



International Rivers and Lakes

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The editor encourages contributions of news items for an exchange of information with interested readers.

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I. Notes on NAFTA's Environmental Implications ¹

The International Institute for Sustainable Development (IISD), in collaboration with the World Wildlife Fund-U.S., has produced a study, *Private Rights, Public Problems* as a definitive guide to NAFTA's Chapter 11 on Investor Rights, complete with an annex that analyses all the relevant cases to March 2001. The author is Howard Mann, an IISD Associate and Senior Counsel in the case of Methanex Corporation vs. the United States of America, a case relating to a Californian ban of the gasoline additive MTBE. The book sets out the problems with Chapter 11 in clear, non-technical jargon and offers concrete solutions.

In the Methanex case, which critics consider one of the most worrisome, the Methanex Corporation of Vancouver, British Columbia, is challenging California's decision to phase out the use of a gasoline additive containing methanol, which Methanex makes. The state considers the additive MTBE, which was originally intended to reduce air pollution from motor vehicle emissions, to be a health hazard when it enters the water supply. Santa Monica, California, with 93,000 residents, had to shut down most of its municipal wells when gasoline, containing MTBE, leached into the drinking water a few years ago.

“NAFTA's investment provisions are being used by investors to undermine environmental and human health and safety measures, in a process that is closed to the public, and cannot be effectively appealed. Instead of using these provisions as intended -- as a last ditch response to unfair treatment -- corporations are using NAFTA's Chapter 11 as a strategic weapon to resist and deter legitimate government regulation. The result: provisions meant to protect private rights have now become a real public problem.

“This guide, aimed at a non-technical audience, lays out the problems with NAFTA's Chapter 11 in easily accessible detail. It is an essential reference for anyone interested in fixing NAFTA's investment provisions, and in helping develop international investment rules that promote a healthy environment and sustainable development. The guide also includes an invaluable resource: a digest of known Chapter 11 cases to March 2001 complete with legal analysis.”

IISD is concerned about the possible environmental implications of the investment provisions of NAFTA – specifically, the Chapter 11 provisions. In 1999 it published an in-depth authoritative analysis of those provisions and their environmental implications called, *NAFTA's Chapter 11 and the Environment - Addressing the Impacts of the Investor-State Process on the Environment*. This work led IISD to try and intervene, as a friend of the court, in the NAFTA Chapter 11 Methanex Corporation's case against the US. If successful, the petition will establish an important precedent for openness in the previously secretive Chapter 11 proceedings.

IISD released the book *An International Investment Regime? Questions of sustainability*, by Senior Fellow Konrad von Moltke, on 14 September 2000. The book argues that investment is necessary for the types of innovation and change that will bring about sustainable development. But, it asks, what would such an agreement look like if it explicitly aimed to

¹ From: <http://www.iisd.org/trade/private_rights.htm>; *Private Rights, Public Problems: A Guide to NAFTA's Chapter on Investor Rights* by, Howard Mann. Produced in collaboration with the World Wildlife Fund - U.S

achieve that goal? Not much like the General Agreement on Tariffs and Trade (GATT) or the now-defunct Multilateral Agreement on Investment (MAI), it concludes, and takes a different tack inspired by international environmental treaty making.

II. US-Mexican transboundary water issues: public and private sector entities participate in round table²

A water roundtable held in March 2001 in Tijuana, Mexico, focused on US-Mexican border water issues and attracted 54 participants from 39 public and private sector entities. The California-based Latin American NGO Institute of the Americas organised the event.

The event followed a US\$ 270,000 US Department of Commerce grant to the Institute to restart its water programme. The programme's objectives include: drafting recommended solutions to existing water shortages and water contamination; reviewing the current regulatory framework; and identifying and increasing opportunities for smaller companies.

Water program co-director Isabel Alvarez was pleased with the results, especially because it was the first meeting of the program. Participants included US companies Bechtel, Black & Veatch, Camp, Dresser & McKee, France's Vivendi and subsidiary US Filter, Mexico's National Water Commission, Baja California state-based public services utility Cespt and Grupo Cydsa's environmental subsidiary Atlatec.

The roundtable agenda included: sustainable water supply; the development of new water sources; financing; and ways consumers and industry can reduce water costs. "Financing is always a big issue and we hope to cover that in more depth in future events. We are working on a follow-up with the International Private Water Association focusing only on finance", Alvarez commented.

Two other roundtables were scheduled for June/July 2001 (Mexico) and August 2001 (Brazil), to focus on the development of new water resources for Mexico City and Guadalajara, and to review of Brazil's water investment plans. A conference that will review water issues in Latin America is scheduled for December in San Diego, California.

III. Colloquium on Regulatory Expropriations in International Law³

The New York University (NYU) School of Law's Center on Environmental and Land Use Law and the NYU Environmental Law Journal are planning a colloquium on *Regulatory Expropriations in International Law* to be held in September 2001.

Several recent awards by international arbitration tribunals established under the dispute settlement system of the North American Free Trade Agreement (NAFTA) have addressed claims by foreign investors that their investments were "expropriated" by environmental

² From Right to Water List Digest for Tuesday 21 August 2001. Business News Americas (BNamericas.com) Copyright 2001 Financial Times Information. Global News Wire. Copyright 2001. Business News Americas S.A (Business News Americas).

³ From: <<http://www.nyu.edu/pages/elc/regexprop/main.html>> Regulatory Expropriations in International Law.

regulations that limited their ability to do business. In one case, *Metalclad vs. the United Mexican States*, the Arbitration Tribunal ruled in August 2000 that the following actions --

- Mexico's toleration of local authorities' improper denial of a building permit;
- Mexico's failure to provide a transparent and predictable system of environmental and land use regulation; and
- A decree setting the area (including the site) aside as an ecological preserve

-- all constituted acts "tantamount to expropriation". The Tribunal ordered Mexico to pay US\$ 17 million in financial compensation and interest for the violation of NAFTA. The award was recently upheld in part and overturned in part by the Supreme Court of British Columbia.

Such awards, as well as decisions handed down under the auspices of international bodies, have attracted considerable attention from those concerned about the balance between property rights and community rights in bilateral and multilateral investment treaties. The issue of protection of the foreign investor property rights vs. collective or community rights relating to social objectives such as environmental protection has become central to debates in NAFTA, the European Energy Charter, and the proposed Free Trade Agreement of the Americas.

The Center on Environmental and Land Use Law at NYU School of Law and the NYU Environmental Law Journal sponsored the first major conference to address these crucial issues. The Conference provided participants an opportunity to learn about recent legislative and arbitral developments, to draw upon the experience of scholars, policy-makers, and advocates from North and South America and Europe, and to delve into the underlying normative and pragmatic questions raised by the debate.

The first panel, *Overview of Regulatory Expropriation Issues in International Law*, brought conference participants up to date on how the issue of regulatory expropriation has become central to debates over bilateral and multilateral investment treaties.

The second panel, *Sources of Law and Theory to Guide International Jurisprudence on Regulatory Expropriations*, provided a summary and critique of the major possible sources of legal, political and economic theory that might inform international regulatory expropriation jurisprudence.

The third panel turned to the issue of *What Should "Expropriation" or "Tantamount to Expropriation" Mean*. This panel explored leading normative theories about whether international law should recognize the concept of regulatory expropriations and, if so, how it ought to define such expropriations.

The fourth panel, *How Should Compensation be Measured When There is an Expropriation?*, explored different theories about how the property interest "expropriated" through regulation should be defined and valued for the purposes of compensation.

The conference ended with a roundtable discussion on *Domestic Challenges if Multilateral Investment Treaties Are Interpreted to Expand the Compensation Requirement for Regulatory Expropriations beyond a Signatory State's Domestic Law*.

IV. Great Lakes: Donors pledge US \$140 million for Nile basin projects, 29 June 2001.⁴

Nairobi, 29 June, Integrated Regional Information Networks (IRIN) -- The newly-created International Consortium for Cooperation on the Nile (ICCON) held its first meeting from 26 to 28 June in Geneva, bringing together the international donor community and NGOs in support of the Nile Basin Initiative, a cooperative programme to address poverty, environmental degradation and instability. It is also intended to serve as a forum for dialogue on the options and opportunities for management and development of the Nile Basin, according to an ICCON statement received by IRIN. The ministers of water affairs of all 10 countries sharing the Nile River lead the Consortium: Burundi, the DRC, Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania and Uganda.

Donor countries pledged initial financial support of at least US\$ 140 million to finance the full programme, with a trust fund to be established by the World Bank for this purpose. Strong support was also expressed to underwrite and secure financing for the first phase of the US \$3 billion investment programme in the sub-basins, once the projects are ready for funding, according to the ICCON statement.

"The successful launch of ICCON marks a new partnership of the Nile Basin states and the international community, working together to improve the lives of the people of the Nile Basin and promote peace. The Nile Basin Initiative is a new development paradigm of regional co-operation that could help address many of the challenges of the basin", according to the statement. While concerns were expressed over instability in the region, it was hoped that the initiative might serve as "an example of how international waters can become catalysts for co-operation, development, and stability".

V. Toronto newspaper concerned about U.S. interest in Canadian water⁵

An article in the *Toronto Star* by Rachel Giese observes that the U.S. is now expressing serious interest in Canadian water due to its own water crisis. Contributors to the problem include global warming and environmentally unsound farming practices. Farmlands and ranches in California and the Southwest USA are parched, and existing water supplies cannot meet current demand. Just prior to the G8 summit in Genoa, President Bush told reporters that he is "ready anytime" to discuss a continental water pact with Canada's Prime Minister Jean Chrétien.

Though the North American Free Trade Agreement specifically excludes bulk water exports, free trade provisions will kick in requiring that open trade continue, if Canada does agree to sell water. So far, the Canadian Government in Ottawa has said that it is not interested in selling bulk water.

⁴ From: <<http://www.reliefweb.int/IRIN/cea/countrystories/other/20010629.phtml>> Integrated Regional Information Networks

⁵ Source: Right to Water List Digest for Tuesday 31 July 2001, Excerpts from an article published on Thursday, July 26, 2001 in the *Toronto Star*, "Let's Teach Americans a Few Lessons" by Rachel Giese, Copyright 2001. Toronto Star Newspapers Limited <http://www.thestar.com/news> Jim Riker, Ph.D.

VI. Debate on piping Canadian water to the American Southwest⁶

Washington - Yesterday U.S. President George W. Bush said to The Toronto *Globe and Mail* in a meeting with reporters at the White House that he wants to talk to Prime Minister Jean Chrétien about piping Canadian water to the parched American Southwest.

Bulk water exports were specifically excluded from the North American Free Trade Agreement and the Canadian government says that it is against the practice.

"I look forward to discussing this with the Prime Minister . . . at any time because water is valuable for a lot of our countries", said Bush. He would be open to "any discussions" about a possible continental water pact - along the lines of the co-operation talks now under way between Canada, the United States and Mexico on energy.

It is believed to be the first time that Mr. Bush has raised the issue of Canadian water imports. Former president Bill Clinton never raised the issue. "Water will forever be an issue in the United States, particularly the western part of the United States", Mr. Bush said. "I'm from a part of the world where there was no water". He noted that when world oil prices crashed in the early 1980s to less than \$10 a barrel it seemed like water was worth more than oil.

Under NAFTA water is exempted from rules that require an open two-way trade in commodities. However, the agreement states that free-trade provisions will kick in, requiring open trade to continue, once Canada starts trading in bulk water. This could limit the power of federal and provincial governments in Canada to restrict water exports. Public-opinion polls suggest that a majority of Canadians say that bulk water exports should be allowed, as long as governments regulate where they go and for what purpose.

VII. Mexican water debt coming due⁷

Under a March accord reached between US President George W. Bush and Mexican President Vicente Fox, Mexico was supposed to pay half of its water debt owed to the United States by 31 July 2001. This meant that Mexico had to allow almost 300,000 acre-feet of water to flow from its reservoirs, according to Carlos Marin, an engineer with the international commission's El Paso office. An acre-foot of water is about 326,000 gallons.

"There's no way they can do it", he said. "They would really have to start releasing water from interior reservoirs. They would have to move fast and really work on their system".

⁶ Source: Right to Water List Digest for Friday 27 July 2001

⁷ Source: Right to Water List Digest, 31 July 2001, Express-News: Mexico/Latin America "Time's up for Mexico water debt", By Alison Gregor. San Antonio Express-News Rio Grande Bureau, Web Posted: 07/28/2001, agregor@express-news.net

Javier Mendoza, a spokesman for Mexico's National Water Commission, said officials are preparing to assess how much water is still owed by Mexico.

In June Mexico had released a little more than one-half of the 600,000 acre-feet it had promised in March to deliver by the July deadline. Marin said that if a circumstance, such as lack of rain, blocks Mexico from complying, a contingency in the March accord requires Mexico to release the water by 30 September from four designated reservoirs in Mexico.

The United States also will continue to receive 100 % of the runoff from unmeasured tributaries to the Rio Grande, as it has since the March accord. The United States and Mexico share those waters.

Rio Grande Valley farmers in the US have accused Mexico of slowly choking the life out of the region's agricultural industry by ignoring a 1944 treaty that regulates the use of tributary runoff on both sides of the Rio Grande.

Under the treaty, the United States should get one-third of the runoff from six Mexican tributaries — or at least 350,000 acre-feet of water a year. But Mexico has failed to meet that minimum the past eight years and owes about 1.4 million acre-feet of water, which is sufficient to irrigate about 720 citrus farms of 200 acres for a year. Bush and Fox agreed in March that Mexico must pay back its water debt at a pace that allows U.S. farmers to continue irrigating.

Mexican officials say their problem is that the region has been in a drought for almost a decade. While irrigators in northwestern Mexico have been receiving some water, Mexico's own farmers downstream in Tamaulipas are losing crops. The Rio Grande's mouth silted up in February and the border-city of Matamoros lost water service for a few days in May. Low levels in the Rio Grande on Wednesday again worried water officials in Matamoros and led Texas and Brownsville officials to agree to divert river water to the Mexican border-city for 48 hours.

Officials said the state also has consistently released water from the Anzalduas Dam to relieve the low-flow problems caused by aquatic plants that choke the river. Due to water shortages, hundreds of Mexican farmers threatened to sue Mexico's National Water Commission in June after it agreed to make the scheduled releases to the United States. Mendoza said that the lawsuit was thwarted by agreeing to compensate farmers for lost crops.

Marin said he did not know what would happen if Mexico misses the 30 September deadline. He said, "Non-compliance is something we don't want to confront, especially since there were instructions from way up at the top to make sure that this issue was taken care of".

VIII. India: Water release into Pakistan rivers⁸

Islamabad - The quantity of water being released by India in the rivers flowing into Pakistan is duly monitored. It is a misperception that India is releasing excessive an amount of

⁸ Source: Right to Water List Digest, Saturday 28 July 2001. Development VISIONS 48-A, Shalimar Colony Bosan Road, Multan- Pakistan. Phone: 92-61-222609 www.brain.net.pk/~daima

water in rivers, which might create problems in the country. Shaukat Ali Awan the director of Flood Forecasting Centre Punjab (FFCP) said this while speaking in a PTV programme.

According to the Indus Basin Treaty, India is bound to inform Pakistan on a daily basis about the amount of water being released in the rivers flowing into Pakistan from the Indian side. This information is received daily by the Indus Water Commission of Pakistan and is monitored round-the-clock by the concerned department, he added. A high-power radar was installed in Lahore in 1992 to observe weather conditions regularly. It covers an area of 450 kilometres. A separate radar network is also operational all over the country. This latest radar has high capability to assess chances and volume of rainfall in different areas and also the level of water in rivers, he said.

The flood warning and forecasting centres are operating round-the-clock to monitor weather conditions properly. A depression or cyclone storm in the Bay of Bengal reaches different areas of the country usually five to six days after its development, he said, adding that this development is minutely monitored to allow time to implement preventive measures.

While heavy rains in one city may not cause a flood in any river, heavy rains on mountains or over larger areas including five to 10 cities can cause floods in the country's river system.

Awan said that the flood forecasting centre releases flood forecasts on a daily basis to all provinces and the Federal Flood Commission. Currently flood forecasts for any river cannot be made, because actual positions come on screen five to six days prior to any flood. He said the information about latest weather positions could be viewed on the web pages of the department, which are updated hourly.

IX. UK Water Industry Says: 'Climate Change Threat Urgent'.⁹

Climate change will hit water and wastewater services first and most strongly. Preparations to combat the threat must start now. These are words from the Britain's water industry body, Water UK. "The water industry is in the front line and is planning to ensure that businesses and the quality of life will not suffer", said Pamela Taylor, Water UK chief executive, as government leaders dispersed from their Bonn meeting on combating global warming in July 2001. "We know what we have to do, but it won't be possible unless there is a full public debate about what is needed and who will pay. In spite of all the noise and coverage of the Bonn meeting, there is no sign of this beginning anytime soon".

Water UK said that the manufacturing industry, transport, agriculture, utilities and others are dependent on secure water supplies and a stable water environment, but if the effects of higher temperatures, more intense rainfall and rising sea levels go unchecked, there would be massive disruption.

⁹ From: <<http://www.planetark.org/dailynewsstory.cfm?newsid=11763>> Reuters News Service. UK, 26 July 2001.

"Everyone is worrying about how to prevent or reduce climate change. That is understandable, but responsible businesses and governments must now accept that the impacts may be inevitable", said Taylor ahead of a seminar on the subject to be held in London.

Water UK represents Britain's privatised regional water companies and has long argued that the regulatory regime that caps prices charged to customers does not take into account enough of the long term environmental costs of maintaining and improving water and sewerage infrastructure.

X. EU plans for liberalising world trade could make it illegal for governments to introduce stringent regulations on protecting the environment.¹⁰

EU plans for liberalising world trade could make it illegal for Governments to introduce stringent regulations on protecting the environment, claimed a coalition of green and development lobby groups in July.

The Seattle to Brussels Network is enraged by the Union's proposal that obstacles to the free trade of "environmental services", such as waste management and the provision of water, should be removed as part of a worldwide general agreement on trade in services (GATS). This recommendation was being discussed at the session of a World Trade Organisation (WTO) sub-group, meeting in July 2001.

Alexandra Wandel, a campaigner with Friends of the Earth, took issue with a recent European Commission paper, which claimed the proposal would benefit the environment. Instead, she argued, it could mean that measures taken by member states, such as imposing restrictions on the amount of groundwater extracted from particular areas, would contravene binding WTO rules.

More than 80 recommendations about liberalising the global trade in services have been tabled during the WTO-sponsored discussions, most coming from the US and Europe.

The conference of world trade ministers to be held in Qatar this November is expected to determine whether the GATS agreement should be finalised as part of a new round of talks on international trade or as part of a 'stand-alone' process. "A lot of concern has been expressed by the developing countries represented in Geneva about the avalanche of market access proposals from the richer countries", said Clare Joy of the World Development Movement.

The Dutch-based Corporate Europe Observatory (CEO) criticised former Trade Commissioner Leon Brittan for urging his successor Pascal Lamy to push for extensive liberalisation of the international trade in services. Now the vice-president of investment bank UBS Warburg, Brittan has been lobbying EU officials on GATS on behalf of the Lotis Committee, which represents the financial services industry in London.

¹⁰ From: European Voice Volume 7 Number 2812, July 2001 by David Cronin (Copyright 2001), The Economist Newspaper Limited.

The CEO's Erik Wesselius also lamented the lack of transparency surrounding the EU's trade discussions. The Council of Ministers 'committee 133', which formulates policies on external trade, is not subject to any parliamentary scrutiny and does not make the minutes of its meetings available to outsiders, he said.

XI. French Water Law to Extend Polluter-Pays Principle to Agriculture¹¹

Paris - French Environment Minister Dominique Voynet unveiled on 27 June a long-awaited reform to framework water legislation that would reduce consumers' tax burden at the expense of industry and extend the polluter-pays principle to agriculture for the first time.

The controversial draft water law, presented before the weekly Cabinet meeting, would also create new effluent emissions taxes on power plants, shorten the duration of municipal waterworks contracts from 20 to 12 years, and allow new parliamentary oversight of water management decisions and tax revenues currently controlled by regional water agencies.

The legislation faces an uncertain future, as France enters the campaign phase of a political cycle leading to parliamentary and presidential elections in mid-2002. Agricultural backers on both sides of the political spectrum are determined to block its passage through parliament, while Voynet, the bill's principal sponsor, was slated to resign her Environment Ministry post to take over day-to-day leadership of the Green Party.

Voynet expressed confidence during a 27 June press briefing that the Socialist-led coalition government would make her bill a legislative priority before next year's elections, saying that she would use "all of my energy as head of the Greens" to get the proposal on the parliamentary agenda. Experts anticipate fiery rhetoric and partisan oratory whenever members of parliament (MPs) launch debate on the bill.

Topping the list of disputed items are plans to change gradually the payment structure of FF9 billion (\$1.17 billion) in water-use charges and pollution taxes collected each year by the country's six regional water agencies.

Residential consumers currently pay about 85 % of the charges, versus 14 % paid by industry and 1 % paid by agriculture. Voynet's law aims to increase agriculture's water-use charges and pollution tax payments to 5 % of the total by 2007.

Farmers would be asked to pay new taxes from 2003 on nitrogen runoff into surface and groundwater linked to excessive fertilizer use and insufficient treatment of livestock waste, two of the principal causes of unacceptably high nitrogen content levels in drinking water across rural France.

¹¹From: Right to Water List Digest for Tuesday 17 July 2001 International Environment Reporter, Vol 24, No. 14: 4 July 2001, p. 544, News, by Lawrence Speer. The Bureau of National Affairs, Inc., Washington D.C. and Mark Ritchie, President, Institute for Agriculture and Trade Policy, Minneapolis, MN, U.S.A. mritchie@iatp.org, www.iatp.org, www.wtowatch.org, www.farmbillwatch.org, www.gefoodalert.org, www.sustain.org/biotech

Voynet had initially sought taxes on agricultural water use topping FF1 billion (US\$ 131 million), but intense lobbying by farm organizations forced a compromise that pegged application of the polluter-pays principle to agriculture at between an estimated FF350 million and FF400 million (\$45.8 million to \$52.4 million) a year.

Industry, for its part, will see its share of water-use charges and pollution taxes rise to 16 % of the total by 2007. This is principally due to new taxes on effluent emissions from power plants and other facilities whose discharges are warmer than the surface temperature of rivers into which they flow. Warm water discharges are currently untaxed but are thought to be responsible for algae blooms that stifle river biological diversity.

The increased payments from agriculture and industry could lighten the load for residential consumers, who stand to see their share of total water taxes drop to 79 % under the proposal.

Another controversial element of the new legislation likely to come in for sharp debate is a provision that would shorten the duration of municipal waterworks contracts held by private sector operators from 20 to 12 years.

The measure -- accompanied by the creation of a High Council on Public Service Water Provision to be charged with overseeing waterworks operation and informing local governments of their economic and technological options -- aims to reduce the political power and market domination of France's two world-renowned waterworks operators. Suez, formerly Lyonnaise des Eaux, and Vivendi Water, formerly Generale des Eaux, together control more than 90 % of the domestic water provision market.

Aside from tightening controls on waterworks operators, the bill also aims to better inform citizens on general water management issues. It would set new standards for pricing transparency, and mandate individual water meters in all new collective residential housing. Currently, most collective residential properties are equipped with a single water meter, meaning that apartment dwellers do not pay for their exact consumption but rather a percentage of the building's total.

Finally, the proposed law would transpose into French law the European Union's Directive 2000/60/EC Establishing a Framework for Community Action in the Field of Water Policy (INER Reference File 3, 151:2701).

The proposed water reform bill ("Projet de Loi sur L'Eau") and linked commentary are available in French, via the Ministry of Environment, at <http://www.environnement.gouv.fr>.

XII. The global water crisis and the commodification of the world's water supply¹²

Available fresh water amounts to less than 0.005 % of all the water on Earth. The rest is seawater, or is frozen in the polar ice cap. Fresh water is renewable only by rainfall, at the rate of 40-50,000 cubic km per year. Global consumption of water is doubling every 20 years, more than twice the rate of human population growth. According to the United Nations, more than one billion people on Earth already lack access to fresh drinking water. If current trends persist, the demand for fresh water is expected to rise by 56 % by 2025.

The 'Blue Gold' report, by Maude Barlow, Chair, International Forum on Globalisation (IFG) Committee on the Globalisation of Water, Council of Canadians, addresses the following issues: Who owns water? Should anyone? Should it be privatized? What rights do transnational corporations have to buy water systems? Should it be traded as a commodity in the open market? What laws do we need to protect water? What is the role of government? How do we share water in water-rich countries with those in water-poor countries? Who is the custodian for nature's lifeblood? How do ordinary citizens become involved in this process?

Proponents of making water a saleable commodity and subsequent privatization say that commodification and mass transport of water are the only ways to distribute water to the world's thirsty. But, in fact, experience shows that selling water on the open market does not address the needs of poor, thirsty people.

On the contrary, privatized water is delivered to those who can pay for it, such as wealthy cities, golf courses and individuals and water-intensive industries. As one resident of the high desert in New Mexico observed after his community's water was diverted for use by the high-tech industry: "Water flows uphill to money." The push to commodify water comes at a time when the social, political and economic impacts of water scarcity are rapidly becoming a destabilizing force, with water-related conflicts springing up around the globe.

For example Malaysia, which supplies about half of Singapore's water, threatened to cut off that supply in 1997 after Singapore criticized its government policies. In Africa relations between Botswana and Namibia have been severely strained by Namibian plans to construct a pipeline to divert water from the shared Okavango River to eastern Namibia. Much has been written about the potential for water wars in the Middle East, where water resources are severely limited.

Meanwhile, those who profit from its overuse and abuse are determining the future of one of the earth's most vital resources. At the annual World Economic Development Congress, which follows the annual International Monetary Fund/World Bank meeting, corporations and financial institutions met with government representatives from more than 84 countries. They attended

¹² Foro-Infoagua, Resumen número 119, Blue Gold: The global water crisis and the commodification of the world's water supply, by Maude Barlow, Chair, International Forum on Globalisation (IFG) Committee on the Globalisation of Water, Council of Canadians, June 1999. A Special Report produced and published by the IFG "The wars of the next century will be about water." The World Bank Report summary.

one panel entitled "Overcoming Obstacles to Water Investment". The agenda was clear: water should be treated like any other tradable good, with its use determined by market principles.

At the same time governments are signing away their control over domestic water supplies by participating in trade treaties such as the North American Free Trade Agreement (NAFTA) and institutions such as the World Trade Organization (WTO). These agreements effectively give transnational corporations the unprecedented right to the water of signatory countries. Already corporations have started to sue governments in order to gain access to domestic water sources. For example Sun Belt, a California company, is suing the government of Canada under NAFTA because British Columbia (BC) banned water exports several years ago. The company claims that BC's law violates several NAFTA-based investor rights and therefore is claiming US\$ 220 million in compensation for lost profits.

With the protection of these international trade agreements, companies are setting their sights on the mass transport of bulk water by diversion and by super tanker. Several companies are developing technology whereby large quantities of freshwater would be loaded into huge sealed bags and towed across the ocean for sale. The U.S. Global Water Corporation, a Canadian company, is one of those seeking to be a major player in the water trade. It has signed an agreement with Sitka, Alaska, to export 18 billion gallons per year of glacier water to China, where it will be bottled in one of the free trade zones to take advantage of low-cost labour. The company brochure entices investors "to harvest the accelerating opportunity...as traditional sources of water around the world become progressively depleted and degraded".

Selling water to the highest bidder will only exacerbate the worst impacts of the world water crisis. Due to the social inequalities in India, some households pay a staggering 25 % of their income on water. Poor residents of Lima, Peru pay private vendors as much as \$US3.00 for a cubic metre of often-contaminated water, while the more affluent pay \$0.30 cents per cubic meter for treated municipal tap water. In the *maquiladora* zones of Mexico, water is so scarce that babies and children drink Coca-Cola and Pepsi instead. More than five million people, most of them children, die every year from illnesses caused by drinking poor-quality water.

China is facing the likelihood of severe grain shortages because of water depletion and the current shift of limited water resources from agriculture to industry and cities. The resulting demand for grain in China could exceed the world's available exportable supply. During a drought crisis in northern Mexico in 1995 the government cut water supplies to local farmers, while ensuring emergency supplies to the mostly foreign-controlled industries of the region.

The answer to the increase in water demand has been to build more environmentally destructive dams and divert more rivers. The number of large dams worldwide has climbed from just over 5,000 in 1950 to 38,000 today.

In the U.S. only 2 % of the country's rivers and wetlands remain free flowing and undeveloped. As a result, the country has lost more than half of its wetlands. In the U.S., the centre of freshwater diversity in the world, 37 % of freshwater fish are at risk of extinction, 50 % of crayfish and 40 % of amphibians are in peril, and 67 % of freshwater mussels are extinct or vulnerable to extinction. In the Great Lakes system, the Nature Conservancy has identified 100

species and 31 ecological communities at risk Even in China 80% of the major rivers are so degraded they no longer support fish.

A number of key research and environmental organizations such as Worldwatch Institute, World Resources Institute and the United Nations Environment Programme have been expressing their concern for well over a decade. If water usage continues to increase at current rates, the results will be devastating for the earth and its inhabitants.

International Rivers Network, Greenpeace, Clean Waters Network, Sierra Club and Friends of the Earth International, along with thousands of community groups around the world, are fighting the construction of new dams, reclaiming damaged rivers and wetlands, confronting industry over contamination of water systems and protecting whales and other aquatic species from hunting and overfishing. In a number of countries experts have come up with some exciting and creative solutions to these problems. These issues are explored in the 'Blue Gold' Report.

XIII. NAFTA's Powerful Little Secret¹³

Under the North American Free Trade Agreement (NAFTA), the meetings are secret and the members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors under NAFTA.

Foes of the trade pact say some of their worst fears about anonymous government have become reality. And as Western economies move toward more free trade and globalization, environmentalists, consumer groups and anti-trade organizations are increasingly worried about how the tribunals influence the enforcement of laws.

According to Joan Claybrook, president of Public Citizen, a consumer watchdog group in Washington, the 16 NAFTA cases that have been filed so far in the United States, Canada and Mexico showed how corporations were using NAFTA not to defend trade but to challenge the functioning of government. "This is not the way to do the public's business", she said.

Tribunals have been used in NAFTA disputes for only a few years, but the complaints they have handled have already had many repercussions, such as the following:

- The Canadian government lifted restrictions on manufacturing an ethanol-based gasoline additive that it considered hazardous after an American manufacturer said that the ban hurt its business.
- A tribunal ordered Mexico to pay an American company \$16.7 million after finding that local environmental laws, which prohibited the company to build a toxic-waste-processing plant, were tantamount to expropriation.

It is clear that investors have gained a shield far more powerful than almost anyone had imagined when NAFTA was written in the early 1990s. "There is no doubt that these measures

¹³ From: DePalma, New York Times, 11 March 2001, <http://www.mindfully.org/WTO/NAFTA -Powerful-Secret.htm>

represent an expansion of the rights of private enterprises vis-à-vis government", said Prof. Andreas F. Lowenfeld, an international trade expert at the New York University School of Law. "The question is: Is that a good thing?"

The international tribunals are authorized under NAFTA's Chapter 11 that deals with investments. Investors who believe they have suffered a loss because of a breach in NAFTA rules can bring a claim against the government of the country where they made their investment. They can have the complaint heard under one of two existing sets of rules: one from the United Nations, the other from an independent office of the World Bank.

These off-the-shelf mechanisms adopted by NAFTA have commonly been used to resolve private disputes between corporations and are thus intended to provide a great degree of confidentiality. Both critics and proponents agree that the provisions run headlong into demands for openness and accountability when public issues are involved.

"The fact that the drafters of NAFTA chose this secretive process to resolve these disputes is further evidence that they did not foresee matters of broad social concern coming before these panels", said Martin Wagner, director of international programs for the Earthjustice Legal Defense Fund, an environmental group in San Francisco.

The United States government named as a defendant in the Methanex complaint (discussed in item I of this *Newsletter*), is also concerned that the case stretches NAFTA beyond recognition. In a statement to the tribunal the government contends that "Methanex's claim does not remotely resemble the type of grievance for which the states parties to the NAFTA created the investor-state dispute mechanism."

Mr. Wagner has asked the tribunal to consider breaking with tradition and accepting written statements from third-party groups like the Bluewater Network, a citizens' environmental organization. The tribunal determined in January that it had the right to accept written arguments.

Officials who oversee the tribunals say that anything that opens the proceedings would undermine the promise of confidentiality that corporate investors consider essential, and in turn the primary purpose of the arbitration mechanisms — to help foster commercial development.

"The whole thing here was to have a mechanism to give a base level of comfort to foreign investors", said Ko-Yung Tung, vice president and general counsel of the World Bank and secretary general of its International Center for Settlement of Investment Disputes, which handles NAFTA claims. He said that forcing more disclosure could drive corporations away from the established dispute-resolution process.

For 20 years after the center was created in 1966 it established panels that heard on average no more than one case a year. Now, officials said, about one case is filed every month. The center appoints the arbitrators to the panels, chosen from a list of internationally recognized experts. The center is bound by strict confidentiality rules, and only investors and governments which are party to a dispute can agree to make the documents public.

The United Nations Commission on International Trade Law, based in Vienna devised the other set of rules governing NAFTA tribunals. "Arbitration is really private justice", said Jernej Sekolec, its secretary. Mr. Sekolec says the commission's rules for handling disputes are routinely written into commercial contracts between investors and, increasingly, agreements that let private investors bring complaints against a foreign government. But he said that the commission itself never became involved in a dispute in any way, not even to select the arbitrators. "Our overall mission is to streamline and facilitate negotiations and conclusions of contracts".

Typically, the parties in a dispute each name one tribunal member and agree jointly to a third. Each panel is unique and critics say this lack of continuity makes it hard to establish clear legal precedent. That is especially important because a tribunal decision technically cannot be appealed. It can be submitted to a local court for review, to ensure that there was no corruption or gross misinterpretation of the rules.

The lack of a traditional appeals process, transparency and legally binding precedent, along with the wide scope of what can be challenged under the free-trade investment rules, have made many people wary in all three nations, including government officials. Pierre Pettigrew, Canada's minister of international trade, has written to his counterparts in the United States and Mexico to begin a process to clarify the limits of NAFTA's investment protections and perhaps to amend the agreement before negotiations begin in earnest on the Free Trade Area of the Americas.

Activists said they would protest the idea of adopting similar tribunals in a hemispheric free-trade pact. "This is an example of the excessive powers enjoyed by corporations under NAFTA that should not be expanded," said the Alliance for Responsible Trade, in a critique of the United States position on the proposed trade pact.

"The demand for a more transparent process will cause tension with the more traditional concept of confidentiality — it's inevitable", said Margrete L. Stevens, senior counsel of the International Center for Settlement of Investment Disputes.

XIV. International initiative on shared aquifers¹⁴

The International Initiative on shared aquifers is a joint programme of UNESCO and FAO, with cooperation from the United Nations regional Economic Commissions for Europe and Africa. The project aims to develop methods and techniques for improving the understanding and the management of shared groundwater systems, considering both technical and institutional aspects. A key part of the project will be to survey existing management strategies for shared groundwater systems to spread experience and best practice. IAH contact is Shammy Puri (ShammyPuri@aol.com).

¹⁴ From: <http://www.iah.org/isarm/isarm1.htm>