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INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

(ADDITIONAL FACILITY)

Washington D.C.

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

Bayview Irrigation District et al.

(Claimants)

versus

United Mexican States

(Respondent)

AWARD

Before the Arbitral Tribunal
constituted under Chapter XI
of the North American Free Trade
Agreement, and comprised of:

Professor Vaughan Lowe
Professor Ignacio Gómez-Palacio
The Honorable Edwin Meese III

Secretary of the Tribunal
Ms. Gabriela Alvarez Avila

Date of dispatch to the parties: June 19, 2007

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I. PROCEDURAL HISTORY

1) The International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") received on 20 January 2005, under cover of a letter of 19 January 2005, a request for the institution of arbitration proceedings under the Additional Facility Arbitration Rules ("the Request") by Bayview Irrigation District et al. ("the Claimants") against the United Mexican States ("Mexico" or the "Respondent"). The Request was filed by forty six Claimants including seventeen Irrigation Districts, sixteen individuals, two trusts, two limited partnership, two estates, four corporations and three general partnerships. [1] A list describing the nature of each Claimant, its address and place of incorporation, was attached to the Request.

2) The Request for Arbitration states that each of the individual Claimants is or was a resident of Texas and a national of the United States of America ("United States") and not a national of Mexico, and that each of the legal persons was organized and exists under the law of Texas.

3) On 27 January 2005, the Centre confirmed its receipt of the Request and the prescribed lodging fee pursuant to Regulation 16 of the Centre's Administrative and Financial Regulations for lodging notices for the institution of proceedings, and transmitted a copy to the Mexican Government and the Mexican Embassy in Washington D.C.

4) The Request was supplemented by four letters from counsel for the Claimants, dated 7 March, 7 April, 13 April and May 20, 2005, respectively. By letter of 20 May 2005, Claimants Timothy Reid, Estate of Norman Reid, N.H. Kitayama and Bernadette M. Oeser were withdrawn from the Request for Arbitration. The Respondent filed a letter on 4 March 2005 arguing that the Request should be rejected.

5) On 1 July 2005, the Secretary-General of the Centre approved access to the Additional Facility and notified both Parties of the registration of the Request as provided for in Article 4 of the Additional Facility Arbitration Rules. Additionally and as required by Article 5(e) of the Additional Facility Arbitration Rules, the Secretary-General invited the Parties to constitute an Arbitral Tribunal in accordance with Chapter III of those rules.

6) By letter of 26 July 2005 the Claimants appointed The Honorable Edwin Meese III (an American national) as arbitrator in this proceeding. On 6 October 2005, the Respondent appointed Mr. Ignacio Gómez-Palacio (a Mexican national) as arbitrator. The Respondent by letter of 2 December 2005 and Claimants by

[1] The Claimants' Counter-Memorial on Jurisdiction refers in paragraph 1 to "the 42 investor Claimants". The Tribunal regards the detailed list of Claimants in the Request for Arbitration, as amended by the letter of 20 May 2005 referred to in paragraph 4), below, as the definitive list of Claimants in the absence of any other formal notice of amendment to that list.

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letter of 5 December 2005, agreed on the appointment of Professor Vaughan Lowe (a British national) as President of the Arbitral Tribunal. On 15 December 2005, the Tribunal was deemed to be constituted and the proceedings to have begun. Pursuant to Rule 25 of ICSID's Administrative and Financial Regulations, the parties were notified that Ms. Gabriela Alvarez Avila, ICSID Senior Counsel, would act as Secretary of the Arbitral Tribunal.

7) In this arbitration proceeding, Claimants have been represented by Ms. Nancie G. Marzulla, Mr. Roger J. Marzulla, of the law firm of Marzulla & Marzulla, and by Professor Don Wallace Jr. The Respondent has been represented by Mr. Hugo Perezcano Díaz, Ms. Alejandra G. Treviño Solís and Luis Alberto González García, all of them from the Dirección General de Consultoría Jurídica de Negociaciones de la Secretaría de Economía.

8) The Tribunal held its First Session with the parties on 14 February 2006 in Washington D.C. ("the First Session"). The Claimants were represented at the session by Ms. Nancie G. Marzulla, Mr. Roger J. Marzulla, and Ms. Barbara A. Wally from Marzulla & Marzulla and Prof. Don Wallace, Jr., Chair, International Law Institute. The Respondent was represented at that session by Mr. Hugo Perezcano Díaz and Ms. Alejandra G. Treviño Solís, from the Secretaría de Economía, Mr. Salvador Behar Lavalle and Mr. Carlos Kessner, from the Embassy of Mexico in the United States of America, Mr. Arturo Barrio, Ministry of Foreign Affairs of Mexico, Mr. Gerardo Gordoa Márquez, from the National Water Commission, Mr. Stephan Becker and Mr. Sanjay Mullick, from Pillsbury Winthrop Shaw Pittman LLP, and finally Mr. Cameron Mowatt, from Thomas and Partners. Gabriela Álvarez Ávila, Secretary of the Tribunal and Natalí Sequeira Navarro, were present during the session on behalf of ICSID.

9) At the First Session, the Parties agreed that the Tribunal had been properly constituted and that they had no objections to the appointment of any of its members. It was also agreed that the proceedings would take place in accordance with ICSID Arbitration (Additional Facility) Rules in force since 1 January 2003, as modified by Section B of Chapter XI of NAFTA.

10) At this session, the Tribunal resolved, after consultation with the Parties, that the question of jurisdiction would be considered as a preliminary issue. The Tribunal decided that the Respondent should file a Memorial on Jurisdiction by 19 April 2006 and Claimants should file their Counter-Memorial on Jurisdiction by 23 June 2006. The Tribunal also decided that the Respondent would file its Reply by 26 July 2006 and that the Claimants would file their Rejoinder by 28 August 2006. The Tribunal also stated that pursuant to NAFTA Article 1128, the NAFTA parties would be invited to submit their comments by 18 September 2006. The hearing on jurisdiction was scheduled to be held on 14, 15 and 16 November 2006 in Washington D.C., while the dates for further hearings would be set by the Tribunal following consultation with the Parties.

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11) The Respondent submitted an electronic copy of its Memorial on Jurisdiction on 19 April 2006, and the Claimants filed an electronic copy of their Counter-Memorial on Jurisdiction on 23 June 2006.

12) By letter of 31 August 2006, the Tribunal invited the NAFTA parties to file by 18 September 2006 any submissions in the present proceedings, in accordance with NAFTA Article 1128. On 15 September 2006, the Government of Canada informed the Tribunal that it did not intend to file any submissions prior to the hearing on jurisdiction, but reserved its right to make them at the hearing.

13) On 26 September 2006, the Centre acknowledged receipt of a letter dated 20 September 2006 from Kathleen Harnett White, Chairman of the Texas Commission on Environmental Quality, and transmitted it to the Parties and the Tribunal. The letter concerned the scope of the provisions of the 1944 Water Treaty and of the negotiations over Mexico's water debt. It stated that the claims of water districts and individual water users were not within the scope of the negotiations and settlement concerning the water debt between the United States and Mexico.

14) On 31 October 2006 the Tribunal wrote to the Parties recalling that it is for each Party to decide how it wishes to present its case and use the time available to it at the hearing but, without encroaching upon that fundamental principle, the Tribunal said that there were certain issues which it hoped that the Parties would address at the hearing. These issues were:-

> *First*, two points concerned with the question of the applicable law under NAFTA Article 1131:
>
> a) What is the role, if any, of national law, and in particular (i) Texas law, and (ii) Article 27 of the Constitution of the Republic of Mexico?
>
> b) What is the role, if any, of principles of private international law?
>
> *Second*, what is the meaning and significance in this case of the term "investment" in NAFTA Article 1139, and in particular the meaning and significance of NAFTA Article 1139(g), and specifically the word "property"?
>
> *Third*, what is the meaning and significance in this case of the term "in the territory of the Party" in NAFTA Article 1101?

15) These issues, and the arguments set out in the written pleadings, were addressed by the parties at the hearing on jurisdiction held at the World Bank in Washington DC on 14 and 15 November 2006.

16) At that hearing on jurisdiction the Claimants were represented by Ms. Nancie G. Marzulla, Mr. Roger J. Marzulla, and Ms. Barbara A. Wally from Marzulla & Marzulla and Prof. Don Wallace, Jr., Chair, International Law Institute. The Respondent was represented at that session by Mr. Hugo Perezcano Díaz and Mr. Luis Alberto González García, from the Secretaría de Economía, Mr. Salvador Behar Lavalle from the Mexican Embassy in the United States, Mr. Stephan Becker and Mr. Sanjay Mullick, from Pillsbury Winthrop Shaw Pittman LLP, and Mr. Christopher Thomas and Mr. Cameron Mowatt, from Thomas and Partners. The Secretariat was represented by Gabriela Álvarez Ávila, Secretary of the Tribunal and Natalí Sequeira Navarro, ICSID, Counsel.

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17) Transcripts of that hearing were made in English and Spanish and were distributed to the Tribunal and the Parties at the end of each day of the hearing ("the Transcripts").

18) By letter of 16 November 2006, and as announced during the hearing on jurisdiction, the Tribunal invited the NAFTA Parties to file by 27 November 2006, written submissions on: a) the question of the standing of the Irrigation Districts as Claimants under NAFTA, and b) the question of the concept of territoriality in relation to Articles 1102 and 1105 of NAFTA. The Tribunal requested the NAFTA Parties to limit their representations to the question of treaty interpretation and not to comment on the facts of the case.

19) Also on 16 November 2006 the Tribunal invited the Parties to submit by 11 December 2006: a) any observations on the issues addressed by the NAFTA Parties, i.e. the standing of the Irrigation Districts as Claimants under NAFTA, and the concept of territoriality in relation to Articles 1102 and 1105 of NAFTA; b) any further observations or comments in addition to what was included in their existing submissions, on the case of the *City of San Marcos* v. *Texas Commission on Environmental Quality*, Court of Appeals of Texas, Third District, Austin, dated 8 January 2004; and c) any observations on the concept of water as a good in commerce in Mexico and in Texas, as discussed during the hearing.

20) The Tribunal further requested the Parties to provide a brief explanation as to: a) what, if any, action the State of Texas could take in the event of non-compliance with conditions attached to the exercise of water rights of the kind held by the Claimants; b) whether it is possible under Texas law for the owner of the water rights to sue the Irrigation Districts for non-fulfillment of whatever the obligations of the Irrigation Districts may be under the relevant Texas legislation; and c) the availability of copies of resolutions of the board of directors of the water districts authorizing the initiation of these arbitral proceedings. Finally the Tribunal invited the Parties to submit their respective statements of costs. The parties were asked to deliver all of these submissions by 11 December 2006.

21) On 27 November 2006 the representatives of the United States of America filed their submission on the matters addressed in the Tribunal's letter of 16 November 2006. By letter of 5 December 2006, Claimants requested a four-day extension to respond to the matters addressed by the Tribunal in its letter to the Parties of 16 November 2006. On 7 December 2006, the Tribunal granted both parties an extension, permitting them to file their post-hearing submissions by 15 December 2006.

22) On 15 December 2006, Greg Abbott, the Attorney General of Texas, Kent C. Sullivan, First Assistant Attorney General of Texas, and R. Ted Cruz, Solicitor General of Texas, made a submission on behalf of the State of Texas and in support of the Claimants. On the same date both Parties filed their post-hearing submissions.

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23) By letter of 18 December 2006 Susan Combs, Commissioner of the Texas Department of Agriculture also filed a letter in support to Claimants' arguments.

II. SUMMARY OF PARTIES' ARGUMENTS

A. The challenge to jurisdiction and admissibility

1. The Respondent's Memorial on Jurisdiction

24) The Respondent submitted its Memorial on Jurisdiction dated 19 April 2006. It raised three main objections to jurisdiction and admissibility:-

a) that the claim falls outside the scope of NAFTA in light of NAFTA's object and purpose and of the nature of the treaty;
b) that the claim is untimely and thus inadmissible;
c) that there are deficiencies in the individual claims, in respect of the proof of the eligibility of each claimant.

(a) The claim falls outside the scope of NAFTA

25) The Respondent argued that the jurisdiction of the Tribunal is confined by the limits of the consent of the parties,[2] and that this consent is under NAFTA Article 1122 confined to "arbitration in accordance with the procedures set out in this Agreement."[3] It said that the claim must pertain to an investment within the scope of NAFTA Chapter Eleven, and within the scope of Respondent's consent to arbitration.[4]

26) The Respondent, referring to NAFTA Articles 102, 201, 301, 501, 901, 1213, 1601, 1701, and 1802, among others, argued that NAFTA is based upon a territorial principle of jurisdiction.[5] It pointed in particular to NAFTA Article 1101,[6] which reads in material part as follows:

> "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…"

27) The Respondent cited the holding in the *Methanex* award that

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2 Memorial on Jurisdiction, paragraph 67.
3 Memorial on Jurisdiction, paragraph 69.
4 Memorial on Jurisdiction, paragraph 72.
5 Memorial on Jurisdiction, paragraphs 78-81.
6 Memorial on Jurisdiction, paragraphs 80, 82-100.

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> "…the phrase 'relating to' in Article 1101(1) NAFTA signifies something more than the mere effect of a measure on an investor or an investment and ... requires a legally significant connection between them…"[7]

28) The Respondent emphasized that in its view NAFTA Chapter Eleven applies to protect *investors of one NAFTA State Party* or their investments *in the territory of another NAFTA State Party*.[8] It noted that the Claimants had stated that each one of them is "an Investor and owner of an integrated Investment" which includes "rights to water located in Mexico."[9]

29) The Respondent referred[10] to the definition of an investment in NAFTA Article 1139, which reads in material part as follows:-

> "**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;
> **investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of such Party;
> **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."

The Respondent argued that the Claimants do not and cannot have property rights in Mexico in the waters of the Rio Bravo / Rio Grande or its tributaries, even if they have ownership rights in the water when it is within the United States.[11]

30) The Respondent argued further that the claim was based on allegations that Mexico had breached the bilateral Treaty between the United States of America and Mexico relating to the Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande, signed on 3 February 1944 ('the Water Treaty' or 'the 1944 Treaty').[12] It pointed to statements in the Request for Arbitration in which the Claimants referred to violations of the 1944 Treaty by Mexico,[13] and concluded that

> "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."[14]

31) The Respondent considered that under the 1944 Treaty each State Party is free to distribute, pursuant to its own laws, the water assigned to it by the Treaty,[15] and that, as the US Government memorandum submitted in the case of *Consejo*

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7 Memorial on Jurisdiction, paragraph 84, quoting *Methanex v. United States*, Preliminary Decision of the Tribunal, paragraph 147; < http://naftaclaims.com/Disputes/USA/Methanex/MethanexPreliminaryAwardJurisdiction.pdf>

8 Memorial on Jurisdiction, paragraphs 80, 86, 93, 95, 96.

9 Memorial on Jurisdiction, paragraph 86, quoting the Request for Arbitration paragraph 53.

10 Memorial on Jurisdiction, paragraph 91, 94 fn 75.

11 Memorial on Jurisdiction, paragraphs 88-89.

12 Memorial on Jurisdiction, paragraphs 101-105.

13 Memorial on Jurisdiction, paragraphs 102,103, 104.

14 Memorial on Jurisdiction, paragraph 105.

15 Memorial on Jurisdiction, paragraph 109.

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de Desarrollo Econónomico de Mexicali put it, "the 1944 Treaty did not create private rights of action for individuals."[16]

32) The Respondent argued further that the situation regarding the Mexican water deficit does not constitute a breach of the 1944 Treaty,[17] and that the United States does not claim that there is any such breach.[18]

33) In relation to the 1944 Treaty the Respondent quoted the United States' Reply Memorial in the *Methanex* case:

> "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."[19]

And the Respondent said that "[t]he same can be said with respect to the claimed breaches of Articles 1102 and 1110 based on alleged breaches of the Water Treaty."[20]

(b) The claims are untimely

34) The Respondent also said that "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*."[21]

35) NAFTA Article 1116(2) provides that

> "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."

36) The Respondent noted that the Request for Arbitration was submitted on 20 January 2005, and said that all of the alleged acts and omission on which the claim was based occurred more than three years prior to that date.

(c) The Claimants have not complied with mandatory procedural requirements

37) The Respondent submitted that in addition to the foregoing arguments which point to the lack of jurisdiction in the Tribunal over this dispute, there is a further reason why these particular claims should be held to be inadmissible. It said that NAFTA Article 1119, read with Articles 1116, 1120, 1121 and 1139, and with Article 3 of the Arbitration Rules, requires that information and

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16 Memorial on Jurisdiction, paragraph 111.
17 Memorial on Jurisdiction, paragraph 112.
18 Memorial on Jurisdiction, paragraph 113.
19 Reply Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment (12 April 2001), pp. 32-33.
20 Memorial on Jurisdiction, paragraph 114.
21 Memorial on Jurisdiction, paragraph 90 fn 90, citing *Marvin Roy Feldman Karpa v. United States of Mexico*, ICSID case No. ARB(AF)/99/1, Award 16 December 2002, paragraphs 60-63.

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documents that identify each claimant must be provided and must prove that each claimant is a United States investor.[22]

38) The Respondent asserted that it had no way to verify that each of the claimant water users met the NAFTA nationality requirements, and that there is no evidence that the claimant Irrigation Districts had obtained the consent of those whom they represent to the submission of this claim.[23]

39) The Respondent also said that it was not proven that Messrs Marzulla and Professor Wallace were properly authorized by those Claimants who are juridical persons to represent them.[24]

2. The Claimant's Counter- Memorial on Jurisdiction

40) The Claimants submitted a Counter-Memorial on Jurisdiction dated 23 June 2006. In it they alleged that "[b]eginning 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."[25]

41) Claimants asserted that their ownership of the water at issue in this arbitration may be traced back to a 1969 court decree issued in the Texas court case of *State v. Hidalgo County Water Control & Improvement Dist. No. 18*, 443 S.W.2d 728 (Tex. Civ. App. 1969).[26]

42) The Counter-Memorial on Jurisdiction addressed the objections to jurisdiction and admissibility raised by the Respondent in a different order from that adopted in the Respondent's Memorial on Jurisdiction. For the sake of clarity, this description of the Claimants' arguments adheres to the order used in the Memorial on Jurisdiction.

(a) The claim does not fall outside the scope of NAFTA

43) The Claimants asserted that their claim concerns a measure taken by Mexico in relation both to investors of another Party[27] and to an investment located in Mexican territory.[28] They said that the relevant measure was the impounding by the Respondent of their water while that water was in transit to the Claimants' fields in Texas, and its diversion by the Respondent for use by Mexican farmers in Mexico.[29]

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22 Memorial on Jurisdiction, paragraph 126.
23 Memorial on Jurisdiction, paragraphs 131, 132.
24 Memorial on Jurisdiction, paragraphs 137, 144, 145.
25 Counter-Memorial on Jurisdiction, paragraph 6.
26 Counter-Memorial on Jurisdiction, paragraph 12.
27 Counter-Memorial on Jurisdiction, paragraph 48.
28 Counter-Memorial on Jurisdiction, paragraph 52.
29 Counter-Memorial on Jurisdiction, paragraph 46.

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44) The Claimants pointed to differences in the wording of Articles 1102 (National Treatment), 1105 (Minimum Standard of Treatment) and 1110 (Expropriation and Compensation) of NAFTA and argued that Articles 1102 and 1105 (in contrast to Article 1110) apply to all measures taken by Mexico relating either to investors of another Party or to their investments, whether or not those investments are located in Mexican territory.[30] They pointed out that NAFTA Article 1102 contains no requirement concerning the location of the investor or the investment,[31] and neither does Article 1105.[32]

45) Moreover, Claimants argued that under the 1944 Treaty Mexico had relinquished ownership of the Claimants' irrigation water, and that this water was an investment located in Mexico and within the scope of NAFTA Article 1101(1)(b).[33] They said that the water rights were "transferred from Mexico to the United States in 1944, and from the United States to Claimants under the national law of the United States."[34]

46) The Claimants referred to a Joint Statement issued by the three NAFTA States on 2 December 1993,[35] and said that it recognized that water that has entered into commerce (as contrasted with water in its natural state) falls within the provisions of NAFTA. Claimants said that this Joint Statement is an interpretation of NAFTA binding on the Tribunal under NAFTA Article 1131(2).[36] Claimants said further that water becomes a commercial good or product when an investment of human industry converts it into a tradable commodity, and that Claimants' water,

> "which flows within courses of the six … 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".[37]

47) Claimants quoted a statement concerning the 1906 Mexico-US Water Convention, which they said is equally applicable to the 1944 Treaty. That statement includes the following passages:

> "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. ..... Rights to utilize the water resources within the boundaries of each nation are controlled by their respective domestic laws."[38]

48) In the Claimants' view, "[f]ollowing the conclusion of the [1944] Treaty, each nation owned the water resources allotted to it, and relinquished ownership of

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30 Counter-Memorial on Jurisdiction, paragraph 49.
31 Counter-Memorial on Jurisdiction, paragraph 49.
32 Counter-Memorial on Jurisdiction, paragraph 51.
33 Counter-Memorial on Jurisdiction, paragraph 52.
34 Counter-Memorial on Jurisdiction, paragraph 57.
35 < http://scics.gc.ca/cinfo99/83067000e.htm#statement >.
36 Counter-Memorial on Jurisdiction, paragraph 53.
37 Counter-Memorial on Jurisdiction, paragraph 55.
38 Counter-Memorial on Jurisdiction, paragraph 67, quoting Darcy Alan Frownfelter, 'The International Component of Texas Water Law', 18 *St Mary's L. J.* 481, 512 (1986), who is in turn quoting a United States' Legal Advisor.

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the water allotted to the other nation."[39] They said that "[t]he 1944 Treaty was … 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", and that "Respondent … 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."[40]

49) The Claimants said that under United States' law it is the sovereign states of the union and not the federal government which hold legal title to water, with the authority to apportion its use among their residents,[41] and that the United States court in the 1969 *Hidalgo* case "took judicial custody of the American waters of the Rio Grande" and "made substantial quantities of water available to Texas residents (including Claimants), even though the 1944 Treaty itself did not apportion these rights".[42]

50) The Claimants said further that Mexico 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 (sc., property) rights over the property in question, and pointed by way of analogy to the NAFTA obligation to respect ownership of registered vehicles, intellectual property and intangible property created and registered in the US or Canada.[43]

51) The Claimants denied that they were asking the Tribunal to rule on the rights and obligations of Mexico and the United States under the 1944 Treaty, and said that their claim was based upon alleged breaches of NAFTA.[44]

(b) The claims are not untimely

52) The Claimants said that because Article 4(B)(c) of the 1944 Water Treaty provides that the United States' share of 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", the US' minimum allotment was strictly speaking a right to 1,750,000 acre-feet (as a minimum) every five years, rather than a right to demand 350,000 acre-feet each and every year.[45]

53) Accordingly, the Claimants said, there was no violation of their water rights until after the end of Cycle 26 on 30 September 2002, because it was on 1 October 2002 that Respondent's obligations under both Cycle 25 and Cycle 26 became delinquent.[46] That date, 1 October 2002, falls within the NAFTA Article 1116(2) three-year period of limitations.[47]

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39 Counter-Memorial on Jurisdiction, paragraph 71.
40 Counter-Memorial on Jurisdiction, paragraph 74.
41 Counter-Memorial on Jurisdiction, paragraph 76
42 Counter-Memorial on Jurisdiction, paragraph 77.
43 Counter-Memorial on Jurisdiction, paragraph 78.
44 Counter-Memorial on Jurisdiction, paragraph 83.
45 Counter-Memorial on Jurisdiction, paragraph 29.
46 Counter-Memorial on Jurisdiction, paragraph 34.
47 Counter-Memorial on Jurisdiction, paragraph 32.

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(c) The Claimants have complied with mandatory procedural requirements

54) The Claimants considered that they had put forward ample evidence, in the form of passports, birth certificates or other proof, of the nationality of each of the Claimants,[48] and (while they questioned whether either NAFTA or the Additional Facility Rules requires such proof) of the authority of the Claimants who had themselves authorized Messrs Marzulla and Professor Wallace to represent them.[49]

3. The Respondent's Reply on Jurisdiction

55) The Respondent submitted a Reply on Jurisdiction dated 26 July 2006.

(a) There is no investment within the meaning of NAFTA Chapter Eleven

56) The Respondent reasserted its view that NAFTA is based upon the principle of territorial jurisdiction.[50] It accepted that all legal systems recognize property rights created abroad, and that the property in question can be moved across borders,[51] but says that when that property is in Mexico it is governed by Mexican law.[52]

57) The Respondent said that the rights that Claimants argued had been affected by Mexico "are only valid in U.S. territory, once the waters leave Mexican territory, and, in fact, the international channels, and are distributed under applicable U.S. law."[53]

58) The Respondent said that the 1993 Joint Statement of NAFTA States Parties[54] does not support the Claimants' contention that their water is a good or product in commerce.[55] It said that the water is governed by the legal system established by the 1944 Treaty and not by NAFTA;[56] and further that water is in its natural state and not a good or product in commerce until it is "taken out of its natural source, for example to be bottled or stored in bulk in other types of containers."[57] The Respondent said that the Claimants "confuse the water that flows in the rivers with 'water rights' that may or may not be marketable."[58]

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48 Counter-Memorial on Jurisdiction, paragraph 36.
49 Counter-Memorial on Jurisdiction, paragraphs 42, 43.
50 Reply on Jurisdiction, paragraphs 14-16.
51 Reply on Jurisdiction, paragraph 22.
52 Reply on Jurisdiction, paragraph 23.
53 Reply on Jurisdiction, paragraph 24.
54 See paragraph 46) above.
55 Reply on Jurisdiction, paragraph 25.
56 Reply on Jurisdiction, paragraph 27
57 Reply on Jurisdiction, paragraph 29.
58 Reply on Jurisdiction, paragraph 30.

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59) The Respondent also reasserted its contention that the Tribunal was being asked to rule upon rights and obligations under the 1944 Treaty, and noted that both the United States and Mexico had agreed on the manner in which Mexico's water debt during the period to which this case relates should be paid.[59]

(b) It is not proved that the Irrigation Districts suffered cognizable loss.

60) The Respondent raised the further objection that the Claimants had not proved that the Irrigation Districts had suffered any cognizable loss. It said that the Irrigation Districts are middlemen, whose role is the transfer of the water from the State to those who use it.[60]

(c) The Claimants have not complied with mandatory procedural requirements

61) The Respondent renewed its objection that the Claimants had not complied with mandatory procedural requirements under the NAFTA. It said that because of doubts about the authority of the officers of the Irrigation Districts to initiate this arbitration, it was concerned that the Irrigation Districts might later disclaim responsibility for initiating the arbitration and that this might affect the recoverability of any costs awarded against the Claimants.[61]

4. The Claimants' Rejoinder on Jurisdiction

62) The Claimants submitted a Rejoinder on Jurisdiction, dated 28 August 2006.

63) The Claimants asserted that the Respondent bears the burden of demonstrating that the Tribunal should not hear the claim, and that in this context the Tribunal should assume that the facts alleged by the Claimants are true.[62] They said that "This means that [the Tribunal] must interpret, definitively, Article 1101(1) and decide whether, on the facts alleged by the claimant, Chapter 11 applies."[63]

64) Claimants then said that much of the argument in the Respondent's Reply on Jurisdiction is irrelevant because it concerns the merits of the case, and (citing *Methanex*[64]) that the Tribunal "must hold in abeyance Respondent's merits arguments", i.e., the arguments that (a) Mexico owns and controls all water within its boundaries, (b) Mexico is not obliged to recognize that ownership of the water rights has lawfully passed from the United States to the Claimants, (c) ownership of the right to water in the six rivers located wholly within Mexico is not ownership of an 'investment in Mexico', and (d) Claimants do not have an

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59 Reply on Jurisdiction, paragraph 35.
60 Reply on Jurisdiction, paragraphs 37-41.
61 Reply on Jurisdiction, paragraph 43.
62 Rejoinder on Jurisdiction, paragraph 2.
63 Rejoinder on Jurisdiction, paragraph 3.
64 *Methanex*, Preliminary Award, paragraph 109.

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investment in their farmland, crops, irrigation facilities and water rights. These issues, they said, must be joined to the merits.[65]

65) In the Claimants' view, "the sole question at this stage in the proceedings is whether Respondent's capture and diversion of water located in Mexico and owned by Claimants falls within the ambit of Chapter Eleven of NAFTA."[66]

66) The Claimants reasserted that they owned water in Mexico. They drew an analogy between the 1944 Treaty and the treaties by which the United States acquired title to its landmass.[67] They concluded that "for the purposes of the jurisdictional challenge pending before this Tribunal, it must be assumed that Claimants are rightful owners of an investment located in Mexico, and therefore this claim is within the competence of this Tribunal under Chapter Eleven of NAFTA."[68]

67) The Claimants said that

> "the United States has the right to determine who owns the water rights allocated to it by Mexico in the 1944 treaty (in this case, employing the law of Texas), and that Mexico has the same right with respect to the water rights it owns. When Mexico relinquished these water rights by treaty, it relinquished the right to dictate who owns them, but retained the right to decide who owns its share of those rights, as well as the 1.5 million acre-feet per year allotted to Mexico from the Colorado River under the same treaty."[69]

68) The Claimants said further that the dispute settlement provisions in the 1944 Treaty apply only to government-to-government disputes and did not apply to the present case.[70] Claimants also said that they had referred to the 1944 Treaty "only to help identify the extent and location of their water rights",[71] and that the Treaty "merely lays the factual predicate of their claim."[72] They said that "Claimants will be required to produce more precise evidence of their water loss at the merits and damages stages of this proceeding."[73]

69) As far as the qualification of the Claimants to initiate the claim is concerned, Claimants said that the "Respondent now appears to concede that all Claimants are nationals of the United States."[74]

70) The Claimants said that it was untrue that the Irrigation Districts are 'middlemen': the districts sell water both to their members and to others outside the district.[75]

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65 Rejoinder on Jurisdiction, paragraph 6.
66 Rejoinder on Jurisdiction, paragraph 7.
67 Rejoinder on Jurisdiction, paragraph 14
68 Rejoinder on Jurisdiction, paragraph 16.
69 Rejoinder on Jurisdiction, paragraph 25.
70 Rejoinder on Jurisdiction, paragraph 17.
71 Rejoinder on Jurisdiction, paragraph 18.
72 Rejoinder on Jurisdiction, paragraph 19.
73 Rejoinder on Jurisdiction, paragraph 18.
74 Rejoinder on Jurisdiction, paragraph 20.
75 Rejoinder on Jurisdiction, paragraph 22.

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5. The United States submission

71) On 27 November 2006 the United States made a submission pursuant to NAFTA Article 1128. In that submission it addressed the question of the scope of the protections afforded to investors and investments by Articles 1102 and 1105 of NAFTA. It argued that

> "all of the protections afforded by the NAFTA's investment chapter extend only to investments that are made by an investor of a NAFTA Party in the territory of another NAFTA Party, or to investors of a NAFTA Party that seek to make, are making, or have made an investment in the territory of another NAFTA Party."[76]

In support of this view it pointed to the role of NAFTA Article 1101 as the 'gateway' to the dispute resolution provisions of Chapter Eleven.[77] It noted the statement in Article 1101(1)(b) that Chapter Eleven applies to measures adopted or maintained by a Party relating to "investments of investors of another Party in the territory of the Party" that has adopted or maintained those measures, and said that this defined the scope of the protection of investments in Article 1105.[78] While the scope of Article 1102, in protecting "investors", is not expressly limited to the protection of investors with respect to investments in the territory of the State adopting the measures of which complaint is made, the United States submitted that it is clear that Article 1102 is so limited and that any other conclusion would be absurd.[79] It would, for example, result in situations where there was an obligation to accord national treatment to an investor even though there was no obligation to accord national treatment to the investment itself.[80] The United States' submission noted that Canada had taken the same position on the interpretation of Chapter Eleven in the *S D Myers* case.[81]

72) The Tribunal also received a letter dated 14 December 2006 from the Attorney General, the First Assistant Attorney General, and the Solicitor General of Texas, in which it was asserted that the Claimants' claim is within the concept of territoriality under NAFTA Chapter Eleven and is not inconsistent with the interpretative position provided in the submission made by the United States on 27 November 2006.

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76 United States Submission, paragraph 3.

77 United States Submission, paragraph 2, citing *Methanex Corp.* v. *United States of America*, (First Partial Award) 2002 WL 32824210 at ¶ 106 (Aug. 7, 2002) ("[Article 1101(1)] is the gateway leading to the dispute resolution provisions of Chapter 11. Hence the powers of the Tribunal can only come into legal existence if the requirements of Article 1101(1) are met.").

78 United States Submission, paragraph 5

79 United States Submission, paragraph 8.

80 United States Submission, paragraph 10.

81 United States Submission, paragraph 14, citing *S.D. Myers, Inc.* v. *Canada*, Government of Canada Counter Memorial, ¶¶ 218-52 (Oct. 5, 1999) (arguing that because the claimant did not have an investment in Canada the claim was not within the scope of Chapter Eleven); id. at ¶ 259 ("The [Article 1102(1)] obligation does not mean that the national treatment obligation applies to the investor's activities in its home country. The obligation only applies to the investor with respect to its investment in the foreign country . . . .").

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73) The Tribunal received a post-hearing submission from each of the Parties, both submissions being dated 15 December 2006.

74) The Claimants' post-hearing submission, entitled 'Supplemental Memorial', addressed all of the matters on which the Tribunal had invited submissions.[82] Of central relevance at this stage are the submissions concerning the scope of the NAFTA protections. The Supplemental Memorial reviewed the drafting history of NAFTA Chapter Eleven and focused upon the absence from NAFTA Articles 1102 and 1105 of an explicit territorial limitation such as is found in NAFTA Article 1110. It argued that this omission was not inadvertent, and that the result of the omission is that investors and investments are protected by Chapter Eleven whenever a measure of one NAFTA State Party affects an investment of an investor of another State Party, whether or not the affected investment is in the territory of the NAFTA State applying the measure in question.[83]

75) Further, Claimants said that the omission from NAFTA Article 1101(1)(a) of an explicit territorial limitation, such as is found in Article 1101(1)(b) and (c), has a similar effect.[84] They said that both those protections afforded to 'investors' and those protections afforded to 'investments' by Chapter Eleven apply to the Claimants, and that this is in accordance with the design and purpose of NAFTA which, in their view is to eliminate economic boundaries between Mexico, Canada and the United States.[85]

76) On the question of water as a good in commerce, the Claimants argued that the Rio Grande has long ceased to be a naturally flowing river, and observed that water from the Rio Grande is bought, sold, traded and stored for use in the agricultural commercial activities of farmers on both sides of the River.[86]

77) Claimants stated that the 17 Irrigation Districts among the Claimants are creatures of Texas law but do not act as agents of the state of Texas or the federal government.[87] On the questions of Texas water law the Supplemental Memorial outlined the provisions of Texas law that permit the cancellation of unused water rights in certain circumstances.[88] Claimants regarded the *City of San Marcos* case as irrelevant because it relates to ground water rather than surface water.[89]

78) The Respondent's Post-Hearing Submission on Jurisdiction reaffirmed the Respondent's view the Claimants may present a claim against Mexico under NAFTA Chapter Eleven only if they have made an investment in Mexico.[90] In particular, it was argued that under NAFTA Article 1101(1)(a) an 'investment'

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82 The Supplemental Memorial was accompanied by copies of resolutions of the Boards of Directors of the Texas Water Districts authorizing the initiation of this arbitration.

83 Supplemental Memorial, pp. 2-9.

84 Supplemental Memorial, pp. 9-11.

85 Supplemental Memorial, pp. 10-14.

86 Supplemental Memorial, pp. 16-19.

87 Supplemental Memorial, pp. 14-16.

88 Supplemental Memorial, pp. 20-24.

89 Supplemental Memorial, pp. 19-20.

90 Post-Hearing Submission on Jurisdiction, paragraphs 5-20.

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is protected only if it is an investment of an investor of another NAFTA Party in the territory of the NAFTA Party applying the measure. Further, because an 'investor' is defined by Article 1139 as one who "seeks to make, is making or has made an investment", it follows that an 'investor' under Article 1101(1) is one who seeks to make, is making or has made an investment in the territory of another NAFTA Party, because only those investments are covered by Chapter Eleven.[91] The Respondent observed that its interpretation of these provisions of the NAFTA conforms to the interpretations adopted by the United States and Canada, and argued that this interpretation is in conformity with the purposes of the NAFTA. [92]

79) The Respondent's Post-Hearing Submission on Jurisdiction sought to give precision to the concept of an investment by pointing to the contrast between, on the one hand, 'investments' and, on the other hand, 'cross-border services' which are an example of a form of economic involvement with the economy of another NAFTA Party that is distinct from an investment.[93]

80) On the question of water as a good in commerce, the Respondent reaffirmed the inalienability, under Mexican law, of the waters of rivers flowing through Mexico,[94] and argued that the waters of the tributaries of the Rio Bravo remain subject to Mexican law and also in their natural state, and hence are neither United States property nor "in commerce".[95] Like the Claimants, the Respondent regarded the *City of San Marcos* case as being of limited relevance because it applies to underground water rather than surface water.[96] On the questions of Texas water law, the Respondent argued that the fact that Texas law prevents the taking of water in certain circumstances where the terms of the permit are violated confirms the contingent nature of water rights in Texas.[97] The Respondent further asserted that as a matter of Texas law the Irrigation Districts are subdivisions of the State of Texas.[98]

III. THE TRIBUNAL'S ANALYSIS

81) This claim is made under NAFTA Chapter Eleven, and is based more specifically upon Articles 1120 and 1122, which permit the arbitration of disputes under the Additional Facility Rules of ICSID.

82) The jurisdiction of the Tribunal to adjudicate upon the merits of this claim is created by, and accordingly limited by, the NAFTA. The right to initiate claims is established in Section B of Chapter Eleven of the NAFTA. Articles 1115 and 1116 read as follows:-

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91 Post-Hearing Submission on Jurisdiction, paragraphs 8-14.
92 Post-Hearing Submission on Jurisdiction, paragraphs 15, 16.
93 Post-Hearing Submission on Jurisdiction, paragraphs 17-20
94 Post-Hearing Submission on Jurisdiction, paragraphs 21-23.
95 Post-Hearing Submission on Jurisdiction, paragraphs 24-29 and 30-32.
96 Post-Hearing Submission on Jurisdiction, paragraphs 33-36.
97 Post-Hearing Submission on Jurisdiction, paragraphs 37-40.
98 Post-Hearing Submission on Jurisdiction, paragraphs 41-44.

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Article 1115: Purpose

Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

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.

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.

83) The Tribunal accordingly has jurisdiction to adjudicate upon claims made by an investor of one NAFTA Party that another NAFTA Party has breached Section A (i.e., Articles 1101 – 1114) of Chapter Eleven of the NAFTA (and also of certain alleged breaches of Article 1503, which is not relevant here). It has no jurisdiction over claims that do not arise from such alleged breaches. In order to determine whether the claims fall within Articles 1115 and 1116 it is therefore necessary to determine whether the Claimants are 'investors', and whether their claims are within the scope and coverage of Chapter Eleven Section A.

84) NAFTA Article 1101 reads as follows:-

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; and

(c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

85) The role of Article 1101 in determining the scope of the jurisdiction of tribunals established to hear Chapter Eleven claims is clear from the title of the Article. It defines the 'scope and coverage' of the entirety of Chapter Eleven, including both the scope and coverage of the substantive protections accorded to investors and investments by Chapter Eleven Section A and the scope of the rights to submit disputes to arbitration under Chapter Eleven Section B.

86) No claim is made in this case in respect of NAFTA Articles 1106 or 1114, and Article 1101(c) is accordingly not relevant. The question is therefore whether, in the terms of Article 1101, the claim concerns

"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."

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87) The Tribunal will at this stage assume for the sake of argument that the claims concern "measures adopted or maintained" by the Republic of Mexico. The claims concern alleged violations of NAFTA Chapter Eleven Articles 1102, 1105, and 1110.[99] The first question is therefore whether the claims concern "(a) investors of another Party; and / or (b) investments of investors of another Party in the territory of the Party."

88) The definition of an "investor" for the purposes of NAFTA Chapter Eleven is set out in Article 1139. It reads as follows:

> **"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."

89) Doubts have been raised as to whether all of the Claimants are qualified investors, in terms of their nationality. For the present, however, the Tribunal sets those doubts to one side, because it is clear that there are at least some Claimants who meet the requirement that they be nationals or enterprises of a Party, in this case the United States. That takes us to the question whether there is a Claimant who "seeks to make, is making or has made an investment."

90) That question must be answered by reference to the definition of an "investment" that applies in the context of Chapter Eleven. That definition is set out in NAFTA Article 1139. Article 1139 stipulates that

> **"investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of such Party;"

91) There is no doubt that the Claimants include persons who have invested in farms and irrigation facilities within the State of Texas. There is also no doubt that the Claimants include persons who own or control directly or indirectly those farms and facilities in Texas. The initial question is whether those farms and facilities in Texas qualify not simply as an 'investment' in general terms but as an 'investment' which entitles the owner to initiate under the NAFTA the specific claims against Mexico in this case. We come thus to the question whether there is indeed, for the specific purposes of a claim under NAFTA Chapter Eleven, an "investment" in this case.

92) Article 1139 defines "investment" as follows:

> **"investment** means:
>
> (a) an enterprise;
>
> (b) an equity security of an enterprise;
>
> (c) a debt security of an enterprise
>
> (i) where the enterprise is an affiliate of the investor, or
>
> (ii) where the original maturity of the debt security is at least three years,
>
> but does not include a debt security, regardless of original maturity, of a state enterprise;
>
> (d) a loan to an enterprise
>
> (i) where the enterprise is an affiliate of the investor, or
>
> (ii) where the original maturity of the loan is at least three years,
>
> but does not include a loan, regardless of original maturity, to a state enterprise;

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[99] Request for Arbitration, paragraph 59.

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(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);
(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;
but investment does not mean,
(i) claims to money that arise solely from
(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or
(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or
(j) any other claims to money,
that do not involve the kinds of interests set out in subparagraphs (a) through (h)."

93) The first issue that divides the Parties is the question whether, as the Respondent argues, the 'investment' must be one that the Claimants were seeking to make, were making, or had made *in Mexico*, or whether, as the Claimants argue, the undisputed fact that they had made an investment in Texas is sufficient.

94) It is possible that the States Parties to the NAFTA might have given investors who are nationals of one NAFTA State and who had made an investment in that same State of which they are nationals, the right to bring a claim against another NAFTA Party in respect of a measure of that other Party which had adversely affected their investments in their national State. Such a right would, for example, entitle all Mexican business owners who had invested in Mexico by building up their own businesses there (and similarly all Canadian business owners who had invested in Canada) to bring actions against the United States in respect of any United States measure that affected their Mexican (or Canadian) businesses in violation of NAFTA provisions such as the 'fair and equitable treatment' provision in Article 1105.[100] Such a right would be likely to give those Mexican and Canadian business owners much wider remedies in respect of injurious United States legislation than any United States investor would have against its own government; but such may sometimes be the effect of treaties that protect foreign investors and their investments.

95) If, however, the NAFTA were intended to have such a significant effect one would expect to find very clear indications of it in the *travaux préparatoires*. There are no such clear indications, in the *travaux préparatoires* or elsewhere;

[100] The same position would, of course, apply in respect of other combinations of NAFTA Parties and nationals of other Parties.

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and the Tribunal does not interpret Chapter Eleven of the NAFTA, and in particular Articles 1101 and 1139, in that way.

96) While NAFTA Article 1139 defines the term "investment" it does not define "foreign investment". Similarly, NAFTA Chapter XI is named "Investment", not "Foreign Investment". However, this Tribunal considers that NAFTA Chapter XI in fact refers to "foreign investment" and that it regulates "foreign investors" and "investments of foreign investors of another Party". The ordinary meaning of the text of the relevant provisions of Chapter Eleven is that they are concerned with *foreign* investment, not domestic investments. What then makes an investment "foreign"?

97) An investor of one NAFTA State Party wishing to make an investment in the economy of another NAFTA State Party is necessarily concerned with the law and the governmental authorities who are making the law, applying the law and solving the conflicts, in a State other than its own. The NAFTA Parties negotiated and executed a free trade agreement, in order to provide the international legal framework necessary to assure the foreign investor that its investment will be treated in accordance with certain minimum standards (national treatment, minimum standard of treatment, protection against expropriation and others), and providing a mechanism for the settlement of investment disputes whereby foreign investors may submit to an impartial Tribunal claims that their investments have been affected by governmental measures that violate the obligations which the States Parties assumed in the NAFTA.

98) While this Tribunal does not purport to lay down a comprehensive and definitive test of what constitutes an investment covered by the protections of NAFTA Chapter Eleven, it is evident that a salient characteristic will be that the investment is primarily regulated by the law of a State other than the State of the investor's nationality, and that this law is created and applied by that State which is not the State of the investor's nationality.

99) When an investment is made, such as the investments in farms and irrigation equipment, etc., in the present case, the investor makes its decision in the light of its appraisal of the law and of the authorities who are making, creating and applying the law to that investment._When the investment is made in the investor's State, it is made in the light of the investor's understanding of laws, institutions and procedures that are familiar to the investor. When the investment is made in a different country which has concluded an investment protection treaty covering that investment, the investor is entitled to rely upon the fact the States Parties to the treaty have decided to commit themselves to give a minimum level of legal protection to such foreign investments..

100) The USA Government submission, dated 27 November 2006, stated that:

> "The aim of international investment agreements is the protection of *foreign* investments, and the investor who make them. This is as true with respect to the investment provisions of free trade agreements (FTAs) as it is for agreements devoted exclusively to investment protection, such as bilateral investment treaties (BITs).

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> NAFTA Chapter Eleven is no different in this regard. One of the objectives of the NAFTA, expressly set forth in Article 102(1)(c) is to "increase substantially investment *opportunities* in the territories of the Parties" which refers to, and can only sensibly be considered as referring to, opportunities for *foreign* investment in the territory of each Party made by investors of another Party…."

In the view of the Tribunal, this is the clear and ordinary meaning that is borne by the text of NAFTA Chapter Eleven.

101) The Tribunal considers that in order to be an "investor" within the meaning of NAFTA Art. 1101 (a), an enterprise must make an investment in another NAFTA State, and not in its own. Adopting the terminology of the *Methanex v. United States* Tribunal, it is necessary that the measures of which complaint is made should affect an investment that has a "legally significant connection" with the State creating and applying those measures.[101] The simple fact that an enterprise in one NAFTA State is affected by measures taken in another NAFTA State is not sufficient to establish the right of that enterprise to protection under NAFTA Chapter Eleven: it is the relationship, the legally significant connection, with the State taking those measures that establishes the right to protection, not the bare fact that the enterprise is affected by the measures.

102) While the effect of the NAFTA may in some respects be close to the effect of the elimination of economic boundaries between the three States Parties, and while it is certainly true that the purpose of NAFTA was to strengthen the economics link between their economies, the three States Parties remain three distinct sovereign States with three distinct nationalities. Therefore, when an investor of one NAFTA Party makes an investment that falls under the laws and the jurisdiction of the authorities of another NAFTA Party, it will be treated as a foreign investor under Chapter Eleven. It is not NAFTA's purpose to give every investment in any NAFTA State the protections set out in Chapter Eleven.

103) In the opinion of the Tribunal, it is quite plain that NAFTA Chapter Eleven was not intended to provide substantive protections or rights of action to investors whose investments are wholly confined to their own national States, in circumstances where those investments may be affected by measures taken by another NAFTA State Party. The NAFTA should not be interpreted so as to bring about this unintended result.

104) In this case the Tribunal does not consider that the Claimants were 'foreign investors' in Mexico. Rather, they were domestic investors in Texas. The economic dependence of an enterprise upon supplies of goods – in this case, water – from another State is not sufficient to make the dependent enterprise an 'investor' in that other State.

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101 *Methanex v United States,* Preliminary Award on Jurisdiction and Admissibility, 7 August 2002, paragraph 147.

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105) Article 1101(1)(b) stipulates that Chapter Eleven applies to "investments of investors of another Party in the territory of the Party." It is true that the text of the definition of an "investor" in Article 1139 does not explicitly require that the person or enterprise seeks to make, is making or has made an investment *in the territory of another NAFTA Party*. But the text of the definition does require that the person make an "investment"; and although investments can of course be made in the investor's home State such domestic investments are, as was explained above, not within the scope of Chapter Eleven. Chapter Eleven applies to "investments of investors of another Party in the territory of the Party": Article 1101(1)(b). It is clear that the words "territory of the Party" in that phrase do not refer to the territory of the Party of whom the investors are nationals. It requires investment in the territory of another NAFTA Party –the Party that has adopted or maintained the measures challenged. In short, in order to be an "investor" under Article 1139 one must make an investment in the territory of another NAFTA State, not in one's own.

106) The interpretation adopted here is supported by the fact that it is the interpretation publicly adopted by the NAFTA Parties themselves prior to this litigation. The Tribunal notes the terms of the United States Statement of Administrative Action submitted to Congress in connection with the conclusion of the NAFTA,[102] the report on NAFTA prepared prior to the approval of the NAFTA by the Mexican Senate,[103] and the Canadian Statement on Implementation of the NAFTA.[104]

107) In particular, this interpretation of the scope of NAFTA is consistent with that adopted by Mexico before the Tribunal and by the United States in its submission dated 27 November 2006; but it is an interpretation which the Tribunal would have reached in any event, even if the United States had made no intervention in these proceedings.

108) Accordingly, in the context of the present case it is not enough that the United States' Claimants have made an investment in the United States. They must demonstrate that they were seeking to make, were making, or had made, an investment in Mexico. If they cannot demonstrate that, they will not qualify as "investors" for the purposes of these claims.[105]

109) In the present case Claimants say that they do indeed have an investment in Mexico, in the form of their rights to water located in Mexico which was wrongfully seized by the Respondent.

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[102] North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. 1, 103d Cong., 1 Sess., 589 (1993).

[103] Senate of the Republic. North American Free Trade Agreement, Dictamen de las Comisiones Unidas de Comercio y Fomento Industrial, de Relaciones Exteriores, de Hacienda, de Desarrollo Económico y Social, de Planeación Democrática de Desarrollo, de Puntos Constitucionales de Asentamientos Humanos y Ecología, y del Sector Social del Trabajo, November 18, 1993.

[104] Department of External Affairs, North American Free Trade Agreement: Canadian Statement on Implementation, Extract, Canada Gazette, Part I, 147 (January 1, 1994).

[105] The Tribunal also notes that in this case it appears that the allegation is that measures were taken by Mexico "relating to" the investments of the investors, and not that Mexico took measures "relating to" the investors themselves. It is, however, not necessary to settle this point, for reasons that will become apparent.

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110) Mexican law provides for the grant by the Republic of Mexico of legal rights to extract water from rivers in Mexico for defined periods, in defined amounts, and for defined purposes. Similarly, the law of Texas provides for the grant by the State of Texas of legal rights to extract water from rivers in Texas for defined periods, in defined amounts, and for defined purposes. The Claimants assert that they derive their rights that underlie the present claims from the adjudication of water rights by the Texas courts in the 1969 *Hidalgo* litigation and the subsequent issuing to them of water rights certificates by the Texas authorities.

111) The Tribunal considers that those water rights fall within the definition of "property" in Article 1139 (g). It further considers that water rights acquired for agricultural purposes are "acquired in the expectation or used for the purpose of economic benefit or other business purposes".

112) That brings us to the crucial question: whether the Claimants have an investment "in the territory of [Mexico]".

113) In our view it is clear that they do not. They have substantial investments in Texas, in the form of their businesses and, in the context of these proceedings, more particularly in the form of the infrastructure for the distribution of the water that they extract from the Rio Bravo / Rio Grande. They have investments in the form of the water rights granted by the State of Texas. They are certainly "investors"; but their investments are in Texas, and they are not investors in Mexico or vis-à-vis Mexico.

114) The Tribunal does not accept that the Claimants own water in Mexico, in the sense of the ownership of personal property rights in the physical waters of rivers flowing in Mexican territory.

115) There is an evident and inescapable conceptual difficulty in positing the existence of property rights in water up-river in Mexico in a context where the entitlement of each Claimant depends upon the apportionment of a certain volume of water, measured over a five-year period (or possibly longer, if the possibility of repayment of water debts in subsequent cycles is taken into account), which can be determined only by reference to the volume of water that actually reached the main channel of the Rio Bravo / Rio Grande.

116) One owns the water in a bottle of mineral water, as one owns a can of paint. If another person takes it without permission, that is theft of one's property. But the holder of a right granted by the State of Texas to take a certain amount of water from the Rio Bravo / Rio Grande does not 'own', does not 'possess property rights in', a particular volume of water as it descends through Mexican streams and rivers towards the Rio Bravo / Rio Grande and finds its way into the right-holders irrigation pipes. While the water is in Mexico, it belongs to Mexico, even though Mexico may be obliged to deliver a certain amount of it into the Rio Bravo / Rio Grande for taking by US nationals.

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117) Thus, the Claimants do not own any of the water within Mexico. Nor do the Claimants possess any *water rights* in Mexico and enforceable against the State of Mexico. Their water rights are granted by the State of Texas. Those rights are created in Texas and exercised in Texas.

118) Furthermore, it is plain that under the Mexican Constitution and Mexican law, the Claimants could have no such property rights in water in Mexican rivers. Article 27 of the Mexican Constitution stipulates that the ownership of waters within the boundaries of the national territory originally belongs to the Nation, and that water from its rivers and tributaries are the property of the nation. Exploitation or use of those waters can only be carried out through concessions granted by the Federal Executive. The Mexican Law of National Waters confirms the need for the grant of a concession for the exploitation or use of waters, and specifies that a concession does not guarantee the existence or permanence of the water that is the subject of the concession. And Mexico's General Law of National Assets stipulates specifically, in Article 16, that concessions do not create ownership rights (*derechos reales*) but simply grant a right of use and exploitation, without prejudice to third parties, and subject to conditions imposed by law and by the concession.[106]

119) The Claimants sought, with arguments of considerable subtlety and ingenuity, to identify a supervening right that overcame all such problems, by saying that in the 1944 Treaty Mexico alienated or relinquished title to one-third of the waters in the 'six rivers', just as States sometimes relinquish land territory in treaties. According to this view, approximately one-third of the water in the 'six rivers' belongs to Mexico, and approximately two-thirds belongs to the United States – although who owns what cannot be accurately determined at any given moment because the sharing formula under Article 4 of the 1944 Treaty applies a combination of fixed amounts and percentage shares measured over periods of several years.

120) The Tribunal can find no evidence in the 1944 Treaty to suggest that this imaginative interpretation of the Treaty, whose legal coherence and practical operability are open to considerable doubt, was intended by the Parties. The ordinary reading of the Treaty is that it is an agreement to apportion such waters as arrive in the international watercourse – the Rio Bravo / Rio Grande – between Mexico and the United States; and the Tribunal sees no reason whatever to doubt the correctness of that reading.

121) Any improper diversion of river flows prior to the flow joining the main flow of the Rio Bravo / Rio Grande is a different matter. If such a diversion were to occur, it may or may not amount to a breach of the 1944 Treaty. That would be a matter for the two States, who are the only Parties to that Treaty. If the interests of US nationals were thought to be prejudiced by any action alleged to amount to a violation of the Treaty, that is an issue which could be taken up by the US Government under the dispute resolution procedures in the 1944 Treaty. But the 1944 Treaty does not create property rights amounting to investments within the meaning of the NAFTA which US national themselves may protect

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106 Respondent's Memorial on Jurisdiction, paragraphs 46-50.

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by action under NAFTA Chapter Eleven. The Tribunal expresses no views on the interpretation or application of the 1944 Treaty in the circumstances of this case.

122) In the view of the Tribunal it has not been demonstrated that any of the Claimants seeks to make, is making or has made an investment *in Mexico*. That being the case, the Tribunal does not have the jurisdiction to hear any of these claims against Mexico because the Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven, as defined by NAFTA Article 1101.

123) Having reached this conclusion it is unnecessary to consider further issues, because it is plain that the Tribunal cannot have jurisdiction over these claims.

124) For these reasons the Tribunal finds that it lacks jurisdiction over all of the claims.

IV. COSTS

125) The Tribunal has considered the question of the allocation of costs. The claims were not frivolous, and they were pursued in good faith and with all due expedition. The claims were, equally, defended in good faith and with due expedition. Both sides agreed to the separation of the jurisdictional issue, and this proved a sensible and economical step. The Tribunal does not consider that there is any reason to depart from the normal practice in such cases, according to which each Party shall bear its own costs, and the costs of the Tribunal shall be divided equally between the Parties.

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V. DECISION ON JURISDICTION

For the reasons set forth above, the Tribunal has decided:

a) The Arbitral Tribunal does not have jurisdiction over the dispute submitted to it in this arbitration;

b) Each Party shall bear its own costs, and the costs of the Tribunal shall be divided equally between the Parties.

Made as at Toronto, Canada, in English and Spanish, both versions being equally authentic.

Professor Ignacio Gómez-Palacio
Date: 29. may. 2007

Hon. Edwin Meese III
Date: 6 June 2007

Professor Vaughan Lowe
Date: 11 June 2007