each Party, both with respect to the agreement as well as each Party's ability to regulate. For example:

- Article 301, which incorporates Article III of the GATT, recognizes that each Party has the exclusive power to regulate within its own territory. It refers to tariffs and other internal duties, as well as laws, rules, and prohibitions that affect the sale, offer for sale, purchase, transportation, and distribution or use of products in the domestic market and to certain quantitative rules and establishes that the products in the territory of each Party, imported into another Party are not subject, directly or indirectly, to internal taxes or to other internal charges, regardless of what they may be, greater than those applied, directly or indirectly, to domestic like products, and similarly, that the products of every Party imported into the territory of another Party should not receive less favorable treatment than that accorded to domestic like products, with respect to any law, rules, or prohibition that may affect the sale, offer for sale, purchase, transportation, distribution, and use of those products in the domestic market. Article 302 establishes the obligation of each Party to progressively eliminate their customs duties on goods that originate from a Party pursuant to its tariff schedule; Article 305 provides that each Party shall authorize the temporary duty free importation of certain goods that are imported from the territory of another Party; Article 306 requires that each Party authorize the duty free importation and commercial samples and printed publicity materials if they are imported from the territory of another Party; Article 309, which incorporates Article XI of the GATT, provides that no Party shall neither impose nor maintain prohibitions nor restrictions on the importation of a product of the territory of another Party or the exportation or the sale for export of a product destined for another Party's territory.

- Pursuant to Article 501, the certificate of origin serves to certify that a good exported from the territory of a Party to the territory of another Party qualifies as an originating good. Article 502 provides that each Party shall require an importer in its territory to request both preferential tariff treatment for a good imported into its territory from the territory of another Party and fulfill certain obligations. Article 504 provides that the obligation of each Party to establish in its internal laws that an exporter, or a producer in its territory that has provided a copy of a certificate of origin to an exporter, must provide a copy of the certification to its customs authority, when such authority requests it; that an exporter or a producer in its territory with a complete and signed certificate of origin and with reason to believe that the certificate of origin contains inaccurate information, must notify without delay and in writing any change that might affect its accuracy or validity to all persons to whom they might have provided a copy. Recognizing each Party's right to regulate within its territory, the same article requires that each Party shall provide that the false certification presented by an exporter or by a producer in its territory stating that a good to be exported to the territory of another Party qualifies as an originating good, have the same legal consequences, with modifications that might require circumstances, that those that shall be applied to an importer in its territory that makes false statements or manifestations in breach of its customs laws and regulations; that it shall be able to apply measures that are worthy of the circumstance when an exporter or producer in its territory do not fulfill the requirements of this Chapter, and that no Party shall apply sanctions to the exporter or the producer in its territory that voluntarily provides the aforementioned written notification for having provided an inaccurate certification. With respect to sanctions, Article 508 provides that each Party shall maintain measures that shall impose criminal, civil, or administrative sanctions for breaches to its laws and regulations in relation to the application of the provisions of Chapter V of the NAFTA.
- Pursuant to Article 901, Chapter Eleven applies to measures pertaining to the rulemaking of each one of the Parties. Article 904, provides that each Party shall be permitted to set the levels of protection that it deems appropriate in order to achieve its legitimate aims in the areas of security or protection of the life, or animal, agricultural and human health, as well as for that of the environment and the consumers, and that pursuant to the NAFTA, each one may adopt, keep, or apply any measure pertaining to codification for that purpose. With respect to compatibility and equivalence, Article 906 provides that, at the request of another Party, a Party shall seek, using appropriate measures, to promote compatibility of a rule or conformity assessment procedures that exists in its territory with rules or conformity assessment procedures that exist in the territory of another Party.
- Chapter Twelve governs cross-border trade in services, which Article 1213 defines as provision of a service (a) from the territory of one Party into the territory of another Party, (b) in the territory of a Party by a person of that Party to a person of another Party, or (c) by a national of a Party in the territory of another Party. Article 1202 requires that each Party accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers. Article 1205 provides that no Party may require a service provider of another Party to

establish or maintain a representative office or any form of enterprise, or to be resident in its territory, as a condition for the cross-border provision of a service.

- Chapter Sixteen, which regulates the temporary entry of business persons, establishes in Article 1601 the general principle of the preferential trading relationship between the Parties, the desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry, and the need to ensure border security and to protect the domestic labor force and permanent employment in their respective territories. Article 1603 provides that each Party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to public health and safety and national security.
- Article 1701 provides that each Party shall provide in its territory to the nationals of another Party adequate and effective protection and enforcement of intellectual property rights. Article 1702 provides that each Party may implement in its domestic law more extensive protection of intellectual property rights than is required under the NAFTA, provided that such protection is not inconsistent with it. With respect to intellectual property rights and sound recordings, each Party shall provide holders of such rights and their representatives, among others, the right to authorize or prohibit the importation into the territory of a Party copies of the work or sound recording that is done without the authorization of the title-holder. With respect to patents, each Party may exclude inventions from being patented if it is necessary to prohibit within its territory the commercial exploitation of such inventions in order to protect the public or moral order, even to protect life or human, animal, or vegetative health, or to avoid grave damage to nature or the environment, so long as the exclusion is not based only on the fact that the Party prohibits commercial exploitation in its territory of that which might be the subject of the patent.
- Article 1802 provides that each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them. Article 1805 provides that each Party shall establish or maintain judicial, quasi-judicial or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by the NAFTA.

80. Specifically, by express provisions, Chapter Eleven is limited in its scope of application to investments in the territory carried out by investors of another Party:

Article 1101. Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to::

- (a) investors of another Party;

(b) investments of investors of another Party in the territory of the Party;...

81. Nothing in the NAFTA purports to override the principles of territorial jurisdiction or disturb the application of domestic law within the territory of the Parties. The three NAFTA Parties explicitly premised the Agreement's operation upon their exclusive jurisdiction within their own territories.

**C. The claims must be dismissed because no claimant has an investment in Mexico**

82. The Chapter Eleven investor-state dispute settlement procedure does not provide a forum for all complaints about governmental measures.

83. The Request for Arbitration specifically identifies the following measures of Mexico as the basis of the claim:

Since 1992, Mexico has operated... seven dams and reservoirs to artificially manipulate the flows of the tributaries to the Rio Grande so as to divert the natural flow of those tributaries, in violation of both the terms of the 1994 Treaty and Chapter 11, Articles 1102, 1105 and 1110 of NAFTA.<sup>69</sup>

84. Even if it could be considered that the Mexican measures at issue might have affected productive activity in the United States, it can be easily seen that there is no link between one and the other for purposes of the NAFTA. The tribunal in *Methanex v. United States* considered a claim that measures adopted by the state of California to limit the use of a gasoline additive, MTBE, should be considered measures relating to the Canadian claimant's investment in the United States in providing methanol, an ingredient of MTBE. The respondent United States argued that the measures at issue, on their face, were not directed at the production or use of methanol and that accordingly they could not be considered measures that related to methanol within the meaning of Chapter Eleven. The Methanex tribunal agreed with the argument of the United States, holding as follows regarding the phrase "relating to" in Article 1101(1):

We decide that the phrase "relating to" in Article 1101(1) NAFTA signifies something more than the mere effect of a measure on an

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69. See Request for Arbitration, ¶ 67. The claimants also argue the following:

Mexico ... withheld fair and equitable treatment from Claimants ... by unfairly filling the vacuum in the United States market for irrigated fruits and vegetables (which Claimants could not produce without their water) with Mexican crops grown with Claimants' own water.

Request for Arbitration, ¶ 61. The Government of Mexico does not plant crops for export to the United States. The harvesting of products in Mexico does not constitute a "measure" under NAFTA, which defines "measure" as "any law, regulation, procedure, requirement or practice". NAFTA Article 201.

investor or an investment and that it requires a legally significant connection between them, as the USA contends. Pursuant to the rules of interpretation contained in Article 31(1) of the Vienna Convention, we base that decision upon the ordinary meaning of this phrase within its particular context and in the light of the particular object and purpose in NAFTA's Chapter 11. As indicated above, it is not necessary for us to address other submissions advanced by the USA in support of its interpretation based on Article 31(3) of the Vienna Convention (supported by Canada and Mexico).<sup>70</sup>

85. In this case, there is no legally significant connection between Mexico's actions to regulate the river basin in its territory and the claimants or their productive activities in the United States. In fact, there cannot be a relationship between the two given that none of the claimants has an investment in Mexico pursuant to Chapter Eleven.

86. The NAFTA Parties provided a limited and carefully defined mechanism by which investors of one Party or their investments in the territory of another Party, pursuant to the terms as defined in Article 1139, may claim damages that derive from government actions that are incompatible with the obligations provided in Section A of that Chapter, within the terms of Article 1101. Mexico granted its consent to submit to arbitration with respect to disputes that arise directly from investments carried out in its territory by investors of another Party.

87. The claimants state that each one is "an Investor and owner of an integrated Investment", which includes :

... rights 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 integrated

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70. *Methanex v. The United States*, Preliminary Decision of the Tribunal, ¶ 147. The *Methanex* Tribunal summarized the argument of the United States as follows:

In summary, the USA contends that, in the context of Article 1101(1), the phrase "relating to" requires a legally significant connection between the disputed measure and the investor. It argues that measures of general application, especially measures aimed at the protection of human health and the environment (such as those at issue here), are, by their nature, likely to affect a vast range of actors and economic interests. Given their potential effect on enormous numbers of investors and investments, there must be a legally significant connection between the measure and the claimant investor or its investment. It would not be reasonable to infer that the NAFTA Parties intended to subject themselves to arbitration in the absence of any significant connection between the particular measure and the investor or its investments. Otherwise, untold numbers of local, state and federal measures that merely have an incidental impact on an investor or investment might be treated, quite wrongly, as "relating to" that investor or investment (U.S. Memorial on Jurisdiction, ¶ 130.)



water delivery systems, including pumps, aqueducts, canals, and other facilities for the storage and conveyance of their water to the land on which it is used.<sup>71</sup>

The claimants also alleged that “[e]ach Claimant’s Investment is entirely predicated on this right to receive water located in Mexican tributaries,” and “Claimants, the rightful owners of the majority of the water rights allocated to the United States under the 1944 Treaty, were deprived of this water by measures taken by Mexico in violation of Chapter 11 of the NAFTA.”<sup>72</sup>

88. However, as explained above, the claimants have no property rights, and cannot have any rights, in Mexico in the waters of the Rio Bravo, an international river, much less over waters from its tributaries located in Mexico, which are national rivers under Mexican and international law.<sup>73</sup> Also, the claimants do not, nor can they, have a concession to exploit and use the waters from the rivers referenced and no such right has been granted. Mexico has not created cross-border property rights over domestic waters to benefit U.S. individuals. None of the systems, facilities, and infrastructure that they allege to own is located in Mexican territory; all are located in the United States. Based on *lex situs*, none of the claimants have property rights of any other kind, whether it is over water rights or over any other assets.

89. Even if they have ownership rights in the United States, those rights clearly do not grant the claimants ownership rights in Mexico. In addition, it should be noted that the claimants do

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71. Request for Arbitration, ¶ 53.

72. *Id.*, ¶¶ 53, 60. The Claimants may be proposing a theory that they have a cross-border, common law riparian property interest in the flow of water within Mexico. But Mexico is not a common law country, no such cross-border riparian rights for individuals are recognized under customary international law, and no provision of the 1994 Water Treaty purports to grant such rights to individuals. Moreover, the Claimants do not even have riparian rights to water from the rivers within the United States; rather, their rights to use water for irrigation derive exclusively from authority granted by the State of Texas.

73. Under international law, the rivers located completely within U.S. territory are national rivers. For example, Oppenheim’s International Law states:

Theory and practice agree upon the rule that rivers are part of the territory of the riparian state. Consequently, if a river lies wholly, that is, from its source to its mouth, within the boundaries of one and the same state, such state owns it exclusively, the waters and the mouth of the river being national or internal waters. Such rivers may be called national rivers.

[Emphasis in the original]

*Oppenheim’s International Law*, (Robert Jennings and Arthur Watts, editors), 9th ed., p. 574. Also see Brownlie, Ian, *Principles of International Law* 4th ed., Oxford University Press (1990), p. 120: “Lakes and rivers included in the land territory of a state, as well as waters on the landward side of baselines from which the breadth of the territorial sea is calculated, comprise internal waters subject to state sovereignty”.

not even have ownership rights over a specific amount of water under the applicable U.S. law. They have a permit issued by the State of Texas, which grants them a proportional amount of the water available in the region.

90. In the Request for Arbitration, the claimants allege that the “Integrated investment” fits the definition contained in NAFTA based on Article 1139, which defines an investment as “real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes”. However, as Mexico explained in its submission to the ICSID dated 4 March, the definition provided in Chapter Eleven cannot be considered in the abstract; rather, by virtue of Article 1101, which defines the scope of application of the Chapter, in the present case the investment must pertain to investments made in Mexican territory.

91. For purposes of Chapter Eleven, Article 1139 defines:

- “**investment** means... (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...”;
- “**investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment”; and
- “**investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of such Party”.

92. The claimants allege that Mexico has breached Articles 1102, 1105 and 1110 of the NAFTA<sup>74</sup>, which provide, in relevant part (the emphasis is added by the respondent in each case):

Article 1102. National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments or investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 1105. Minimum Standard of Treatment

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74. Request for Arbitration, ¶ 59.

*The Spanish version is the original and prevails over this document in all respects*

1. 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.

Article 1110. Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6.

[Emphasis added]

93. Upon review of the above definitions, as they are used in the substantive provisions that are pertinent in this case (Articles 1102, 1105 and 1110), pursuant to Article 1101, it is clear that the protection afforded by Chapter Eleven only covers investments of investors of one Party in the territory of another Party. In this case, it only covers real estate or other property, tangible or intangible, located in Mexican territory, acquired or used in Mexican territory by a U.S. national or enterprise in the expectation for the purpose of economic benefit or other business purposes.

94. Under Article 1139, the water rights granted by the State of Texas to the benefit of the claimants are not an investment for purposes of Chapter Eleven.<sup>75</sup> They are simply authorizations granted by the State of Texas for the use of water available in the region<sup>76</sup>. Even if they somehow it might be considered an investment, they are not an investment located in

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75. The claimants only identified paragraph (g) of the definition of investment contained in Article 1139. However, it is Mexico's opinion that neither paragraph (g) nor any other type of investment of that definition are relevant: a) an enterprise; b) an equity security of an enterprise; c) a debt security of an enterprise; d) a loan to an 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; 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; h) interests arising from the commitment of capital or other resources in the territory of a Mexico (or the U.S.) to economic activity in such territory.

76. In their letter dated 7 March 2005, the claimants argue that the language of the ICSID Convention supports their position that they are "investors" at page 4. It is unnecessary to comment on the claimants' interpretation of the ICSID Convention because Mexico is not a signatory to the Convention and therefore it is not relevant for the purposes suggested.

Mexican territory; and, more importantly, the water rights were not granted to the claimants by Mexican law, and not even under international law.

95. Under Article 1101, the definition of “investor of a Party” contained in Article 1139 refers necessarily to an investment in Mexico. In effect, the definition of “investor of a Party” is granted by virtue of an investment and, pursuant to Article 1101, Chapter Eleven only applies to investments carried out in the territory of a Party that adopts or applies the measures in question.

96. In addition, Articles 1102, 1105 and 1110 also state that a claim must always arise from an investment in the territory of a Party that adopts or applies a measure:

- With respect to national treatment, the comparison that should be made is between the treatment accorded to Mexican investors and that afforded to the investors of another Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in Mexican territory; and between the treatment accorded to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in Mexican territory, whether they are Mexican investments or whether they belong to investors of another Party.

Neither Mexico’s measures with respect to the provision of water to the United States pursuant to the Water Treaty of 1944, nor the water rights that the claimants might have pursuant to Texas law, refer to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in Mexican territory. The case presented by the claimants would require ignoring the scope of application of Chapter Eleven in order to interpret that such measures by Mexico refer to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in the United States, notwithstanding that Mexico lacks jurisdiction to regulate investments in the United States.<sup>77</sup> Similarly, it would be necessary to determine that the State of Texas can create rights for the benefit of its residents, a breach of which is attributable to Mexico.

- With respect to the minimum standard of treatment, the elements that must be analyzed are the treatment accorded to the investments, of investors of another Party, located in Mexican territory, in light of the minimum standard of treatment required by customary international law.
- With respect to expropriation, one must analyze if Mexico nationalized or expropriated investments of investors of another Party located in Mexican territory.

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77. Given the territorial limits of the NAFTA, it is evident that the persons located in different countries and subject to different legal systems cannot be in like circumstances. The claimants have not identified any Mexican person that has received more favorable treatment, nor have they explained how it is that such a comparison could be made.

97. Due to the lack of any investment by the claimants in Mexican territory, the claim is outside the scope of NAFTA Chapter Eleven, and none of the substantive provisions -refer to measures of the Mexican government that are alleged. In this case, no such measures pertain to the claimants as U.S. investors intending to carry out, presently carrying out, or having an existing investment in Mexico.

98. However, at a more basic level, if the claimants are located in the United States and are subject to U.S. jurisdiction, specifically, to that of the State of Texas, it is perplexing at best to wonder how they can simultaneously be subject to Mexican jurisdiction such that the difference in treatment imputed to Mexico could be legally relevant, or how it is that Mexico could have expropriated a property right created by a foreign legal system and existing only in another country.

99. Obviously Mexico lacks territorial jurisdiction to adopt or apply U.S. measures, just as the United States lacks jurisdiction to do the same with respect to Mexico. In sum, none of the measures adopted or applied in Mexico pertain to the claimants or their investments (using the term here in a broad sense).

100. The Statement of Administrative Action presented by the U.S. President to Congress in 1993 when it submitted the legislation to implement the NAFTA reflects the limits of Chapter Eleven in this respect:

The chapter applies where such firms or nationals [investor of a Party] make or seek to make investments in another NAFTA country.<sup>78</sup>

[Emphasis added]

**D. The Tribunal lacks competence to rule on the rights and obligations of Mexico and the United States pursuant to the Water Treaty of 1944**

101. The claim is based on the allegation that Mexico has breached the Water Treaty of 1944. The Request for Arbitration contradicts the claimants' statement, made during the First Session of the Tribunal, that the claim is not based on a breach of the Water Treaty of 1944<sup>79</sup>.

102. After noting in paragraph 60 of their Request for Arbitration the NAFTA articles that they allege were breached by Mexico, in paragraph 62 the claimants state:

This claim submitted for arbitration accrued in October 2002, when Mexico's water debt (which is owned almost entirely by Claimants) became delinquent. This water debt arose under the 1944 Treaty, which allocated the waters of the Rio Grande River and its tributaries. Claimants' right to receive this water, which is located in Mexico, is the

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78. U.S. Statement of Administrative Action, H. Doc. 103-159, Vol. 1, 103d Cong., 1st Sess. (1993) p. 589.

79. See English version of the transcript of the First Session of the Tribunal, pp. 43-44.

foundation for their expenditure of millions of dollars in pumps, aqueducts, pipes, irrigated farmland, farm equipment and buildings, and their ongoing agricultural businesses. Claimants, the rightful owners of the majority of the water rights allocated to the United States under the 1944 Treaty, were deprived of this water by measures taken by Mexico in violation of Chapter 11 of NAFTA. As a result, Claimants have suffered damages in an amount between US\$320,124,350 and US\$667,687,930, as calculated by their economic experts.

103. In paragraph 62 they add that Mexico breached the NAFTA “by flagrantly violating the 1944 Treaty”. In paragraphs 63 to 65 they explain the hydrographic situation of the Rio Bravo and its Mexican tributaries and their interpretation of the purpose of the Bilateral Water Treaty and international dams, and state:

66. In direct contravention to the 1944 Treaty and Chapter 11 of NAFTA, Mexico has constructed and operated on tributaries of the Rio Conchos Basin, seven dams and reservoirs, the purpose of which is to collect and divert for use by its own nationals, water rights belonging to Claimants.

67. Since 1992, Mexico has operated these seven dams and reservoirs to artificially manipulate the flows of the tributaries to the Rio Grande so as to divert the natural flows of those tributaries, in violation of both the terms of the 1944 Treaty and Chapter 11, Articles 1102, 1105, and 1110 of NAFTA. One-third of the natural flows of the tributaries (a minimum of 350,000 acre-feet per year) is allotted by the 1944 Treaty to the United States, and the right to use these flows is owned by Claimants. In the 1992-1997 cycle, Mexico delivered only 726,151 acre-feet of a water when it should have delivered a total of 1,750,000 acre-feet of water.

104. In paragraph 69 they add: “Claimants are the legal owners of 1,219,521 acre-feet of the irrigation water wrongfully withheld and diverted from the Rio Grande by Mexico's manipulation of its dams and reservoirs as of October 2002”. The Request for Arbitration goes on to state that:

71. Respondent's failure to deliver the water due to Claimants and continued retention of Claimants' water on Respondent's side of the United States – Mexican border violates Articles 1102, 1105, and 1110 of NAFTA.

72. ... By taking Claimants' water rights ... and providing the water for use by its own nationals, Respondent has accorded Claimants less favorable treatment than that granted to the Mexican investors in like circumstances ....

73. Under Article 1105, each Party must grant the investments of investors from another Party treatment in accordance with international law .... Respondent's intentional violation of the 1944 Treaty ... is a clear violation of international law ....

75. Mexico took a measure tantamount to ... expropriation of Claimants' Investment ... in violation of Article 1110 when it captured, seized or diverted to the use of Mexican farmers the water located in Mexico and owned by Claimants.

105. Therefore, the only basis the claimants could have for any expectation of receiving any volume of water from the Mexican tributaries of Rio Bravo is the Bilateral Treaty of 1944, and it is precisely the alleged non-compliance with that international agreement on which the claimants assert a purported breach of the NAFTA.

106. Mexico already has explained the legal situation concerning the waters of Rio Bravo in detail from the perspective of Mexican law, as well as the authorization that claimants have to use those waters under Texas law. Their assertion that they have the right to receive water from the Rio Bravo and its tributaries due to being owners of most of the water rights assigned to the United States is incorrect.

107. United States itself recently affirmed that the only basis for cross-border rights to water is the Bilateral Water Treaty, specifying that no private rights of action arise under the Treaty. The flow of the Colorado River, like that of the Rio Bravo, is apportioned between Mexico and the United States under the terms of the Water Treaty of 1944. In the case *Consejo de Desarrollo Económico de Mexicali, A.C. et. al. v. United States et. al.* (case CV-S-05-0870-KJD-GWF) (still pending decision), the plaintiffs, including a Mexican entity, have argued that they will be deprived of water rights protected by the U.S. Constitution as a result of U.S. plans to capture seepage from the Colorado River that otherwise would have flowed into Mexico. The plaintiffs claim rights to the water based on, among other things, "prior appropriation" of the seepage, "international comity," and "international and equitable concepts of apportionment and comity."<sup>80</sup>

108. In its Motion to Dismiss filed on 19 September 2005, the United States Government stated:

... Mexican water users do not have water rights or a property interest in Colorado River water conveyed through the All-American Canal or water than seeps out of the All-American Canal. ...[T]he Colorado River is fully apportioned between Mexico and the United States, and among states and water users in the United States.

...

[T]he United States and Mexico have a treaty that governs the Colorado River water allocated to each nation.... Plaintiffs are not part of [the

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80 Complaint for Declaratory And Injunctive Relief (9 July 2005) ¶ 52. Exhibit R-23.

U.S.] allocation system under United States federal law, and are bound by Mexico's allocation under the 1944 Treaty.<sup>81</sup>

109. Similarly, Mexico argued in its submission dated 4 March 2005 addressed to the ICISD, that the Bilateral Water Treaty does not establish how each State is to distribute the water assigned to it. Each State is free to do so pursuant to its own laws. Accordingly, the claimants do not have a right arising from the Treaty of 1944. Any right that they have is derived from United States law (in this case, of the State of Texas).<sup>82</sup>

110. Mexico argued that NAFTA Chapter Eleven is not a forum available to individuals to resolve any type of complaints. The right of action conferred to individuals is clearly defined and limited.

111. In addition, the Water Treaty of 1944 provides for its own dispute settlement mechanism, which grants the CILA exclusive jurisdiction, and as such, the governments of both countries (through the *Secretaría de Relaciones Exteriores* of Mexico and the United States Department of State, respectively)<sup>83</sup>. In the case *Consejo de Desarrollo Económico de Mexicali*, the U.S. Government emphasized that any dispute concerning implementation of the Bilateral Water Treaty had to be resolved by the CILA: “[I]n 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.” It added that “[T]he 1944 Treaty did not create private rights of action for individuals.”<sup>84</sup> Mexico agrees.

112. Specifically in this case, the Treaty of 1944 itself provides that for a number of reasons the States can incur a water deficit, and it establishes a compensation mechanism under five-year cycles; however, a water deficit does not constitute a breach of the Treaty. The difference that arose between Mexico and the United States was not with respect to the existence of a debt on the part of Mexico, but rather, with respect to the interpretation of provisions regarding the method of compensation. In fact, the United States did not even submit the dispute to the CILA through the formal procedure established in the Bilateral Treaty. Both countries reached an agreement regarding how to eliminate the debt, and Mexico did so.<sup>85</sup>

113. The claimants purport to argue before this Tribunal that there exists a situation involving a breach of the Bilateral Water Treaty on the part of Mexico, when there is not even a claim

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81 Memorandum In Support of United States' Motion to Dismiss Counts 104 and 708 (“U.S. Memorandum”) (19 September 2005), ¶¶ 30, 34. Exhibit R- 4.

82. Mexico had already pointed this out in its official communication No. 511.13.117.05, dated 4 March 2005, ¶¶ 11 to 14.

83 Water Treaty of 1944, Articles 2 and 24(d). Exhibit R-2.

84 U.S. Memorandum, pp. 17-18. Exhibit R-24, at 0403-0404.

85. See Section III.D.



under the appropriate channels on the part of the United States and even less so, a recognition of a breach on the part of Mexico.

114. The United States was faced with an analogous argument in the *Methanex* case. The claimant had argued that an alleged breach by the United States of the WTO agreement could be deemed a violation of NAFTA's Article 1105(1). The United States answered as follows:

... Methanex's suggestion that Article 1105(1) creates a new, private right of action for investors to challenge a breach of any treaty or customary international law obligation is manifestly absurd. Numerous treaties, many of which have either no mechanism for resolving disputes between States or highly specialized mechanisms, are in effect among the NAFTA Parties. The limited consent to arbitration granted in Chapter Eleven cannot reasonably be extended to the international law obligations embodied in those treaties. Otherwise, the NAFTA Parties would potentially be subject to a vast number of claims for monetary damages based on obligations that were not assumed with the understanding that their breach could give rise to such claims.<sup>86</sup>

The same can be said with respect to the claimed breaches of Articles 1102 and 1110 based on alleged violations of the Water Treaty. They are equally defective.

**E. The claims are untimely**

115. As previously stated, Mexico has only consented to submit to arbitration under the procedures established in the NAFTA (Article 1122(1)).

116. The procedural requirements are found in Articles 1116 to 1121, inclusive. Specifically, Article 1116(2) provides:

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

117. This limitations period is fully enforceable and strict. As noted by the tribunal in *Marvin Roy Feldman Karpa v. United States of Mexico*:

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<sup>86</sup> Reply Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment (12 April 2001), pp. 32-33. In the same sense, the 31 July 2001 opinion of the Free Trade Commission provided the following interpretation pursuant to Article 1131(2) of NAFTA: "A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)". Pursuant to paragraph 2 of Article 1131, the interpretation of the NAFTA by the Free Trade Commission (a tripartite institution created by NAFTA, comprised of representatives from each Party at the rank of Minister) of a provision of this Agreement is binding on a Tribunal established under Chapter Eleven.

the Arbitral Tribunal stresses that, like many other legal systems, NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense which, as such, is not subject to any suspension (see *supra*, para. 58), prolongation or other qualification. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three years, and does so in full knowledge of the fact that a State, *i.e.*, one of the three Member Countries, will be the Respondent, interested in presenting a limitation defense. The quality of one Party as a State as well as all specificities and constraints necessarily connected to any state activity neither exclude nor qualify resort to the defense of limitation.<sup>87</sup>

118. The same tribunal also determined that the three year limitation period must be traced back from the date that the claim is submitted to arbitration,<sup>88</sup> meaning that timeliness is defined based on the date on which the request for arbitration was made.

119. In the Request for Arbitration the Claimants assert Mexico violated the NAFTA:

- “From 1992 to 2002, Mexico has captured, seized, and diverted to the use of Mexican farmers, the foundation of the Investment (approximately 1,219,521 acre-feet of irrigation water) located in Mexico ....” (paragraph 61).
- “In direct contravention to the 1944 Treaty and Chapter 11 of NAFTA, Mexico has constructed and operated on tributaries of the Rio Conchos Basin, seven dams and reservoirs, the purpose of which is to collect and divert for use by its own nationals, water rights belonging to Claimants:

San Gabriel Reservoir was completed on the Florido River in 1981; it holds 0.210 million acre-feet and is used for irrigation.

Pico de Aguila Reservoir was completed on the Florido River in 1993; it holds 0.045 million acre-feet of water and is used for irrigation.

La Boquilla Reservoir was completed in 1916 on the Conchos River; it holds 2.340 million acre-feet of water and is used for irrigation and hydroelectricity.

La Colina Reservoir was completed on the Conchos River in 1927, holds 0.195 acre-feet of water and is used for irrigation and hydroelectricity.

Francisco I. Madero Reservoir was completed in 1949 on the San Pedro River; it holds 0.280 acre-feet of water and is used for irrigation and sediment control.

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<sup>87</sup> *Marvin Roy Feldman Karpa v. United States of Mexico*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), at ¶ 63.

<sup>88</sup> *Id.*, ¶¶ 39-47.

Chihuahua Reservoir was completed on the Chuvistar River in 1960; it holds 0.021 million acre-feet of water and is used for municipal water, irrigation and flood control.

Luis L. Leon Reservoir was completed on the Conchos River in 1968; it holds 0.290 million acre-feet of water and is used for irrigation and flood control.”<sup>89</sup>

(Paragraph 66).

- “Since 1992, Mexico has operated these seven dams and reservoirs to artificially manipulate the flows of the tributaries to the Rio Grande ....” (paragraph 67).
- “From 1992 to October 1999, Mexico kept all of the water that fell above the Luis Leon Reservoir ....” (paragraph 68).

120. The claimants submitted their Request for Arbitration on 20 January 2005. All of the alleged acts and omissions occurred more than three years prior to that date, and as a result, are excluded from the jurisdiction of the Tribunal by Article 1116(2).<sup>90</sup>

#### **F. The claimants have not complied with mandatory procedural requirements**

121. Notwithstanding the above objections requiring the Tribunal to dismiss the claim entirely, Mexico reiterates that, despite its various requests, many of the claimants have not fulfilled the procedural requirements to allow them to participate in the arbitral procedure. Mexico wishes to be clear: based on the reasons submitted above, it does not admit that the Tribunal has competence to decide the claim; however, aside from the objections that have been identified, each claimant must fulfill the procedural requirements established by the NAFTA.

122. Section B of Chapter Eleven establishes an arbitration procedure between an investor of one Party to the NAFTA and another Party to the agreement, in which it intends to carry out, carries out, or carried out an investment. It is a principle of international law in this area that an individual cannot submit a claim against the State of which it is a national, as expressly recognized by the NAFTA. Therefore, it is essential that each claimant demonstrate that it is an investor of a Party. In the case at hand, each claimant must show that it is a United States

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<sup>89</sup> It is unclear how reservoirs constructed in 1916 and 1927, years before the Water Treaty was negotiated, could have been built in violation of the Water Treaty as the Claimants allege. It should also be noted that none of the Florido, San Pedro or Chuvistar rivers are within the scope of the Water Treaty.

<sup>90</sup> Of course, alleged acts or omissions of Mexico that occurred before the entry into force of the NAFTA on 1 January 1994 are beyond the Tribunal’s jurisdiction *ratione temporis*. See *Marvin Roy Feldman Karpa v. United States of Mexico*, ICSID Case No. ARB(AF)/99/1, Award 16 December 2002, ¶¶ 60-63.

national or juridical entity.<sup>91</sup> The Chapter Eleven tribunal in the *Loewen* case held that investor claimants must continually have the nationality of a Party different from the Respondent Party<sup>92</sup> from the moment the events that gave rise to the dispute took place, until the dispute is resolved.<sup>93</sup> Similarly, Article 2 of the ICSID Additional Facility Rules authorize the ICSID to conduct “proceedings between a State... and a national of another State...”.

123. Article 1119 requires that each claimant present a notice of its intent to submit its claim to arbitration (“notice of intent”):

Article 1119: Notice of Intent to Submit a Claim to Arbitration

The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify:

(a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise;

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91. Article 201 (Definitions of General Application) provides the following definitions for purposes of the entire agreement:

**national** means a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1 [which provides definitions specific to Mexico and the United States]:

**enterprise of a Party** means an enterprise constituted or organized under the law of a Party; [and]

**enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.

Article 1139 adds, for purposes of Chapter Eleven exclusively:

**enterprise** means an "enterprise" as defined in Article 201 (Definitions of General Application), and a branch of an enterprise;

**enterprise of a Party** means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there; ....

92. Article 1139 defines a “disputing Party” as “means a Party against which a claim is made under Section B”.

93. *Loewen Group, Inc. et al v. United States of America*, Award 26 June 2003, ¶ 225.

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- (b) the provisions of the Agreement alleged to have been breached and any other relevant provisions;
- (c) the issues and factual basis for the claim; and
- (d) the relief sought and the approximate amount of damages claimed.

124. With respect to the claim, below the provisions relevant to this case are also transcribed:

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

- (a) Section A or Article 1503(2) (State Enterprises); or
- (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A;

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

Article 1120. Submission of a Claim to Arbitration

1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:

...

(b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention...

2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

Article 1121. Conditions Precedent to Submission of a Claim to Arbitration

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:

- (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and
- (b) the investor...waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other

*The Spanish version is the original and prevails over this document in all respects*

extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

Article 1139. Definitions

For purposes of this Chapter:

...

**enterprise** means an "enterprise" as defined in Article 201 (Definitions of General Application), and a branch of an enterprise;

**enterprise of a Party** means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there;

...

**investor of a Party** means an investor other than an investor of a Party, that seeks to make, is making or has made an investment;

...

**disputing investor** means an investor that makes a claim under Section B;

...

**disputing Party** means a Party against which a claim is made under Section B;

**disputing party** means the disputing investor or the disputing Party;

**disputing parties** means the disputing investor and the disputing Party;

...

125. Similarly, Article 3 of the Arbitration Rules provides:

(1) The request shall:

(a) designate precisely each Party to the dispute and state the address of each;

(b) set forth the relevant provisions embodying the agreement of the Parties to refer the dispute to arbitration;

(c) indicate the date of approval by the Secretary-General pursuant to Article 4 of the Additional Facility Rules of the agreement of the parties providing for access to the Additional Facility;

(d) contain information concerning the issues in the dispute and an indication of the amount involved, if any; and

(e) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request.

126. Of course, nothing prevents several claims from being consolidated into one single notice or request, but this does not presuppose that the requirements of the NAFTA or the ICSID Additional Facility Rules may be avoided, nor that individuals have the right to consolidate multiple claims on their own – the consolidation may be carried out by agreement between the disputing parties, as occurred in the present case, or pursuant to the procedure provided in Article 1126. In any case, the information and documents that identify each claimant must be provided and they must prove that each one is a United States investor.

127. The Tribunal will note that Mexico has insisted from the beginning in due compliance with NAFTA requirements, which, to date, have not been fulfilled.<sup>94</sup>

### **1. Section B does not authorize class actions**

128. The Request for Arbitration includes claims from the 17 irrigation districts and indicates that each one “brings this action on behalf of the water users in the District who actually put this water to beneficial use in their farms and fields”.

129. However, the treaty does not allow for class or authorized representative actions, as are allowed, for example, in U.S. law.<sup>95</sup> Each claimant must be identified individually and must fulfill the requirements established in the NAFTA and the Additional Facility Rules, that is, in addition to the information to identify each claimant, each one must:

- have submitted a notice of intent that complies with the requirements of NAFTA Article 1119;

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94 See Section II of this submission.

95. Black’s Law Dictionary defines a *class or representative action* in the following manner:

A class action provides a means by which a large group of persons are interested in a matter, one or more may sue or be sued as representatives of the class without needing to join every member of the class...

There are general requirements for the maintenance of any class suit. These are that the persons constituting the class must be so numerous that it is impracticable to bring them all before the court, and the named representatives must be such as will fairly insure the adequate representation of them all. In addition, there must be an ascertainable class and there must be a well defined community of interest in the questions of law and fact involved affecting the parties to be represented.

Black, Henry Campbell, *Black’s Law Dictionary* 5th ed. (West Publishing Co. St. Paul, Minn.) (1979), p. 226.

- demonstrated that it is a national or a company of the United States, whatever the case may be, with ownership or direct or indirect control of an investment in Mexican territory;
- indicated in the notice of intent the remedy it requests and an approximate amount of damages claimed, and, when appropriate, demonstrate that it has suffered damages and losses;
- express consent to submit to arbitration under the terms of the proceedings provided in the NAFTA;
- submit the waiver referenced in Article 1121(1)(b);
- in the case of juridical persons, must demonstrate they have taken all the necessary internal actions to authorize the request; and
- demonstrate that the legal representatives have been duly authorized.

130. No such water user is listed in the notice of intent or in the Request for Arbitration. Mexico does not know how many claimants there are or who they are, their address, nationality, and the amount of damages claimed by each.

131. It is no trivial matter. For example:

- Mexico has no way to verify that the users meet the requirements of nationality provided in the NAFTA and the Additional Facility Rules.
- There is no evidence of consent of the users who the districts claim they represent. Messrs. Marzulla and Wallace stated that three of the initial claimants have withdrawn<sup>96</sup> and Mexico does not have a way of knowing if these persons are among the users of the irrigation districts, or whether other users had an interest in submitting a claim to arbitration, or if they refused to do so, etc.<sup>97</sup>
- Given that none of the claimants has an investment in Mexican territory, the jurisdiction available is that of the national tribunals, whether in Mexico or the United States. In effect, in the *Consejo de Desarrollo Económico de Mexicali* case, a Mexican entity, among other claimants, initiated an action against the United States and others because, according to its arguments, a project to contain the waters in the Rio Colorado that flow towards Mexico would affect its rights,<sup>98</sup> and it is equally

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96. See paragraph 11 of this submission.

97. The *Hidalgo* case, for example, involved over 2,500 individuals. See “Water Law” in Handbook of Texas Online, available at <http://www.tsha.utexas.edu/handbook/online/articles/WW/gyw1.html>.

98. See footnote 94.



likely that there could be a similar complaint against Mexican authorities with respect to the measures that allegedly breach provisions of Chapter Eleven. It can even be anticipated that a claim could be submitted against the United States because it accorded Mexico a solution to the issue of water debt that might not seem satisfactory to the claimants.<sup>99</sup> However, Article 1121 requires that each disputing investor “waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116,” (emphasis added)<sup>100</sup>. However, Mexico has no way to know if such a claim has been submitted or could be submitted.

132. However, more importantly, by not appearing on the notice of intent or in the Request for Arbitration, none of the referenced users have fulfilled the requirements of the NAFTA and the Additional Facility. As a result, none of the users can participate in this process, whether by themselves or through the irrigation districts.

133. Compliance with such requirements is not optional. They are mandatory provisions: it is mandatory to submit a notice of intent under the terms of Article 1119; to demonstrate nationality of a Party to the agreement that is not a disputing Party in terms of Articles 1116, 1119, 1120, 1121 and 1139 of the NAFTA and Article 2 of the Additional Facility Rules; to consent to arbitration and to make the appropriate waiver in terms of Article 1121, etc.

134. The Tribunal in the *Waste Management I* case specifically discussed the issue of compliance with conditions precedent to the submission of a claim to arbitration established in Article 1121. It concluded that “it is fulfillment of NAFTA Article 1121 conditions precedent by an aggrieved investor that entitles this Tribunal to take cognisance of any claim forming the subject of arbitration”<sup>101</sup>.

135. This is not simply a question of an omission that may be corrected. The consequence of non-compliance is that the Tribunal lacks competence to decide the claims of persons who are unidentified. In addition, Mexico consented to consolidate 43 of the remaining claims listed in the Request for Arbitration, but not to consolidating others. Under Article 1126, this Tribunal lacks the authority to do so.

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99. In this respect it must be taken into account that Mexico has no pending water deficits with the United States. Mexico has provided the total volume of the deficit that it had, to the satisfaction of the United States, however, the claimants insist on continuing with this arbitration.

100. Evidently, the same measure may give rise to different claims in different fora. In this respect, see the Award in the *Waste Management I* case, §27, pp. 19-21. The Tribunal concluded: “It is clear that one same measure may give rise to different types of claims in different courts or tribunals...” (p. 19).

101. *Waste Management I*, §14, p. 12. In general, see section III.C of the Award, pp. 11 et seq.

136. All the claims of the 17 irrigation districts in representation of unidentified water users must be dismissed.<sup>102</sup>

**2. The claimants have failed to provide documents to fulfill evidentiary requirements of the NAFTA and the Additional Facility Mechanism**

137. From the time the claimants presented their Notice of Intent, Mexico expressed several concerns about the documents that demonstrate each one of the claimants listed in the Request for Arbitration legitimately can participate in this arbitration, particularly with respect to (i) the identity of the individual claimants; (ii) the nationality of the natural and juridical persons; (iii) evidence that the claimants own or control their purported investments<sup>103</sup>; and (iv) documents that demonstrate that Messrs. Marzulla and Wallace were duly authorized to represent them in these proceedings. These concerns were communicated to the Claimants and to the ICSID via several letters from the Secretaría de Economía dated between September 2004 and March 2005.<sup>104</sup>

138. As discussed above, it is essential that each claimant clearly demonstrate it is a national of the United States and not a national of Mexico.<sup>105</sup> At the first session of the Tribunal, the

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102. It should be noted that under United States law, the water districts (irrigation districts are specialized water districts) lack the authority to initiate legal claims on behalf of anyone other than themselves. Specifically, the Texas Water Code provides:

The board may institute and maintain any suit or suits to protect the water supply or other rights of the district, to prevent any unlawful interference with the water supply or other rights of the district, or to prevent a diversion of its water supply by others.

Texas Water Code, §58.181. Exhibit R-17, at 026 (emphasis added). The authority to sue is limited to the protection of rights that belong to the district. Nothing in the Texas Water Code allows irrigation districts to submit claims in representation of others, which is consistent with the fact that the water districts are political subdivisions of the State (see letter from Nancie Marzulla to Gabriel Alvarez, dated 7 March 2005, p. 3) that distribute water that belongs to the State.

103 Each Claimant has presented a “certificate of adjudication” issued by the State of Texas or a “monthly report statement”. Mexico accepts that either of those documents provides evidence that the State of Texas has issued a “water right” to the individual or entity under the authority of the *Hidalgo* decision.

104 See letters from the DGIE to Messrs. Marzulla and Wallace dated 9 September 2004; 11 November 2004; 16 November 2004; 23 November 2004, Exhibit R-1. See also official letter DGCJN.511.13.117.05 dated 4 March 2005 directed to the Secretary General of the ICSID. Exhibit R-1.

105 The Free Trade Commission’s approved form of Notice of Intent recommends the inclusion of documented proof of nationality of natural persons, place of incorporation of juridical persons, and ownership and control of the investment at issue. See *Statement of Free Trade Commission on Notices of*

Footnote continued on next page

Claimants' counsel offered to provide Mexico with all of the documents that it deemed necessary for that purpose.<sup>106</sup> In response to that offer, on 13 March 2006, Mexico sent to Messrs. Marzulla a letter that specifically explained its case for requesting information that had not been provided previously, despite the fact that it had been requested.<sup>107</sup> On 4 and 11 April 2006, provided letters were provided in response.<sup>108</sup>

139. However, the documents recently provided remain insufficient to remedy the deficiencies. Indeed, the persistent failure of Claimants' counsel to provide this basic information over the course of an entire year raises doubts as to whether those counsel have the full cooperation of the parties they are purporting to represent.

140. The Claimants have not provided even prima facie evidence of (a) the nationality of the purported claimants who are natural persons, and (b) documents which demonstrate that the individuals who authorized Messrs. Marzulla and Wallace to represent the juridical persons in these proceedings have the authority to do so.

**a. No evidence of the claimants' nationality was provided**

141. In its 13 March 2006 document request, Mexico requested that the Claimants verify the nationality of 14 individuals.<sup>109</sup> In their response, Messrs. Marzulla again submitted copies of driver's licenses (which had been provided before). A driver's license is not proof of nationality

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Footnote continued from previous page

*Intent to Submit a Claim to Arbitration* at page 3.

[http://www.ustr.gov/assets/Trade\\_Agreements/Regional/NAFTA/asset\\_upload\\_file212\\_3601.pdf](http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file212_3601.pdf)

106 Mr. Marzulla stated:

I would also point out that as to any concerns that Respondent may have with respect to issues of illegibility of documents previously, voluntarily provided by Claimants to demonstrate their nationality or their water rights, or as to any questions raised about the nationalities of any of the Claimants or other questions, we have offered--and quite frankly, I thought we had an agreement with Respondent--that they would simply point out what information, what documents they needed and that we would provide them.

Transcript of First Session, 14 Feb. 2006, at p. 44.

107 See official letter DGCJN.511.13.186.06 dated 13 March 2006. Exhibit R-1, at 0048-0052.

108 Exhibit R-25.

109 Arthur Benton Beckwith, Luther E. Bradford, Richard Berndt Drawe, Odus D. Emery, Jr., Willard Orin Fike, Francis Donald Phillipp, Francis Ludwick Phillip, Juan Francisco Ruiz, James D. Russell, Samuel Robert Sparks, Gregory Schreiber, Rita Schreiber, Charles Shofner and Julie G. Uhlhorn.

because it is not necessary to be a U.S. citizen or permanent resident to obtain one.<sup>110</sup> Mexico does not have certainty regarding whether those persons are U.S. nationals (citizens, permanent residents or “U.S. nationals,” as defined by the Immigration and Nationality Act of the United States), under the terms of the pertinent definition in Article 201 of the NAFTA.

142. Proof of nationality could consist of birth or naturalization certificates, or a passport. Documentary proof of permanent residency could consist of a permanent resident card (the “green card”) or the corresponding passport stamp.

143. Because there is no evidence that any of these individuals are U.S. nationals, their claims should be dismissed.

**b. It has not been confirmed that Messrs. Marzulla are duly authorized to represent the juridical persons**

144. In the case of the entities, particularly the irrigation districts, no information has been provided to evidence that they duly authorized Messrs. Marzulla and Wallace to represent them in these proceedings. Certain “certificates of representation” were provided, which were granted by individuals professing to retain the Marzulla&Marzulla firm on behalf of the irrigation districts. However, Mexico pointed out in its 4 March 2005 letter that, under Texas law, irrigation districts are governed by a board of directors.<sup>111</sup> Thus, in its 13 March document request, Mexico requested the Claimants provide documentation evidencing that (i) the entities actually had appointed these individuals to their respective positions and (ii) the board of each of these entities had authorized Messrs. Marzulla and Wallace to represent them in this arbitration. .

145. In their 11 April response, Messrs. Marzulla provided notarized statements from the Secretaries or Presidents of the Board of some of the juridical persons to validate that the individuals that had issued the certificates of representation also were officers of those entities, e.g., President or General Manager of an irrigation district. Messrs. Marzulla state that, by doing so, they were “therefore confirming that the individual has the authority to act on that entity’s behalf in this arbitration.”<sup>112</sup> That position is incorrect, however. What is required are corporate minutes verifying that the board specifically authorized those officials to retain the Marzulla firm in these proceedings, or bylaws showing that those positions generally are vested

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110 Texas only requires that foreign nationals demonstrate they are in the United States legally to obtain a driver’s license. See Nina Spears, *Playing Hardball in District 99*, Fort Worth Star-Telegram, March 1, 2006, at B10 (quoting Governor Perry as stating “Existing Texas law and Texas Department of Public Safety rules already provide the means for foreign nationals who are in this country legally to obtain Texas driver’s licenses ....”) Exhibit R-26.

111 Texas Water Code §§ 58.001(1), .71 (stating “District means irrigation district,” and “The governing body of a district is the board of directors...”). Exhibit R-17, at 0259-0260.

112 Letter from Nancie Marzulla to Hugo Perezcano, 11 April 2006. Exhibit R-25, at 0520-0521.

with the authority to act on behalf of those entities with respect to dispute settlement.<sup>113</sup> For those 20 entities, there still is insufficient evidence that they authorized Messrs. Marzulla and Wallace to represent them in these proceedings.<sup>114</sup>

**V. RELIEF REQUESTED**

146. For all of the foregoing reasons, the Government of Mexico respectfully requests that the claims be dismissed in their entirety with the appropriate costs awarded.

All of which is respectfully submitted for your consideration;

(Signed in the original)

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Hugo Perezcano Díaz  
Legal Counsel and Representative of  
the United Mexican States  
19 April 2006

147.

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113 In fact, only one of the notarized statements even indicates that the individual “is authorized to represent the District in the NAFTA arbitration proceedings.” See notarized statement for Hidalgo and Cameron Counties Irrigation District No. 9. Exhibit R-27.

114 Bayview Irrigation District No. 11; Brownsville Irrigation District; Cameron County Irrigation District #2; Cameron County Irrigation District #6; Delta Lake Irrigation District; Donna Irrigation District, Hidalgo County No. 1; Engleman Irrigation District; Hidalgo County Irrigation District No. 1; Hidalgo County Irrigation District No. 2; Hidalgo County Irrigation District No. 5; Hidalgo County Irrigation District No. 6; Hidalgo County Irrigation District No. 16; Hidalgo and Cameron County Irrigation District No. 9; La Feria Irrigation District Cameron County No. 3; Santa Maria Irrigation District Cameron County No. 4; United Irrigation District; Valley Acres Irrigation District; Electric Gin Company of San Benito; Krenmueller Farms and North Alamo Water Supply Corporation.