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Comment

Bayview Irrigation District et al. v. United Mexican States: NAFTA, Foreign Investment, and International Trade in Water—A Hard Pill to Swallow

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Fresh water is essential to all life on earth.[1] It is indispensable to the very existence of human beings and to the ecosystems, agriculture, industry, and development which sustain the modern world.[2] Unfortunately, freshwater is both scarce and unevenly distributed.[3] Only about 2.5% of the world's water is fresh, with only 0.3% of that being accessible to humans.[4] This means that less than one tenth of one percent of the world's water is available to sustain human life. To make matters worse, nine countries hold 60% of the world's fresh water resources, while many others are forced to depend almost entirely on foreign water resources.[5] This scarcity and

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1. ANTOINETTE HILDERING, INTERNATIONAL LAW, SUSTAINABLE DEVELOPMENT AND WATER MANAGEMENT 1 (2004). "Freshwater resources are those resources that contain water with such a low level of salt that they are suitable for uses such as drinking." *Id.* at 21.

2. *Id.* at 1, 21–26.

3. Urs Luterbacher & Ellen Wiegandt, *Cooperation or Confrontation: Sustainable Water Use in an International Context*, *in* FRESH WATER AND INTERNATIONAL ECONOMIC LAW 11, 12 (Edith Brown Weiss, et al. eds., 2005).

4. HILDERING, *supra* note 1, at 21. Further, most of this water is ground water and only a small percentage can be found in lakes and streams. *Id.*

5. Luterbacher & Wiegandt, *supra* note 3.

inequitable distribution is currently causing 29 counties to experience severe water shortages, leaving 1.1 billion people without clean drinking water and 2.4 billion without water for sanitation.[6] For this reason, water could very well become the source of significant international conflicts in the future.[7]

While there is currently no consensus regarding how best to mitigate the potential for international water conflict, commodification[8] of fresh water is often advocated as a means of alleviating water shortage and more equitably distributing it across the globe.[9] Within this context, there is an emerging debate as to whether free flowing fresh water should be considered a good or commodity subject to international trade law, such as the North American Free Trade Agreement (NAFTA).[10] Determining whether fresh water should fall under the rubric of international trade law is of great importance to domestic and international policy makers and to civil society as a whole.[11] If fresh water—particularly fresh water flowing in rivers across international borders—is subject to international trade law, efforts to allocate water by treaty, manage domestic water supplies, and regulate property rights could be seriously compromised.[12] Thus, subjecting free flowing freshwater to international trade law could possibly exacerbate the potential for international conflict over water—rather than alleviate it—by confusing the existing system of water allocation and dispute resolution.

This Comment analyzes whether fresh water flowing in its

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6. Rona Nardone, *Like Oil and Water: The WTO and the World's Water Resources*, 19 CONN. J. INT'L L. 183, 183 (2003).

7. *E.g.*, Luterbacher & Wiegandt, *supra* note 3, at 11–12, 19–33; Patricia Wouters, *Editor's Forward* to INTERNATIONAL WATER LAW: SELECTED WRITINGS OF PROFESSOR CHARLES B. BOURNE xiii–xxvi (Patricia Wouters ed., 1997).

8. "'Commodification' is the process of converting a good or service formerly subject to many non-market . . . rules into one that is primarily subject to market rules." Nardone, *supra* note 6, at 183 n.21.

9. *See generally* CONTINENTAL WATER MARKETING (Terry L. Anderson, ed. 1994) (discussing ways water can be commodified in North America); GARY D. LIBECAP, RESCUING WATER MARKETS: LESSONS FROM OWENS VALLEY (2005), *available at* http://www.perc.org/pdf/ps33.pdf (arguing that water markets benefited the American West); SHARING SCARCITY: GAINERS AND LOSERS IN WATER MARKETING (Harold O. Carter et al. eds., 1994) (discussing the California water market).

10. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. *See generally*, FRESH WATER AND INTERNATIONAL ECONOMIC LAW at Ch. 1–3 & 10–15 (Edith Brown Weiss et al. eds., 2005).

11. Edith Brown Weiss, *Introduction* to FRESH WATER AND INTERNATIONAL ECONOMIC LAW, *supra* note 10 at 2.

12. *Id.*

natural state across an international border should be considered a good or product subject to intentional trade law through a case study of *Bayview Irrigation District et al.*[13] *v. United Mexican States*, an unprecedented request for an "investor-state" arbitration under article 1120 of NAFTA.[14] The case was filed by a group of Texas water users and irrigation districts ("Claimants" or "Bayview") on January 19, 2005.[15] The Claimants sought arbitration of their allegations that Mexico has violated Chapter 11, Articles 1102, 1105, and 1110, of NAFTA.[16] They claim Mexico has violated NAFTA by capturing, seizing, and diverting, for use by Mexican farmers, approximately 1,219,512 acre-feet[17] of naturally flowing Rio Grande irrigation water that originates in Mexico and is allegedly owned by the Claimants.[18] They allege ownership of the water under a 1944 treaty between the United States and

13. All claimants are: Bayview Irrigation District #11; Brownsville Irrigation District; Cameron County Irrigation District #2; Cameron County Irrigation District #6; Delta Lake Irrigation District; Donna Irrigation District Hidalgo County #1; Engelman Irrigation District; Hidalgo County Irrigation District #1; Hidalgo County Irrigation District #2; Hidalgo County Irrigation District #5; Hidalgo County Irrigation District #6; Hidalgo County Irrigation District #16; Hidalgo & Cameron County Irrigation District #9; La Feria Irrigation District Cameron County #3; Santa Maria Irrigation District Cameron County #4; United Irrigation District; Valley Acres Irrigation District; Arthur E. Beckwith; W.G. Ball Jr. Trust; Luther Bradford; Capote Farms, Ltd.; Estate of E.F. Davis, Jr.; Richard Drawe; Electric Gin Co. of San Benito; Odus D. Emery, Jr.; Willard Fike; Fike Farms; Fuller Farms; N.H. Kitayama; Krenmueller Farms; Moore & Sons Farms Inc.; North Alamo Water Supply Corp.; Bernadette M. Oeser; Donald Phillipp; Francis Phillipp; Pine Tree Conservation Society; Timothy Reid and Estates of Jesse Reid and Norman Reid; Juan F. Ruiz; James D. Russell; Sam Sparks, L.P.; Gregory Schreiber; Rita Schreiber; Charles Shofner; Theimer Trust; and Julie G. Ulhorn.

14. Claimants' Request for Arbitration Under the Rules Governing the Additional Facility for the Admin. of Proceedings by the Int'l Ctr. for Settlement of Inv. Disputes and the N. Am. Free Trade Agreement at 25–26, 40, Bayview Irrigation Dist. *et al.* v. United Mexican States, ICSID Case No. ARB(AF)/05/1 (Jan. 19, 2005), *available at* http://naftaclaims.com/Disputes/Mexico/Texas/TexasClaims_NOA-19-01-05.pdf. Claimants' petition has been declined by the Arbitral Tribunal. Bayview Irrigation Dist. et al. v. United Mexican States, ICSID Case No. ARB(AF)/05/1 (June 19, 2007). Claimants have appealed in the Ontario Superior Court of Justice. Notice of Application, Bayview Irrigation Dist. et al. v. United Mexican States, No. 07-CU-340139 PD2 (Ont. S.C.J. Sept. 17, 2007).

15. *Request for Arbitration*, ICSID Case. No. ARB(AF)/05/1 at 1–24.

16. *Id.* at 30–32.

17. An acre-foot of water is the amount of water it would take to cover one acre of land with water one foot deep, approximately 325,850 gallons of water. BLACK'S LAW DICTIONARY 25–26 (8th ed. 2004).

18. *Request for Arbitration*, ICSID Case. No. ARB(AF)/05/1 at 32. The Rio Grande river originates partially in the United States and partially in Mexico, which forms the border between the southwest Texas and Mexico. Earth Observatory, http://earthobservatory.nasa.gov/Study/RioGrande/Images/rio_grande.gif.

Mexico that allocates the water of the Rio Grande.[19] The Claimants sought $667,687,930 in damages for the claimed NAFTA violations.[20]

Part I of this Comment describes the relevant legal and factual framework for the *Bayview* dispute. It reviews NAFTA's investor-state dispute resolution mechanism; the 1944 Treaty between the United States and Mexico; and the water debt which Mexico accrued under the 1944 treaty. Part II considers the arguments for using international trade law to regulate free flowing international waters by discussing *Bayview*'s arguments for considering the international waters of the Rio Grande an investment subject to NAFTA's Chapter 11 regulations. Part III addresses the problematic consequences of applying international trade law to the regulation of free flowing international waters. It does so by analyzing the problems inherent in *Bayview*'s arguments for applying NAFTA Chapter 11 to the waters of the Rio Grande. Finally, this Comment concludes that treating water that is flowing in its natural state as a good and subjecting it to international trade law when it crosses international borders is a dangerous and counterproductive undertaking. Such an approach overextends the scope of international trade regimes such as NAFTA, risks usurping nation-states' territorial sovereignty, fosters forum shopping for favorable dispute resolution mechanisms, and allows trade bodies to unilaterally rewrite water allocation treaties.

I. FRAMEWORK OF THE *BAYVIEW* DISPUTE

A. RELEVANT NAFTA PROVISIONS

NAFTA was signed by the United States, Mexico, and Canada on December 17, 1992.[21] It was intended to remove barriers to trade in goods and services between the three countries, while preserving the parties' sovereignty over their territory and substantive law.[22] The parties hoped NAFTA

19. *Id.* at 32.

20. "Claimants seek full compensation for the 914,641 acre-feet of water expropriated by Mexico, in the approximate amount of US$320,124,350 to US$667,687,930.00; or, in the alternative, full compensation for the economic damages caused by Mexico's less favorable and unfair treatment of Claimants and their Investment in the approximate amount of US$667,687,930 . . . ." *Id.* at 39.

21. NAFTA, *supra* note 10.

22. LESLIE ALAN GLICK, UNDERSTANDING THE NORTH AMERICAN FREE TRADE

would enable economic growth and increase jobs through foreign investment.[23] Chapter 11 of NAFTA, on foreign investments, is one of the most innovative and essential Chapters for achieving NAFTA's goals.[24] Chapter 11 is also the focus of *Bayview*.[25]

1. Chapter 11: NAFTA's Regulations Regarding Investment

Chapter 11 has a very broad scope.[26] It affords protection to existing and future "investments of investors of another party" made in the territory of another NAFTA party.[27] An "investment" includes everything from "an equity security of an enterprise" to "real estate or other property (tangible or intangible) acquired in the expectation or used for the purposes of economic benefit or other business purposes."[28] An "investor

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AGREEMENT 3 (1993).

23. *Id.*

24. *See generally* FOREIGN INVESTMENT AND NAFTA (Alan M. Rugman ed., 1994). "Trade and investment flows are interdependent. To achieve the benefits of economic liberalization, investment barriers must be addressed as comprehensively as trade barriers. Hence, a chapter on investment was an essential element of an agreement that was to provide for hemispheric free trade." Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L LAW. 727, 727 (1993).

25. *See generally Request for Arbitration*, ICSID Case. No. ARB(AF)/05/1.

26. Price, *supra* note 24, at 727.

27. NAFTA, *supra* note 10, art. 1101. *See also* Price, *supra* note 24, at 727.

28. NAFTA, *supra* note 10, art. 1139. Article 1139 states in pertinent part:

> [I]nvestment 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, or 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 debt security is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise;
>
> (e) an interest in an enterprise that entitles the owner to share in the 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

of a party" is any national of a NAFTA party who seeks to make, makes, or has made an investment in another NAFTA country.[29] Thus, Chapter 11 protects any investment owned or controlled directly or indirectly by an investor of a party in another NAFTA country.[30]

Chapter 11 consists of two parts.[31] Part A contains the substantive rules and rights that NAFTA parties must afford "investments of an investor of a party" made in its county.[32] Part B establishes the procedures for enforcing Part A's substantive rights through investor-state arbitration of alleged violations.[33]

a. Chapter 11's Substantive Rights

Part A mandates five principal rights that NAFTA parties must afford investments of investors of parties: (1) national treatment under Article 1102, (2) most favored nation treatment under Article 1103, (3) a minimum standard of treatment under Article 1105, (4) restrictions on performance requirements under Article 1106, and (5) restrictions on the expropriation of property under Article 1110.[34] *Bayview* only deals with the substantive rights set forth in Articles 1102, 1105, and 1110.[35]

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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 the remuneration depends substantially on the production, revenues or profits of an enterprise . . . .

29. *Id.* Article 1139 states in pertinent part: "[I]nvestor 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 . . . ."

30. *Id.* Article 1139 states in pertinent part: "[I]nvestment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party . . . ."

31. *Id.* ch.11.

32. *Id.* *See also* PHILIP T. VON MEHREN, CROSS-BORDER TRADE AND INVESTMENT WITH MEXICO: NAFTA'S NEW RULES OF THE GAME 2 (1997).

33. NAFTA, *supra* note 10, ch. 11. *See also* VON MEHREN, *supra* note 32, at 2.

34. NAFTA, *supra* note 10, ch. 11; THE FIRST DECADE OF NAFTA: THE FUTURE OF FREE TRADE IN NORTH AMERICA 272 (Kevin C. Kennedy ed., 2004).

35. *See generally* Claimants' Request for Arbitration Under the Rules Governing the Additional Facility for the Admin. of Proceedings by the Int'l Ctr. for Settlement of Inv. Disputes and the N. Am. Free Trade Agreement at 25–26, 40, Bayview Irrigation Dist. *et al.* v. United Mexican States, ICSID Case No. ARB(AF)/05/1 (Jan. 19, 2005), *available at* http://naftaclaims.com/Disputes/Mexico/

Therefore, most favored nation treatment and restrictions on performance requirements will not be discussed in this Comment.

National treatment under Article 1102 is the fundamental obligation of Chapter 11.[36] It seeks to prevent NAFTA parties from favoring domestic investors or their investments by requiring that all NAFTA parties treat foreign investors of a party and their investments no less favorably than domestic investors and their investments.[37] This protection extends to the "establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments."[38]

Additionally, Article 1105 requires NAFTA countries to afford investors of another party and their investments a minimum standard of treatment "in accordance with international law, including fair and equitable treatment and full protection and security."[39] However, after a surge of Chapter 11 arbitrations that broadly interpreted Article 1105's language,[40] the Free Trade Commission issued a binding interpretation of Article 1105 on July 31, 2001.[41] The

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Texas/TexasClaims_NOA-19-01-05.pdf.

36. *See* Price, *supra* note 24, at 728; VON MEHREN, *supra* note 32, at 3. NAFTA, *supra* note 10, art. 1102(1) and (2) states in the pertinent part:

> (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.

37. NAFTA, *supra* note 10, art. 1102. *See also* Price, *supra* note 24, at 728; VON MEHREN, *supra* note 32, at 3; THE FIRST DECADE OF NAFTA, *supra* note 34, at 272. Examples of potential discrimination would include measures such as requiring certain senior management positions to be held by domestic nationals or requiring a minimum level of equity in the investment to be held by domestic nationals. Price, *supra* note 24, at 729.

38. NAFTA, *supra* note 10, art. 1102.

39. *Id.* art. 1105(1). *See also* THE FIRST DECADE OF NAFTA, *supra* note 34, at 273.

40. Todd Weiler, *NAFTA Chapter 11 Jurisprudence: Coming Along Nicely*, 9 SW. J. L. & TRADE AM. 245, 246 (2002–2003).

41. NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, July 31, 2001, *available at* http://www.naftaclaims.com/files/NAFTA_Comm_1105_Transparency.pdf. The binding nature of the Free Trade Commission's interpretation of Article 1105 is controversial and not wholly accepted. *See* Marcia J. Staff & Christine W. Lewis, *Arbitration Under NAFTA Chapter 11: Past, Present,*

Commission's interpretation clarifies that the minimum standard of treatment required under Article 1105 is the standard which international law provides to aliens, and that a breach of another international agreement or provision of NAFTA does not establish a violation of Article 1105.[42]

Article 1110 regulates nationalization[43] or expropriation[44] of investments of an investor of a party.[45] It provides that investments of investors from a signatory state may not be nationalized or expropriated except for (1) a public purpose, (2) on a nondiscriminatory basis, (3) in comport with due process of law (i.e. 1105), and (4) upon adequate payment for the expropriated property.[46]

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and Future, 25 HOUS. J. INT'L L. 301, 326 (2003) (questioning binding nature of Free Trade Commission's interpretation on Chapter 11 arbitral tribunals); Todd Weiler, *NAFTA Investment Law in 2001: As the Legal Order Starts to Settle, The Bureaucrats Strike Back*, 36 INT'L LAW. 345, 347 (2002) (criticizing the Free Trade Commission's interpretation as an attempt to amend NAFTA in violation of the amendment process).

42. *Id.* The Commission's report states in pertinent part:

> B. Minimum Standard of Treatment in Accordance with International Law
>
> (1) 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.
>
> (2) The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
>
> (3) A determination that there has been a breach of another provision of the NAFTA, or a separate international agreement, does not establish that there has been a breach of Article 1105(1)

43. "The act of bringing an industry under governmental control or ownership." BLACK'S LAW DICTIONARY 1052 (8th ed. 2004).

44. "A governmental taking or modification of an individual's property rights . . . ." BLACK'S LAW DICTIONARY 621 (8th ed. 2004).

45. NAFTA, *supra* note 10, art. 1110.

46. *Id.* *See also* THE FIRST DECADE OF NAFTA, *supra* note 34, at 275–76; Price, *supra* note 24, at 730. Article 1110 states in pertinent part:

> (1) No Party may directly or indirectly nationalize or expropriate an investment of an investor or another party in its territory or take a measure tantamount to nationalization or expropriation of such an investment . . . except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6.
>
> (2) Compensation shall be equivalent to the fair market value of the

b. Chapter 11's Dispute Resolution Mechanism

Section B of Chapter 11 allows an investor from a party to submit an arbitral claim against a foreign NAFTA party, alleging it has violated one or more of the substantive rules of Part A.[47] This is one of the most innovative aspect of Chapter 11 because it allows individual investors to pursue claims for monetary damages directly against a NAFTA country.[48] Three pretexts must exist for an investor of a party to be able to bring an arbitral claim. First, only an investor from a party holding a foreign investment in another NAFTA country may bring a claim under Chapter 11.[49] Second, the investor of another party only has three years from the time the investor first acquired, or should have first acquired, knowledge of the alleged infringement of Chapter 11 to bring the claim.[50] Third, each investor must consent to the arbitration of the claim in writing and serve a copy on the disputing NAFTA country.[51] However, no such written consent is needed from a NAFTA country because "[e]ach [NAFTA] Party consents to the submission of a request for arbitration in accordance with the provisions of this Subchapter."[52]

B. INTERNATIONAL ALLOCATION OF THE RIO GRANDE (RIO BRAVO) BETWEEN THE UNITED STATED AND MEXICO

On February 3, 1944 the United States and Mexico signed the *Treaty Regarding Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande* (1944 Treaty).[53] The purpose of the 1944 Treaty as stated in its preamble is as follows:

> The Government of the United States of America and the Government of the United Mexican States . . . considering that the utilization of

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expropriated investment immediately before expropriation took place . . . .

47. NAFTA, *supra* note 10, art. 1116. *See also* VON MEHREN, *supra* note 32, at 212.

48. *See* NAFTA, *supra* note 10, arts. 1116, 1117, 1119; VON MEHREN, *supra* note 32, at 220.

49. NAFTA, *supra* note 10, arts. 1116 & 1117. *See also* VON MEHREN, *supra* note 32, at 213.

50. NAFTA, *supra* note 10, arts. 1116(2) & 1117(2). *See also* VON MEHREN, *supra* note 32, at 213.

51. NAFTA, *supra* note 10, arts. 1121 & 1122.

52. *Id.* art. 1122.

53. Treaty Regarding Utilization of the Waters of Colorado and Tijuana Rivers and of the Rio Grande, U.S.-MEX., Feb. 3, 1944, 59 Stat. 1219 [hereinafter 1944 Treaty].

> these waters [the Colorado, Tijuana, and Rio Grande Rivers] . . . is desirable [and] in the interest of both countries, and desiring, 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, . . . to the Gulf of Mexico, in order to obtain the most complete and satisfactory utilization thereof, have resolved to conclude a treaty. . ..[54]

Article 4 allocates the waters of the Rio Grande and its tributaries among the United States and Mexico from Fort Quitman, Texas to the Gulf of Mexico.[55] Under Article 4, Mexico must deliver one-third of the flow of six Rio Grande tributaries which originate in Mexico[56] to the United States.[57] However, the average annual water delivery must be no less than 350,000 acre-feet per year, averaged over five consecutive years (or a total of 1.75 million acre-feet of water every 5 years).[58] If an "extraordinary drought" prevents Mexico from meeting its delivery requirements to the United States, a water debt to the United States is created which may be paid during the next five-year cycle.[59] This roll over does not excuse Mexico from its obligation to deliver the indebted water or the 1.75 million acre-feet required during the second five-year cycle.[60] It simply allows Mexico additional time to deliver the full 1.75 million acre-feet from the first cycle.[61] However, if U.S. storage in the two uppermost international dams, Falcon Dam and Amistad Dam, reach capacity, any Mexican water debt is forgiven and a new 5 year cycle begins.[62] In spite of this, the 1944 Treaty is silent regarding what constitutes an "extraordinary drought" and whether a "roll over" beyond a second five year cycle can occur.[63]

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54. *Id.*

55. *Id.* art. 4.

56. The six Rio Grande tributaries are the Conchos, San Diego, San Rodrigo, Escondido, Salado, and Las Vacas Arroyo Rivers. *Id.*

57. 1944 Treaty, *supra* note 53, art. 4. *See also* Carlos Marin, *Bi-national Border Water Supply Issues From the Perspective of the IBWC*, 11 U.S.-MEX. L.J. 35, 35 (2003).

58. 1944 Treaty, *supra* note 53, art. 4. *See also* Marin, *supra* note 57, at 35; Stephen P. Mumme, *Developing Treaty Compatible Watershed Management Reforms for the U.S.-Mexico Border: The Case for Strengthening the International Boundary and Water Commission*, 30 N.C. J. INT'L & COM. REG. 929, 931 (2005).

59. 1944 Treaty, *supra* note 53, art. 4. *See also* Mumme, *supra* note 58, at 931.

60. 1944 Treaty, *supra* note 53, art. 4. *See also* Mumme, *supra* note 58, at 931.

61. 1944 Treaty, *supra* note 53, art. 4. *See also* Mumme, *supra* note 58, at 931.

62. 1944 Treaty, *supra* note 53, art. 4. *See also* Mumme, *supra* note 58, at 931.

63. 1944 Treaty, *supra* note 53, art. 4. Article 4 states in relevant part:

> In the event of extraordinary drought or serious accident to the hydraulic systems on the measured Mexican tributaries, making it difficult for

In addition, Article 2 of the 1944 Treaty created the International Boundary and Water Commission (IBWC)[64] which is entrusted with: (1) implementing the 1944 Treaty's terms, (2) application of the regulations, rights, and obligations which Mexico and the United States assumed under the 1944 Treaty, and (3) settlement of *all disputes* to which observance and execution of the 1944 Treaty may give rise.[65] Thus, Article 2 and the IBWC constitute the sole dispute resolution mechanism for all disputes arising under the 1944 Treaty.

Further, the IBWC provides a procedure called the Minute Process for reaching bi-national interpretation of the 1944 Treaty, its obligations, and its terms.[66] Under the Minute Process, the IBWC has the power to interpret and expand the 1944 Treaty to deal with particular problems in implementation by issuing binding minutes.[67] IBWC minutes function, for all intents and purposes, as amendments to the 1944 Treaty.[68] Further, to issue a binding minute, the IBWC need only receive the consent of each country's foreign ministries.[69] Legislative Treaty approval from either country is not usually required.[70]

C. MEXICO'S WATER DEBT UNDER THE 1944 TREATY

During the five-year cycle from 1992–1997, Mexico failed to meet its water delivery requirements to the United States under

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> Mexico to make available the run-off of 350,000 acre-feet (431,721,000 cubic meters) annually . . . 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. . .
>
> Whenever the conservation capacities assigned to the United States in at least two of the major international reservoirs, including the highest major reservoir, are filled with waters belonging to the United States, a cycle of five years shall be considered as terminated and all debits fully paid, whereupon a new five-year cycle shall commence.

64. In reality Article 2 simply changed the name of the International Boundary Commission, created by the United States and Mexico on March 1, 1889, to deal with disputes over the location of the border, to the International Boundary and Water Commission and gave it additional duties as discussed in the text above. 1944 Treaty, *supra* note 53, art. 2.

65. *Id.* *See also* International Boundary and Water Commission, *The International Boundary and Water Commission, Its Mission, Organization and Procedures for Solution of Boundary Water Problems*, *available at* http://www.ibwc.state.gov/Files/About_us.pdf. (last visited Oct. 21, 2007).

66. Mumme, *supra* note 58, at 935.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

the terms of the 1944 Treaty.[71] In so doing, Mexico accrued a water debt of approximately 1.024 million acre-feet with the United States.[72] In accordance with Article 4 of the 1944 Treaty, the United States allowed the Mexican water debt to roll over to the 1997–2002 five-year cycle.[73] However, an official declaration of "extraordinary drought" was never made.[74] In 1999, with the 1992–1997 debt still pending, Mexico officially and unilaterally declared a state of extraordinary drought.[75] In its declaration, Mexico argued that the extraordinary drought absolved it of any and all Article 4 obligations, but that it would try to restore normal Treaty delivery and make good on its debt if "Mother Nature" cooperated.[76] The United States rejected this proposition and argued Mexico was bound by Article 4 irrespective of extraordinary drought.[77] By the expiration of the 1997–2002 cycle, Mexico's water debt had grown to approximately 1.5 million acre feet,[78] which the United States has agreed to let roll over into a third consecutive cycle.[79] Moreover, at the time of the third roll over, the IBWC issued minute 308 which was designed to help Mexico pay off its water debt.[80] Largely as a result of IBWC minute 308, Mexico paid off its water debt as of 2005 and is current with all 2002–2007 cycle deliveries.[81]

However, many in the United States, Texas in particular, believe Mexico's obligatory and belated repayment of the water

71. *Id.* at 933.

72. Marin, *supra* note 57, at 36.

73. Mumme, *supra* note 58, at 933.

74. Mexico believed the status of "extraordinary drought" had been conceded by the United States, arguing that if it had not been conceded the United States could not have allowed roll over, but rather would have had to declare Mexico in default on the Treaty. *Id.* at 933 n.8.

75. *Id.* at 933.

76. *Id.*

77. *Id.*

78. Marin, *supra* note 57, at 36.

79. Mumme, *supra* note 58, at 933. Mexico argues that its obligation under the third roll over to pay down the water debt is based on international comity, and is a moral rather than legal obligation. *Id.* It bases this argument on the 1999 declaration of extraordinary drought. *Id.*

80. United States Allocation of Rio Grande Waters During the Last Year of the Current Cycle, IBWC Minute no. 308 (June 28, 2002), *available at* http://www.ibwc.state.gov/Files/Minutes/Min308.pdf. (Minute 308 obligates both countries to invest in water conservation systems in Mexico.). *See also* Mumme, *supra* note 58, at 933–34.

81. *Mexico's Rio Grande Water Debt Repaid*, U.S. WATER NEWS ONLINE, Oct. 2005, *available at* http://www.uswaternews.com/archives/arcglobal/5mexiriox10.html.

debt is insufficient.[82] They argue that repayment of the indebted water does not compensate them for the harm caused by Mexico's failure to meet its delivery requirements.[83] They assert that this failure to meet the requirements of the 1944 Treaty irrefutably caused farmers in Texas's Lower Rio Grande Valley to suffer extreme financial and agricultural loss.[84] Studies support this position, showing that as a result of the Mexican water debt the Lower Rio Grande Valley lost 30,000 jobs and that approximately 1,720 farmers lost $11 million in crops per year, totaling more than $1 billion in net losses to the region between 1992–2002.[85] Further, studies indicate that if Texas had received standard water delivery under the 1944 Treaty, it would have gained 3,000 jobs and $80 million in personal income during the same period.[86] Furthermore, during the same time period, Mexico increased its total irrigated acreage by 3% in Chihuahua alone, and replaced its typical crops of grains, soybeans, and cotton with more profitable and water consumptive crops such as alfalfa, melons, fruits, and nuts.[87]

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82. Jill Warren, *Mexico's Compliance With the 1944 Water Treaty Between the United States and Mexico: A Texas Perspective*, 11 U.S.-MEX. L.J. 41, 41–42 (2003); Paul Krza, *Texas Water Case is 'Takings' on Steroids*, HIGH COUNTRY NEWS, Feb. 21, 2005, *available at* http://www.hcn.org/servlets/hcn.PrintableArticle?article_id=15295.

83. Mumme, *supra* note 58, at 934; Warren, *supra* note 82, at 41–42; Paul Krza, *Texas Water Case is 'Takings' on Steroids*, HIGH COUNTRY NEWS, Feb. 21, 2005, *available at* http://www.hcn.org/servlets/hcn.PrintableArticle?article_id=15295.

84. Warren, *supra* note 82, at 42.

85. *See* Steve Taylor, *U.S. Hopes Mexico's Water Debt Moves from War of Words to Plan of Action*, BROWNSVILLE HERALD, May 19, 2002 *available at* http://old.brownsvilleherald.com/community_comments.php?id=P2394_0_3_0_C; Steve Taylor, *Study: Water Debt Has Cost Jobs*, VALLEY MORNING STAR, Oct. 3, 2002 *available at* http://new.valleystar.com/articles/2002/10/03/export45841.txt; Press Release, Texas Comptroller of Public Accounts, Comptroller Report Shows Mexico Water Debt Costs South Texas Jobs (Oct. 2, 2002), *available at* http://www.window.state.tx.us/news/21002mexwater.html; C. Parr Rosson, III, Aaron Hobbs & Flynn Adcock, *A Preliminary Assessment of Crop Production and Estimated Irrigation Use for Chihuahua, Mexico*, at 2–6 (May 2, 2002) (Department of Agricultural Economics, Center for North American Studies of Texas A&M University), *available at* http://cnas.tamu.edu/publications/ChiWater.pdf.

86. *See* Taylor, *supra* note 85; Texas Comptroller press release, *supra* note 85; Rosson, *supra* note 85, at 2–6.

87. Rosson et al., *supra* note 85, at 2–6. *See also* Warren, *supra* note 82, at 42–43.

II. CLAIMANTS' ARGUMENTS FOR TREATING NATURAL FLOWING WATER AS A "GOOD" SUBJECT TO THE INTERNATIONAL TRADE LAW OF NAFTA

The Claimants allege to be the owners of an "integrated investment," which includes rights to water located in Mexico and various farms, farm equipment, and facilities to store and distribute the water in the United States.[88] Further, they assert the water located in Mexico is the "foundation" for their "integrated investment," the rest of which becomes unusable without it.[89] Moreover, the Claimants argued they have an absolute property right to the water because they have paid "substantial sums for the purchase of water rights, the delivery of water, and the administration of the water system through the [Texas] Water Master."[90] Therefore, Claimants believe their integrated investment qualifies as an investment in "real estate or other property (tangible or intangible) acquired in the expectation or used for the purpose of economic benefit or other business purposes," under Article 1138(g) of NAFTA.[91] If one accepts the above argument that the Claimants "integrated investment" is an investment in property for the purposes of NAFTA, it could then be argued that Mexico's retention of Rio Grande water violates Articles 1102, 1105, and 1110 of NAFTA.

For example, Article 1102 requires a NAFTA party to treat its own investors no differently than foreign investors in like circumstances.[92] Claimants could argue that by withholding the water which forms the foundation of their investment and providing it to Mexican farmers, Mexico has afforded Claimants less favorable treatment than it has afforded Mexican water investors in like circumstances. Similarly, Article 1105 requires each NAFTA party to afford the investments of investors from another party treatment in accordance with international law.[93] Claimants could argue that Mexico's clear failure to adhere to

88. Request for Arbitration, *supra* note 14, at 27.

89. *Id.* at 32, 37–38.

90. *Id.* at 27; *see also* United States v. Gerlach Live Stock Co., 339 U.S. 725, 753 (1950) ("[The right to irrigate land is] a recognized and adjudicated private property right"); Bigham Bros. v. Port Arthur Canal & Dock Co., 97 S.W. 686, 688 (Tex. 1906) ("The right of a riparian owner to take water from the stream is property"). The Texas Water Master is a government officer appointed by the Texas Commission on Environmental Quality, and he is charged with monitoring, authorizing, and regulating Texas water rights. Request for Arbitration, *supra* note 14, at 27 n.2.

91. *See supra* notes 28–30, & 90 and accompanying text.

92. *See supra* notes 36–38 and accompanying text.

93. *See supra* notes 39–42 and accompanying text.

its water delivery obligations under the 1944 Treaty is a per se violation of international law as set forth in the 1944 treaty, and therefore a violation of Article 1105. Finally, Article 1110 bars countries from expropriating investments of another party's investors or taking measures that are tantamount to expropriation, unless there is due process and just compensation.[94] Claimants could argue that Mexico either expropriated the foundation to their integrated investment or took actions tantamount to expropriation when it withheld Claimants' water and gave the water to Mexican farmers without compensating them.

Upon initial assessment of Bayview's potential arguments for subjecting the waters of the Rio Grande to the international trade law of NAFTA, one may think these arguments seem reasonable. However, as the next section demonstrates, these arguments are problematic, beyond the scope of NAFTA, and inconsistent with principles of international law. Therefore, they should be disregarded.

III. WATER FLOWING IN ITS NATURAL STATE SHOULD NOT BE SUBJECT TO INTERNATIONAL TRADE LAW, SUCH AS NAFTA

A. CLAIMANTS' REQUEST FOR ARBITRATION EXCEEDS THE SCOPE OF NAFTA BECAUSE CLAIMANTS DO NOT OWN AN "INVESTMENT" IN MEXICO

Chapter 11's investor-state dispute resolution mechanism is not a forum for all complaints against a NAFTA party.[95] Article 1101 clearly limits the scope of Chapter 11 to arbitration of measures adopted or maintained by a NAFTA Party relating to "*investments* of investors of *another Party* made in the *territory* of the Party."[96] This limited scope is apparent in Articles 1102, 1105, and 1110, among others. For example: Article 1102 requires only National Treatment for "*investments* [or investors] of another party"; Article 1105 requires only a minimum standard of treatment for "*investments* of investors of another Party;" and Article 1110 likewise bars only expropriation of "*investments* of investors."[97] Therefore, Claimants must own an

94. *See supra* notes 43–46 and accompanying text.
95. *See supra* notes 27–30 and accompanying text.
96. *See supra* note 27 and accompanying text (emphasis added).
97. *See supra* notes 36, 39 & 46 (emphasis added).

"investment" in Mexico in order to have any remedy for their claims under NAFTA. This in turn requires the free flowing waters of the Rio Grande's tributaries to be ownable as an investment in Mexico.

Contrary to the Claimants' belief that they own an investment of water in Mexico under Article 1138(g), they do not in fact "own" anything in Mexico, let alone an investment in water. It is a basic principle of international law that nation states are sovereign over their territory and laws.[98] This means that one nation state may not exercise its sovereign power *in any form* in the territory of another nation state.[99] Therefore, the United States lacks the ability to create property rights—whether in water or otherwise—in Mexico and Mexico lacks the ability to create property rights in the United States.[100] Thus, a determination of ownership or investment in water that is located in Mexico is governed by the laws of Mexico, not the laws of the United States or Texas. Consequently, the rights Claimants have acquired to use the water of the Rio Grande once it reaches Texas and the status of those water rights as property under Texas law are irrelevant. Only ownership rights created under Mexican law are relevant. Therefore, to "own" the water of the Rio Grande tributaries as an investment located in Mexico, the Claimants must own the water located in Mexico under Mexican law.

This argument cannot be undermined by the international water law principle of equitable apportionment, which requires the recognition of Claimants' rights to the water once it reaches the United States. This is so despite equitable apportionment rejecting absolute territorial sovereignty over international waters and requiring water crossing international borders to be equitably apportioned among the riparian states.[101] First, equitable apportionment only requires apportionment between

98. Shannon K. Baruch, *The Proposed Florida Nonindigenous Species Statute: A Salvation for the Lacy Act*, 10 FLA. J. INT'L L. 185, 205 (1995) ("The most stringent restriction that international law imposes on a sovereign state is that one nation state may not exercise its power in any form in the territory of another.").

99. *Id.*

100. *See id.*

101. *See Helsinki Rules*, art. IV, 52 I.L.A. 484 (1967), *available at* http://www.internationalwaterlaw.org/IntlDocs/Helsinki_Rules.htm; Yonatan Lupu, *International Law and the Waters of the Euphrates and Tigris*, 14 GEO. INT'L ENVTL. L. REV. 349, 359–66 (2001); Ludwik A. Teclaff, *Fiat or Custom: The Checkered Development of International Water Law*, 31 NAT. RESOURCES J. 45, 68–73 (1991); Press Release, United Nations General Assembly, General Assembly Adopts Convention on Laws of Non-Navigational Uses of International Watercourses, U.N. Doc. GA/9248 (May 21, 1997).

"riparian states" not riparian users, and the 1944 Treaty has equitably apportioned the water of the Rio Grande and its tributaries between the United States and Mexico in accordance with international law.[102] Second, equitable apportionment has no bearing on this issue; the argument is not that Mexico has absolute sovereignty to withhold water from the United States—it is that Mexico has absolute sovereignty to determine the laws of private property in Mexico.

Moreover, the 1944 Treaty did not give the Claimants rights to water on the Rio Grande. Courts have repeatedly held that the 1944 Treaty did not grant water rights to individual users, but rather that it merely apportioned the water of the Rio Grande between the United States and Mexico.[103] In fact, the courts have consistently held that "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 [1944] treaty."[104] As the above discussion makes clear, the relevant inquiry for the purposes of determining the validity of a potential arbitration of the *Bayview* claims under Chapter 11 is whether the Claimants own an investment in the water of the Rio Grande *under Mexican law*, not under U.S. law.

Article 27 of the Mexican Constitution states, "[o]wnership of the lands and *waters* within the boundaries of the national territory is vested originally in the Nation."[105] It clarifies that "[t]he Nation has domain over . . . rivers and their direct and indirect tributaries, as of the place in the river bed where permanent, intermittent, or torrential flow of water starts and up to the river's mouth in the national property."[106] One commentator has gone as far as to say virtually "all of the water in Mexico except for rainfall, and only before it hits the ground, is deemed to be 'national waters.'"[107]

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102. 1944 Treaty, *supra* note 53, art. IV; Warren, *supra* note 82, at 41 ("The treaty equitably distributes between the United States and Mexico the waters of the Rio Grande River from Fort Quitman, Texas to the Gulf of Mexico.").

103. *See, e.g.*, Texas v. Hidalgo County Water Control Improvement Dist. No. Eighteen, 443 S.W.2d 728, 742 (Tex. App. 1969) ("[T]he United States did not by the [1944] [T]reaty confer on anyone a right emanating from the central government to make use of the waters of the Rio Grande.").

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

105. Constitucíon Política de los Estados Unidos Mexicanos [Const.], *as amended* Diario Oficial de la Federacíon [D.O.], 5 de Febrero de 1917 (Mex.) at art. 27 [hereinafter Mexican Constitution].

106. *Id.*

107. Abdon Hernandez, *Water Law in the Republic of Mexico*, 11 U.S.-MEX. L. J.

While Mexico retains the ability to transfer title of national waters to private parties, "ownership by the Nation is inalienable and imprescriptible, and the exploitation, use, or appropriation of the resources concerned [i.e. water], by private persons or by companies . . . *may not be undertaken except through concessions granted by the Federal Executive*, in accordance with rules and conditions established by law."[108] Thus, for Claimants to own or hold an investment in water located in Mexico, they must have received a "concession" from the Federal Executive of Mexico in accordance with the laws of Mexico.

The *National Waters Law* (NWL) of Mexico affirms the National ownership of waters under the Constitution and is considered the most important piece of Mexican water legislation.[109] The NWL dictates the requirements for receiving a concession for urban use, *agricultural use*, power generation, and other productive activities.[110] To receive an agricultural concession, a private party or corporate entity must own agricultural lands, cattle, or forestlands in Mexico.[111]

Not a single *Bayview* Claimant owns agricultural lands, cattle, or forestlands in Mexico or claims to own such.[112] Thus, it is legally impossible under the NWL for the Claimants to have owned or held an investment in water in Mexico. Further, since the Claimants do not own or hold an investment in Mexico, it would be impossible for Mexico to have violated Articles 1102, 1105, and 1110 of NAFTA, as these provisions require the existence of an "investment of an investor of another party."[113]

Therefore, allowing a NAFTA tribunal to arbitrate Bayview's claims would greatly exceed the scope of NAFTA. First, it would allow for arbitration of a claim under Chapter 11 when there is no recognizable foreign investment in violation of Chapter 11's prerequisites for investor-state arbitration.[114] Moreover, even if the tribunal determined that a foreign investment existed, thus avoiding the above problem, it would nonetheless still exceed the scope of NAFTA and violate general principles of international law by usurping Mexico's private property laws and sovereign authority. NAFTA's intended

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15, 18 (2003).

108. Mexican Constitution, *supra* note 105, art. 27.

109. Hernandez, *supra* note 107, at 18.

110. *Id.* 20–21.

111. *Id.* at 21.

112. *See generally supra* note 14, at 1–25.

113. *See supra* notes 98–100 and accompanying text.

114. *See supra* notes 48–51 and accompanying text.

purpose was to remove trade barriers while preserving parties' sovereignty over their territory and substantive laws.[115] Thus, if a tribunal determined that the Claimants did in fact own an investment in water in Mexico, therefore allowing the Claimants to seek an investor-state arbitration, it would unilaterally alter Mexican water law in the face of Mexico's Constitution. In essence, the NAFTA tribunal would be saying that private ownership of Mexican water in the United States by the *Bayview* Claimants gives them actionable private property rights to the water while it remains in Mexico, irrespective of what the Mexican Constitution says. This is a clear usurpation of Mexican sovereign authority and therefore a violation of NAFTA's scope and the general international law principles as set forth above.

Bayview is exemplary of problems which may arise any time water flowing in its natural state is considered a "good" subject to international trade laws such as NAFTA. As this section has shown, international trade regimes are not well equipped to address the potential for conflicts over territorially sovereignty and are limited in their scope to things that have truly entered international commerce as a commodity or truly constitute an investment. Therefore, unless water has truly entered the international market as a commodity or is truly owned as a foreign investment, it should not be governed by international trade law. If water is considered a good subject to international trade law in circumstances other than when it has truly entered commerce, such as when it is flowing in its natural state, there is a real potential that trade regimes will grossly exceed their scope and infringe upon nation-states sovereign authority when addressing disputes arising over this scarce resource.

B. ARBITRATION BY A NAFTA TRIBUNAL WOULD PRESUME A VIOLATION OF THE TREATY WHERE NONE EXISTED, USURP THE POWER OF THE IBWC, AND ALTER THE TERMS OF THE 1944 TREATY

As demonstrated in the previous section, if water flowing in its natural state across an international border is subject to international trade law, the dispute resolution mechanisms of international trade regimes would be available to resolve water disputes.[116] Although this may seem like an appealing method

115. GLICK, *supra* note 22.

116. Edith Brown Weiss, *Water Transfers and International Trade Law*, *in* FRESH WATER AND INTERNATIONAL ECONOMIC LAW 61, 83 (Edith Brown Weiss et al.

to reduce the potential for armed water conflicts that many scholars predict,[117] it would likely destabilize the international system by undermining the practical significance and authority of treaties apportioning the use of water between countries.

While there has been surprisingly little attention given to this issue, the consensus is that allowing international trade bodies to resolve international water disputes presents problems.[118] For example, granting trade bodies jurisdiction to resolve international water disputes may encourage forum shopping between trade bodies and treaty dispute resolution mechanisms. In addition, trade bodies may lack the expertise to adequately resolve international water disputes.[119] These vices of allowing free flowing water to be subject to international trade law can readily be seen in the context of *Bayview*.

For example, as discussed above, Mexico's water debt was resolved under the terms of the 1944 Treaty and IBWC minute 308.[120] However, many in Texas, including the Claimants, did not believe this Treaty resolution to be a satisfactory resolution of the dispute.[121] Thus, they utilized an alternative dispute resolution forum—namely NAFTA's Chapter 11 investor-state dispute mechanism. The ramifications of this type of forum shopping in relation to water flowing in its natural state raise many concerns.

One issue *Bayview* illuminates is that allowing trade bodies to resolve international water disputes may potentially alter the terms and obligations of water treaties by creating liability where none existed under the terms of the treaty. For example, the *Bayview* Claimants' entire argument is based on the idea that they were harmed by the creation of the Mexican water debt.[122] Thus, in order to arbitrate the *Bayview* dispute, the

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eds., Oxford University Press, 2005).

117. *See supra* note 7 and accompanying text. Some scholars argue that water flowing in its natural state should be subject to international trade dispute mechanisms because it would help to more equitably distribute the world's water while at the same time ensuring countries could not "discriminate in favor of water from one country over that from another by imposing differential tariffs or quantitative limitations." *See, e.g.*, Weiss, *supra* note 116, at 80.

118. Weiss, *supra* note 116, at 82–83.

119. *Id.*

120. *See supra* notes 71–81 and accompanying text.

121. *See supra* notes 82–87 and accompanying text.

122. Request for Arbitration, *supra* note 14, ¶¶ 61–76. The following are some highlights that particularly demonstrate this point. "Mexico further withheld fair and equitable treatment from Claimants by flagrantly violating the 1944 Treaty." *Id.* ¶ 61. "Under article 1105 . . . Respondent's intentional violation of the 1944 Treaty (to the substantial damage of Claimants) is a clear violation of international law." *Id.* ¶ 73. "This claim submitted for arbitration accrued in October 2002, when

NAFTA tribunal would have to accept that the Mexican water debt did, or at least could have, abridged the Claimants' Chapter 11 rights. This is problematic because the 1944 Treaty by its very terms allows for the legal creation of a water debt.[123] By arbitrating *Bayview*, a NAFTA tribunal would in essence be altering, without the official consent of either Mexico or the United States, the meaning and obligations of the 1944 Treaty. It would potentially be creating a trade liability for accruing a water debt under the 1944 Treaty when the Treaty itself explicitly allows for the creation of such a debt under its terms.

With *Bayview* as an example, the absurdity of allowing this type of forum shopping and extralegislative rewriting of treaties is apparent. Allowing trade bodies to potentially and unilaterally write into treaties individual rights of action and monetary damages of upwards of $600,000,000 seems irrational and counter productive to fostering cooperative allocation of international water. Further, when one considers that there have been over 145 separate water allocation treaties enacted in the last 140 years, problems of creating disincentives for cooperation on water issues are amplified. If the terms of common international water allocation treaties cannot be counted on as secure, due to trade law forum shopping, the incentive to enter water allocation treaties will be diminished. This is a step in the wrong direction. The best way to avoid international conflict over water is to have the affected states agree on an equitable allocation of the naturally flowing water, the liability for failing to meet the terms of the treaty, and the specific dispute resolution mechanism. If this process is undermined, the likelihood of international conflict would consequently rise because of an utter absence of agreement with respect to the use of water.

CONCLUSION

As can be seen through *Bayview Irrigation District et al. v. United Mexican States*, considering free flowing water that crosses an international border a "good" subject to international trade law is problematic and should be avoided. As has been shown through the context of *Bayview*, making free flowing water subject to international trade law would greatly exceed

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Mexico's water debt (which is owned almost entirely by Claimants) became delinquent. This water debt arose under the 1944 Treaty, which allocated the waters of the Rio Grande River and its tributaries." *Id.* ¶ 60.

123. *See* 1944 Treaty, *supra* note 53, art. IV.

the scope of international trade regimes, potentially usurp nation-states' territorial sovereignty, foster dispute resolution forum shopping, and allow for unilateral rewriting of water allocation treaties by trade bodies. For these reasons, only water that has actually entered commerce—such as bottled water or water included as an ingredient or component to some good in commerce—should be subjected to the laws of international trade regimes such as NAFTA. Therefore, the International Centre for Settlement of Investment Disputes correctly denied jurisdiction over *Bayview*.