In The Arbitration

between

BAYVIEW IRRIGATION DISTRICT ET AL.,

CLAIMANTS/INVESTORS,

AND

THE UNITED MEXICAN STATES,

RESPONDENT/PARTY.

ICSID Case No. ARB (AF)/05/1

Counter-Memorial of Bayview Irrigation District et al. in Support of Jurisdiction

---

Nancie G. Marzulla
Roger J. Marzulla
Barbara A. Wally
Marzulla & Marzulla
1350 Connecticut Avenue, N.W.
Suite 410
Washington, DC 20036
(202) 822-6760

Don Wallace, Jr.
Chair of International Law Institute,
and Professor of Law
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, DC 20001
(202) 247-6006

Counsel for Claimants/Investors

Dated: June 23, 2006

I. Introduction

1. The 42 investor Claimants are seventeen Texas irrigation districts serving the Rio Grande Valley and supplying water for use on approximately 400,000 acres of valuable and productive agricultural land; 24 individual water users, the majority of whom do not receive their water through any irrigation district; and a corporate investor. Together, they have invested millions of dollars in facilities for the storage and conveyance of irrigation water to farms and homes in the Rio Grande Valley.

2. The investment at issue in this dispute consists of water rights for irrigation and municipal use. Claimants' expectations to the right to the receipt of use of the water at issue in these claims were fixed by 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, Feb. 3, 1944, U.S.-Mex., 59 Stat. 1219 (effective Nov. 8, 1945) (hereinafter "1944 Treaty"). The 1944 Treaty allotted the water from the lower Rio Grande River, below Fort Quitman, and its six tributaries (located in Mexico) between the United States and to Mexico. Claimants are the owners of 1,219,521 acre-feet of the water allotted to the United States under the 1944 Treaty, and diverted by Mexico for use by Mexican farmers.

3. Based on their fixed expectations and their legal rights in the water at issue, Claimants heavily invested in the development of their agricultural businesses, which require the timely, annual receipt of water in order to grow and market their crops. In addition, Claimants also buy and sell their water rights on an open market, which

provides another source of income for Claimants.[1] Claimants' investments in their commercial interests and their water rights form an integrated investment.

4. Claimants' water originates in six tributaries to the Rio Grande River (the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers, and the Las Vacas Arroyo) located in Mexico:

> The water resources of Texas, as in the nature of water, do not respect . . . jurisdictional lines or confine themselves to unified legal systems. Instead, the waters interact with adjacent jurisdictions on their own terms as part of the larger hydrologic framework developed by nature without regard to jurisdictional lines drawn by governmental institutions . . . . The Rio Grande Basin . . . drains a portion of the four northern Mexican states . . . ."

Darcy Alan Frownfelter, *The International Component of Texas Water Law*, 18 St. Mary's L.J. 481, 488-89 (1986).

5. When it reaches the Rio Grande, Claimants' water is commingled with Mexican water and stored in two international reservoirs, the Falcon and Amistad Reservoirs, which were jointly built and are owned and operated by Mexico and the United States, and are located partly in Mexico and partly in the United States.

6. Beginning in 1992, Mexico set about a course of purposeful and systematic capture, seizure, and diversion of the water belonging to Claimants while it was located in Mexican territory, for use by farmers located in Mexico. By diverting 1,219,521 acre-feet of Claimants' water to Mexican farmers, Mexico dramatically increased its irrigated agricultural production on the Mexican side of the Rio Grande River, while the crops and agricultural businesses of United States farmers in the Rio Grande Valley shriveled.

[1] The Rio Grande Regional Water Authority (until recently, the Lower Rio Grande Authority) helps to administer and facilitate the purchase and sale of these water rights. Sellers, such as the Claimants, however, set their own price for water, and can sell any or all of the water belonging to them. Legislation authorizing the new Rio Grande Regional Water Authority to administer the water market is pending.

7. Mexico has treated the investments of United States investors less favorably than it treated its own investors, in violation of Article 1102 of NAFTA. Mexico has further withheld fair and equitable treatment from Claimants in violation of Article 1105 of NAFTA, 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' water. Mexico also nationalized or expropriated Claimants' investment within Mexico, or took a measure tantamount to nationalization or expropriation of this investment, unfairly and without compensation and due process in violation of Article 1110 of NAFTA.

II. Factual Background

8. The Rio Grande River forms more than 1,200 miles of the boundary between the United States and Mexico, from the Gulf of Mexico to north of El Paso.[2] A 1906 water convention provides the international legal regime for water of the Rio Grande above Fort Quitman, Texas. *See* Convention between the United States and Mexico Regarding the Equitable Distribution of the Waters of the Rio Grande, U.S.-Mex., May 21, 1906, 34 Stat. 2953 (hereinafter "1906 Convention"). Under the 1906 Convention, Mexico is entitled to 60,000 acre-feet of water from the United States. *Id.* art. I. The 1944 Water Treaty allots the water of the Rio Grande below Fort Quitman to the Gulf of Mexico between the two nations, for disposition under their respective national laws.

9. The majority of the natural flow of the lower Rio Grande comes from the six above-named tributaries on the Mexican side of the River, which together drain

[2] *See* Rio Grande/Rio Bravo Basin Coalition, *Basin Facts*, *available at* http://www.rioweb.org/basinfacts.html (last visited June 20, 2006).

approximately 62,000 square miles of Mexican territory.[3] The Rio Grande River, downstream of El Paso, is generally a dry channel because its water is entirely diverted for human and agricultural use; the river resumes further downstream where the Rio Conchos flows into the Rio Grande.[4] The largest and farthest upstream of the tributaries is the Rio Conchos, which flows into the Rio Grande upstream of one of the two above-mentioned international reservoirs on the Lower Rio Grande, the Amistad Reservoir.[5] The other international reservoir on the Rio Grande, the Falcon Reservoir, receives water from the other five tributaries, including the Rio Salado, which is the second largest and runs directly into the Falcon Reservoir.[6]

10. Mexico controls the flow of these six tributaries through a series of dams, reservoirs, and irrigation works in Mexico. In the Rio Conchos basin, over 90 percent of the water is used for agricultural purposes and there are seven major reservoirs, constructed between 1916 and 1993.[7]

- The La Boquilla Reservoir was completed on the Conchos River in 1916.
- The La Colina Reservoir was completed on the Conchos River in 1927.
- The F. Madero Reservoir was completed on the San Pedro River in 1949.
- The Chihuahua Reservoir was completed on the Chuviscar River in 1960.
- The Luis L. Leon Reservoir was completed on the Conchos River in 1968.
- The San Gabriel Reservoir was completed on the Florido River in 1981.

---

[3] *See* Texas Comprehensive Wildlife Conservation Strategy – Wildlife Action Plan, Section II at 362, *available at* http://www.tpwd.state.tx.us/business/grants/wildlife/cwcs/ (last visited June 20, 2006).
[4] Rio Grande/Rio Bravo Basin Coalition, *Basin Facts*, *available at* http://www.rioweb.org/basinfacts.html (last visited June 20, 2006).
[5] *Id*.
[6] *Id*.
[7] *See* Mary E. Kelly, *The Rio Conchos: A Preliminary Overview* (Texas Center for Policy Studies 2001) at 7, 16, T.7, *available at* http://www.texascenter.org/publications/rioconchos.pdf (last visited June 13, 2006).

- The Pico de Aguila Reservoir was completed on the Florido River in 1993. [8]

A. The Claimants Own Water Allotted to the United States Under the 1944 Treaty.

11. In 1944, the United States and Mexico entered into a treaty "to fix and delimit the rights of the two countries with respect to the waters . . . of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, United States of America, to the Gulf of Mexico, in order to obtain the most complete and satisfactory utilization thereof . . . ." 1944 Treaty. As noted above, the water allotted to the United States under the 1944 Treaty originates in six tributaries to the Rio Grande River (the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers, and the Las Vacas Arroyo), all of which are located within Mexico.

12. In 1969, the American share of these Treaty waters was apportioned to Texas water districts, towns, and individual farmers by court decree. *See State v. Hidalgo County Water Control & Improvement Dist. No. 18*, 443 S.W.2d 728 (Tex. Civ. App. 1969). Claimants' ownership of the water at issue in this arbitration traces to this 1969 decree.

13. Pursuant to the 1944 Treaty, the United States and Mexico have constructed two jointly owned and operated reservoirs across the Rio Grande to store the waters from the above-named Mexican tributaries (as well as other waters). The Amistad Reservoir was completed in 1968 and the Falcon Reservoir was finished in 1953. Located partly in Mexico and partly in Texas, both reservoirs store commingled water belonging to Claimants and to Mexico. Claimants water stored in those reservoirs, along with their water conveyance and distribution facilities, irrigation works, farms, equipment and

[8] *Id*. at 7.

irrigated farming businesses all constitute an integrated investment, as more fully described *infra*.

14. The International Boundary and Water Commission (hereinafter "Commission" or "IBWC"), an international body established by the 1944 Treaty, maintains records of the waters owned by each party, and authorizes withdrawals of such waters from the reservoirs. *See* 1944 Treaty, art. 9. Orders for release of water owned by Claimants are transmitted to the Commission by the Texas Water Master, a Texas official appointed by the court to account for and enforce the water rights derived from the American share. *See Hidalgo*, 443 S.W.2d at 738.

B. Although Mexico Possessed No Right to Claimants' Water Under the 1944 Treaty, Mexico Diverted Claimants' Water For Use in Mexico.

15. Under the 1944 Treaty, the United States was allotted one-third of the flow of six Mexican rivers, but not less than an average of 350,000 acre-feet annually, averaged over a five-year cycle. 1944 Treaty, art. 4(B)(c) (allotment to the United States "shall not be less, as an average amount in cycles of five consecutive years, than 350,000 acre-feet (431,721,000 cubic meters) annually"). In other words, Mexico allotted to the United States a total of 1,750,000 acre-feet of water from six of its rivers during each five-year period.

16. Mexico and the United States, through the IBWC, have agreed on a method of accounting for these waters in consecutive five-year cycles. For two consecutive five-year periods (Cycle 25, 1992-97, and Cycle 26, 1997-2002), Mexico diverted for its own use water allotted to the United States (and owned by Claimants) under the 1944 Treaty. As more fully discussed *infra*, although Mexico invoked an extraordinary drought provision of the 1944 Treaty during Cycle 25, allowing it to roll over its Cycle 25 debt

into Cycle 26, it did not invoke the provision during Cycle 26. Thus, Mexico's entire Cycle 25 and Cycle 26 water debt to the United States became due and payable at the end of Cycle 26 – September 30, 2002.

17. According to the official accounting records of the Commission, in the 1992-1997 cycle (Cycle 25 under the Treaty), Mexico allowed only 726,151 acre-feet, rather than the minimum 1,750,000 acre-feet allotted as the American share, to flow from the six Mexican tributaries into the reservoirs.[9] Claiming "extraordinary drought," Respondent exercised its right to make up this deficit during the next 5-year cycle. *See* 1944 Treaty, art. 4. Respondent failed to make up the Cycle 25 deficit during the 5-year grace period of Cycle 26, and assumed additional deficits as it continued to divert the American share (including Claimants' share) for the use of Mexican agriculture.[10] Accordingly, at the end of Cycle 26 (September 30, 2002),[11] Respondent had seized and diverted for use in Mexico a total of 1,219,521 acre-feet of Claimants' water.

C. As a Result of Mexico's Failure to Provide Claimants' Water, Claimants Have Suffered Unredressed Economic Injuries.

18. Due to Mexico's failure to deliver Claimants' water, the Lower Rio Grande Valley region in Texas has experienced irrigation water shortages since the middle of the 1990s.[12] 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. These water rights, as well as the delivery

[9] International Boundary and Water Commission, Report of the United States Section, *Deliveries of Waters Allotted to the United States Under Article 4 of the United States – Mexico Water Treaty of 1944*, at 4 (April 2002), Ex. C-0177 (hereinafter "IBWC Report").
[10] *See, e.g., id.* at 9.
[11] *See, e.g., id.* at 5.
[12] John C. Robinson, *Alternative Approaches to Estimate the Impact of Irrigation Water Shortages on Rio Grande Valley Agriculture* (May 17, 2002), *available at* http://twri.tamu.edu/reports/2002/2002-015/sr2002-015.pdf (last visited June 20, 2006).

facilities, irrigation works, farms, equipment, and irrigated farming businesses of which they are an essential element, form an integrated investment, the expropriation and diversion of which has severely damaged the ability of Claimants to produce crops.

19. Irrigated acreage in Cameron, Hidalgo, and Willacy counties has decreased by about 29 percent, or 103,210 acres, since 1992.[13] The average loss in business activity in the region from 1998 to 2001 is estimated at $367.6 million per year.[14] The average irrigation use per year in the Texas Valley has decreased by 563,826 acre-feet since 1992.[15] Between 1992 and 2002, nearly $1 billion has been lost in decreased business activity and 30,000 jobs have been lost.[16]

20. During the same time period, Mexico's exports to the United States, through ports of entry in South Texas and Nogales, Arizona, of fruits and vegetables increased dramatically.[17] Irrigated production of crops in the Mexican state of Chihuahua tripled from 1980 to 1999.[18] There has been a decrease in acreage of crops in Chihuahua needing less irrigation and an increase in production of more profitable but more water-dependant crops such as tomatoes, melons, and nuts.[19] Total estimated water use for

---

[13] Letter from Gov. Rick Perry to the Hon. Colin L. Powell, White Paper, *An Issue of Non-Compliance Between Mexico and the United States of America in accordance with the 1944 Treaty Between Mexico and the United States of America* (March 18, 2002), Ex. C-0178.
[14] *Id*.
[15] *Id*.
[16] Robinson, *supra* note 12; *see also U.S. Taxpayers Subsidize Mexico's Theft of Water*, NewsMax.com Wires (Jan. 29, 2003), *available at* http://www.newsmax.com/archives/articles/2003/1/28/141543.shtml (last visited June 13, 2006).
[17] Mexico Truck Imports Through South Texas Ports of Entry in Pounds According to the Animal and Plant Health Inspection Service, PPQ, Period Covered September 1, 199[0] Through August 31, 1995; Mexico Truck Imports Through South Texas Ports of Entry in Pounds According to the Animal and Plant Health Inspection Service, PPQ, Period Covered September 1, 1995 Through August 31, 2000; Mexico Rail and Truck Imports Through Nogales, Arizona Port of Entry in Pounds According to Plant Quarantine, Period Covered July 1st Through June 30 [1990-1995].
[18] *See* C. Parr Rosson, III *et al.*, *A Preliminary Assessment of Crop Production and Estimated Irrigation Water Use for Chihuahua, Mexico, Department of Agricultural Economics, Center for North American Studies*, Texas A&M University, at 2 (May 2, 2002), *available at* http://cnas.tamu.edu/publications/ChiWater.pdf (last visited June 13, 2006).
[19] *Id*.

irrigation increased from 1.2 million acre-feet in 1980 to 2.3 million acre-feet in 1997 in Chihuahua.[20]

III. Procedural History

21. Nearly two years ago, on August 27, 2004, Claimants sent to Respondent their Notice of Intent to submit these claims to arbitration. In their cover letter, Claimants invited Respondent to amicably discuss their claims, stating:

> As you know, NAFTA encourages the parties to meet and confer in an effort to amicably resolve their dispute, an effort which we heartily endorse. NAFTA, ch. 11, art. 1118 ("The disputing parties should first attempt to settle a claim through consultation or negotiation."). Accordingly, by this letter we request the opportunity to meet at your earliest convenience to initiate discussions in a good-faith effort to resolve this matter prior to initiation of the formal arbitration process. At that time we will be prepared to present our case in greater detail, and to discuss appropriate settlement options; we would ask you to be similarly prepared so as to maximize the likelihood of settlement.

Ex. C-0169. In response, on September 9, 2004, Respondent stated that it would not discuss the matter unless certain documentation was provided. *See* Ex. C-0170. In an effort to satisfy Respondent's requirements, on October 1, 2004, Claimants provided Respondent with a large box containing all of the documentation Respondent had requested, including:

> 1. A copy of Certifications of Representation, confirming authority of Nancie G. Marzulla, Roger J. Marzulla, and Don Wallace, Jr., to act as attorneys for each of the claimants;
>
> 2. A copy of Articles of Incorporation or other documentation for each claimant that is not a natural person, demonstrating that each is an enterprise of the United States;
>
> 3. A copy of a driver's license for each claimant who is a natural person, indicating that each resides in the United States;

[20] *Id*. at 7.

> 4. A copy of Certificates of Adjudication and Supplementary Amendments for each relevant water right, certified by the State of Texas, as set forth in Exhibit A of the August 27, 2004 Notice of Intent.

Ex. C-0171 (letter from Counsel for Claimants to Mr. Gregorio Canales Ramirez, (October 1, 2004)).

22. On November 11, 2004, Respondent wrote to Claimants' counsel, indicating that it remained dissatisfied with the documentation provided and was unwilling to discuss the matter without further documentation. Ex. C-0172. In response, on November 16, 2004, Claimants responded by stating that, in the hope of initiating good faith negotiations, they had supplied Respondent with complete evidence of ownership, citizenship and authorization to represent claimants as their attorneys. That letter concluded:

> We reiterate our willingness to meet with you in an effort to amicably resolve this dispute, which we continue to believe would be in the best interest of both parties. The 90-day negotiation period prescribed by NAFTA, however, concludes in less than ten days, at which time we will submit this matter for arbitration in order to seek prompt resolution of our clients' claim.

Ex. C-0173.

23. Given the absence of any ongoing discussions with Respondent, on January 19, 2005, Claimants filed their Request for Arbitration with ICSID. Over the next several months, Claimants responded to all document and information requests made by ICSID and, on July 1, 2005, the Secretary of ICSID registered these claims over Respondent's objections.

24. On December 12, 2005, this Tribunal was constituted, and on February 14, 2006, held its First Session. On April 20, 2006, Respondent filed its objections to the jurisdiction of this Tribunal.

IV. Standard of Review and Burden of Proof

25. This Tribunal's power to rule on Respondent's challenges derives from Chapter 11 of NAFTA and the Additional Facility Rules of ICSID. *See* NAFTA art. 1120(b). In addition, the Additional Facility Rules state that "the Tribunal shall have the power to rule on its competence." *See* Additional Facility Rules, art. 45(1).

26. Because a ruling on any evidentiary issue would be premature at this preliminary stage, where only the jurisdiction of the Tribunal over these claims is at issue, for purposes of Respondent's Motion, the Tribunal should assume that Claimants' factual contentions are correct "insofar as they are not incredible, frivolous or vexatious." *Methanex Corp. v. United States*, Preliminary Award on Jurisdiction ¶ 112 (August 7, 2002). *See also Canfor Corp. & Terminal Forest Products Ltd. v. United States*, Decision on Preliminary Question ¶ 171 (June 6, 2006) (issuing an award holding that "the facts as alleged by a claimant must be accepted as true *pro tempore* for purposes of determining jurisdiction.").

V. Argument

A. These Claims Are Timely.

27. As of October 1, 2002, Respondent's liability for the water debt under the 1944 Treaty became fixed. NAFTA allows three years within which to bring a Chapter 11 claim. NAFTA art. 1116(2). The period of limitations starts to run when the claimant has actual or imputed "knowledge of the [] breach and knowledge that it has incurred loss or damage [thereby]." *Mondev Int'l Ltd. v. United States*, Final Award ¶ 87 (October 11, 2002). Mere speculation by the claimant that an injury or loss could occur will not cause the statute of limitations to run. Rather, "[t]he critical requirement is that the loss has

occurred and was known or should have been known by the Investor, not that it was or should have been known that loss could or would occur." *Pope & Talbot, Inc. v. Canada*, Award on Preliminary Motion ¶ 12 (February 24, 2000).

28. Claimants filed their Notice of Intent to submit these claims to arbitration on August 27, 2004, well before the three year statute of limitations under NAFTA expired. Because a statute of limitations defense "is in the nature of an affirmative defense . . . [Mexico] has the burden of proof of showing the factual predicate to that defense." *Pope & Talbot, supra*, ¶ 11. Respondent has failed to do so.

1. Claimants' Cycle 25 Claims Did Not Accrue Until October 1, 2002.

29. The 1944 Treaty allotted to the United States, for distribution to Texas residents, the water rights to one-third of the flow of water reaching the main channel of the Rio Grande from the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers, and the Las Vacas Arroyo. 1944 Treaty art. 4(B)(c). This water right is measured on a five-year cycle, for the Treaty provides that the flow "shall not be less, as an average amount in cycles of five consecutive years, than 350,000 acre-feet (431,721,000 cubic meters) annually." *Id.* In other words, the United States' minimum allotment is 1,750,000 acre-feet (as a minimum) every five years, not a right to demand 350,000 acre-feet each and every year. The Commission in fact makes its calculations of water belonging to each country (*see id.*) in numbered five-year cycles. The period 1992-1997 is thus designated Cycle 25, and it was only on completion of this Cycle 25 and Cycle 26 that Respondent's improper diversion of water belonging to Claimants became actionable under NAFTA. Any claim brought prior to that date would have been

premature, as Respondent retained the right to satisfy the entire Cycle 25 five-year water right as late as September 30, 1997. Respondent did not do so.

30. Instead, Respondent invoked its right to roll over this obligation into Cycle 26 due to extreme drought:

> In the event of extraordinary drought or serious accident to the hydraulic systems on the measured Mexican tributaries, making it difficult for Mexico to make available the run-off of 350,000 acre-feet (431,721,000 cubic meters) annually, allotted in subparagraph (c) of paragraph B of this Article to the United States as the minimum contribution from the aforesaid Mexican tributaries, any deficiencies existing at the end of the aforesaid five-year cycle shall be made up in the following five-year cycle with water from the said measured tributaries.

1944 Treaty, art. 4.

31. Thus, although at first blush, it might seem that Claimants' Cycle 25 claims accrued in 1997 and are therefore barred, this was not the case because as noted above, another qualification to the treaty allocation scheme is that Respondent may, in the case of "extraordinary drought," elect to postpone its obligations under one cycle until the end of the subsequent cycle. Respondent's election thus rolled over its Cycle 25 delivery obligation to the end of Cycle 26. This date is within NAFTA's three-year period of limitations, as applied to Claimants.

32. Respondent in fact admits that it exercised its right to postpone its unfulfilled Cycle 25 obligations until the end of Cycle 26. *See* Respondent's Mem. ¶¶ 35–39. As a result of Respondent's election, there was no violation of Claimants' water rights, and thus no NAFTA Chapter 11 violation, until after the end of Cycle 26 on September 30, 2002—within the three-year period of limitations.

2. Claimants' Cycle 26 Claims Are, for the Same Reasons, Also Within the Three-Year Limitations Period Provided in NAFTA.

33. As discussed *supra*, Respondent did not exercise its right to postpone its Cycle 26 obligations. Thus, Respondent's Cycle 26 obligations became due and payable at the end of Cycle 26 (September 30, 2002). Respondent was obligated to release a total of 1,750,000 acre-feet of water from the six named tributaries by the end of water year 2002, but not to release 350,000 each and every year. Thus, any claim with respect to the Cycle 26 years prior to October 1, 2002 would have been premature, as Claimants' water rights (and NAFTA) had not yet been violated. Like a monetary obligation due at the end of September 2002, Claimants' right to "payment" of their water had not yet become due prior to the end of September 2002, and they therefore had no claim that Respondent had violated their rights until that date.[21]

34. Thus, both Respondent's Cycle 25 and Cycle 26 obligations became due on September 30, 2002, and delinquent on October 1, 2002. Claimants filed their notice of intent to file suit against Respondent on August 27, 2004. Thus, their claims are timely.

B. All Claimants Are Nationals of the United States and Have Authorized Counsel to Bring These Claims.

35. Respondent objects to the jurisdiction of this Tribunal, asserting that there is no evidence that Claimants are nationals of the United States. Respondent also asserts that Claimants have not authorized counsel to bring these claims on their behalf, to Respondent's satisfaction. For example, Respondent erroneously states that "the Claimants have not provided even prima facie evidence of (a) the nationality of the

[21] Unlike Cycle 25, Respondent has not claimed that Cycle 26 (1997-2002) was a period of extraordinary drought so as to postpone Respondents' Cycle 26 water obligation for another five years.

purported claimants who are natural persons . . . ." Respondent's Mem. ¶ 140. These contentions are spurious, as the documentation filed with this Counter-Memorial attests.

36. First, Claimants have put forward ample evidence demonstrating their nationality. Although Respondent questions the adequacy of Claimants' documentary evidence, it offers no evidence of its own to suggest that Claimants are not United States nationals. Claimants have attached to this Counter-Memorial copies of passports or birth certificates or other proof of nationality not only for all of the individual Claimants as to which Respondent raised questions, but also for each Claimant in this case. Exs. C-0002, C-0006, C-0010, C-0014, C-0018, C-0022, C-0026, C-0030, C-0034, C-0038, C-0042, C-0046, C-0050, C-0054, C-0058, C-0062, C-0066, C-0070, C-0074, C-0078, C-0082, C-0086, C-0090, C-0094, C-0098, C-0102, C-0106, C-0110, C-0114, C-0118, C-0122, C-0126, C-0130, C-0134, C-0138, C-0142, C-0146, C-0150, C-0154, C-0158, C-0162, C-0166.

37. As Respondent correctly recites, at the First Meeting of the Tribunal, counsel for Claimants offered to provide documentation sufficient to satisfy Respondent's questions regarding the nationality of the Claimants who are natural persons. *See* Respondent's Mem. ¶ 106. On March 13, 2006, Respondent requested the following documentation:

> For the physical persons, please provide documents that attest to the United States nationality of the following claimants:
>
> - Arthur Benton Beckwith
> - Luther E. Bradford
> - Richard Berndt Drawe
> - Odus D. Emery, Jr.
> - Willard Orrin Fike
> - Francis Donald Phillipp
> - Francis Ludwick Phillipp

- Juan Francisco Ruiz
- James D. Russell
- Samuel Robert Sparks
- Gregory Schreiber
- Rita Schreiber
- Charles Shofner
- Julie G. Uhlhorn

Ex. C-0174.

38. In response, on April 4, 2006, counsel provided birth certificates and passports as follows:

Birth certificates:

- Luther E Bradford
- Richard Berndt Drawe
- Odus D. Emery, Jr.
- Francis Donald Phillipp
- Francis Ludwick Phillipp
- Juan Francisco Ruiz
- Samuel Robert Sparks
- Gregory Schreiber

Passports:

- Rita Schreiber

Ex. C-0175. On May 1, 2006, Claimants further provided the birth certificates of Arthur Benton Beckwith, Charles Shofner and Willard Orrin Fike, and the passport of James D. Russell. Ex. C-0176.

39. Claimants' counsel concluded its April 4, 2006 letter to Respondent's counsel by offering to provide any other documentation it may require:

> Once you have received these documents and have had a chance to review them, please call me if you have any other questions. We look forward to promptly resolving these outstanding issues.

Ex. C-0175.

40. Thereafter, Claimants' counsel never received a document request or any other type of communication from Respondent's counsel, leading Claimants to conclude that Respondent was satisfied with the documentation provided.

41. This documentation, together with all of the other documentation previously provided to Respondent (*see, e.g.*, Exs. C-0002, C-0006, C-0010, C-0014, C-0018, C-0022, C-0026, C-0030, C-0034, C-0038, C-0042, C-0046, C-0050, C-0054, C-0058, C-0062, C-0066, C-0070, C-0074, C-0078, C-0082, C-0086, C-0090, C-0094, C-0098, C-0102, C-0106, C-0110, C-0114, C-0118, C-0122, C-0126, C-0130, C-0134, C-0138, C-0142, C-0146, C-0150, C-0154, C-0158, C-0162, C-0166, C-0171, C-0175, C-0176) adequately proves that all of the individual Claimants are United States nationals, and that the time of this Tribunal is not profitably consumed with the examination of these documents for each Claimant. If any reasonable doubt remains regarding the nationality of any of these Claimants, it may be most efficacious for the Tribunal to decide what, if any, additional evidence it requires.[22]

42. Second, Claimants take exception to Respondent's assertion that "the Claimants have not provided . . . documents which demonstrate that the individuals who authorized Messrs. Marzulla and Professor Wallace to represent the juridical persons in these proceedings have the authority to do so." Respondent's Mem. ¶ 140. First, it is unclear what provision of NAFTA or the Additional Facility Rules requires such proof. Claimants further note that Respondent's counsel has filed no such documentation with the Tribunal showing that it is authorized to represent Mexico, calling into question the symmetry and the legitimacy of such a requirement.

[22] Claimants' counsel remains available to discuss the matter with Respondent's counsel in an effort to narrow any differences.

43. Finally, Respondent's assertion that Claimants have not provided such documentation cannot be sustained. In 2004 and 2005, Claimants submitted signed letters, authorizing Marzulla & Marzulla and Professor Don Wallace, Jr. to represent them in this arbitration in vindication of these claims as required by NAFTA and the Additional Facility Rules. *See* Exs. C-0003, C-0007, C-0011, C-0015, C-0019, C-0023, C-0027, C-0031, C-0035, C-0039, C-0043, C-0047, C-0051, C-0055, C-0059, C-0063, C-0067, C-0071, C-0075, C-0079, C-0083, C-0087, C-0091, C-0095, C-0099, C-0103, C-0107, C-0111, C-0115, C-0119, C-0123, C-0127, C-0131, C-0135, C-0139, C-0143, C-0147, C-0151, C-0155, C-0159, C-0163, C-0167. Then, in response to Respondent's request of March 13, 2006, Claimants provided proof that the persons who signed the authorizations were themselves bona fide officers (President or General Manager) of the water districts, and with authority to bring this claim. *See* Exs. C-0003, C-0007, C-0011, C-0015, C-0019, C-0023, C-0027, C-0031, C-0035, C-0039, C-0043, C-0047, C-0051, C-0055, C-0059, C-0063, C-0067, C-0095, C-0115, C-0123. Respondent's present demand for minutes of executive session meetings of the Board of Directors (at which confidential lawyer/client discussions take place) is not required by any Additional Facility Rule or NAFTA rule of which Claimants are aware.

44. Respondent, therefore, has not sustained its burden of demonstrating lack of jurisdiction on the basis of nationality and lack of counsel's authority to bring these claims before this Tribunal.[23]

[23] Respondent's concerns relating to class actions by persons not named as Claimants (*see* Respondent's Mem. ¶ 128) are also baseless. This proceeding is brought only by and on behalf of the 42 named Claimants; it is not intended to be a class action, nor to assert claims on behalf of any unnamed party.

C. This Tribunal Has Jurisdiction Over This Chapter 11 Arbitration Because Respondent's Seizure of Claimants' Water Is a Measure Relating to Both Investors of Another Party (Article 1101(1)(a)) and an Investment Located in Respondent's Territory (Article 1101(1)(b)).

45. Under the plain language of Chapter 11 of NAFTA, the jurisdiction of this Tribunal extends to measures adopted by Respondent relating to (1) investors of another party, or (2) investments of such investors located in Mexico. Here, the offending measure adopted by Respondent is the capture and diversion to Mexican farmers of approximately 1.2 million acre-feet of water owned by Claimants and located in Mexico. Respondent's contention that this seizure and diversion of Claimant's water is not a measure relating to investors of another party or an investment ("real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes," NAFTA art. 1139(g)) is unpersuasive. This is particularly so in light of the joint statements of all three NAFTA Parties, including Mexico, most notably their 1993 statement affirming that water that has entered into commerce is, in fact, within the provisions of NAFTA.

46. Claimants are the owners of water rights allotted by treaty to the United States by Mexico in 1944, including water located in the six above-named Mexican tributaries which empty into the Rio Grande. Respondent impounded Claimants' water in these six tributaries while it was in transit to the Claimants' farms and fields located in Texas, and diverted it for use by Mexican farmers in Mexico. Respondent's assertion of defense—that Mexico owns all of the waters within its boundaries, including those allotted to the United States (and thence to Claimants) by treaty in 1944—ignores both the plain language of the 1944 Treaty and the established rule of equitable distribution of international rivers which it implements.

1. Claimants Are Investors, and Their Water Rights in the Six Named Mexican Tributaries Are Investments Within the Meaning of NAFTA Chapter 11.

47. Chapter 11's reach is broad, reflecting the stated purposes of NAFTA.[24] To advance these objectives, the NAFTA Parties consented to jurisdiction over all measures adopted by a Party relating to either an investor of another party or his investment located in the party's territory:

> 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 . . .

NAFTA art. 1101(1)(a), (b).

48. First, this Tribunal has jurisdiction under Article 1101(1)(a) because Respondent has adopted measures relating to Claimants, who are investors of another party—the United States. Respondent does not deny that it captured and diverted water from the six above-named Mexican tributaries, which had been allotted to the United States under the 1944 Treaty. Nor could Respondent successfully contend that these measures did not relate to Claimants who, as downstream users of that water, were deprived of it and suffered a severe shortage of water as a result. As investors of millions of dollars in irrigated agriculture and the water delivery infrastructure it requires,

---

[24] 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;
>
> * * *
>
> (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. . . .

NAFTA art. 102.

Claimants are clearly NAFTA investors to whom Respondent's measures related—with catastrophic economic consequences. This, without more, affords jurisdiction to this Tribunal under Article 1101(1)(a): "This Chapter applies to measures adopted or maintained by a Party relating to . . . investors of another Party . . ."

49. This Tribunal's jurisdiction over measures relating to investors of another party under Article 1101(1)(a) is confirmed by the requirements of Articles 1102 and 1105 which (in contrast to Article 1110) apply to all measures taken by Mexico relating either to investors of another party or their investments, whether those investments are in Mexican territory or not. Article 1102, the "national treatment" provision, contains no requirement concerning the location of the investor (subparagraph (1)) or the investment (subparagraph (2)):

> 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 of 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.

NAFTA art. 1102.

50. The "national treatment" analysis under Article 1102 does not include a determination of the territory in which the investment is carried out. *See, e.g., S.D. Myers, Inc. v. Canada*, Partial Award ¶ 252 (November 13, 2000) (the test for national treatment is "(1) whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals; and (2) whether a measure, on its face, appears to favour its nationals over non-nationals who are protected by relevant treaty.").

51. Similarly, Article 1105 provides a remedy for denial of "fair and equitable treatment" regardless of the location of the investor or investment:

> 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.

NAFTA art. 1105.

52. Second, Art. 1101(1)(b) provides an even more obvious ground for the jurisdiction of this Tribunal, as the capture and diversion of this water was a measure adopted by Respondent relating to "investments of investors of another Party in the territory of the Party . . ." NAFTA art. 1101(1)(b). As Claimants demonstrate below, this irrigation water clearly qualifies as an investment under Chapter 11. NAFTA art. 1139(g) (defining "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."). That investment is owned by Claimants, as Mexico has relinquished ownership of it under the 1944 Treaty, and the water was physically located in Mexico at the time it was seized and diverted for use by Mexican farmers.

2. By Their 1993 Joint Statement, the NAFTA Parties Specifically Recognized That Water Which Has Entered into Commerce Falls Under NAFTA's Provisions.

53. Respondent itself has affirmed that water which enters into commerce falls under NAFTA'S provisions, and this Tribunal's interpretation of the scope of NAFTA is informed by this interpretation placed on the Treaty by the Parties. NAFTA art. 1131(2) ("An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."). Respondent, together with the United States and Canada, issued a joint statement on December 2, 1993, recognizing that water

that has entered into commerce (as contrasted with water in its natural state) falls within the provisions of NAFTA:

> The governments of Canada, the United States and Mexico, in order to correct false interpretations, have agreed to state the following jointly and publicly as Parties to the North American Free Trade Agreement (NAFTA):
>
> The NAFTA creates no rights to natural water resources of any Party to the Agreement.
>
> *Unless water, in any form, has entered into commerce and become a good or product,* it is not covered by the provisions of any trade agreement including NAFTA. And nothing in the NAFTA would oblige any NAFTA Party to either exploit its water for commercial use, or to begin exporting water in any form. *Water in its natural state in lakes, rivers, reservoirs, aquifers, water basins and the like is not a good or product, is not traded, and therefore is not and never has been subject to the terms of any trade agreement*.

1993 Statement by the Governments of Canada, Mexico and the United States, *available at* http://www.scics.gc.ca/cinfo99/83067000_e.html#statement (last visited June 8, 2006) (emphasis added); *see also* David Johansen, *Water Exports and the NAFTA, available at* http://dsp-psd.communication.gc.ca/Collection-R/LoPBdP/EB/prb995-e.htm#(12)txt (last visited June 8, 2006).

54. As one commentator has noted, the import of this joint statement is clear: water that has entered into commerce as a good or product is covered by NAFTA's trade provisions:

> First and foremost, it is clear that if water has entered into commerce and become a good or a product it is covered by NAFTA. This is so even, for example if it is sold through a water diversion project. Second, while the statement says that water in its natural state in lakes and rivers is not a good or product, this does not mean that rights to use or take the water may not be subject to NAFTA or other economic agreements. Third, the apparently categorical governmental view that trade law does not address water in its natural forms has since been pulled back from in other important official statements. The bilateral International Joint

> Commission, for example, stated that "The Commission's initial analysis indicates that it would appear unlikely that water in its natural state (*e.g.*, in a lake, river, or aquifer) is included within the scope of any of these trade agreements since it is not a product or good, and indeed the NAFTA parties have issued a statement to this effect. When water is "captured" and enters into commerce, it may, however, attract obligations under GATT, the FTA, and NAFTA.

Howard Mann, *International Economic Law: Water for Money's Sake?* at 4 (September 22, 2004), http://www.iisd.org/pdf/2004/investment_water_economic_law.pdf.[25] In fact, water has already been the subject of a NAFTA claim. *See Sun Belt Water, Inc. v. Canada*, Notice of Claim and Demand for Arbitration (October 12, 1999) (claim against Canada under Articles 102, 1102, 1105, 1110 for failure to honor fresh water export licensing agreement).

55. Water, like many other "natural" products (*e.g.*, timber, metals, cement, gems, salt and other minerals, plants and fruits, fish), although perhaps not a commercial good or product in its natural state, becomes such when an investment of human industry converts it into a tradable commodity:

> There is no doubt that when water is sold in a package—a bottle, can, etc.—it becomes a good in commerce. The same holds true if it is sold in a bulk container like a ship or large floatable bag. When this happens, all the rules on trade come into play. Imports and exports of bottled water, for example, cannot be constrained without due consideration for trade rules such as non-discrimination as regards the place of consumption. In many cases, this may mean that no legal constraints on exporting water in such forms would be allowed. This does not mean that any potential exporter would have a right to draw water from any source for export: water draws on any one water source could be subject to the environmental limits and controls appropriate to that source. However, the fact that the water is being exported as opposed to domestically consumed could not be a factor in a decision under trade law.

[25] This was similar to the government of Canada's view in 2000-2001 on its own proposed legislation on water exports. In 2001, Canada adopted a regulatory licensing approach for exports rather than a direct prohibition in order, in its view, not to trigger the application of trade law to an effort designed to prevent the commercialization of freshwater resources. Mann, *supra*, at 5.

Id. at 5-6. Since Claimants' water, which flows within courses of the six above-named Mexican tributaries before reaching the Rio Grande, where it is stored in Falcon and Amistad reservoirs, sold on the Water Market, and delivered through a complex of irrigation works, is clearly a good or product in commerce, it necessarily falls within the scope of NAFTA. Mexican farmers, like those in Texas, also divert this same water through irrigation works and incorporate it into their crops, further underscoring its status as a good in commerce. Indeed, Mexico itself recognizes tradable water rights in these very waters. *See* Mark W. Rosegrant and Renato Gazmuri S., *Reforming Water Allocation Policy Through Markets in Tradable Water Rights: Lessons from Chile, Mexico, and California*, at 10, Environment and Production Technology Division, International Food Policy Research Institute (October 1994), *available at* http://www.ifpri.org/divs/eptd/dp/papers/eptdp06.pdf (last visited June 20, 2006).

3. Claimants Are the Owners of the One-Third Flow of Six Mexican Tributaries to Which Mexico Relinquished Ownership in the 1944 Treaty.

56. Respondent's assertion that it retains the absolute right to control the waters of the six Mexican tributaries (the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers, and the Las Vacas Arroyo) is inconsistent with the accepted principle of international law that the waters of these international rivers must be equitably shared between the United States and Mexico. Moreover, Respondent's assertion overlooks the fact that, in the 1944 Treaty, Mexico and the United States accomplished an equitable sharing of these (along with other) waters, each nation ceding ownership of an equitable share to the other for distribution under its municipal law. Finally, Respondent is not free

under Chapter 11 of NAFTA to disregard the lawful transfer of these water rights to Claimants, in accordance with the national law of the United States.

57. Since Claimants' water rights, transferred from Mexico to the United States in 1944, and from the United States to Claimants under the national law of the United States, constitute an investment (NAFTA art. 1139(g) ("[I]nvestment means: . . . real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes")), this Tribunal has jurisdiction.

a. Respondent Does Not Have Absolute Sovereignty over the Waters of International Rivers Crossing Its Territory, but Only the Right to an Equitable Share of Those Waters.

58. Respondent's contention that it possesses absolute territorial sovereignty over all waters within its borders (sometimes called the "Harmon doctrine") is at least a century out of date, and has been superseded by principles of equitable distribution (sometimes referred to as equitable apportionment).[26]

[26] The United States, which developed the Harmon doctrine in response to Mexico's complaint about diminution of the Rio Grande's flows near El Paso, , has long since rejected the doctrine. As the then-Legal Advisor to the International Boundary and Water Commission wrote:

> The doctrine of exclusive territorial sovereignty as applied to water resources [was] often referred to as the Harmon Doctrine. The Harmon Doctrine was developed in the context of rivers which flow through the territory of more than one nation. The Harmon Doctrine holds that, absent an obligation imposed by international agreement, each nation, through which an international river flows, has complete sovereignty over the portion of the river within its territory and has no obligation imposed by international law to share the water with other nations. While the rationale of the Harmon Doctrine can be applied to any water resources within the boundaries of a nation and is not limited strictly to rivers, it must be noted that the validity of the Harmon Doctrine as an accurate statement of international law is seriously in doubt. It has been consistently rejected by authorities which have considered the principles upon which it stands. From the rejection of the Harmon Doctrine follows the proposition that the sovereignty of a nation over the water resources within its territorial boundaries necessarily becomes limited regardless of the existence of an international agreement. For this reason the jurisdiction of a nation over its natural resources is considered only prima facie exclusive, rather than definitively exclusive.

Darcy Alan Frownfelter, *The International Component of Texas Water Law*, 18 St. Mary's L.J. 481, 501-03 (1986).

59. In 1958, the International Law Association agreed that equitable distribution, rather than the Harmon doctrine, is the operative rule of international law for international rivers:

> [E]ach coriparian state is entitled to a reasonable and equitable share in the beneficial uses of the waters of the drainage basin. What amounts to a reasonable and equitable share is a question to be determined in the light of all the relevant factors in each particular case.

International Law Association, Report of the Forty-Eighth Conference 100 (Agreed Principle 2) (New York) (1958), *quoted in* Ludwik A. Teclaff, *Fiat or Custom: The Checkered Development of International Water Law*, 31 Nat. Resources J. 45, 68 (1991) (footnote omitted).

60. The *Institut de Droit International* reiterated this rule of law:

> In the Salzburg Declaration of 1961, it found that the rights of states to use waters flowing across their borders are limited by the rights of other states concerned with the same river or watershed, and that principles of equity define these rights. The Declaration did not name the principles, beyond stating that a state which unilaterally undertakes a project that may affect the use of the same waters by other states must preserve the equitable rights of those states and compensate for any losses or damage incurred.

Id. (footnotes omitted).

61. The principle of equitable apportionment is also found in the *Helsinki Rules of the Uses of the Waters of International Rivers* (hereinafter *Helsinki Rules*), promulgated by the International Law Association, which state that "[e]ach basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin." *Helsinki Rules*, art. IV, 52 I.L.A. 484 (1967), *available at* http://www.internationalwaterlaw.org/IntlDocs/Helsinki_Rules.htm

(last visited June 8, 2006).[27] "International drainage basin" is defined as "a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus." *Id*. art. II.

62. More recently, in 1997 the United Nations General Assembly adopted the Convention on the Law of the Non-Navigational Uses of International Watercourses based on draft articles proposed by the International Law Commission (the "ILC"), a United Nations body responsible for the progressive development of international law and its codification. Based on this dual purpose, the ILC draft and the final Convention attempted to codify and develop norms of customary international law:

> The Convention has some key concepts in common with the Helsinki Rules. Article 5 states that parties shall "utilize an international watercourse in an equitable, reasonable manner." Article 6 then gives the factors to be considered in determining reasonableness, listing the same eleven factors as the Helsinki Rules. These articles embody the Convention's adoption of the limited territorial sovereignty doctrine, mirroring the Helsinki Rules.

Yonatan Lupu, *International Law and the Waters of the Euphrates and Tigris*, 14 Geo.

---

[27] The Helsinki Rules use eleven factors to determine "what is a reasonable and equitable share." *Helsinki Rules*, art. V(I). These eleven factors are:
1. The geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;
2. The hydrology of the basin, including in particular the contribution of water by each basin State;
3. The climate affecting the basin;
4. The past utilization of the waters of the basin, including in particular existing utilization;
5. The economic and social needs of each basin State;
6. The population dependent on the waters of the basin in each basin State;
7. The comparative costs of alternative means of satisfying the economic and social needs of each basin State;
8. The availability of other resources;
9. The avoidance of unnecessary waste in the utilization of waters of the basin;
10. The practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and
11. The degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.
Id. art. V(II)(1)-(11).

Int'l Envtl. L. Rev. 349, 362-63 (2001).

63. The resolution endorsing the Convention passed by the affirmative vote of 103 countries, including Mexico[28] and the United States. Press Release, United Nations General Assembly, General Assembly Adopts Convention on Law of Non-Navigational Uses of International Watercourses, U.N. Doc. GA/9248 (May 21, 1997), *available at* http://www.thewaterpage.com/UNPressWater.htm (last visited June 9, 2006).

64. The United States Supreme Court also applies the principle of equitable apportionment in allotting the waters of rivers which flow through two or more states. Equitable apportionment is a doctrine concerning the rights of multiple states to use an interstate stream, and seeks to recognize the equal rights of both states and establish justice and equity between them. *See, e.g.*, *Kansas v. Colorado*, 206 U.S. 46, 98 (1907). The principle of equitable apportionment is also found in the 1944 Treaty, which equitably divided the waters of the Rio Grande and Colorado Rivers between the United States and Mexico.

b. Under the 1944 Treaty, Mexico Relinquished Ownership of One-Third of the Rio Grande Waters in Six Named Mexican Tributaries.

65. Even under the Harmon doctrine, the claim of absolute sovereignty over international waterways obtains only in the absence of a treaty to the contrary. The 1944 Treaty between Mexico and the United States, under which the waters of the Rio Grande basin were equitably apportioned between the two nations is such a treaty, negating any claim Respondent may now assert to the one-third share of the waters of the six

[28] "MANUEL TELLO (Mexico) introduced the draft resolution on the draft convention . . ." Press Release, United Nations General Assembly, General Assembly Adopts Convention on Law of Non-Navigational Uses of International Watercourses, U.N. Doc. GA/9248 (May 21, 1997), *available at* http://www.thewaterpage.com/UNPressWater.htm (last visited June 9, 2006).

previously named Mexican tributaries which Mexico ceded to the United States in that Treaty.

66. The fact that the Rio Grande (Rio Bravo) is both an international border between Mexico and the United States and a significant source of water for irrigation and domestic use for each nation has led to the conclusion of a number of treaties between the two nations relating both to the location of the boundary and the allotment of the international waters between them. *See, e.g.*, Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary Between the United States of America and the United Mexican States, November 23, 1970, 23 U.S.T. 371, *available at* http://www.ibwc.state.gov/Files/1970Treaty.pdf; the 1944 Treaty; the 1906 Convention; 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 Grande and the Rio Colorado, U.S.-Mex., November 12, 1884, 24 Stat. 1011, *available at* http://www.ibwc.state.gov/Files/TREATY_OF_1884.pdf.

67. The 1906 and 1944 treaties apportion the waters of the Rio Grande and its tributaries above and below Fort Quitman, respectively, leaving the further distribution of those water rights to the municipal law of each nation. As the then-United States Legal Advisor to the International Boundary and Water Commission describes it:

> The 1906 Water Convention equitably distributes the surface waters of the Rio Grande above Fort Quitman. Other than the waters to which it is entitled under the 1906 Water Convention, Mexico has waived all claims to the waters of the Rio Grande for any purpose. Thus, the waters are divided for utilization and management under the distinct water laws of the United States and Mexico.
>
> This same result holds true for the 1944 Water Treaty. This treaty fixes

> and delineates the rights of the United States and Mexico with respect to the waters of the Rio Grande and its tributaries. Rights to utilize the water resources within the boundaries of each nation are controlled by their respective domestic laws.

Darcy Alan Frownfelter, *The International Component of Texas Water Law*, 18 St. Mary's L.J. 481, 512 (1986).

68. The 1944 Treaty makes clear that its purpose is to fix and delimit the rights of each nation to their respective shares of these international waters. Titled "Water Treaty for the 'Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande,'" the 1944 Treaty states as its purpose the delimiting of the rights of Mexico and the U.S. to the waters of three transnational rivers, including the Rio Grande. The parties state that they "desir[e], moreover, to fix and delimit the rights of the two countries with respect to the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, United States of America, to the Gulf of Mexico, in order to obtain the most complete and satisfactory utilization thereof, [and thus] have resolved to conclude a treaty. . . ." *See* 1944 Treaty, Preamble.

69. In addition to allocating to Mexico 1.5 million acre-feet per year of the Colorado River, of pertinence here the 1944 Treaty allots to each nation one-half of the flow of the Rio Grande, and divides the flows of the six above-named Mexican tributaries, two-thirds to Mexico and one-third to the United States, as follows:

> To Mexico:
> ….
> (b) One-half of the flow in the main channel of the Rio Grande (Rio Bravo) below the lowest major international storage dam, so far as said flow is not specifically allotted under this Treaty to either of the two countries.
>
> (c) Two-thirds of the flow reaching the main channel of the Rio Grande (Rio Bravo) from the Conchos, San Diego, San Rodrigo, Escondido and

> Salado Rivers and the Las Vacas Arroyo, subject to the provisions of subparagraph (c) of Paragraph B of this Article.
>
> (d) One-half of all other flows not otherwise allotted by this Article occurring in the main channel of the Rio Grande (Rio Bravo), including the contributions from all the unmeasured tributaries, which are those not named in this Article, between Fort Quitman and the lowest major international storage dam.
>
> To the United States:
> ….
> (b) One-half of the flow in the main channel of the Rio Grande (Rio Bravo) below the lowest major international storage dam, so far as said flow is not specifically allotted under this Treaty to either of the two countries.
>
> (c) One-third of the flow reaching the main channel of the Rio Grande (Rio Bravo) from the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers and the Las Vacas Arroyo, provided that this third shall not be less, as an average amount in cycles of five consecutive years, than 350,000 acre-feet (431,721,000 cubic meters) annually. The United States shall not acquire any right by the use of the waters of the tributaries named in this subparagraph, in excess of the said 350,000 acre-feet (431,721,000 cubic meters) annually, except the right to use one-third of the flow reaching the Rio Grande (Rio Bravo) from said tributaries, although such one-third may be in excess of that amount.
>
> (d) One-half of all other flows not otherwise allotted by this Article occurring in the main channel of the Rio Grande (Rio Bravo), including the contributions from all the unmeasured tributaries, which are those not named in this Article, between Fort Quitman and the lowest major international storage dam.

See 1944 Treaty, art. 4.

70. The purpose of the 1944 Treaty was thus to partition not only the waters in the main channel of the Rio Grande, but also the waters of numerous other international tributaries to it,[29] so that each nation could then put those waters to use within its territory:

[29] The 1944 Treaty allots to Mexico all of the waters of the San Juan and Alamo Rivers, two-thirds of the waters of the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers and the Las Vacas Arroyo. To the United States it allots all of the waters of the Pecos and Devils Rivers, Goodenough Spring, and

> The primary focus of international water law is the definition of water resources which are international and the definition of the rights of each nation to the utilization of international water resources. The process is one of partitioning international waters through allocations between the competing nations, conversion of the rough allocations into specific defined national components, and making the national water resources available to the water users for exclusive use within the territorial boundaries of each nation. The 1906 Water Convention and the 1944 Water Treaty have accomplished this process in a successful fashion.

Frownfelter, *supra*, at 525-26.

71. The plain language of the 1944 Treaty allows no room for Respondent's contention that it retained complete territorial sovereignty over the waters of the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers and the Las Vacas Arroyo. The Treaty makes no distinction between the respective rights of Mexico and the United States to one-half each of the water in the main channel of the Rio Grande (S*ee* 1944 Treaty arts. 4A(b) and 4B(b)) and their rights to one-third and two-thirds, respectively, of the waters of the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers and the Las Vacas Arroyo. *See* 1944 Treaty arts. 4(A)(c) and 4(B)(c). Following conclusion of the Treaty, each nation owned the water resources allotted to it, and relinquished ownership of the water allotted to the other nation.

72. Other provisions of the 1944 Treaty leave no doubt that such allotted waters belong to the country to which they were allotted:

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

Alamito, Terlingua, San Felipe and Pinto Creeks, and one-third of the waters of the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers and the Las Vacas Arroyo.

(b) Inflows to each reservoir shall be credited to each country in accordance with the *ownership of such inflows*.

(c) In any reservoir *the ownership of water belonging to the country* whose conservation capacity therein is filled, and in excess of that needed to keep it filled, *shall pass* to the other country to the extent that such country may have unfilled conservation capacity, except that one country may at its option temporarily use the conservation capacity of the other country not currently being used in any of the upper reservoirs; provided that in the event of flood discharge or spill occurring while one country is using the conservation capacity of the other, all of such flood discharge or spill shall be charged to the country using the other's capacity, and all inflow shall be credited to the other country until the flood discharge or spill ceases or until the capacity of the other country becomes filled with its *own water*.

(d) Reservoir losses shall be charged in proportion to *the ownership of water* in storage. Releases from any reservoir shall be charged to the country requesting them, except that releases for the generation of electrical energy, or other common purpose, shall be charged in proportion to *the ownership of water in storage*.

(e) Flood discharges and spills from the upper reservoirs shall be divided in the same proportion as *the ownership of the inflows* occurring at the time of such flood discharges and spills . . . .

(f) Either of the two countries may avail itself, whenever it so desires, of any *water belonging to it* and stored in the international reservoirs . . . .

1944 Treaty, art. 8 (emphasis added).

* * *

(a) The channel of the Rio Grande (Rio Bravo) may be used by either of the two countries to convey *water belonging to it*.

(b) Either of the two countries may, at any point on the main channel of the river from Fort Quitman, Texas to the Gulf of Mexico, divert and use the *water belonging to it* and may for this purpose construct any necessary works. . . .

* * *

(d) The Commission shall have the power to authorize either country to divert and use *water not belonging entirely to such country*, when the water belonging to the other country can be diverted and used without injury to the latter and can be replaced at some other point on the river.

> (e) The Commission shall have the power to authorize temporary diversion and use by one country of *water belonging to the other*, when the latter does not need it or is unable to use it, provided that such authorization or the use of such water shall not establish any right to continue to divert it.
>
> (j) The Commission shall keep a *record of the waters belonging to each country* and of those that may be available at a given moment, taking into account the measurement of the allotments, the regulation of the waters in storage, the consumptive uses, the withdrawals, the diversions, and the losses. For this purpose the Commission shall construct, operate, and maintain on the main channel of the Rio Grande (Rio Bravo), and each Section shall construct, operate and maintain on the measured tributaries in its own country, all the gaging stations and mechanical apparatus necessary for the purpose of making computations and of obtaining the necessary data for such record.

1944 Treaty, art. 9 (emphasis added).

73. The waters in the six above-named Mexican tributaries (as well as the waters in the United States tributaries) fall under the authority of the Commission, which measures that water to determine how much of it belongs to each country. Importantly, Mexico is required to measure the flows of the six Mexican tributaries within its territory, and provide that information to the Commission for that purpose. *Id.* art. 9(j) ("The Commission shall keep a record of the waters belonging to each country and of those that may be available at a given moment, taking into account the measurement of the allotments, the regulation of the waters in storage, the consumptive uses, the withdrawals, the diversions, and the losses. For this purpose the Commission shall construct, operate and maintain on the main channel of the Rio Grande (Rio Bravo), and each Section shall construct, operate and maintain on the measured tributaries in its own country, all the gauging stations and mechanical apparatus necessary for the purpose of making computations and of obtaining the necessary data for such record."). As discussed *supra*,

the Commission also receives orders for release of water owned by Claimants from the Texas Water Master. *See Hidalgo*, 443 S.W.2d at 738.

74. Respondent itself has 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. *See* Respondent's Mem. ¶ 31. The 1944 Treaty was thus more than a promise to deliver water. The 1944 Treaty consisted of an actual fixing of water rights in the Rio Grande and its tributaries, much like the fixing of the territorial boundary between the two nations.[30] It would appear quite intentional that the name of the International Boundary Commission, established in 1889 to identify the territorial boundary between the two nations, was by the 1944 Treaty changed to "International Boundary and *Water* Commission," and that it was by that Treaty given responsibility for keeping track of the waters belonging to each country, as well as the lands. Respondent thus retains no greater ownership of the waters of the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers and the Las Vacas Arroyo than it does of lands conveyed to the United States. *See, e.g.*, Boundary Solution of the Problem of the Chamizal, Convention Between the United States of America and Mexico, U.S.-Mex., August 29, 1963, 15 U.S.T. 21 (treaty resolving dispute involving land north of the Rio Grande), *available at* http://www.ibwc.state.gov/Files/ChamizalConvention1963.pdf; The Gadsden Purchase

[30] *See, e.g.*, Boundary Solution of the Problem of the Chamizal, Convention Between the United States of America and Mexico, U.S.-Mex., August 29, 1963, 15 U.S.T. 21 (treaty resolving dispute involving land north of the Rio Grande), *available at* http://www.ibwc.state.gov/Files/ChamizalConvention1963.pdf; The Gadsden Purchase (Treaty of La Mesilla), U.S.-Mex., December 30, 1853, 10 Stat. 1031 (treaty defining boundary between the United States and Mexico), *available at* http://www.yale.edu/lawweb/avalon/diplomacy/mexico/mx1853.htm; Treaty of Peace, Friendship, Limits, and Settlement Between the United States of America and the United Mexican States (also known as the Treaty of Guadalupe Hidalgo), U.S.-Mex., February 2, 1848, 9 Stat. 922 (establishing United States-Mexico boundary), *available at* http://www.yale.edu/lawweb/avalon/diplomacy/mexico/guadhida.htm.

(Treaty of La Mesilla), U.S.-Mex., December 30, 1853, 10 Stat. 1031 (treaty defining boundary between the United States and Mexico), *available at* http://www.yale.edu/lawweb/avalon/diplomacy/mexico/mx1853.htm; Treaty of Peace, Friendship, Limits, and Settlement Between the United States of America and the United Mexican States (also known as the Treaty of Guadalupe Hidalgo), U.S.-Mex., February 2, 1848, 9 Stat. 922 (establishing United States-Mexico boundary), *available at* http://www.yale.edu/lawweb/avalon/diplomacy/mexico/guadhida.htm.

c. Claimants Are the Owners of Approximately 1.2 Million Acre-Feet of Water Allotted to the United States Under the 1944 Treaty and Diverted by Respondent for Use in Mexico.

75. The 1944 Treaty delegates to the International Boundary and Water Commission the task of keeping track of the amounts of water belonging to each nation. However, the determination of who owns and has the right to use the water allotted to, and belonging to, each nation is the province of municipal law:

> Once the national components of the international waters of the Rio Grande have been identified by the International Boundary and Water Commission the utilization of the water resources within the State of Texas becomes a matter of state law. It is at this point that the international aspects of Texas water law terminate and the national aspects begin.

Frownfelter, *supra*, at 516.

76. In contrast to the law of Mexico, under United States law, it is the sovereign states (and not the federal government) which hold title to water, with the authority to apportion its use among their residents. *See, e.g.*, *California v. United States*, 438 U.S. 645 (1978). In the case of the 1944 Treaty, the State of Texas thus possessed the legal authority to apportion the American share of the Rio Grande waters allotted to the United

States by the Treaty. As the United States Court of Appeals for the Fifth Circuit held in 1955:

> We think it was intended by the parties to the treaty that to each nation should be left the power of making determinations, pursuant to its own law, of those who are, may become, or cease to be, entitled to the use of the waters secured by the treaty to such nation, and their relative rights among themselves.

Hidalgo County Water Control & Improvement Dist. No. 7 v. Hedrick, 226 F.2d 1, 7 (5th Cir. 1955).

77. Following adoption of the 1944 Treaty, Texas commenced a water adjudication process in its state courts to allocate the American share of the waters belonging to the United States under the Treaty. This adjudication culminated in the 1969 decree to which Claimants trace their water rights. *See State v. Hidalgo County Water Control & Improvement Dist. No. 18*, 443 S.W.2d 728, 728 (Tex. Civ. App. 1969) ("Suit . . . to obtain adjudication of water rights to American share of waters of the Rio Grande"). As the court in that case described it, that adjudication process was filed in June 1956, and in October 1956, the court took judicial custody of the American waters of the Rio Grande in the reach of the river extending from Falcon reservoir to the Gulf of Mexico. *Id.* at 738. The court also issued a temporary injunction restraining the diversion of water from the river in violation of the court's custodial control. *Id.* Since then, the American waters have been divided and allotted among the various users by a Master in Chancery or Water Master under the direction of the district court. *Id.* (footnotes omitted). As that court described the 1944 Treaty, its division of the Rio Grande's waters made substantial quantities of water available to Texas residents (including Claimants), even though the 1944 Treaty itself did not apportion these rights:

> While no water right as such emanated from the United States to anyone, it is a fact and circumstance of this case that the promulgation of the treaty and the construction of dams across the river has,
> (a) changed the river from a free flowing stream to a controlled water course, and
> (b) made available for Texas users along the left or American bank of the Rio Grande a much greater amount of water for irrigation purposes by virtue of the approximate 58%-42% Division of the waters between the United States and Mexico and the providing of storage space for flood waters.

Id. at 745.

78. Thus, Respondent's contention that it may seize Claimants' water rights, validly created under United States law and carved out of the portion of Rio Grande waters belonging to the United States under the 1944 Treaty, is unsupportable. Respondent is not free to seize property which a United States or Canadian investor owns in Mexico simply on the ground that Mexico did not create the right, and therefore need not recognize it. To the contrary, NAFTA clearly requires Mexico to respect ownership of registered vehicles (cars, trucks, ships and airplanes), intellectual property (patents, copyrights) and intangible property (Treasury bills, stock certificates) created and registered in the U.S. or Canada. *See, e.g.*, NAFTA art. 1110 (NAFTA Parties prohibited from directly or indirectly nationalizing or expropriating investments of investors of other NAFTA Parties in its territory except upon payment of compensation); NAFTA art. 1139(g) (investment includes tangible and intangible property).

79. Finally, Respondent's contention that Mexican law does not recognize water rights as property is both irrelevant and incorrect. Article 27 of the Mexican Constitution makes clear that, although all titles to land and water derive from the government (just as they do in the United States), private property rights may be created in water just as they may be created in land:

> The ownership of lands and waters comprised within the limits of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property.

Constitución Política de los Estados Unidos Mexicanos, art. 27, ¶ 1. In 1992, Mexico, as part of broad economic reforms, liberalized the right of its water users to acquire private water rights, and to sell and trade these water rights on the open market. As one report notes:

> [A]long with general economic reform, Mexico began the process of implementing fundamental changes in its water policy with respect to water rights, water management, and allocation of water, with passage of a new Water Law in December 1992, which, among other important features described below, created tradable water rights, and initiated the process of turning over the operation and maintenance of irrigation systems to farmers.

Mark W. Rosegrant and Renato Gazmuri S., *Reforming Water Allocation Policy Through Markets in Tradable Water Rights: Lessons from Chile, Mexico, and California*, at 10, Environment and Production Technology Division, International Food Policy Research Institute (October 1994), *available at* http://www.ifpri.org/divs/eptd/dp/papers/eptdp06.pdf (last visited June 20, 2006).

80. The Mexican system in fact mirrors the more mature Chilean system of tradable water rights:

> [B]oth [Chilean and Mexican water] laws provide for strong protection of third party rights arising from trades. In addition to approval authority by local [independent water users' associations], third-parties who could be damaged by a trade are further protected through prohibition of damaging transfers or setting of compensation; with appeals to [Comisión Nacional del Agua] in Mexico and the National Water Authority in Chile; and final appeal to courts in each case.
> . . .
> All transfers of water rights must be recorded in the Public Registry of Water Rights maintained by the [Comisión Nacional del Agua]. In general, the process can be seen as a regulatory hierarchy, with water user

> associations having authority over trades among individuals, the regulations of the irrigation district have primacy over the water user associations, and the [Comisión Nacional del Agua] having authority over operations of the IDs.

Id. at 29, 30. Moreover, even if Mexico did not recognize private water rights, its national law would give way before a treaty – such as the 1944 Treaty or NAFTA. Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

81. Accordingly, Mexico is not free to disregard Claimants' water rights in the American portion of the Rio Grande's waters (including the six above-named Mexican tributaries) allotted to the United States under the 1944 Treaty. Claimants' water rights, which constitute an investment under Article 1139 of NAFTA, may not simply be seized by Mexico for its own use without consequences under Chapter 11.

82. The purpose of Article 1105 is to supplement Article 1102, the national treatment provision, to ensure that minimum standards of due process are met with regard to the treatment of all foreign investors. David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement*, 19 Am. U. Int'l. Law Rev. 679, 701 (2004). Article 1105 provides a "minimum standard of treatment" that forms a floor for the treatment of investors, based upon international law, which must be followed regardless of the standard of treatment in a particular country. *Id.* The NAFTA parties have issued an interpretation of Article 1105 which says nothing about limiting its scope to investments carried out in the territory of a NAFTA party: "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to

investments of investors of another Party." Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, July 31, 2001).

D. Contrary to Respondent's Contention, Claimants Have Not Requested That the Tribunal Rule on the Rights and Obligations of Mexico and the United States Pursuant to the 1944 Treaty.

83. Contrary to Respondent's assertion, Claimants are not seeking to have this Tribunal rule on the rights and obligations of Mexico and the United States pursuant to the water treaty of 1944. Whether the Treaty was breached, and the ramifications for the United States government for such a breach under international law, is an issue for the United States and Mexican governments and the International Boundary and Water Commission. Rather, Claimants seek to have this Tribunal determine whether Mexico has treated Claimants' investments less favorably than it treated Mexico's own investors in violation of Article 1102 of NAFTA; whether Mexico withheld fair and equitable treatment from Claimants by unfairly filling the vacuum in the United States' market for irrigated fruits and vegetables with Mexican crops' grown with Claimants' water in violation of Article 1105 of NAFTA; and whether Mexico nationalized or expropriated Claimants' investment within Mexico, or took a measure tantamount to nationalization or expropriation of this investment, unfairly and without compensation and due process in violation of Article 1110 of NAFTA. In short, Claimants' claims are under (and well within the parameters of) Chapter Eleven of NAFTA.

84. Respondent's citation of the jurisdictional objections of the United States in its Reply Memorial on Jurisdiction in *Methanex Corp. v. United States* is inapposite. In *Methanex*, the United States objected to Methanex's assertion that "the NAFTA adopted the WTO Technical Barriers and Phytosanitary Measures Agreement as investment

protections." *Methanex Corp. v. United States*, Reply Memorial of Respondent United States on Jurisdiction at 30 (April 12, 2001). Put another way, Methanex claimed that "[b]ecause the [measures at issue] violate the Technical Barriers Agreement and the Sanitary Measures Agreement, they are unfair and inequitable, and thus a violation of NAFTA Article 1105." *Methanex Corp. v. United States*, Amended Statement of Claim at 64 (Feb. 12, 2001). Here, Claimants do not claim a violation of the 1944 Treaty, nor do they claim that they were given unfair and inequitable treatment in violation of Article 1105 based on an alleged violation of the 1944 Treaty.[31] Rather, Claimants assert that Mexico has given them unfair and inequitable treatment in violation of Article 1105 because Mexico usurped their market for irrigated fruits, vegetables, and nuts. That is to say, in *Methanex* the violations of the WTO agreements in and of themselves were alleged to cause a violation of the NAFTA; whereas, Claimants do not claim (1) a violation of the 1944 Treaty; (2) a violation of NAFTA *based on the 1944 Treaty*. Indeed, Claimants' claims relate to the use of Claimants' water by Mexico vis-à-vis Mexican farmers. This difference distinguishes this case from *Methanex* and gives this Tribunal jurisdiction over the matter.

85. The same is true of Claimants' claims under Articles 1102 and 1110 of NAFTA. Mexico alleges in its Memorial that Claimants' claims under Articles 1102 and 1110 are defective because they call on the Tribunal to rule on the rights and obligations of Mexico and the United States under the 1944 Treaty. Respondent's Mem. ¶ 114. However, again, Claimants' claims based on violations of Articles 1102 and 1110 of NAFTA are not based on violations of the 1944 Treaty. Under Article 1102, "National

[31] Nor is it relevant whether the United States and Mexico settled their recent differences under the 1944 Treaty. *See* Respondent's Mem. ¶¶ 40-41. That settlement involved the United States' rights under the 1944 Treaty, not Claimants' rights under NAFTA, and did not purport to settle any of Claimants' rights.

Treatment," NAFTA parties are to treat investors of another party no less favorably than they treat their own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. By taking Claimants' water rights—Claimants' investment—and providing the water for use by its own nationals, Mexico has accorded Claimants less favorable treatment than that granted to the Mexican investors, in clear violation of the obligations Mexico assumed under NAFTA. Moreover, under Article 1110, "Expropriation and Compensation," NAFTA parties must not expropriate investments, either directly or indirectly, or through a measure tantamount to an expropriation, unless such expropriation is for a public purpose, is non-discriminatory, is in accordance with due process of law and the prescribed international minimum standards of treatment under Article 1105(1), and is accompanied by compensation at fair market value. Mexico took a measure tantamount to nationalization or expropriation of Claimants' investment unfairly and without compensation and due process in violation of Article 1110 of NAFTA when it captured, seized, and diverted to the use of Mexican farmers the water located in Mexico and owned by Claimants.

86. The fact that Mexico may have breached a treaty obligation owed to the United States does not immunize it from the separate consequences of a violation of Chapter 11 of NAFTA. Simply put, this arbitration is about national treatment, the minimum standard of treatment, and expropriation and compensation, resulting from Respondent's seizure of water owned by Claimants. As investors, Claimants have the right to pursue this claim for Respondent's adoption of measures relating to their investment, and this Tribunal has jurisdiction over this claim.

VI. Conclusion

87. For all of these reasons, Claimants ask this Tribunal to deny Mexico's requests to dismiss these claims, and to allow them to go forward on the merits.

Respectfully submitted,

(signed in the original)
Nancie G. Marzulla
Roger J. Marzulla
Barbara A. Wally
Marzulla & Marzulla
1350 Connecticut Avenue, N.W.
Suite 410
Washington, DC 20036
(202) 822-6760
(202) 822-6774 (facsimile)

(signed in the original)
Don Wallace, Jr.
Chair of International Law Institute,
and Professor of Law
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, DC 20001
(202) 247-6006

Counsel for Claimants

Dated: June 23, 2006