

SAME AS IT EVER WAS: THE TIJUANA RIVER SEWAGE
CRISIS, NON-STATE ACTORS, AND THE STATE

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I. INTRODUCTION

Sewage—a scary mixture of human waste and industrial toxins¹—flows into the Tijuana River Valley, a waterway that has long been an environmentally sensitive area.² The Tijuana River Watershed

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¹ Lesley Stahl, *Raw Sewage Flowing into the Tijuana River Brings Toxic Sludge to California*, CBS NEWS: 60 MINUTES (May 31, 2020), <https://www.cbsnews.com/news/raw-sewage-southern-california-coast-tijuana-mexico-60-minutes-2020-05-31/> [https://perma.cc/Y823-AZTX].

² See generally TIJUANA RIVER NAT’L ESTUARINE RES. RSRV., TIJUANA RIVER VALLEY EXISTING CONDITIONS REPORT (2014).

covers a 1,735-square-mile area that straddles the United Mexican States (“Mexico”) and the United States of America, with seventy percent of its area in Mexico. According to the California State Coastal Conservancy:

Historically, the Tijuana River was the dominant feature of the valley and a critical driver of numerous physical and ecological processes. While the river was characterized by prolonged dry periods with little to mark its course but a sandy channel, major storms periodically transformed the river into a powerful force that abruptly shifted its course and flooded vast areas of the valley floor. These flood events redistributed tremendous amounts of sediment and uprooted riparian vegetation, maintaining a heterogeneous mosaic of floodplain habitats that included sandy river wash, dense riparian scrub, and groundwater-fed ponds. Wetlands, ranging from perennial freshwater wetlands to vernal pools and alkali meadows, occupied extensive areas outside of the river corridor, while terrestrial habitat types such as grassland and coastal sage scrub occupied higher and drier soils on a low mesa north of the valley floor. At the mouth of the Tijuana River, the daily ebb and flow of the tides maintained a broad estuary with a diverse array of habitat types and associated species.³

Millions of gallons of raw sewage have polluted the area for years.⁴ So much sewage has made its way into the Tijuana River that in September of 2020, CBS TV’s 60 Minutes investigative team broadcasted a special report on the binational environmental disaster.⁵

Tijuana’s rich and poor live in a beach suburb of Playas de Tijuana, located downstream from the American-, Korean-, and

3 SAMUEL SAFRAN, SEAN BAUMGARTEN, ERIN BELLER, JEFF CROOKS, ROBIN GROSSINGER, JULIO LORDA, TRAVIS LONGCORE, DANIELLE BRAM, SHAWNA DARK, ERIC STEIN & TYLER MCINTOSH, S.F. ESTUARY INST. & AQUATIC SCI. CTR., TIJUANA RIVER VALLEY HISTORICAL ECOLOGY INVESTIGATION, at ii (2017) (prepared for the California State Coastal Conservancy).

4 In a two-week period in February 2017 alone, some 143 million gallons of sewage spilled into the Tijuana River. David Hernandez, *143 Million Gallons of Sewage Spill into Tijuana River*, SAN DIEGO UNION-TRIB. (Feb. 24, 2017, 8:30 PM), <https://www.sandiegouniontribune.com/news/environment/sd-me-sewage-spill-20170224-story.html> [<https://perma.cc/DP9S-W4RH>]; Burke Kanemasu, *The Emergency in the Tijuana River Valley*, CORONADO EAGLE & J. (June 1, 2021), http://www.coronadonewsca.com/opinion/the-emergency-in-the-tijuana-river-valley/article_68d03f06-c308-11eb-a53a-b34ddb8ead81.html [<https://perma.cc/5R9R-M7GW>].

5 Stahl, *supra* note 1.

Taiwanese-owned *maquiladoras* (or *maquilas*),⁶ border factories that sprawl around the upper region of Otay Mesa, twenty-five miles from the Pacific Ocean and abutting the U.S.-Mexico border.

Maquilas are poorly suited to a sustainable city. For one, they resemble a kind of suburban hacienda compound, an insular space where workers provide labor to the ‘*patrón*’ (the industrial giant) in return for a modest salary. Maquila parks are surrounded by poor colonies, low-income settlements that typically house many of the plants’ workers. A second environmental feature is that maquilas have been notoriously insensitive to the physical environment. Reports abound of air pollution and the dumping of toxic wastes and untreated sewage.⁷

Where there is sanitation in the city and its environs, it is old and ineffective.⁸ The pollution emanating from the runoff of storm water adds to spills from aging pipes and hazardous discharges from the deteriorating San Antonio de Los Buenos Wastewater Treatment Plant in Punta Bandera, located about six miles south of the border. The limited chlorine is not enough to treat all the sewage.⁹ During the 1990s, the South Bay Wastewater Treatment Plant was constructed for \$344 million in San Diego County to treat a portion of Tijuana’s sewage.¹⁰ The plant was completed in January of 1997, but its effluents

⁶ Zach V. Chayet, *Maquiladora Operations: A Comment on the Maquiladora Program in Mexico*, 18 CAL. W. INT’L L.J. 53, 56 (2015).

⁷ Lawrence A. Herzog, *Rethinking Urban Ecologies: Cultural Barriers to Sustainable Development?*, in EQUITY AND SUSTAINABLE DEVELOPMENT: REFLECTIONS FROM THE U.S.-MEXICO BORDER 43, 49 (Jane Clough-Riquelme & Nora Bringas-Rábago eds., 2006).

⁸ MacKenzie Elmer, *Environment Report: Tijuana and San Diego Share a Sewage Problem but Not a Solution*, VOICE OF SAN DIEGO (Apr. 26, 2021), <https://www.voiceofsandiego.org/topics/science-environment/environment-report-tijuana-and-san-diego-share-a-sewage-problem-but-not-a-solution/>

[<https://perma.cc/LGT2-V758>]. See also Salvador Rivera, *Report Shows High Levels of Chemicals, Metals and Oils in Tijuana River Valley*, BORDER REP. (Oct. 2, 2020), <https://www.borderreport.com/regions/california/report-shows-high-levels-of-chemicals-metals-and-oils-in-tijuana-river-valley/> [<https://perma.cc/SCC4-EQYJ>]. For the referenced report, see INT’L BOUNDARY & WATER COMM’N, BINATIONAL WATER QUALITY STUDY OF THE TIJUANA RIVER AND ADJACENT CANYONS AND DRAINS (2020).

⁹ See generally FALK FEDDERSEN, XIAODONG WU & SARAH GIDDINGS, MODELING IMPACTS OF VARIOUS WASTEWATER AND STORMWATER FLOW SCENARIOS ON SAN DIEGO SOUTH BAY AND TIJUANA BEACHES (2020).

¹⁰ Kristina Davis, *Judge Allows South Bay Lawsuit Over Tijuana Sewage Overflows to Move Ahead*, SAN DIEGO UNION-TRIB. (Aug. 30, 2018), <http://www.sandiegouniontribune.com/news/environment/sd-me-sewage-order-20180830-story.html> [<https://perma.cc/K2L9-XDAT>]; see also Ross Campbell, *The Bajagua Project:*

are not in compliance with the agreements between the two countries,¹¹ nor are they in compliance with the U.S. Clean Water Act.¹²

For decades since the construction of the treatment plant, toxic sewage has seeped into the Tijuana River.¹³ The plant, having a daily limit of twenty-five million gallons, simply cannot process the volume of sewage present.¹⁴ In February of 2017, a single sewer line repair in Tijuana led to a spill of twenty-eight million gallons of sewage.¹⁵ By June 20, 2017, sewage was flowing at about ninety gallons per minute, according to San Diego County officials.¹⁶ An investigation by the International Boundary and Water Commission (“IBWC”), the international agency created by the United States and Mexico tasked with border waterway issues, found that more than 250 million gallons of sewage were unaccounted for during two rain-soaked months.¹⁷ The

Finding a Solution to the San Diego-Tijuana Sewage Crisis, 40 SAN DIEGO L. REV. 1039 (2003); *International Wastewater Treatment Plant, Tijuana, Mexico*, WATER TECH. VERDICT MEDIA LTD., <https://www.water-technology.net/projects/tijuana> [<https://perma.cc/D7YT-JV9U>] (last visited Jan. 15, 2022).

¹¹ See Minute No. 283 of the International Boundary and Water Commission: Conceptual Plan for the International Solution to the Border Sanitation Problem in San Diego, California/Tijuana, Baja California, Mex.-U.S., July 2, 1990, T.I.A.S. No. 11,735 [hereinafter Minute No. 283].

¹² *USMCA Tijuana River Watershed and Adjacent Coastal Transboundary Wastewater Flows*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/sustainable-water-infrastructure/usmca-tijuana-river-watershed#transboundary> [<https://perma.cc/W6RB-KS4Z>] (last visited Jan. 15, 2022).

¹³ In 2008, Daniel M. Sabet wrote: “Not surprisingly, this untreated sewage was of considerable concern on the U.S. side of the border. U.S. residents in the Tijuana River Valley were forced to contend with bad odors, health risks, and mosquito proliferation.” DANIEL M. SABET, *NONPROFITS AND THEIR NETWORKS: CLEANING THE WATERS ALONG MEXICO’S NORTHERN BORDER* 126 (2008).

¹⁴ *South Bay International Wastewater Treatment Plant*, INT’L BOUNDARY & WATER COMM’N, https://www.ibwc.gov/Mission_Operations/sbiwtp.html [<https://perma.cc/A8K9-VRUU>] (last visited Jan. 15, 2022).

¹⁵ Erik Anderson, *Cross-Border Sewage Spill Response Uncovers Ongoing Problems*, KPBS (Apr. 4, 2017), <https://www.kpbs.org/news/2017/apr/04/cross-border-sewage-spill-response-uncovers-ongoing/> [<https://perma.cc/GFN3-DF3A>]; *Official Report Finds That Damaged Sewer Line Primary Cause in Cross-Border Sewage Spill*, KPBS (Apr. 3, 2017), <https://www.kpbs.org/news/2017/apr/03/report-finds-that-damaged-sewer-line-primary/> [<https://perma.cc/V2AU-ZQTM>].

¹⁶ *San Diego Officials Issue Warning Due to Sewage Spill at Border Field State Park*, KPBS (June 21, 2017), <https://www.kpbs.org/news/2017/jun/21/san-diego-warning-sewage-spill-border-field-state/> [<https://perma.cc/36FS-RM82>].

¹⁷ Erik Anderson, *Tijuana’s Sewage System Needs Major Upgrades*, KPBS (June 2, 2017), <http://www.kpbs.org/news/2017/jun/02/tijuana-needs-major-sewer-upgrades/> [<https://perma.cc/EW8E-W9VV>].

shoreline of the City of Imperial Beach was closed for a total of 160 days and Border Field State Park was closed for 295 days in 2020.¹⁸

In April of 2017, the IBWC estimated the Tijuana River Valley was in need of roughly \$500 million in repairs.¹⁹ Government action from both countries was slow and results from such State intervention, when it did arrive, were lacking.²⁰ True, the spills have been discussed by federal authorities in the United States.²¹ Hearings were held²² and a bill to deal with the various areas affected by transborder pollution was introduced in the House of Representatives,²³ but it was never subject to a vote.²⁴ For years, nothing of substance was achieved until non-state actors (“NSAs”)—some U.S.-based, some Mexico-based, and a few binational in nature—sprang to action to lobby the IBWC and initiate legal proceedings in U.S. courts.²⁵ Cities too became involved—even those outside the State of California—contributing

¹⁸ Alessandra Selgi-Harrigan, *Board of Supervisors Declares Public Health Crisis in the Tijuana River Valley*, EAGLE & TIMES (Feb. 19, 2021), http://www.imperialbeachnewsca.com/news/article_0c9bb8ea-7606-11eb-bdac-a3bf7ba0fb54.html [<https://perma.cc/YQY8-P5L2>]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-307, INTERNATIONAL BOUNDARY AND WATER COMMISSION: OPPORTUNITIES EXIST TO ADDRESS WATER QUALITY PROBLEMS (2020).

¹⁹ Joshua Emerson Smith, *San Diego Joins South Bay Cities in Legal Fight Against Feds on Tijuana Sewage Spills*, SAN DIEGO UNION-TRIB. (Oct. 4, 2017), <https://www.sandiegouniontribune.com/news/environment/sd-me-san-diego-sewage-ibwc-20171004-story.html> [<https://perma.cc/54MD-BUZW>]; Sandra Dibble, *Accord Aims to Clean Up Tijuana River Watershed*, SAN DIEGO UNION-TRIB. (Oct. 6, 2016), <https://www.sandiegouniontribune.com/news/border-baja-california/sdut-treaty-minute-tackles-pollution-tijuana-san-diego-2015oct06-story.html> [<https://perma.cc/3Z86-ZQG5>].

²⁰ Press Release, Int'l Boundary & Water Comm'n, Investigation Finds Sewer Line Break and Other Wastewater Sources Affected the Tijuana River (Apr. 3, 2017).

²¹ Erik Anderson, *Federal Response to Cross-Border Sewage Spill Questioned*, KPBS (Feb. 28, 2017), <http://www.kpbs.org/news/2017/feb/28/federal-response-cross-border-sewage-spill-questio/> [<https://perma.cc/J4RZ-QWPE>].

²² Erik Anderson, *Federal Officials Discuss Cross-Border Sewage Spills at Public Hearing*, KPBS (May 31, 2017), <http://www.kpbs.org/news/2017/may/31/federal-officials-discuss-cross-border-sewage-spill/> [<https://perma.cc/2YAQ-GE2J>]; *US Water Commission Wants to Hold Workshop to Avoid Lawsuit Over Sewage Spill*, KPBS (Nov. 2, 2017), <http://www.kpbs.org/news/2017/nov/02/us-water-commission-to-hold-workshop-to-avoid/> [<https://perma.cc/8FPK-YWZZ>].

²³ *Bipartisan Bill Aims to Rehabilitate Tijuana River Valley After Sewage Spills*, KPBS (Sept. 18, 2017), <http://www.kpbs.org/news/2017/sep/18/bipartisan-bill-aims-to-rehabilitate-tijuana/> [<https://perma.cc/ADY3-5ZEP>].

²⁴ Tijuana River Valley Comprehensive Protection and Rehabilitation Act of 2017, H.R. 3795, 115th Cong. (2017).

²⁵ See *infra* III.B.

resources to assist with the ongoing sewage spill.²⁶ California also committed to assisting in the clean-up.²⁷

Individuals on the Mexican side of the border also played a role in creating this pollution. “[G]overnment efforts are also hindered by the behavior of the many residents, beachgoers, and migrants who contribute to the contamination problem.”²⁸ Tijuana has grown exponentially in the last few decades. In 1950, Tijuana’s population was 60,000 while today the population is estimated to be over 2.2 million people.²⁹ The addition of tens of thousands of displaced Haitians, Cameroonians, Central Americans, and Iraqis waiting in temporary shelters for asylum claims to be heard in the United States, has not helped the situation.³⁰ A surge of tens of thousands of Central American migrants—many of them under the age of sixteen—during the early part of the Biden administration further stretched conditions on the Mexican and U.S. sides of the border.³¹ On the receiving end of

²⁶ Michel Marizco, *Arizona City Helping Mexican Neighbor with Sewage Spill*, FRONTERAS (Sept. 21, 2017), <http://www.fronterasdesk.org/content/10818/arizona-city-helping-mexican-neighbor-sewage-spill> [<https://perma.cc/K24A-Z6N4>].

²⁷ Maureen Cavanaugh, *Governor Brown Signs Bill Allocating \$2.1 Million to Address Tijuana Sewage Spills*, KPBS (Oct. 10, 2017), <http://www.kpbs.org/news/2017/oct/10/governor-brown-signs-bill-allocating-21-address-ti/> [<https://perma.cc/XD45-SX5X>].

²⁸ SABET, *supra* note 13, at 14. “Large amounts of trash also harm the beach environment and devalue coastal property. Although the municipal government offers garbage collection services, trash is visible all along the beaches and surrounding properties.” *Id.*

²⁹ *Tijuana, Mexico Metro Area Population 1950-2022*, MACROTRENDS, <https://www.macrotrends.net/cities/21871/tijuana/population> [<https://perma.cc/WL75-5HMK>] (last visited Jan. 15, 2022).

³⁰ Daniella Silva, *Trapped in Tijuana: Migrants Face a Long, Dangerous Wait to Claim Asylum*, NBC NEWS (Mar. 18, 2019), <https://www.nbcnews.com/news/latino/trapped-tijuana-migrants-face-long-dangerous-wait-claim-asylum-n981721> [<https://perma.cc/EFD2-PWBR>]; see also Maya Srikrishnan, *There Are Few Resources to Help the Growing Number of African Migrants at the Border*, VOICE OF SAN DIEGO (May 29, 2019), <https://www.voiceofsandiego.org/topics/news/there-are-few-resources-to-help-the-growing-number-of-african-migrants-at-the-border/> [<https://perma.cc/9WD2-SP8L>].

³¹ Jen Psaki, Press Sec’y, White House, Press Briefing (Apr. 19, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/04/19/press-briefing-by-press-secretary-jen-psaki-april-19-2021/> [<https://perma.cc/YZP4-S768>]; see also Joey Garrison, *White House Backpedals After Biden Refers to a ‘Crisis’ at the Border*, USA TODAY (Apr. 19, 2021), <https://www.usatoday.com/story/news/politics/2021/04/19/white-house-backtracks-bidens-comment-crisis-border/7288376002/> [<https://perma.cc/2BPB-W493>]; Muzaffar Chishti & Jessica Bolter, *Border Challenges Dominate, But Biden’s First 100 Days Mark Notable Under-the-Radar Immigration Accomplishments*, ONLINE J. MIGRATION POL’Y

the effluents are people on the U.S. side of the border—ranchers and farmers—along the valley which ends in an estuary filled with wild-life.³² Surfers get sick if they take to the waves off Imperial Beach and as far up as Coronado Island, given that the Tijuana River sewage makes its way out to the Pacific Ocean largely untreated.³³

The role that individuals and NSAs play at the border was on display at one of the quarterly meetings that the United States Section of the IBWC (“USIBWC”) hosts near the southwestern most point of the continental United States. It is the discussion site where NSAs mix and interact with the state-based entities that make up varying levels of government with some jurisdiction relating to the border and environmental issues that they share. Established in 2002, the Citizens Forum “is intended to bring together community members enabling the early and continued two-way flow of information, concerns, values, and needs between the USIBWC and the general public, environmentalists, government agencies, municipalities, and other interested parties.”³⁴

One such interested party is the binational Tijuana River National Estuarine Research Reserve (“TRNERR”), an organization composed of a number of U.S. government institutions and an Imperial Beach non-profit organization, but it is highly dependent on actions taken in Mexico.³⁵ Not only are there a variety of pollutants that flow into the reserve, but urban development, poor planning, de-vegetation, and

INST. (Apr. 26, 2021), <https://www.migrationpolicy.org/article/biden-100-days-immigration> [<https://perma.cc/UBH7-VGEX>].

³² Stephen P. Mumme, Kim Collins & Jose Luis Castro, *Strengthening Binational Management of the Tijuana River*, 17 U. DENV. WATER L. REV. 329, 330 (2014) (citing Peter Smith, *The Watershed Economy: Legal Challenges Facing the Tijuana River*, 11 U. DENV. WATER L. REV. 337, 350–51 (2008)).

³³ Gustavo Solis & Carlos Castillo, *New Study Shows Imperial Beach Ocean Pollution Worse Than Previously Thought*, KPBS NEWS (Jan. 17, 2022, 6:15 PM), <https://www.kpbs.org/news/evening-edition/2022/01/17/new-study-shows-imperial-beach-ocean-pollution-worse-than-previously-thought> [<https://perma.cc/K6P8-TQZF>].

³⁴ USIBWC Citizen’s Forums, *International Boundary and Water Commission United States and Mexico* (2021), https://www.ibwc.gov/Citizens_Forum/CF_SBIWTP.html [<https://perma.cc/X738-CD6R>]. The online forum is where meeting announcements, press releases, agendas, minutes, and presentations are posted. The links are up to date and provide a place to facilitate and archive the quoted purpose above by centralizing the latest information open to everyone.

³⁵ See TIJUANA RIVER NAT’L ESTUARINE RSCH. RSRV., <https://trnerr.org> [<https://perma.cc/X9MY-XKC7>] (last visited Jan. 21, 2022).

illegal settlements also cause massive erosion that threaten to fill in the estuary and endanger this important habitat.³⁶

The Citizens Forum meeting, held at the TRNERR Meeting Room on the evening of December 7, 2017, was less a meeting and more of an expression of exasperation. Getting to the meeting location was difficult enough, let alone following the proceedings. There was no parking available in the area and few lights to guide the way that night.³⁷ Malodorous scents emanated from the nearby sewage.³⁸ It was worth the trip just to witness the dysfunction, both local and bi-national. Some ninety people were present, including a coalition called "Citizens Against Sewage." That evening's IBWC Citizens Forum agenda dealt with Tijuana River hydrology and discussed the feasibility of a floodplain and sediment transport study, yet another study to be conducted by the U.S. Army Corps of Engineers, and it reported the results of the program for integrated water management in the Tijuana River Basin.³⁹ Finally, an update on efforts to address Tijuana River water quality was provided.⁴⁰ At least that is what the agenda stated.

Both a U.S. flag and a Mexican flag were displayed in the Meeting Room, but no one on the U.S. side spoke Spanish nor possessed any materials from the Mexican side that were translated into English. Yet both the Mexican and U.S. citizens at the meeting wanted to hold their public officials accountable for doing something about the seemingly endless spills of sewage.⁴¹ Sighs of frustration and outright incredulity abounded.

Two California State Park Rangers,⁴² each armed with a handgun, watched from the back of the Meeting Room. One Ranger explained that the gun was necessary "just in case people get a little pumped up

³⁶ SABET, *supra* note 13, at 130.

³⁷ Firsthand account from author (present at meeting). Note that, throughout this Article, the author draws upon his firsthand accounts of meetings that he attended.

³⁸ See ABC10 NEWS, *Tijuana River Sewage Issues Impacting South Bay Worsen* (July 28, 2021), <https://www.yahoo.com/entertainment/tijuana-river-sewage-issues-impacting-234709585.html> [<https://perma.cc/3RW3-AH69>] (comment from San Diego City Council Member Vivian Moreno at 1:45).

³⁹ See USIBWC CITIZENS FORUM, *Updated Agenda* (Dec. 7, 2017), https://www.ibwc.gov/Files/Press_Release_120417.pdf [<https://perma.cc/4S7J-6EWW>].

⁴⁰ *Id.*

⁴¹ Erik Anderson, *Another Unreported Cross-Border Sewage Spill Fouls Imperial Beach*, KPBS (Nov. 1, 2017), <https://www.kpbs.org/news/2017/nov/01/another-unreported-cross-border-sewage-spill> [<https://perma.cc/GRE3-KUBG>].

⁴² Tijuana River National Estuarine Reserve is a partnership between the United States and the State of California. California State Parks has jurisdiction over the area. See TIJUANA RIVER NAT'L ESTUARINE RSCH. RSRV., *supra* note 35.

and to keep the discourse civil.” The assembled group was not violent, but some people were upset. 2017, after all, seemed to be the year of sewage spills. More were to come. During the meeting, one man incredulously asked out loud: “Isn’t there a Hague Court that can deal with this?”⁴³

There is, but international law alone cannot regulate the U.S.-Mexico border to provide sustainable and workable solutions to the challenges of transborder environmental devastation. That should be no surprise given that international law has done little to address other festering and seemingly intractable border crises like immigration and drug policy.⁴⁴ This Article details the most important international agreements concerning the flow of waterways, the quality of water, and the respective responsibilities of the two countries. A complex legal regime comprised of treaties, Minutes, and operating procedures with States and NSAs alike exists for the U.S.-Mexico border region.

Part II of this Article highlights the way State primacy in international law and international relations has been diminished over the last several decades and the way that the State has been repositioned in a broader field of power. This has been achieved in part through the formation of a new private institutional order that has undergirded globalization wherein NSAs are increasingly part of the international legal system.⁴⁵ According to the National Intelligence Council, NSAs “are non-sovereign entities that exercise significant economic, political, or social power and influence at a national, and in some cases international, level.”⁴⁶ At the border, the two national governments—that of Mexico and the United States—for all their resources, are not the only actors dealing with the proliferating transborder pollution disaster befalling the region. For all the binational treaties and working groups coming out of these two sovereign States, an increasing amount of the

⁴³ The International Court of Justice is the peaceful adjudication mechanism for inter-State disputes under the Charter of the United Nations and is housed in The Hague, Netherlands. See U.N. Charter art. 92.

⁴⁴ See generally James M. Cooper, *The United States, Mexico, and the War on Drugs in the Trump Administration*, 25 WILLAMETTE J. INT’L L. & DIS. RES. 234 (2018).

⁴⁵ “[T]he international legal system must be conceptualized as inclusive—not exclusive—of non-state actors.” Robert McCorquodale, *An Inclusive International Legal System*, 17 LEIDEN J. INT’L L. 477, 484 (2004).

⁴⁶ NAT’L INTEL. COUNCIL, NONSTATE ACTORS: IMPACT ON INTERNATIONAL RELATIONS AND IMPLICATIONS FOR THE UNITED STATES 2 (2007).

problem-solving work is being done at sub-state levels and among NSAs.⁴⁷

Part III of this Article examines the way international law has recognized new opportunities for an expanded role of NSAs and identifies the types of NSAs operating at the U.S.-Mexico border in the context of transnational water pollution. There are transnational corporations (“TNCs”)—also known as multinational enterprises (“MNEs”)⁴⁸ or multinational corporations (“MNCs”)—which hire unskilled labor drawn from all over Mexico to the *maquiladoras* that dot the landscape and dump toxic waste as a by-product of their operations. Other corporations on the U.S. side of the border are commissioned by the U.S. government to do some of the work that has traditionally been undertaken by the United States or the State of California, like education, pensions, prisons, and some public utilities, as well as studies about the environment.⁴⁹ Judge C.G. Weeramantry wrote:

When it is considered that some of the major trading multinationals have revenues which far [*sic*] those of over 150 of the nation states, it becomes clear that they have a correspondingly large role to play on the international stage and that any attempt to advance the international rule of law requires reorientation of traditional principles discounting the importance of non state actors.

The proliferation of powerful non-governmental organisations, which are often bonded together across national boundaries, is another factor requiring a reconsideration of traditional attitudes.⁵⁰

Part III also explores the role that outsourcing of traditional services provided by States has achieved through the growing importance of international networks and the rise of human rights advocacy

⁴⁷ North American Agreement on Environmental Cooperation art. 14–15, Sept. 14, 1993, 32 I.L.M. 1480.

⁴⁸ There are several terms to refer to these entities: transnational/multinational and corporations/enterprises. The various combinations of these four terms are then abbreviated as MNCs, MNEs, TNCs, and TNEs. See PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 12–15 (1995) (explaining history and content of the disagreements); Menno T. Kamminga & Saman Zia-Zarifi, *Introduction to LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 1, 1–4 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000) (comparing varying usages of multinational, transnational, corporation and enterprises). This thesis calls these transnational corporations (“TNCs”).

⁴⁹ See James M. Cooper, *The Rise of Private Actors at the United States-Mexico Border*, 33 WIS. INT'L L.J. 101 (2016).

⁵⁰ C.G. WEERAMANTRY, *UNIVERSALISING INTERNATIONAL LAW* 192 (2004).

groups and transnational environmental non-governmental organizations (“NGOs”) that monitor and force the U.S. government to live up to its domestic legal obligations. To do so, NGOs have initiated lawsuits against federal authorities,⁵¹ some of which are explored in Part III below, demonstrating that sovereign States are no longer the sole actors to effectuate change at the U.S.-Mexico border. Environmentalist groups like the Surfrider Foundation, the Sierra Club, WILDCOAST, and other not-for-profit organizations use litigation to force the United States to protect itself from the Tijuana sewage spills.⁵² Other 501(c)(3) entities (not-for-profit organizations under the U.S. Tax Code) include the Border Angels,⁵³ Casa Cornelia Law Center,⁵⁴ Jewish Family Services,⁵⁵ and other NGOs doing immigrant rights work.

Among the more nefarious NSAs are border vigilantes and other anti-immigrant groups patrolling the U.S.-Mexico border because, in their view, the U.S. government has failed to do so, and they peddle the narrative that the border is insecure and needs patriots to protect the homeland.⁵⁶ There are also drug trafficking organizations—the *narcotraficantes*—who ply their trade in the border region,⁵⁷ and inter-

⁵¹ Erik Anderson, *Feds Facing Lawsuit Over Cross-Border Sewage Spills in San Diego*, KPBS (Mar. 2, 2018), <https://www.kpbs.org/news/2018/mar/02/federal-government-faces-lawsuit-over-cross-border> [https://perma.cc/P6WT-AX6C]; Audra Stafford, *Fight Over Tijuana Sewage Heads to Court*, NBC (Mar. 2, 2018), <https://www.nbcсандiego.com/news/local/Tijuana-Sewage-Spill-Lawsuit-Chula-Vista-Imperial-Beach-Port-of-San-Diego-475692413.html> [https://perma.cc/X7SG-BQQP].

⁵² For an example of such litigation, see *Complaint, Surfrider Found. v. Int’l Boundary & Water Comm’n U.S. Section*, No. 18CV1621WQHBS (S.D. Cal. July 17, 2018).

⁵³ See BORDER ANGELS, <https://www.borderangels.org> [https://perma.cc/2XGD-43DY] (last visited Jan. 20, 2022).

⁵⁴ See CASA CORNELIA L. CTR., <https://casacornelia.org> [https://perma.cc/2K9X-PP94] (last visited Jan. 20, 2022).

⁵⁵ The work of the author’s former student and research assistant, Luis Gonzalez, Esq., is a case in point. See Max Rivlin-Nadler, *Immigrant Mom Must Return to Mexico – With or Without Her Newborn Child*, NPR (July 12, 2020), <https://www.npr.org/2020/07/12/890148681/immigrant-mom-must-return-to-mexico-with-or-without-her-newborn-child> [https://perma.cc/F3K5-7E8D].

⁵⁶ The Minutemen describe illegal immigrants as “invading” America with the goal of “reconquering” the land. See HAREL SHAPIRA, *WAITING FOR JOSÉ: THE MINUTEMEN’S PURSUIT OF AMERICA* 4, 13 (2013).

⁵⁷ James M. Cooper, *The Complicated Relationship: A Snapshot of the U.S.-Mexico Border*, KONRAD ADENAUER STIFTUNG (Sept. 30, 2010), <http://www.kas.de/usa/en/publications/19916> [https://perma.cc/D4PV-GFW7].

governmental organizations doing work in the border region.⁵⁸ In short, NSAs operate throughout the region. Together these NSAs form the Border Industrial Complex⁵⁹ that is proliferating at the U.S.-Mexico border.

Part IV of this Article examines the outsourcing of State activities to private actors and the way this plays into the general trend toward hollowing out the State. There is both an outsourcing by commission—wherein corporations and non-profit organizations are tasked by governments to do the work of governments—and an outsourcing by omission—wherein NSAs fill in for an abdication of governmental activities.

Part V of this Article concludes with an exploration of the return of the State. Despite all this hollowing out, privatization, and outsourcing, States are still playing the dominant role in U.S.-Mexico wastewater issues just as they do in international life generally. Accordingly,

States have been and remain the most important actors in world affairs, acting both directly and through intergovernmental organizations to which states, and only states, belong. States virtually monopolize large-scale, organized force which remains the ultimate weapon and a potent bargaining

⁵⁸ José Luis Castro Ruiz, Stephen P. Mumme & Kimberly Collins, *Local Binational Cooperation: The Tijuana River International Watershed*, 19 ESTUDIOS FRONTERIZO e006 (Mar. 7, 2018), <https://ref.uabc.mx/ojs/index.php/ref/article/view/657> [<https://perma.cc/X2US-U9DV>]; see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-307, INTERNATIONAL BOUNDARY AND WATER COMMISSION: OPPORTUNITIES EXIST TO ADDRESS WATER QUALITY PROBLEMS (2020).

⁵⁹ For the first time this expression was used in popular culture, see Tom Dart, *Inside the US 'Border Industrial Complex': Spy Tech Meets Immigration Crackdown*, GUARDIAN (Apr. 26, 2015), <https://www.theguardian.com/world/2015/apr/26/surveillance-border-security-expo> [<https://perma.cc/F6PP-VZSQ>]. See also the trailer of the documentary film by James Cooper and Sebastián Vives del Solar called BORDER INDUSTRIAL COMPLEX, which was debuted at the 2021 San Diego Latino Film Festival. BORDER INDUSTRIAL COMPLEX: STORIES FROM THE UNITED STATES-MEXICO BORDER – TRAILER, <https://vimeo.com/518254054/883b0c983d> [<https://perma.cc/WT6U-ZJ9N>] (last visited Jan. 15, 2022); see also James Cooper's Latest Documentary to Premiere at San Diego Latino Film Festival, CAL. W. SCH. L. (Mar. 4, 2021), <https://www.cwsl.edu/news/newsroom/faculty-news/2021/03/04/james-cooper's-latest-documentary-to-premiere-at-san-diego-latino-film-festival> [<https://perma.cc/MHW2-QS9W>].

resource. Thus, there would be no point in ignoring the nation-state.⁶⁰

To see this, one need only observe the manner in which the U.S. government has chosen to deal with the Tijuana River Valley sewage spills: A \$300 million fund provided by the United States-Mexico-Canada Agreement of 2020 (“USMCA”),⁶¹ the trade agreement among the three sovereign States that replaced the North American Free Trade Agreement (“NAFTA”).⁶² This Article ends with an examination of the outsourcing process that is underway to address the Tijuana River Valley sewage crisis, one that awards contracts to corporations yet again. Even the process by which corporations are chosen is created and managed by corporations who themselves have been awarded a contract for their services.⁶³ The cycle of competition and co-dependency between States and NSAs continues.

This Article first looks at what has traditionally been the sole subject of international law and relations: sovereign States. The State remains the primary actor in international law, international relations, and along the U.S.-Mexico border, but it is not the only actor. The State-centricity of international law dominates when it comes to the provision of resources for solving binational problems like the sewage coming from the Tijuana River.

II. THE PRIMACY OF THE STATE

A. *In International Law*

In international law, States have long been the primary and exclusive actors in the law of nations since the nineteenth century.⁶⁴ Austrian legal philosopher Hans Kelsen explained: “International Law or the Law of Nations is the name of a body of rules which—according

⁶⁰ Joseph S. Nye, Jr. & Robert O. Keohane, *Introduction* to TRANSNATIONAL RELATIONS AND WORLD POLITICS, at ix, xxiv (Robert O. Keohane & Joseph S. Nye, Jr. eds., 1972).

⁶¹ Christina Bravo, *San Diego Secures \$300M to Address Tijuana Sewage Seepage*, NBC SAN DIEGO (May 12, 2020), <https://www.nbcsandiego.com/news/local/san-diego-secures-300m-to-address-tijuana-sewage-seepage/2323730> [<https://perma.cc/B8AN-YSVL>].

⁶² United States-Mexico-Canada Agreement, Preamble, Pub. L. 116-113, 134 Stat. 11 (Nov. 30, 2018) [hereinafter USMCA].

⁶³ See *Infra* Part V.

⁶⁴ “The classical problem confronting the discipline of international law is the problem of how order is created among sovereign states.” ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 15 (2004).

to the usual definition—regulate the conduct of the states in their intercourse with one another.”⁶⁵ States have enjoyed this exclusive voice in international law.⁶⁶ Louis Henkin wrote that, “State consent is the foundation of international law.”⁶⁷ In classic international law, neither individuals nor companies could complain to foreign sovereign States for their alleged ill treatment in those States; instead, individuals relied on their own home State to do their bidding with foreign governments representing those other States.⁶⁸ Writing just after the Second World War, Maximilian Koessler explained the vagaries of “diplomatic protection” which allows for “the action taken by state against state to secure redress of alleged wrongs done individuals or corporations.”⁶⁹ He concluded that “the private person today, unrecognized by international courts or arbitration bodies, would be without legal protection against an offending foreign state were not that private person’s claim espoused by his government.”⁷⁰

Standing in international dispute settlement bodies has been traditionally within the sole purview of States. The International Court of Justice (“ICJ”) is open only to litigants who are sovereign States, as evidenced by Article 34 of the Statute of the International Court of Justice (“ICJ Statute”), which provides that “[o]nly states may be parties in cases before the Court.”⁷¹ Hence, NSAs do not have access to the ICJ. As Judge Rosalyn Higgins explains, “[a]ccess to the [ICJ], as

⁶⁵ HANS KELSON, *PRINCIPLES OF INTERNATIONAL LAW* 3 (2d ed. 1966).

⁶⁶ See James M. Cooper, *State of the Nation: Therapeutic Jurisprudence and the Evolution of the Right of Self-Determination in International Law*, 17 *BEHAV. SCI. & L.* 607 (1999).

⁶⁷ LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS: GENERAL COURSE ON PUBLIC INTERNATIONAL LAW* 46 (1989).

⁶⁸ See 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE: PEACE* §13 (H. Lauterpacht ed., 8th ed. 1955) (“States are the principal subjects of international law. This means that international law is primarily a law for the international conducts of states, and not of their citizens. As a rule, the subjects of the rights and duties arising from the international law are states solely and exclusively, and international law does not normally impose duties or confer rights directly upon an individual human being, such as an alien or an ambassador.”)

⁶⁹ Maximilian Koessler, *Government Espousal of Private Claims Before International Tribunals*, 13 *U. CHI. L. REV.* 180, 180 (1946).

⁷⁰ *Id.* at 180–81.

⁷¹ Statute of the International Court of Justice art. 34(1), June 26, 1945, 59 *Stat.* 1055, 33 *U.N.T.S.* 993 [hereinafter *ICJ Statute*].

to the Permanent Court before it, is barred to the individual; but he may assert his claim through his national government.”⁷²

ICJ cases such as *Asylum*,⁷³ *Nottebohm*,⁷⁴ and *Barcelona Traction*⁷⁵ are examples in which the rights of individuals or corporations were taken up and pursued by sovereign States on behalf of their subjects. Because individuals do not have the right of individual petition in the ICJ, they rely on sovereign States to advocate for them in this tribunal for international dispute resolution. In short, “[i]ndirect representation of the individual, by the state has been a common practice”⁷⁶

States have long enjoyed the monopoly of communicating with other States on behalf of their respective subjects—be they individuals or corporations. That exclusive purview—“capacity to enter into relations with the other states”—is the fourth and final criteria for statehood in the Montevideo Convention on the Rights and Duties of States of 1933.⁷⁷ Moreover, the sources for use in proceedings before the ICJ are all created by States. Article 38(1) of the ICJ Statute provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations⁷⁸

⁷² Rosalyn Higgins, *Conceptual Thinking About the Individual in International Law*, in THEMES AND THEORIES: SELECTED ESSAYS, SPEECHES AND WRITINGS IN INTERNATIONAL LAW 76 (2009).

⁷³ *Asylum* (Colom. v. Peru), Judgment, 1950 I.C.J. 266 (Nov. 20).

⁷⁴ *Nottebohm* (Liech. v. Guat.), Judgment, 1955 I.C.J. 4 (Apr. 6).

⁷⁵ *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, Judgment, 1964 I.C.J. 6 (July 24).

⁷⁶ Francisco Orrego Vicuña, *Individuals and Non-State Entities Before International Courts and Tribunals*, 5 MAX PLANCK Y.B.U.N.L. 53, 56 (2001).

⁷⁷ Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19. Article 1 provides: “The state as a person of international law should possess the following qualifications: a. a permanent population; b. a defined territory; c. government; and d. capacity to enter into relations with the other states.” *Id.* art. 1.

⁷⁸ ICJ Statute, *supra* note 71, art. 38(1).

As such, in classic international law, States were viewed as the *subjects* of international law.⁷⁹ Individuals, NGOs, corporations, trade unions, women's collectives, Indigenous Peoples, national liberal movements, and inter-governmental agencies—in essence the gamut of NSAs—were the *objects* of international law.

For Judge Rosalyn Higgins, this objects-and-subjects dichotomy is a prison, as she explained in *Problems and Process in International Law*:

The designating of States as 'subjects' within the international legal system in turn led to an embracing, especially by the leading jurists of the positivist school of international law, of the position that under a legal system there exists only 'objects' and 'subjects'. This starting point has received a widespread and uncritical acceptance and has necessarily dictated the framework of any examination. We have all been held captive by a doctrine that stipulates that all of international law is to be divided into 'subjects' — that is, those elements bearing, without the need for municipal intervention, rights and responsibilities — and 'objects' — that is, the rest. Certain authors have contended vigorously that only States are the subjects of international law. And to the positivist there is no permissive rule of international law that allows individuals to be bearers of rights and duties. They must, therefore, be *objects*: that is to say, they are like 'boundaries' or 'rivers' or 'territory' or any of the other chapter headings found in the traditional textbooks.

... [T]he whole notion of 'subjects' and 'objects' has no credible reality, and in my view no functional purpose. We have erected an intellectual prison of our own choosing, then declared it to be an unalterable constraint.⁸⁰

⁷⁹ See DIONISIO ANZILOTTI, *COURS DE DROIT INTERNATIONAL* 134 (1929); MANFREDI SIOTTO PINTOR, 41 *RECUEIL DES COURS* 356 (1932); see also RICHARD COLLINS, *THE ACTORS OF POSTNATIONAL RULE-MAKING: CONTEMPORARY CHALLENGES OF EUROPEAN AND INTERNATIONAL LAW* 28 (Elaine Fahey ed., 2016).

It is perhaps trite to say that the main or most prominent subjects of international law — its actors — are States. For a long period of time, of course, there were doubts about the formal legal recognition of legal subjects other than States, though the steady 'institutionalisation' of international law from the late nineteenth century onwards brought this restrictive approach increasingly into question.

Id.

⁸⁰ ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 49 (1994) (citations omitted).

In classic international law, there was indeed a dichotomy between objects and subjects, but this was erased starting in 1949, when the ICJ introduced the idea of international legal personality in the *Reparations* case:

It has now been established that the Organization has capacity to bring claims on the international plane, and that it possesses a right of functional protection in respect of its agents On this point, the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.⁸¹

This introduction of international legal personality opened international activities beyond the purview of the State so that NSAs can meaningfully participate: “Now, in this model, there are no ‘subjects’ and ‘objects’, but only *participants*. Individuals *are* participants, along with states, international organizations (such as the United Nations, or the International Monetary Fund (IMF) or the ILO), [MNCs], and indeed private non-governmental groups,”⁸² as well as “norm entrepreneurs.”⁸³ But the State has not gone away.

B. *In International Relations*

Indeed, the monopoly that States enjoy in international law is also backed up by international relations theory. States are assumed to have special powers that come with sovereignty since “[t]raditionally, in International Relations, power and authority were considered to rest with states.”⁸⁴ Carolyn Nordstrom wrote:

There is an explicit assumption in many analyses of state and [NSAs] that states are somehow supra-communities, born of unique institutions of leadership that are not replicated

⁸¹ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 184–85 (Apr. 11).

⁸² ANNA-KARIN LINDBLOM, *NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL LAW* 93 (2005) (citing HIGGINS, *supra* note 80, at 50).

⁸³ See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909, 929 (1996).

⁸⁴ Richard A. Higgott, Geoffrey R.R. Underhill & Andreas Bieler, *Introduction: Globalisation and Non-state Actors*, in *NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM 1* (Richard A. Higgott, Geoffrey R.R. Underhill & Andreas Bieler eds., 2000).

outside the formal institutions of the state. No matter how successful or large a non-state collectivity, it will never approximate the moral community of the state.⁸⁵

Further, Joseph S. Nye, Jr. and Robert O. Keohane explained:

The state, regarded as an actor with purposes and power, is the basic unit of action; its main agents are the diplomat and soldier. The interplay of governmental policies yields the pattern of behavior that students of international politics attempt to understand and that practitioners attempt to adjust to or control. Since force, violence, and threats thereof are at the core of this interplay, the struggle for power, whether as end or necessary means, is the distinguishing mark of politics among nations. Most political scientists and many diplomats seem to accept this view of reality, and a state-centric view of world affairs prevails.⁸⁶

Likewise, Hedley Bull maintained that “[t]he starting point of international relations is the existence of *states*, or independent political communities each of which possesses a government and asserts sovereignty in relation to a . . . particular segment of the human population.”⁸⁷

States control the many institutions of international import—norm creating bodies like the United Nations and its agencies, as well as regional organizations like the Organization of American States (which pre-dates the creation of the United Nations), the African Union (formerly the Organization of African Unity), and the European Union (formerly the European Economic Community). According to Ronnie D. Lipschutz and Cathleen Fogel:

For much of the post-World War II period, such international regulation as there was emerged from intergovernmental negotiations, which led to the signing and ratification of agreements and treaties by individual states and the creation of ‘international regimes.’ There were few, if any, other channels available for the development of formal international laws and rules. While non-state social actors were permitted access to and influence within a number of intergovernmental institutions such as the UN Economic and Social Commission (ECOSOC), for the most part there were serious

⁸⁵ Carolyn Nordstrom, *Shadows and Sovereigns*, 17 THEORY, CULTURE & SOC’Y 35, 46 (2000).

⁸⁶ Nye & Keohane, *supra* note 60, at ix (citations omitted).

⁸⁷ HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 8 (1977).

restrictions in terms of what they could say or do in these forums.⁸⁸

Since the Second World War, States have had the right to take out loans from the International Monetary Fund and the World Bank, as well as from regional financial institutions such as the Asian Development Bank, the African Development Bank, and the Inter-American Development Bank. They can exercise self-defense, collect taxes, buy weapons, and engage in international relations with other States. For Kjell Skjelsbaek, “[t]he state-centered view of world affairs, the interstate model which still enjoys so much popularity in the study of international relations, has now become too simplistic as a result of new developments in the global system, particularly since World War II.”⁸⁹ But with the end of the Cold War, the rise of the information society, and the spread of globalization and its attendant neoliberal infrastructure to benefit the movement of transnational capital and labor, this all changed.⁹⁰ For Samuel Huntington, “[n]ation-state power has diminished with the rise of [NSAs] such as international bureaucracies and global corporations whose loyalty is to no state.”⁹¹

Moreover, States cannot, on their own, solve many of the problems that confront humankind. According to Ann Florini,

the tendency in international relations studies to see states as the sole providers of collective goods has become an increasingly inappropriate over-simplification. States cannot solve all, or even most, of humanity’s most important collective action problems, nor can all these collective goods be converted by the magic of property rights into private goods to be provided by the market. This is true in part because state capacity is being undermined even at the domestic level by

⁸⁸ Ronnie D. Lipschutz & Cathleen Fogel, “*Regulation for the Rest of Us?*” *Global Civil Society and the Privatization of Transnational Regulation*, in *THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE* 116 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002) (citation omitted).

⁸⁹ Kjell Skjelsbaek, *The Growth of International Nongovernmental Organization in the Twentieth Century*, in *TRANSNATIONAL RELATIONS AND WORLD POLITICS*, *supra* note 60, at 85.

⁹⁰ *Cf.* “States are not and never have been the only international actors.” KENNETH N. WALTZ, *THE THEORY OF INTERNATIONAL POLITICS* 93 (1979).

⁹¹ *SOCIAL JUSTICE IN THE U.S.-MEXICO BORDER REGION* 11 (Mark Lusk, Kathleen Staudt & Eva Moya eds., 2012) (citing SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 36 (1996)).

everything from the globalisation of the economy to environmental degradation.⁹²

It is in the context of environmental degradation that this Article now turns to the sewage spill in the Tijuana River and its waterways. Sovereign States are no longer the only actors working to address the sewage spill and this speaks to the increasing roles that NSAs play in international relations. But the two countries are still the dominant actors, as the long history of U.S.-Mexico boundary and water issues demonstrates.

C. *United States-Mexico Treaty Law*

The aforementioned IBWC is an international agency created by treaty and tasked with managing transborder water issues along the U.S.-Mexico border, such as the sewage spills in the Tijuana River Valley. It is the binational body comprised of the USIBWC and the Comisión Internacional de Límites y Aguas (“CILA”), its counterpart in Mexico.⁹³ An agency and instrumentality of the U.S. government, the IBWC is charged with addressing transboundary issues arising out of bilateral agreements between the United States and Mexico.⁹⁴ The two parties to the agreements that span these relations are the sovereign States—the United States and Mexico.

The IBWC has its antecedents in the Treaty of Guadalupe Hidalgo, signed in 1848,⁹⁵ which ended the United States-Mexico War and provided a temporary joint boundary commission to survey, mark, and map the new boundary between the two countries. Article V of the Treaty of Guadalupe Hidalgo states in part:

In order to designate the boundary line with due precision, upon authoritative maps, and to establish upon the ground

⁹² Ann M. Florini, *Who Does What?: Collective Action and the Changing Nature of Authority, in* NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM, *supra* note 84, at 15, 15.

⁹³ *The International Boundary and Water Commission - Its Mission, Organization and Procedures for Solution of Boundary and Water Problems*, INT'L BOUNDARY & WATER COMM'N U.S. & MEX., https://www.ibwc.gov/About_Us/About_Us.html [<https://perma.cc/3Q7E-VCUK>] (last visited Jan. 15, 2022); *see also* *125 Years Preserving The Territorial Integrity Of Mexico And The Distribution Of International Waters On The Northern Border*, INT'L BOUNDARY & WATER COMM'N BETWEEN MEX. & U.S., <https://cila.sre.gob.mx/cilanorte/index.php/quienes-somos/historia> [<https://perma.cc/FW9J-SZWN>] (last visited Jan. 15, 2022).

⁹⁴ INT'L BOUNDARY & WATER COMM'N U.S. & MEX., *supra* note 93.

⁹⁵ Treaty of Guadalupe Hidalgo of Peace, Friendship, Limits and Settlement, Mex.-U.S., Feb. 2, 1848, T.S. No. 207.

land-marks which shall show the limits of both republics, as described in the present article, the two Governments shall each appoint a commissioner and a surveyor, who, before the expiration of one year from the date of the exchange of ratifications of this treaty, shall meet at the port of San Diego, and proceed to run and mark the said boundary in its whole course to the mouth of the Rio Bravo del Norte. They shall keep journals and make out plans of their operations; and the result agreed upon by them shall be deemed a part of this treaty, and shall have the same force as if it were inserted therein. The two Governments will amicably agree regarding what may be necessary to these persons, and also as to their respective escorts, should such be necessary.⁹⁶

A few decades after the Treaty of Guadalupe Hidalgo, the IBWC—first called the International Boundary Commission (“IBC”)—was created by the Convention between the United States and Mexico, *Water Boundary: Extending the Duration of the Convention of March 1, 1889* (“Convention of 1889”),⁹⁷ “to conclude the examination of decision of the cases which may have been submitted to it”⁹⁸ There are dozens of disputes that are decided related to these three areas that the two countries share that form part of the border. The IBWC is the adjudicative legacy of the Convention of 1889, the main mechanism to navigate the vagaries of the binational relationship concerning the shared waterways and boundaries. Since rivers form a large part of the U.S.-Mexico border, there had to be a mechanism to deal with changes in waterways that force a re-delimitation of their borders and shifts in property ownership.

The Convention of 1889 was not undertaken in isolation. It was built on prior treaties that the two countries had ratified. The Convention of 1889 implemented an earlier convention and was designed “[t]o facilitate the carrying out of the Principles contained in the Treaty of November 12, 1884, and to avoid the difficulty occasioned by reason of the changes which take place in the beds of the Rio Grande and Colorado Rivers.”⁹⁹ This treaty provided ways to delimit the shared boundaries:

⁹⁶ *Id.* art. V.

⁹⁷ *Water Boundary: Extending the Duration of the Convention of March 1, 1899*, Mex.-U.S., Dec. 2, 1898, T.S. No. 241, 4 [hereinafter *Convention of 1899*].

⁹⁸ *Convention Touching the International Boundary Line Where It Follows the Bed of the Rio Colorado*, Mex.-U.S., Nov. 12, 1884, 24 Stat. 1011.

⁹⁹ *Convention to Facilitate the Carrying Out of the Principles Contained in the Treaty of November 12, 1884 and to Avoid the Difficulties Occasioned by Reason*

All differences or questions that may arise on that portion of the frontier between the United States of America and the United States of Mexico where the Rio Grande and the Colorado rivers form the boundary line, whether such differences or questions grow out of alterations or changes in the bed of the aforesaid Rio Grande and that of the aforesaid Colorado River, or of works that may be constructed in said rivers, or of any other cause affecting the boundary line, shall be submitted for examination and decision to an International Boundary Commission, which shall have exclusive jurisdiction in the case of said differences or question.¹⁰⁰

The subsequent treaty between the two countries formed the United States-Mexico Treaty for Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande in February of 1944 ("1944 Treaty"), which concerned the waterways that feature the international border between them.¹⁰¹ Specifically, it deals with three watersheds shared by the two countries: the Colorado River, the Rio Grande basins, and the Tijuana River watershed. Notwithstanding these shared resources, Article 2 of the 1944 Treaty provides, in part, that each party has jurisdiction over matters within their respective territory, stating that, "[n]either Section shall assume jurisdiction or control over works located within the limits of the country of the other without the express consent of the Government of the latter."¹⁰² Territory is sacrosanct at the border. Article 2 also provides:

The works constructed, acquired or used in fulfilment of the provisions of this Treaty and located wholly within the territorial limits of either country, although these works may be international in character, shall remain, except as herein otherwise specifically provided, under the exclusive jurisdiction and control of the Section of the Commission in whose country the works may be situated.¹⁰³

The 1944 Treaty is important because it creates the process by which Minutes—further agreements of a binational nature—are created by the IBWC to implement the 1944 Treaty. Most critics view the current mandate, structure, and jurisdiction of the IBWC as inadequate to handle the complexities involved with water management on the

of the Changes Which Take Place in the Beds of the Rio Grande and Colorado Rivers, Mex.-U.S., Mar. 1, 1889, 26 Stat. 1512.

¹⁰⁰ *Id.* art 1.

¹⁰¹ Treaty for Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Mex.-U.S., Feb. 3, 1944, T.S. No. 994 [hereinafter 1944 Treaty].

¹⁰² *Id.* art. 2.

¹⁰³ *Id.*

border.¹⁰⁴ Some articles have extolled the 1944 Treaty for its applicability to modern environmental challenges which were not foreseen by its drafters.¹⁰⁵ The 1944 Treaty's ad-hoc system of Minutes may provide the IBWC with an opportunity to respond to changing conditions. Indeed, the Minute system has been used as a means by which treaty reform and extensions can be legally undertaken.¹⁰⁶

In July of 1990, Minute 283 was agreed upon to “consider a conceptual plan for an international solution which would provide for the proper collection, treatment and final disposal of sewage in excess of the capacities of existing facilities in San Diego, California/Tijuana, Baja California.”¹⁰⁷ A plan was developed, subject to agreement by the respective federal governments of each country, for the construction and operation of an international sewage plant. This Minute also stipulates that sewage was not to be discharged into the Tijuana River Valley.¹⁰⁸ On August 8, 1990, the Minute was turned into an agreement between the United States and Mexico and construction of the CILA Pump Station began.¹⁰⁹

Minute 320, which emerged from an IBWC meeting on October 5, 2015, references Articles 3, 16, and 24 of the 1944 Treaty.¹¹⁰ The IBWC established three work groups related to water quality, sediment, and sand solid waste, all comprised of stakeholders from both sides of the border. A Binational Core Group (“BNCG”) was created—comprised of IBWC representatives and representatives from federal, state, and local authorities and NGOs from both countries—

¹⁰⁴ See Craig J. Pritzlaff, *The Tragedy of Another Minute: IBWC Minute 308's Failure to Mend the Rio Grande River*, 9 L. & BUS. REV. AMERICAS 617 (2003); Mark A. Sinclair, Note, *The Environmental Cooperation Agreement Between Mexico and the United States: A Response to the Pollution Problems of the Borderlands*, 19 CORNELL INT'L L.J. 87, 110 (1986).

¹⁰⁵ Stephen P. Mumme, *The 1944 Water Treaty and the Incorporation of Environmental Values in U.S.-Mexico Transboundary Water Governance*, 112 ENV'T SCI. & POL'Y 126 (2020).

¹⁰⁶ Annelia Tinklenberg, *Will the Minute System Work to Modernize the International Boundary and Water Commission?*, U. OF N.M. DIGIT. REPOSITORY (July 21, 2007), https://digitalrepository.unm.edu/wr_sp/81 [<https://perma.cc/GX94-LGCE>].

¹⁰⁷ Minute No. 283, *supra* note 11, at 1.

¹⁰⁸ *Id.* at 8.

¹⁰⁹ INT'L BOUNDARY & WATER COMM'N, CILA PUMP STATION OPERATIONS AND NOTIFICATION PROTOCOL (July 2, 1990), https://www.ibwc.gov/Files/CILA_EmergencyProtocol_101817.pdf [<https://perma.cc/3BDL-Z2T8>].

¹¹⁰ Minute No. 320 of the International Boundary and Water Commission: General Framework for Binational Cooperation on Transboundary Issues in the Tijuana River Basin at 1 (Oct. 5, 2015), https://www.ibwc.gov/Files/Minutes/Minute_320.pdf [<https://perma.cc/F63T-UBUB>] [hereinafter Minute No. 320].

"to assist with the formulation of recommendations regarding trans-boundary issues in the Tijuana River Basin."¹¹¹ To keep the public informed, periodic newsletters are posted on the IBWC website.¹¹²

At the December 7, 2017, Citizens Forum, Edward Drusina, then USIBWC Commissioner,¹¹³ and government experts paid homage to Minute 320 and addressed priority issues of water quality, sediment, and solid waste in the Tijuana River watershed in the public document that the USIBWC had released prior to the meeting.

Among the actions are the development of a binational water quality monitoring program to include tributary canyons, development of a scope of work for a diagnostic of the binational diversion and pumping system, including development of alternatives in both the U.S. and Mexico, increased binational inspections of the Tijuana River, and a proposed sediment basin in the main Tijuana River channel. The Minute 320 Water Quality Work Group has convened several meetings to address ongoing water quality problems in the Tijuana River and to implement recommendations from the investigative report of the February 2017 transboundary sewage spill.¹¹⁴

A study of the Tijuana River, commissioned by the IBWC, concluded that there was no violation of the 1944 Treaty.¹¹⁵ Moreover, there was discussion of the relevance of Minute 283.¹¹⁶ Minute 317 was also explored, since it provided concrete steps toward minutes for studies.¹¹⁷ Minute 323 was also addressed.¹¹⁸ But in the end, the active minute was deemed to be Minute 320. In this sea of minutes, NSAs played

¹¹¹ *Id.*; see also Press Release, Int'l Boundary & Water Comm'n U.S. Section, Meeting of the IBWC Minute 320 Core Group Tijuana River Basin (Jan. 28, 2020).

¹¹² Minute No. 320, *supra* note 110.

¹¹³ See Edward Drusina, P.E., LINKEDIN, <https://www.linkedin.com/in/edward-drusina-p-e-23b34254> (last visited Feb. 11, 2022).

¹¹⁴ Press Release, Int'l Boundary & Water Comm'n U.S. Section, Tijuana River Sediment, Integrated Water Management, and Water Quality Activities on Agenda for December 7 Public Meeting in Imperial Beach, CA (Nov. 21, 2017).

¹¹⁵ USIBWC CITIZENS FORUM MEETING MINUTES, TIJUANA RIVER NAT'L ESTUARINE RSCH. RSRV. 1 (Dec. 7, 2017), https://www.ibwc.gov/Files/CF_SBIWTP_Minutes_120717.pdf [<https://perma.cc/CL46-2DDF>].

¹¹⁶ *Id.* at 4.

¹¹⁷ *Id.* at 1.

¹¹⁸ Chandler Donald, *Minute 323 Agreement Between the U.S. and Mexico Ensures Water Sharing Until 2026*, DAILY WILDCAT (Oct. 3, 2017), <http://www.wildcat.arizona.edu/article/2017/10/minute-323-agreement-between-u-s-mexico-ensures-water-sharing-until-2026> [<https://perma.cc/6U22-6HCT>].

increasing roles in calling for monitoring and enforcement. The IBWC, however, had a different idea.

On that December night in 2017, Drusina announced that there was no indication that there were any treaty violations, bringing an end to the discussion.¹¹⁹ Such arbitrary decision making did not bode well for his long-term viability as Commissioner of the USIBWC.¹²⁰ While Drusina, with his counterpart from the Mexico Section of the IBWC, Roberto Salmón, did work on short-term upgrades to the Tijuana sewage collection and treatment system in 2017 and 2018,¹²¹ the first public meeting of the BNCG occurred on January 28, 2020 at Tijuana City Hall some two years after the December 7, 2017 Citizens Forum meeting.¹²²

At the meeting, members of the public gave their input on the current levels of environmental degradation and their impacts on quality of life. Community members discussed concerns about marine pollution levels, the influence of coastal currents on both sides of the border, wastewater treatment, the pollution impact on the Tijuana River Estuary and the resulting beach closures. Members of the public also urged the BCG to engage local stakeholder groups in further discussions.¹²³

In short, it was just more complaints and more discussions of ways to cooperate binationally.

Drusina left his position as Commissioner of the USIBWC in May of 2018.¹²⁴ After more than eight years as the Commissioner and

¹¹⁹ USIBWC CITIZENS FORUM MEETING MINUTES, *supra* note 115, at 1.

¹²⁰ Carlos Peña, an engineer “brought from HQ,” according to Drusina, was present at the December 7, 2017, meeting but did not effectively answer any questions. Also present at the Citizens Forum was Edward Spriggs, a City of Imperial Beach Council Member. Citizens Forum Committee Members Steve Smullen and Marisa Quiroz asked questions. Three members did not bother to show up at all.

¹²¹ Sandra Dibble, *Binational Water Commission Presses for Upgrades to Battle Cross-Border Sewage “Crisis”*, SAN DIEGO UNION-TRIB. (Mar. 6, 2018), <https://www.sandiegouniontribune.com/news/border-baja-california/sd-me-ibwc-cila-20180302-story.html> [<https://perma.cc/8TUS-E3LR>].

¹²² *IBWC Binational Core Group First Public Meeting*, SAN DIEGO REG’L CHAMBER OF COM. (Feb. 13, 2021), <https://sdchamber.org/2020/02/ibwc-binational-core-group-meeting/> [<https://perma.cc/XBR7-2RSU>].

¹²³ *Id.*

¹²⁴ Joshua Emerson Smith, *Head of Federal Water Agency Overseeing Efforts to Combat Tijuana Sewage Steps Down*, SAN DIEGO UNION-TRIB. (May 14, 2018), <https://www.sandiegouniontribune.com/news/environment/sd-me-ibwc-chief-20180514-story.html> [<https://perma.cc/E95G-698U>].

a non-stop flow of controversies¹²⁵ and criticism about the IBWC's work,¹²⁶ Drusina joined Weston Solutions, Inc., in September of 2018 as a Project Engineer.¹²⁷ Weston Solutions Inc. was a corporate contractor for the City of Imperial Beach (which borders Tijuana, Mexico), and in 2012 the company completed a Tijuana River bacterial source identification study.¹²⁸

Whether it is corporations working at the border to provide bi-national solutions or not-for-profit organizations, some of them nationally based coalitions of environmental advocacy groups, there is a proliferating number of NSAs at the border. As Brian Roach explained, “[l]arge corporations are an economic, political, environmental, and cultural force that is unavoidable in today’s globalized world. Large corporations have an impact on the lives of billions of people every day, often in complex and imperceptible ways.”¹²⁹

III. THE EXPANDING ROLE OF NON-STATE ACTORS

NSAs matter more and more.¹³⁰ According to Ann Florini, “states increasingly have to share authority in the international arena with a range of different [NSAs].”¹³¹ These NSAs include NGOs, TNCs, international institutions, regional agencies, financial institutions, trade associations, organized labor groups, Indigenous Peoples, lobbyists, academicians, and investors. They also include terrorist groups, transnational criminal organizations,¹³² and private military and security companies.

¹²⁵ *Questions Being Asked About Massive Cross-Border Sewage Spill*, KPBS (Mar. 2, 2017),

<http://www.kpbs.org/news/2017/mar/02/questions-being-asked-about-massive-cross-border-s> [<https://perma.cc/SV7H-GE8M>].

¹²⁶ See Smith, *supra* note 124.

¹²⁷ See LINKEDIN, *supra* note 113.

¹²⁸ WESTON SOLUTIONS, INC., TIJUANA RIVER BACTERIAL SOURCE IDENTIFICATION STUDY: FINAL REP. (2012).

¹²⁹ BRIAN ROACH, CORPORATE POWER IN A GLOBAL ECONOMY 1 (2007); *Cf.* While there is a common belief among scholars and media pundits that a few TNCs dominate the global economy, there are few studies to assist in this conclusion. Stefania Vitali, James B. Glattfelder & Stefano Battiston, *The Network of Global Corporate Control*, PLOS ONE (Oct. 26, 2011), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0025995> [<https://perma.cc/2TUM-AK8D>].

¹³⁰ *Cf.* “The importance of [NSAs] and the extent of transnational activities are obvious. The conclusion that the state-centric conception of international politics is made obsolete by them does not follow.” WALTZ, *supra* note 90, at 94.

¹³¹ Florini, *supra* note 92, at 28.

¹³² Mark Galeotti wrote: “organized crime is now transnational: all the main groupings operate and are structured internationally, and even essentially domestic

There are advantages that attend the increased participation of NSAs in the policy-making processes of international institutions. According to Diane Stone, “[t]hese organisations are not weighed down by the bureaucratic weight of government agencies. Consequently, they have a capacity for direct action and immediacy not always available to official agencies in mobilising intellectual resources via conferences, study groups and research networks.”¹³³ Ronnie D. Lipschutz and Cathleen Fogel explained, “[s]ocial groups have come to fulfill a variety of normative and functional roles, ranging from observers of elections, to advisors to UN projects around the world, to writers and implementers of rules and regulations in a range of global forums;”¹³⁴ and so too have corporations come to fulfil these roles.

A. Corporations

TNCs have been very active at the U.S.-Mexico border. TNCs are “incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates”; while “[a] parent enterprise is defined as an enterprise that controls assets of other entities in countries other than its home country, usually by owning a certain equity capital stake.”¹³⁵ These corporations manufacture products for the North American marketplace in *maquiladoras*, Mexico-based factories, and they do the work of sovereign States in operating border activities.

gangs are involved in cross-border traffic, whether in drugs, guns or dirty money.” Mark Galeotti, *Underworld and Upperworld: Transnational Organized Crime and Global Society*, in NON-STATE ACTORS IN WORLD POLITICS 203, 204 (Daphné Josselin & William Wallace eds., 2001).

¹³³ Diane Stone, *Private Authority, Scholarly Legitimacy and Political Credibility: Think Tanks and Informal Diplomacy*, in NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM, *supra* note 84, at 211, 219.

¹³⁴ Lipschutz & Fogel, *supra* note 88, at 117.

¹³⁵ U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2012: METHODOLOGICAL NOTE 3 (2012). The definition of transnational corporation goes on to provide:

An equity capital stake of 10% or more of the ordinary shares or voting power for an incorporated enterprise, or its equivalent for an unincorporated enterprise, is normally considered as the threshold for the control of assets [(in some countries, an equity stake other than that of 10% is still used. In the United Kingdom, for example, a stake of 20% or more was the threshold until 1997)]. A foreign affiliate is an incorporated or unincorporated enterprise in which an investor, who is resident in another economy, owns a stake that permits a lasting interest in the management of that enterprise (an equity stake of 10% for an incorporated enterprise, or its equivalent for an unincorporated enterprise).

Id.

There is an outsourcing of relations as sovereign States no longer have the monopoly over transnational relations and agreement making. Samuel Truett documents how individuals, networks, and other private actors have played historical roles alongside the increasing dominance of corporations in the borderlands region:

[A]s corporations and states gained power, so too did ordinary people and landscapes. Networks of corporate and state power supported equally powerful shadow pathways oriented around the local lives of Mexican smelter workers, Yaqui miners, Chinese farmers, U.S. colonists, and others. These human webs kept the borderlands in motion, even as states and corporations bent their collective will to lashing this fugitive terrain to the managerial foundations of modern America.¹³⁶

As such, TNCs are NSAs of growing importance in international affairs.¹³⁷ Marina Caparini and Otwin Marenin pointed out that “[a]nother trend of concern in border management is the growing involvement of private actors (corporate firms such as airline carriers) in surveillance and migration control functions and thereby in security governance.”¹³⁸

The increasing vigilance at the borders between countries, particularly borders separating the developed world from the developing world, has become even more defined as private actors take over the responsibilities of border management and border security. For Lee Rodney, “there is an increasingly blurred boundary between private actors such as media networks and vigilante groups seeking to lay claim to the US border and the government institutions charged with the maintenance of territorial sovereignty.”¹³⁹ The corporate sector has

¹³⁶ SAMUEL TRUETT, *FUGITIVE LANDSCAPES: THE FORGOTTEN HISTORY OF THE U.S.-MEXICO BORDERLANDS* 102–03 (2006).

¹³⁷ See ORG. ECON. COOPERATION & DEV., *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* 17 (2011): (“These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed.”).

¹³⁸ Marina Caparini & Otwin Marenin, *Conclusion: Border Management as an Element of Security Sector Governance*, in *BORDERS AND SECURITY GOVERNANCE: MANAGING BORDERS IN A GLOBALISED WORLD* 305, 310 (Marina Caparini ed., 2006).

¹³⁹ LEE RODNEY, *LOOKING BEYOND BORDERLINES: NORTH AMERICA’S FRONTIER IMAGINATION* 162 (2017).

increasing influence over national governments.¹⁴⁰ MNCs “can be viewed either as independent actors operating in the interstices of state-to-state relations or as an instrument of foreign policy of states within which the parent companies are located.”¹⁴¹

It is no secret that corporations are increasingly being consulted for input into government policies where there is “an alignment of interests,” even in a Democratic White House.”¹⁴² This is the case on most issues, and the environment is no different. Critics have written:

There are other actors in environmental policy besides states and transnational environmental activist organizations, and none more important than [TNCs], as anybody will soon find who does research on the mining, oil and gas, pharmaceutical, agricultural and forest sectors. Corporations have in theory no political power, they operate only in the economic sphere. One may choose to emphasize how reality squarely contradicts this theory, or one might choose to highlight instead the fact that they often operate in countries distant from their home base, and have difficulties in exercising power. Bribery and corruption often arise from lack of direct political power.¹⁴³

One member of the general public in attendance at the Citizens Forum meeting on December 7, 2017 asked how a new study that was being proposed by the USIBWC was different than a previous one that had been conducted under contract with URS Corporation (“URS”).¹⁴⁴ No one from the USIBWC attending that night knew about the previous URS study, one that had been completed for \$800,000 in 2012 (having been awarded in 2009), only five years prior.¹⁴⁵ Here there was a private corporation transacting work for the U.S. government

¹⁴⁰ Tania Voon, *Multinational Enterprises and State Sovereignty Under International Law*, 21 ADEL. L. REV. 219, 234–41 (1999).

¹⁴¹ Robert S. Walters, *International Organizations and the Multinational Corporation: An Overview and Observations*, 403 ANNALS AM. ACAD. POL. & SOC. SCI. 127, 127 (1972).

¹⁴² Roberta Rampton, *Obama Opens White House Doors to Forge CEO Alliances*, REUTERS (Dec. 15, 2015), <http://www.reuters.com/article/us-usa-obama-coos-insight-idUSKBN0TY1FI20151215> [<https://perma.cc/U6PJ-5T45>].

¹⁴³ JOAN MARTINEZ-ALIER, *THE ENVIRONMENTALISM OF THE POOR: A STUDY OF ECOLOGICAL CONFLICTS AND VALUATION* 196 (2002).

¹⁴⁴ See Press Release, Int’l Boundary & Water Comm’n U.S. Section, October 22 Public Meeting to Discuss Environmental Issues Affecting the Tijuana River Valley (Oct. 5, 2009).

¹⁴⁵ CAL. DEP’T PARKS & RECREATION, *NELSON SLOAN QUARRY RESTORATION PLANNING AND ENVIRONMENTAL REVIEW PROJECT* 9 (2016).

dealing with border issues, and yet no government official present at the meeting had any knowledge of this work or the history behind it.¹⁴⁶

According to Resolution No. R9-2015-0035 of the California Water Quality Control Board San Diego Region, dated March 2015:

11. In early 2010, the San Diego Water Board requested and was granted \$700,000 from the State's Cleanup and Abatement Account (CAA) to support the Recovery Team's efforts. The City of San Diego signed a CAA grant agreement with the State in 2010 and contracted with the URS [] to investigate River Valley hydrology and hydraulics and to characterize trash and sediment.
12. URS Corporation has also played a lead role in the development and writing of the Recovery Team's Recovery Strategy, which identifies problems and challenges and outlines collaborative processes and management priorities by which Recovery Team members might develop and implement projects to cost-effectively address sediment and trash problems in the Valley.¹⁴⁷

Thus, URS had been contracted to write a trash and sediment characterization study,¹⁴⁸ as well as to develop and write a recovery strategy.¹⁴⁹

With its office in La Jolla, California, URS is a long way from the polluted waters and trash of the Tijuana River Valley,¹⁵⁰ the region

¹⁴⁶ See USIBWC CITIZENS FORUM MEETING MINUTES, *supra* note 115, at 1 (explaining that at the USIBWC Citizens Forum Meeting on December 7, 2017, Commissioner of USIBWC, Edward Drusina, mentioned various studies during the meeting, including one being conducted by the City of San Diego, U.S. Army Corps of Engineers).

¹⁴⁷ Cal. Reg'l Water Quality Bd. San Diego Region, Resolution No. R9-2015-0035, A Resolution Endorsing the Tijuana River Valley Recovery Team Five-Year Action Plan at 3, 4 (Mar. 16, 2015).

¹⁴⁸ *Id.* at 8; see also URS CORP., TIJUANA RIVER WATERSHED MANAGEMENT AREA FINAL WATER QUALITY IMPROVEMENT PLAN (2016).

¹⁴⁹ URS CORP., ANALYSIS OF EXTREME PEAK FLOWS FOR THE MAIN TIJUANA RIVER, SAN DIEGO, CALIFORNIA (2012); see also URS CORP., PILOT CHANNEL BORINGS AND SEDIMENT CHARACTERIZATION REPORT (2011); URS CORP., EXCAVATION AND POST-STORM OBSERVATIONS IN TJ RIVER VALLEY (2011); URS CORP., THE CITY OF SAN DIEGO, TIJUANA RIVER PILOT CHANNEL AND SMUGGLER'S GULCH CHANNEL INDIVIDUAL MAINTENANCE PLAN (2015); URS CORP., INDIVIDUAL HYDROLOGIC AND HYDRAULIC (IHHA) ASSESSMENT REPORT (2012).

¹⁵⁰ See ALL. BUS. CTRS., <https://www.abcn.com/offices-la-jolla-california-executive-square-3493> [<https://perma.cc/BST9-6DBG>] (last visited Jan. 15, 2022).

in which URS played a pivotal role analyzing the problem.¹⁵¹ This corporation's involvement in the Tijuana River Valley and binational environmental matters demonstrates the complexity of the public-private relationships that exist and the private contracting roles that corporations can carve out in binational affairs at the U.S.-Mexico border. In 2014, URS merged with AECOM,¹⁵² an \$18.2 billion annual revenue company.¹⁵³ AECOM, a publicly listed company in the United States, is:

[A] global network of experts working with clients, communities and colleagues to develop and implement innovative solutions to the world's most complex challenges.

Delivering clean water and energy. Building iconic skyscrapers. Planning new cities. Restoring damaged environments. Connecting people and economies with roads, bridges, tunnels and transit systems. Designing parks where children play. Helping governments maintain stability and security.

[The Company] connect[s] expertise across services, markets, and geographies to deliver transformative outcomes. Worldwide, [it] design[s], build[s], finance[s], operate[s] and manage[s] projects and programs that unlock opportunities, protect our environment and improve people's lives.¹⁵⁴

URS and AECOM have been brought into several lawsuits regarding claims of subcontractor fraud, fraudulent overbilling, plant safety violations, hazardous waste violations, and air and waste regulation violations, but none were related to the U.S.-Mexico border.¹⁵⁵ There have been several documented instances of misconduct related to other work. For example, in 2016, the U.S. Attorney's Office for the Eastern District of Washington and the Department of Justice ("DOJ") announced a settlement agreement between URS, AECOM, and Bechtel National Inc. ("BNI"). The settlement requires BNI and URS to pay \$125 million, and it

resolves allegations that BNI illegally used taxpayer dollars to pay for a multi-year Congressional lobbying campaign to

¹⁵¹ URS CORP., TIJUANA RIVER VALLEY TRASH, WASTE TIRE AND SEDIMENT CHARACTERIZATION STUDY: A STATUS UPDATE (2009).

¹⁵² Press Release, AECOM, AECOM and URS Announce Preliminary Merger Consideration Election Results (Oct. 16, 2014).

¹⁵³ See *About AECOM*, AECOM, <https://aecom.com/cn/about-aecom-2/?lang=en> [<https://perma.cc/25PN-QVD7>] (last visited Jan. 20, 2022).

¹⁵⁴ *Id.*

¹⁵⁵ *URS Corporation*, FED. CONTRACTOR MISCONDUCT DATABASE, <https://www.contractormisconduct.org/contractors/55/urs-corporation> [<https://perma.cc/Y8MH-DELP>] (last visited Jan. 20, 2022).

acquire, among other things, more taxpayer dollars for BNI's continued work on the WTP [(Waste Treatment & Immobilization Plant)] project . . . for over 13 years — from January 1, 2001, to June 30, 2013 — BNI and URS knowingly submitted false claims for payment while failing to comply with the rigorous nuclear quality requirements for the DOE's WTP project.¹⁵⁶

Corporate work for governments can be lucrative but there are myriad compliance requirements.

B. *Non-Governmental Organizations*

Kjell Skjelsbaek, in a landmark 1972 study on NGOs, wrote: The NGO world is growing and changing in many ways. New organizations are added and old ones disappear. New countries become represented and others see their relative share of influence reduced. New functions are performed, new procedures adopted, and more channels of information established. Internal structures of organizations are reformed. These changes affect the importance of NGOs in the world. It is hard to form a conclusive opinion about the role they are playing today and harder still to predict their future significance.¹⁵⁷

But NGOs, in addition to other NSAs, have been involved in international governance issues for many years before this study. In the *Reparations* case, the ICJ concluded, “[t]hroughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.”¹⁵⁸

Since that seminal case, there have been several different international instruments—in the form of treaties and the soft law of United Nations reports and resolutions—that detail the rights and duties of NSAs. These include the United Nations Committee on Economic, Social and Cultural Rights (“CESCR”) General Comment No. 12: The Right to Adequate Food; CESCR General Comment No. 15: The Right to Water; CESCR General Comment No. 14: The Right to the

¹⁵⁶ Press Release, Dep't of Just., BNI and URS to Pay \$125 Million Resolving Alleged False Claims Regarding Deficient Nuclear Quality Procurements at the Waste Treatment Plant and Improper Payments to Lobby Congress (Nov. 25, 2016).

¹⁵⁷ Skjelsbaek, *supra* note 89, at 423.

¹⁵⁸ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 178 (April 11).

Highest Attainable Standard of Health; Committee on the Rights of the Child (“CRC”) General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (Articles 4, 42, and 44); International Labour Organization C029 Forced Labor Convention; Organisation of Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and the International Convention on Civil Liability for Oil Pollution Damage.¹⁵⁹ The International Tribunal on the Law of the Sea has extended its jurisdiction to include NSAs in cases before its Seabed Chamber.¹⁶⁰ Some NSAs have human rights obligations and duties under *ius in bello*.¹⁶¹

Hedley Bull envisioned possibilities for other actors in the international system, writing that “it is reasonable to assume that new forms of universal political organization may be created in the future”¹⁶² Sabino Cassese stated the disruption simply, writing that “the

¹⁵⁹ U.N. Comm. on Econ. & Cultural Rts., General Comment No. 12: The Right to Adequate Food, U.N. Doc. E/C.12/1999/5 (1999); U.N. Comm. on Econ. & Cultural Rts., General Comment No. 15: The Right to Water, U.N. Doc. E/C.12/2002/11 (2003); U.N. Comm. on Econ. & Cultural Rts., General Comment No. 14: The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4 (2000); U.N. Comm. on the Rights of the Child, General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/5 arts. 4, 42, 44 (2003); Int’l Lab. Org., Forced Labour Convention No. 29 (1930); Org. for Econ. Coop. & Dev., Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997); International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3.

¹⁶⁰ See United Nations Convention on the Law of the Sea art. 187(c), Dec. 10, 1982, 1833 U.N.T.S. 3.

¹⁶¹ Under Article 96(3) of Additional Protocol I to the Geneva Convention, “the authority representing the people struggling against the colonial, alien, or racist party to the Protocol can undertake to apply the Conventions and the Protocol by making a declaration to the depository (the Swiss Federal Council).” Andrew Clapham, *Human Rights Obligations of Non-state Actors in Conflict Situations*, 88 INT’L REV. RED CROSS 491, 494 (2006); see also Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Rome Statute of the International Criminal Court art. 8(2) (creating International Humanitarian Law obligations for non-government armed or rebel groups).

¹⁶² HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 21 (1st ed. 1977). Bull wrote of

[t]he Kantian or universalist tradition, at the other extreme, takes the essential nature of international politics to lie not in the conflict among states, as on the Hobbesian view, but in the trans-national social bonds that link the individual human beings who are the subjects or citizens of states. The dominant theme of international relations, on the Kantian view, is only apparently the relationship among states, and is really the relationship among all men in the community of mankind – which exists

entire world of actors within this new space is in constant movement”¹⁶³ Jonas Tallberg and Christer Jönsson explained:

While international institutions were long the exclusive preserve of national governments, the past decades have witnessed a gradual and partial shift from interstate cooperation to more complex forms of governance, involving participation by transnational actors, such as [NGOs], advocacy networks, party associations, and [MNCs]. Increasingly, states and international institutions are engaging transnational actors as policy experts, service providers, compliance watchdogs and stakeholder representatives.¹⁶⁴

Across the globe, NSAs have been able to gain access to international institutions, the very ones that make and harmonize public policy, helping democratize their respective proceedings to some degree.¹⁶⁵ “Critics portray international institutions as suffering from ‘democracy deficits,’ . . . such as participation, accountability, and transparency.”¹⁶⁶ Transnational actors are often better suited to give a voice to the objects of decisions by international organizations, are closer to the ground, and are more representative and current with the thinking of the stakeholders that are affected by international rulemaking and policy implementation.¹⁶⁷

It is argued that involving civil society in the governance of international institutions is becoming increasingly necessary because the

potentially, even if it does not exist actually, and which when it comes into being will sweep the system of states into limbo.

Id.

¹⁶³ Sabino Cassese, *Foreword: The New Rulers: The Actors and Processes of the Global Space*, in *THE ACTORS OF POSTNATIONAL RULE-MAKING: CONTEMPORARY CHALLENGES OF EUROPEAN AND INTERNATIONAL LAW* at ix, x (Elaine Fahey ed., 1st ed. 2016).

¹⁶⁴ Jonas Tallberg & Christer Jönsson, *Transnational Actor Participation in International Institutions: Where, Why and with What Consequences?*, in *TRANSNATIONAL ACTORS IN GLOBAL GOVERNANCE: PATTERNS, EXPLANATIONS, AND IMPLICATIONS* 1, 1 (Christer Jönsson & Jonas Tallberg eds., 2010).

¹⁶⁵ “In the absence of anything resembling a global *demos*, transnational actors are then sometimes seen as a substitute source of democratic legitimacy.” *Id.* at 17.

¹⁶⁶ *Id.* at 2; Magdalena Bexell, Jonas Tallberg & Anders Uhlin, *Democracy in Global Governance: The Promises and Pitfalls of Transnational Actors*, 16 *GLOB. GOVERNANCE* 81, 89–90 (2010) (“Partnerships hold a *promise* to further democracy in global governance by broadening participation and providing spaces for deliberation on global public goods.”).

¹⁶⁷ Florini, *supra* note 92, at 28 (“The information revolution increases the capacity of non-state actors relative to states by making it possible for ephemeral networks to lower transaction costs, just as more permanent institutions have always done.”).

traditional approach of consultation is inadequate to gauge potential contribution to institutions. Civil society groups are becoming key actors in international arenas. Some scholars have examined a new generation of twenty-first century international institutions that are moving away from exclusively inter-governmental structures and toward multi-stakeholder partnerships where NSAs are full participants in governance.¹⁶⁸

One need only think of NGOs like Amnesty International in its efforts to raise consciousness and affect policy changes in dictatorial governments around the world,¹⁶⁹ or Médecins Sans Frontières (“MSF”) in keeping the world informed of the atrocities of armed conflict and providing much needed medical relief in zones of armed conflict.¹⁷⁰ Amnesty International won the Nobel Peace Prize in 1977¹⁷¹ and MSF won it in 1999.¹⁷² Some local institutions have even displaced international financial institutions. Scholars have written:

Nurtured by local [NGOs] in development countries such as the Grameen Bank, these grassroots organisations (GROs) have proved capable of significantly improving the living conditions of their members, opening public space for women and the poor, and diminishing the need for constant

¹⁶⁸ David Gartner, *Beyond the Monopoly of States*, 32 U. PA. J. INT’L L. 595, 597 (2010).

¹⁶⁹ See Morton E. Winston, *Assessing the Effectiveness of International Human Rights NGOs: Amnesty International*, in *NGOS AND HUMAN RIGHTS: PROMISE AND PERFORMANCE* 25 (2001) (“[Amnesty International] has been called the ‘conscience of the world’ for its tireless work in documenting and publicizing human rights violations, such as unfair trials for political prisoners, the imprisonment of prisoners of conscience (a term that Amnesty coined), executions (extrajudicial and judicial), disappearances, the practice of torture, judicial harassment of journalists and trade unionists, massacres of innocents, and instances of genocide, among others.”); see also Stone, *supra* note 133, at 215 (“Other non-state actors—business associations as well as advocacy groups such as Greenpeace or Amnesty International—find the substantive analytic work undertaken by think tanks useful in bolstering policy recommendations and normative positions.”).

¹⁷⁰ PETER REDFIELD, *LIFE IN CRISIS: THE ETHICAL JOURNEY OF MÉDECINS SANS FRONTIÈRES* 1 (2013) (“MSF[] has become a staple reference in international aid . . .”).

¹⁷¹ For Stephen Hopgood, who critiqued the explosion of human rights litigation, the “postwar malaise was the milieu for the creation of the first modern global human rights organization, Amnesty International, formed in London in 1961. It was . . . a look back to the past, not a vision of the future.” STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS*, at xi (2013).

¹⁷² See *All Noble Peace Prizes*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/lists/all-nobel-peace-prizes/> [https://perma.cc/4HZS-4DM7] (last visited Feb. 9, 2022).

flows of aid from national and international public agencies.¹⁷³

The work of the Bill and Melinda Gates Foundation in eradicating disease and empowering women is another example.¹⁷⁴ In early 2018, the Foundation paid Nigeria's debt to the Japanese government for a polio eradication program.¹⁷⁵ Two years later it was leading the charge for a vaccine for COVID-19.¹⁷⁶

Likewise, some international NGOs have led the way on anti-corruption efforts. Berlin-based Transparency International has become the gold standard in measuring corruption worldwide.¹⁷⁷ The International Consortium of Investigative Journalists exposed the unethical, and at times illegal, behavior of world leaders through the Panama Papers.¹⁷⁸

NGOs from both sides of the U.S.-Mexico border are involved in many aspects of policy making and regulatory compliance. On the other side "stand a growing number of [NSAs] that are developing increasingly robust functional legal orders through which they operate

¹⁷³ Kendall W. Stiles, *Grassroots Empowerment: States, Non-State Actors and Global Policy Formulation*, in NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM, *supra* note 84, at 32 (citing DAVID C. KORTEN, *GETTING TO THE TWENTY-FIRST CENTURY: VOLUNTARY ACTION AND THE GLOBAL AGENDA* (1990)).

¹⁷⁴ NICHOLAS D. KRISTOF & SHERYL WUDUNN, *HALF THE SKY: TURNING OPPRESSION INTO OPPORTUNITY FOR WOMEN WORLDWIDE* 28 (2009); J. Youde, *Private Actors, Global Health, and Learning the Lessons of History*, 32 *MED. CONFLICT & SURVIVAL* 203–20 (2016).

¹⁷⁵ Mythili Sampathkumar, *Gates Foundation to Pay \$76 million of Nigeria's Debt to Help Eradicate Polio*, *INDEPENDENT* (Jan. 16, 2018), <http://www.independent.co.uk/news/world/africa/bill-gates-nigeria-debt-pay-polio-eradication-foundation-money-pledge-a8163056.html> [<https://perma.cc/47RF-NCTN>].

¹⁷⁶ *See Gates Foundation Announces New Funds to Develop COVID-19 Vaccines and Increase Access to Affordable Vaccines in Low-Income Countries*, BILL & MELINDA GATES FOUND. (Nov. 12, 2020), <https://www.gatesfoundation.org/Ideas/Media-Center/Press-Releases/2020/11/Gates-Foundation-announces-new-funds-to-develop-COVID-19-vaccines> [<https://perma.cc/KV6Y-NVJC>].

¹⁷⁷ *See* NORWEGIAN AGENCY DEV. COOP., *EVALUATION OF TRANSPARENCY INTERNATIONAL*, at xvii (2011) ("Transparency International Secretariat (TI-S) has succeeded in maintaining a clear operating profile and developing a sustained global effort that is directly relevant to the field of corruption. The global governance of the movement is distinctive, with TI-S providing a unifying reference point, protecting in an effective way the 'signature' or 'brand' of the movement. The balance between TI-S and the chapters remains fluid and at times contested but, overall, the current model works well.").

¹⁷⁸ *See* BASTIAN OBERMAYER & FREDERIK OBERMAIER, *THE PANAMA PAPERS: BREAKING THE STORY OF HOW THE RICH & POWERFUL HIDE THEIR MONEY* (2016).

that appear to destabilize the conceptual order on which the law-state relationship is maintained.”¹⁷⁹

During the December 7, 2017, Citizens Forum, there were several Mexican NSAs present.¹⁸⁰ It was no surprise that “[t]he nonprofit sector, broadly understood to include neighborhood associations, social clubs, professional organizations, unions, churches, and private schools, has a long history in Mexico.”¹⁸¹

The Mexicans present at the Citizens Forum meeting had developed a multiple stakeholder approach to planning that culminated in the development of the “Program for Comprehensive Management of Water in the Tijuana River Basin,” which “aims to improve the environmental quality of the basin through adaptive management and social participation.”¹⁸² Speaking in Spanish (and translated into English courtesy of the IBWC), Gabriela Caloca Michel, Project Coordinator for Pronatura Noroeste and one of the stakeholders in the multiagency collaboration from Mexico, discussed the results of a broad planning effort to address concerns in the Tijuana River Basin. With the financial support of the Gonzalo Rio Arronte Foundation,¹⁸³ this broad participatory planning process has been led by Pronatura Noroeste, the College of the Northern Border (Colegio de la Frontera Norte), and the Border Project of Environmental Education and Water and Social Welfare since 2016. In doing so,

The initiative was able to develop a comprehensive assessment of the basin and create alliances with three levels of government in Mexico and the United States, directly benefiting 5 million users. The team plans to insert the Management Program in Minute 320 for formalization and compliance. In addition, the team plans to form a binational working group to implement the master plan. As part of the interexchange meeting activities, the Pronatura Noroeste team

¹⁷⁹ Larry Catá Backer, *The Emerging Normative Structures of Transnational Law: Non-State Enterprises in Polycentric Asymmetric Global Orders*, 31 *BYU J. PUB. L.* 1, 4 (2016).

¹⁸⁰ See USIBWC CITIZENS FORUM MEETING MINUTES, *supra* note 115.

¹⁸¹ SABET, *supra* note 13, at 9 (citing 1 CARLOS FORMENT, *DEMOCRACY IN LATIN AMERICA 1760-1900: CIVIC SELFHOOD AND PUBLIC LIFE IN MEXICO AND PERU* (2003)).

¹⁸² *Outcomes of Tijuana River Basin Project and Colorado River Delta Project Were Presented at Gonzalo Rio Arronte Foundation*, PRO NATURA NOROESTE AC (May 23, 2019), <https://pronatura-noroeste.org/en/news/outcomes-tijuana-river-basin-project-and-colorado-river-delta-project-were-presented-gonzalo> [<https://perma.cc/GA82-SRKS>].

¹⁸³ FUNDACIÓN RÍO ARRONTE, <https://fundaciongonzalorioarronte.org> [<https://perma.cc/HR4J-JZ5Q>] (last visited Jan. 20, 2022).

participated in the presentation of the new strategic focuses of the Gonzalo Río Arronte Foundation and a workshop with other civil society organizations.¹⁸⁴

There is no surprise about the rise in civil society participation in governance issues on the Mexico side of the border. As Mexico continues to move from a one-party form of government toward liberal democracy, “many Mexicans have turned away from the clientelism, radicalism, and skepticism of the past in favor of autonomous collective action.”¹⁸⁵

NGOs, so-called “cooperating agencies” in IBWC parlance, committed to environmental protection have long been operating on the U.S. side of the U.S.-Mexico border as well.¹⁸⁶ As an example, Southwest Wetlands Interpretive Association (“SWIA”) is a U.S.-based 501(c)(3) non-profit organization founded in 1979. “SWIA is dedicated to the education in and acquisition, preservation and restoration of wetlands.”¹⁸⁷ Likewise, the Friends of San Diego Wildlife Refuges is a non-profit citizen’s organization dedicated to supporting conservation and promoting awareness and appreciation of the National Wildlife Refuges of San Diego County.¹⁸⁸ The refuges include the Tijuana Slough, San Diego Bay, and San Diego National Wetland Reserves. The Friends of San Diego Refuges runs the Clapper Rail Nest Gift Shop inside the Tijuana Estuary Visitor Center.¹⁸⁹ In July of 2000, Project Clean Water commenced “to provide a broad and inclusive forum for exploring water quality issues of regional significance.”¹⁹⁰ Much of the Project’s focus during its first two years was on establishing a visible forum to discuss issues of shared concern, to find consensus solutions to priority problems, and to characterize baseline conditions in the region’s watersheds.¹⁹¹

¹⁸⁴ PRO NATURA NOROESTE AC, *supra* note 182.

¹⁸⁵ SABET, *supra* note 13, at 7.

¹⁸⁶ *TRNERR Managing Agencies*, TIJUANA RIVER NAT’L ESTUARINE RSCH. RSRV. (June 8, 2010), <http://trnerr.org/trnerr-partners> [<https://perma.cc/3AWM-MR6X>].

¹⁸⁷ *Who We Are*, SW. WETLANDS INTERPRETIVE ASS’N, <http://www.swia4earth.org> [<https://perma.cc/B7NA-FGAZ>] (last visited Jan. 20, 2022).

¹⁸⁸ FRIENDS OF SAN DIEGO WILDLIFE REFUGES, *About Us*, http://friendsofsdrefuges.org/?page_id=12 [<https://perma.cc/KK8G-E4MU>] (last visited Feb. 9, 2022).

¹⁸⁹ *Tijuana Estuary Visitor Center*, TIJUANA RIVER NAT’L ESTUARINE RSCH. RSRV., https://trnerr.org/plan_a_visit/visitor_center [<https://perma.cc/NN2D-74MU>] (last visited Jan. 20, 2022).

¹⁹⁰ *See* PROJECT CLEAN WATER, <https://projectcleanwater.org/about> [<https://perma.cc/PLK7-GN2U>] (last visited Jan. 21, 2022).

¹⁹¹ *Id.*

There are also several other environmental advocates who use lawsuits to change government policy and force enforcement of domestic or international treaty regulations. Using the Clean Water Act, these NGOs alleged that the secondary treatment plant was not meeting standards.¹⁹² The proliferating number of NSAs are taking on increasingly important roles in mediating bilateral relations, often getting around if not replacing the sovereign State in solving problems, outside of international law and traditional diplomacy.¹⁹³

A good example is the Surfrider Foundation, which teamed up with the Blue Water Task Force to perform water quality testing on the Tijuana sewage.¹⁹⁴ The Surfrider Foundation filed a lawsuit arguing that the fouled waters keep swimmers from enjoying ocean waves.¹⁹⁵ The Regional Water Quality Control Board, the agency responsible for monitoring and cleaning up pollution in local waterways, and the California Attorney General also filed sixty-day notices that they intended to sue.¹⁹⁶ Judge Miller took a trip to the border a day before issuing his ruling.¹⁹⁷

It is not unusual for judicial officials, nor any number of NSAs, to visit the border. According to Jorge Domínguez,

¹⁹² Khari Johnson, *What Went Wrong at the International Wastewater Treatment Plant*, PATCH (Nov. 18, 2011), <https://patch.com/california/imperialbeach/clean-water-act-standards-south-bay-international-was93d7dc3375> [<https://perma.cc/H994-UN4D>].

¹⁹³ *Id.*

¹⁹⁴ See *Clean Border Water Now*, SURFRIDER FOUND. (Feb. 28, 2017), <https://sandiego.surfrider.org/clean-border-water-now> [<https://perma.cc/YAT7-JNUB>]. For the study, see *CBWN x BWTF Collaboration in the Tijuana River Valley*, SURFRIDER FOUND. (Feb. 27, 2021), <https://sandiego.surfrider.org/cbwn-x-bwtf-collaboration-in-the-tijuana-river-valley/> [<https://perma.cc/YW9H-LDWX>].

¹⁹⁵ *Surfrider Found. v. Int'l Boundary & Water Comm'n*, No. 18cv1621 JM (JMA) (S.D.Cal. Dec. 11, 2018).

¹⁹⁶ Erik Anderson, *Feds Seek Dismissal of San Diego Cross-Border Sewage Lawsuit*, KPBS (Aug. 13, 2018), <https://www.kpbs.org/news/2018/aug/13/federal-government-seeks-dismissal-san-diego-cross> [<https://perma.cc/BBM4-YJSG>].

¹⁹⁷ Luan Troxel, *Update on Trans-Border Pollution—Lawsuit Moves Forward and IBWC Has a New Commissioner*, CORONADO EAGLE & J. (Sep. 7, 2018), http://www.coronadonewsca.com/news/coronado_city_news/update-on-trans-border-pollution-lawsuit-moves-forward-and-ibwc-has-a-new-commissioner/article_beca94e2-b2fb-11e8-ae6b-5bcbccde0edc.html [<https://perma.cc/HDM7-UQ42>]. For more details and a picture of the visit, see also Joshua Emerson Smith, *In Rare Move, Federal Judge Presiding Over Tijuana Sewage Lawsuit Tours Border*, SAN DIEGO UNION-TRIB. (Aug. 28, 2018), <https://www.sandiegouniontribune.com/news/environment/sd-me-judge-tour-20180828-story.html> [<https://perma.cc/7B7Z-WZV5>].

U.S.-Mexican relations have never been limited exclusively to the intergovernmental arena, despite some of the Mexican government's efforts over the years to control such relations. Instead, the relations between the two countries have long engaged ordinary citizens, large business firms, and varied kinds of governmental [organizations] and [NGOs].¹⁹⁸

Thinktanks are also important in the U.S.-Mexico relationship, for it is not just corporations and NGOs which are undertaking services for, or using litigation to push, governments to enforce their respective State's laws. Diane Stone wrote:

although think tanks are not really part of those actors which share authority in the global system . . . [,] these organisations acquire political credibility by performing services for states and for other [NSAs]. Think tanks respond to demand for high quality reputable research and analysis, ideas and argumentation. They also contribute to governance and institution building by facilitating exchange between official and other private actors via informal diplomacy. In general, think tank activity in the global system tends to be based on a complex interweaving of network interactions.¹⁹⁹

For Rachel St. John, this binationality, both in its formal and informal vestiges, changes the landscape of the borderlands. She wrote:

If the form and relative success of government strategies revealed state priorities and binational compromises, it was the ability of individuals and corporations to negotiate them that reflected the larger landscape of power that existed on the border. As they moved, invested, smuggled, shopped, and socialized across the boundary line, border people created alternative spatial orders and binational communities that challenged national definitions of space and identity.²⁰⁰

It is important to note that it is not always a panacea to have private NSAs involved in global governance issues.²⁰¹ There is "a fear that one 'legitimizes' actors by giving them human rights obligations and

¹⁹⁸ Jorge I. Domínguez, *Mexico's New Foreign Policy: States, Societies, and Institutions*, in BRIDGING THE BORDER: TRANSFORMING MEXICO-U.S. RELATIONS 181, 182 (Rodolfo O. de la Garza & Jesús Velasco eds., 1997).

¹⁹⁹ Stone, *supra* note 133, at 223.

²⁰⁰ RACHEL ST. JOHN, *LINE IN THE SAND: A HISTORY OF THE WESTERN U.S.-MEXICO BORDER* 8 (2011).

²⁰¹ See generally Bexell, Tallberg & Uhlin, *supra* note 165.

implies a power which they may themselves erode, rather than enhancing, human freedom and autonomy.”²⁰²

The next section of this Article examines the reordering of these special orders and challenges that such outsourcing presents for the primacy of the State and its traditional monopoly at the U.S.-Mexico border.

IV. HOLLOWING OUT THE STATE

There is a trend in the outsourcing of work from States to NSAs. For-profit contractors and non-profit NGOs have been replacing federal workers. John J. DiIulio Jr. calls this “Leviathan by Proxy,” and the result is a monumental challenge for democratic accountability as reforms slash jobs to make government smaller:

Leviathan by Proxy is ideologically androgynous and has a bipartisan pedigree. Thus, while Washington now has roughly the same number of full-time federal bureaucrats as it had in the 1960s, it also pays millions more people – state and local government workers, for-profit contractors, non-profit grantees – to administer its policies, programs, and regulations.²⁰³

Rita Abrahamsen and Anna Leander have explained the impetus for the hollowing out:

Governing through markets or quasi-market mechanisms has increasingly become valuable in and of itself, and in the same way as social services like health and education have been affected by demands to ‘slim down the state,’ so public security institutions have felt the emphasis on fiscal discipline, value for money, and efficiency.²⁰⁴

Hollowing out the State through elaborate schemes of privatization has taken place in the United States over decades. The U.S. government has also eschewed many jobs along the way. According to DiIulio Jr.,

during the same half-century that federal government spending increased fivefold, the number of federal bureaucrats increased hardly at all. In fact, during several post-1960

²⁰² ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 53 (2010).

²⁰³ JOHN DI IULIO JR., BRING BACK THE BUREAUCRATS: WHY MORE FEDERAL WORKERS WILL LEAD TO BETTER (AND SMALLER!) GOVERNMENT 38 (2014).

²⁰⁴ Rita Abrahamsen & Anna Leander, *Introduction* to ROUTLEDGE HANDBOOK OF PRIVATE SECURITY STUDIES 1, 3 (Rita Abrahamsen & Anna Leander eds., 2016).

periods when federal spending spiked and new federal cabinet departments and agencies launched, the number of full-time federal civil servants, excluding military personnel and postal workers, actually *decreased*.²⁰⁵

Such a hollowing out has occurred, in essence, because the State prescribed it. State bureaucracies have acquiesced to the ascendance of NSAs in the international arena. According to Rodney Bruce Hall and Thomas J. Biersteker, “where evidence exists that functions that were once the exclusive sovereign prerogatives of the state have devolved to the responsibility of private actors, the question of state complicity arises.”²⁰⁶

States are indeed complicit in abdicating some of their traditional roles to NSAs. Deregulation has also hurried this process as the State shrinks its oversight role.

Deregulation has been a crucial mechanism to negotiate the juxtaposition of the global and the national. Rather than simply seeing it as freeing up markets and reducing the sovereignty of the state, we might underline a much less noted aspect of deregulation: it has had the effect, particularly in the case of the leading economic sectors, of partly denationalizing national territory.²⁰⁷

Privatization too is part of this general trend of the hollowing out of the State. Privatization has saved the U.S. Treasury a great deal of money. The U.S. Government effectively pays \$12 or less to nearly two million contract workers—“more than the number of low-wage workers at Walmart and McDonalds combined.”²⁰⁸ Part of this move toward governance by NSAs has resulted in State deregulation—the selling off of State assets to private entities and the rise of public-private partnerships that have proliferated in the United States. According to DiIulio Jr., “[t]he federal government spends more than \$500 billion a year on contacts with for-profit firms.”²⁰⁹ Corporations are

²⁰⁵ DI IULIO, *supra* note 203, at 14.

²⁰⁶ Rodney Bruce Hall & Thomas J. Biersteker, *The Emergence of Private Authority in the International System*, in *THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE* 7–8 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002).

²⁰⁷ SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS*, at xxviii (1998).

²⁰⁸ AMY TRAUB & ROBERT HILTONSMITH, *UNDERWRITING BAD JOBS: HOW OUR TAX DOLLARS ARE FUNDING LOW-WAGE WORK AND FUELING INEQUALITY* 1 (2013).

²⁰⁹ DI IULIO JR., *supra* note 203, at 17; U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-133R, *INTERAGENCY CONTRACTING: AGENCY ACTIONS ADDRESS KEY MANAGEMENT CHALLENGES, BUT ADDITIONAL STEPS NEEDED TO ENSURE CONSISTENT IMPLEMENTATION OF POLICY CHANGES* (2013).

increasing their influence through lobbying power, regulatory capture, and crony capitalism. Further, the U.S. Government “as the hegemonic power of this period has led/forced other states to adopt these obligations towards global capital. And, in so doing, it has contributed to the strengthening the forces that can challenge or destabilize what have historically been constructed as state powers.”²¹⁰

Kenneth Waltz explained this as far back as 1979, at the height of the Cold War:

States set the scene in which they, along with nonstate actors, stage their dramas or carry on their humdrum affairs. Though they may choose to interfere little in the affairs of nonstate actors for long periods of time, states nevertheless set the terms of the intercourse, whether by passively permitting informal rules to develop or by actively intervening to change rules that no longer suit them. When the crunch comes, state remake the rules by which other actors operate.²¹¹

As private actors expand their respective powers, there needs to be better integration of NSAs into the State-to-State discourse that has traditionally monopolized international relations and international law. As Bob Jessop has explained:

[T]he national state is now subject to various changes which result in its ‘hollowing out.’ This involves two contradictory trends, for, while the national state still remains politically significant and even retains much of its national sovereignty (albeit as an ever more ineffective, primarily juridical fiction reproduced through mutual recognition in the international community of nations), its capacities to project its power even within its own national borders are decisively weakened both by the shift towards internationalized, flexible (but also regionalized) production systems and by the growing challenge posed by risks emanating from the global environment. This loss of autonomy creates in turn both the need for supranational coordination and the space for subnational resurgence. . . . Some state capacities are transferred to a growing number of pan-regional, plurinational, or international bodies with a widening range of powers; others are devolved to restructured local or regional levels of governance within the national state; and yet others are being usurped by emerging horizontal networks of power — local and regional — which

²¹⁰ Saskia Sassen, *The State and Globalization*, in THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE, *supra* note 206, at 95.

²¹¹ WALTZ, *supra* note 90, at 94.

by-pass central states and connect localities or regions in several nations.²¹²

We need to find ways for States to provide the space for NSAs to better provide the services previously ascribed to the State. There are increasing indications that NSAs are providing public goods.²¹³ States and international organizations “can no longer afford to bypass the concerns of transnational actors who have successfully mobilized around many global issues and have strengthened their bargaining position with significant moral, financial and knowledge resources.”²¹⁴

Part of this move toward increasing nodes of shared governance has occurred at the level of NGOs, as was shown at the Citizens Forum in Imperial Beach along the border in December of 2017. There were Mexican environmentalists, advocacy groups of local residents, and a host of NGOs from both sides of the border, plus government representation beyond the IBWC. The Army Corps of Engineers was at the Citizens Forum meeting too. What was most interesting was the bi-national context, represented by Mexican NGO involvement in the public meeting.

A. *Outsourcing by Commission and Omission*

There are two kinds of outsourcing going on at the U.S.-Mexico border. There is both an outsourcing by design and an outsourcing by neglect that goes on at the U.S.-Mexico border in the context of the hollowing out of the State. Increasingly there has been a privatization of formerly State-provided services.²¹⁵ Importantly, the seeming decline of the State can be viewed as its own doing—a disaggregation of sorts that allows for the State to maintain some of its traditional powers like national defense, economic development, tax generation, and the police power while outsourcing other provisions of public goods to NSAs, like TNCs and NGOs. As States conduct their own reordering

²¹² Bob Jessop, *Post-Fordism and the State*, in POST-FORDISM: A READER 251, 264 (Ash Amin ed., 2008); Bob Jessop, *Putting Neoliberalism in Its Time and Place: A Response to the Debate*, 21 SOC. ANTHROPOLOGY 65 (2013).

²¹³ Andrew Clapham, *Non-State Actors*, in POST-CONFLICT PEACEBUILDING: A LEXICON 200 (Vincent Chetail ed., 2009).

²¹⁴ Thorsten Benner, Wolfgang H. Reinicke & Jan Martin Witte, *Multisectoral Networks in Global Governance: Towards a Pluralistic System of Accountability*, 39 GOV'T & OPPOSITION 191, 195 (2004).

²¹⁵ Bob Jessop, *Hollowing Out the 'Nation-state' and Multilevel Governance*, in A HANDBOOK OF COMPARATIVE SOCIAL POLICY 11, 11–25 (Patricia Kennett ed., 2004).

while allowing for NSAs to engage in international relations and transnational problem-solving, new forms of governance merge.

There are other contenders: NSAs that fill the regulatory/law enforcement vacuum, be they NGOs, arms, drugs, and human traffickers, for-profit publicly listed security companies, or just the economic migrant. These NSAs have slowly grown in influence over governmental and international governance mechanisms. States no longer monopolize the border operations and they have limited effect over the relations of the NSAs along it. International law must work to expand the formal roles that private actors play at the border.

These private actors operate along a spectrum that runs from for-profit corporations doing government work and NGOs doing government work, to not-for-profit government organizations and individuals not doing government work. These include narcotraffickers, as well as the Minutemen and other border vigilantes who are monitoring unauthorized entry into the United States along the U.S.-Mexico border.²¹⁶ Drug cartels have organized through controlling territories—so-called *plazas*—over which they have the exclusive operational mandate and a virtual monopoly of force.²¹⁷ Police forces work for them or they are killed; elected officials are in their pockets and are their partners.²¹⁸ For-profit corporations suck at the trough of government largesse. They are the Beltways Bandits, K Street Cowboys, lobbyists, going through the revolving door between government service and industry after which they win government contracts or grants and grow their profits.²¹⁹

It also creates a void wherein nefarious actors can masquerade as non-profit organizations to help shore up national security. The indictment of Steve Bannon in connection to his role in the We Build the

²¹⁶ See Susy Buchanan & David Holthouse, *Freedom Riders and Other Nativist Groups Join for Campaign to Scare off Immigrants*, S. POVERTY L. CTR. (Apr. 20, 2007), <https://www.splcenter.org/fighting-hate/intelligence-report/2007/freedom-riders-and-other-nativist-groups-join-campaign-scare-immigrants> [<https://perma.cc/72Z5-NZVD>].

²¹⁷ See generally GUADALUPE CORREA CABRERA, *LOS ZETAS INC.: CRIMINAL CORPORATIONS, ENERGY, AND CIVIL WAR IN MEXICO* (2017); GEORGE W. GRAYSON, *MEXICO: NARCO-VIOLENCE AND A FAILED STATE?* 196 (2011).

²¹⁸ GUADALUPE CORREA-CABRERA, *supra* note 217, at 39.

²¹⁹ See Sen. Elizabeth Warren, *Warren Leads Colleagues Investigating the Revolving Door Between Federal Agencies and the Private Detention Industry*, U.S. SEN. (Jan. 17, 2020), <https://www.warren.senate.gov/oversight/reports/warren-leads-colleagues-investigating-the-revolving-door-between-federal-agencies-and-the-private-detention-industry> [<https://perma.cc/8AG6-Q2EX>].

Wall crowdfunding²²⁰ is an example of this occurrence, as are the several embezzlement cases that brought down the Minutemen and other border vigilante groups wherein leaders took organization money for personal use, unjustly enriching themselves.²²¹ This is a mixing of public and private purposes that breaks the law and upends our analytical spectrum of private to public ends.

As part of the social contract, there are a number of public goods that the State provides in exchange for our allegiance, our paying of taxes, and our sending of our children to serve in the armed forces. In exchange for these contributions, we expect basic education, sanitation, fire protection, police protection, and for some, healthcare.²²²

The State should also enforce a recognized level of environmental safety to protect public health,²²³ as well as enforce our laws, protect our borders, and look after incarcerated migrants who are not authorized to work in the United States; yet, increasingly, TNCs and NGOs are doing this work. All of this contributes to the Border Industrial Complex.

The rise of NSAs in a border context forces us to question sovereignty from where it emanates, to whom it flows, and the way governance should include NSAs and not just States. How can the United States and Mexico better trade together, live with one another, and provide for the new networks that exist in borderlands? Together these NSAs form the Border Industrial Complex.

B. *The Border Industrial Complex*

In President Dwight D. Eisenhower's Farewell Address to the American people on January 17, 1961, he warned the country of a

²²⁰ Indictment, *United States v. Kolfage*, No. 20-cr-412 (S.D.N.Y. *indictment unsealed* Aug. 20, 2020); Ryan Lucas & Ayesha Rascoe, *Trump Pardons Steve Bannon, Lil Wayne in Final Clemency Flurry*, NPR (Jan. 20, 2021), <https://www.npr.org/2021/01/20/934139723/trump-pardons-steve-bannon-lil-wayne-in-final-clemency-flurry> [<https://perma.cc/KE2H-WCCB>].

²²¹ Sonya Geis, *Minuteman Project in Turmoil Over Financial Allegations*, WASH. POST (Mar. 13, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/12/AR2007031201297.html> [<https://perma.cc/KL7K-3TBP>]; see also Tim Murphy, *The Meltdown of the Anti-Immigration Minutemen Militia*, MOTHER JONES (Aug. 4, 2014), <http://www.motherjones.com/politics/2014/08/minuteman-movement-border-crisis-simcox> [<https://perma.cc/QS7J-YDST>].

²²² See PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2007); see also Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397 (2006).

²²³ See JAMES C. SCOTT, *SEEING LIKE A STATE* (1998).

threat against democracy that would rise from the establishment of a “military-industrial complex.”²²⁴ He was concerned about the expanding arms race between the United States and the Soviets which created a system that benefitted the government and private contractors with vested interests in keeping demand high for security-related projects.²²⁵

Over the last several decades, the convergence of different approaches to implement effective immigration policy has attracted the interest of private contractors seeking to profit from ballooning government investment in its immigration enforcement. The United States’ objective to deter illegal trafficking has allowed government agencies such as the Department of Homeland Security (“DHS”) to spend over \$1 trillion since 9/11 on its partnerships with multitudes of private players hungry for government money—with DHS doing so in the name of national security and NSAs doing so in the search for profit.²²⁶ For some analysts, this intersection of interests has created what they call an “Immigration Industrial Complex,” a term described as “the confluence of public and private sector interests in the criminalization of undocumented migration, immigration law enforcement, and the promotion of ‘anti-illegal’ rhetoric.”²²⁷ This complex is more

²²⁴ Eisenhower stated that “[i]n the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists, and will persist.” *Ike’s Warning of Military Expansion, 50 Years Later*, NPR (Jan. 17, 2011), <https://www.npr.org/2011/01/17/132942244/ikes-warning-of-military-expansion-50-years-later> [<https://perma.cc/GC8H-28S3>].

²²⁵ Dante Disparte & Thomas Dichter, *Afraid? Of What? Fear and the Rise of the Security-Industrial Complex*, NEW AM. (May 31, 2018), <https://www.newamerica.org/bretton-woods-ii/reports/afraid-what/vii-the-security-industrial-complex/> [<https://perma.cc/R3LM-WTGX>] (providing a non-exhaustive list of firms or businesses that benefit from the largely post-9/11 move toward increased border security: guard and patrol service firms, makers of guard clothing and protective gear, military contractors (such as builders of planes, ships, and armaments), security consultants, airport security organizations, employees, alarm system services, security training, cybersecurity firms, pre-employment screening firms, and intelligence sub-contractors).

²²⁶ See Mattea Kramer & Chris Hellman, ‘Homeland Security’: The Trillion-Dollar Concept That No One Can Define, THE NATION (Feb. 28, 2013), <https://www.thenation.com/article/archive/homeland-security-trillion-dollar-concept-no-one-can-define> [<https://perma.cc/A86C-FS2D>].

²²⁷ Tanya Golash-Boza, *The Immigration Industrial Complex: Why We Enforce Immigration Policies Destined to Fail*, 3 SOCIO. COMPASS 295, 295 (2009). Several scholars have focused on the discussion concerning the conflux of interests that benefit from enforcing failed immigration policy that fails to resolve illegal immigration. Other names associated with this trend include the “security-industrial

expansive than merely dealing with immigration matters, for there are other areas of law, like environmental law, in which corporations are playing an increased role.

The Border Industrial Complex is the general concept for the space in which private NSAs take roles that were traditionally done by sovereign States, such as building border fences, incarcerating undocumented migrants entering or working illegally in the United States, and transporting these migrants around the private prison system contracted out to multinational corporations. The Border Industrial Complex features organizations that play increasingly transnational roles in the regulation, occurrences, and facilitation on the border. Members of the Border Industrial Complex span the spectrum of for-profit and not-for-profit organizations, private citizens, faith-based groups, human rights advocates, private vigilante groups, and other succor and aid actors. Some mix for-profit and not-for-profit motives or hold out the latter to achieve the former.

The Border Industrial Complex was born when the United States reformed its immigration law to deter mass migration into the United States from any single country in 1965. This law was unrealistic and unsuited to meet the needs of immigrants from neighboring countries such as Mexico, who today make up more than half of the estimated number of illegal immigrants in the United States.²²⁸ After 1995, numerical limits restricting immigration by country resulted in a cascade of immigrants willing to cross the border into the United States illegally.²²⁹ By passing laws in the 1980s designed to sanction employers for hiring unauthorized workers, U.S. immigration policy became an

complex,” and the “immigration-industrial complex,” which necessarily involve the border-industrial complex. *Id.* at 300.

²²⁸ Ana Gonzalez-Barrera & Jens Manuel Krogstad, *What We Know About Illegal Immigration from Mexico*, PEW RSCH. CTR. (Mar. 2, 2017), <http://www.pewresearch.org/fact-tank/2017/03/02/what-we-know-about-illegal-immigration-from-mexico/> [<https://perma.cc/SG4L-EPEV>]. It remains uncertain how many illegal immigrants are currently in the United States. By one researcher’s estimates, the undocumented population may be as many as 22.1 million, which is twice as high as the American Community Survey’s estimate of 11 million present in country. See Rafael Bernal, *Yale, MIT Study: 22 Million, Not 11 Million, Undocumented Immigrants in US*, THE HILL (Sept. 21, 2018), <https://thehill.com/latino/407848-yale-mit-study-22-million-not-11-million-undocumented-immigrants-in-us> [<https://perma.cc/K6HZ-U9X9>].

²²⁹ Gonzalez-Barrera & Krogstad, *supra* note 228; Mohammed M. Fazel-Zarandi, Jonathan S. Feinstein & Edward H. Kaplan, *The Number of Undocumented Immigrants in the United States: Estimates Based on Demographic Modeling with Data from 1990 to 2016*, PLOS (Sept. 21, 2018), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0201193> [<https://perma.cc/B68X-FYK7>].

attractive means of growth for private corporations seeking to benefit from the government's effort to curb immigration enforcement.

The southern border of the United States boasts a combination of technological and physical manpower that is designed to catch undocumented immigrants and illegal smuggling operations. Since 1986, hundreds of billions of taxpayer dollars have been spent on fences, aircrafts, detention centers, and federal agents.²³⁰ The budgets for immigration enforcement have increased every year, as have the number of officers.²³¹ In 2019 there were more than 52,000 border and interior enforcement officers; yet in 2012 there were about 49,000 officers.²³² Additionally, as of 2022, the DHS Bureau of Immigration and Customs Enforcement ("ICE") employs 19,376 and the Bureau of Citizenship and Immigration Services employs 10,560; while the Executive Office for Immigration Review within the Department of Justice employs 1,350 people.²³³

Private prison companies have also become generators of economic growth in the United States. Two of the largest companies, CoreCivic (formerly the Corrections Corporation of America) and GEO Group, have especially benefited from playing an increased role in managing detention facilities and housing detainee migrants through their removal.²³⁴ As of 2016, these companies manage sixty-five percent of ICE detainees, which cost the U.S. government an estimated \$125 for each detainee per day.²³⁵ About eighty percent of all ICE detainees are in privately run facilities.²³⁶ CoreCivic's "largest

²³⁰ Ted Robbins, *U.S. Grows an Industrial Complex Along the Border*, NPR (Sept. 12, 2012), <https://www.npr.org/2012/09/12/160758471/u-s-grows-an-industrial-complex-along-the-border> [<https://perma.cc/6A4W-44UG>].

²³¹ *The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL (Jan. 20, 2021), <https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security> [<https://perma.cc/PR7Q-2HNJ>].

²³² *Id.*

²³³ *Federal Agencies List*, U.S. OFF. OF PERS. MGMT., <https://www.opm.gov/about-us/open-government/Data/Apps/Agencies> [<https://perma.cc/9YX2-HGGV>] (last visited Jan. 15, 2022); see also *Federal Workforce Data*, U.S. OFF. OF PERS. MGMT., <https://www.fedscope.opm.gov> [<https://perma.cc/VX6X-FEB3>] (last visited Feb. 9, 2022).

²³⁴ Michelle Mark, *Private Prison Companies Are Saying Trump's Immigration Crackdown is Looking Good for Business*, BUS. INSIDER (Aug. 9, 2017), <https://www.businessinsider.com/geo-group-corecivic-private-prisons-trump-immigration-crackdown-good-business-news-2017-8> [<https://perma.cc/7U4T-4W3W>].

²³⁵ *Id.*

²³⁶ Louisa Valentin, *The First Step to Stop Corporations from Profiting from Incarcerations in the United States: Why the Criminal Justice System Needs to be*

customer in 2019 was ICE,” which accounted for twenty-nine percent of its business.²³⁷

Logistical challenges require ICE to seek out modes of transportation that can efficiently move detained immigrants. While ICE regularly uses ground and officer escorts to detain and deport immigrants, aircraft companies have been contracted to provide logistical support for air travel.²³⁸ For instance, ICE Air Operations works with the General Services Administration to contract charter flight services with companies such as CSI Aviation and Zephyr Aviation.²³⁹ Use of these contracts has increased to suit the federal government’s needs. CSI Aviation’s contract with DHS grew from \$88 million in 2017 to \$96 million in 2018.²⁴⁰ Part of ICE’s budget allocates funds to transport children to shelters through commercial aircraft contracts.²⁴¹

Banks have been seeking profits by providing funding to private prison companies and conducting business near the border.²⁴² Investigations into their misconduct, however, have revealed that tracking drug laundering in customers’ accounts has made servicing customers

Returned to Public Hands, TRANSNAT’L INST. (Mar. 30, 2021), <https://www.tni.org/en/article/the-first-step-to-stop-corporations-from-profitting-from-incarceration-in-the-united-states> [<https://perma.cc/K6WZ-X7VB>].

²³⁷ Kate Duguid, *U.S. Private Prison Revenue Under Pressure from New Biden Rules*, REUTERS (Jan. 27, 2021), <https://www.reuters.com/world/us/us-private-prison-revenue-under-pressure-new-biden-rules-2021-01-27> [<https://perma.cc/E5Q3-UTWR>].

²³⁸ Jaden Urbi, *Here’s Who’s Making Money from Immigration Enforcement*, CNBC (June 6, 2018), <https://www.cnbc.com/2018/06/28/companies-profitting-immigration-enforcement-private-sector-prison-tech.html> [<https://perma.cc/836N-L4PR>].

²³⁹ *Id.*

²⁴⁰ John Burnett & Joel Rose, *Funding the Immigration Crackdown at an ‘Unsustainable Rate’*, WBUR (Sept. 26, 2018), <http://www.wbur.org/npr/651524569/funding-the-immigration-crackdown-at-an-unsustainable-rate> [<https://perma.cc/B9UQ-2GZE>].

²⁴¹ Adam Rawsley & Spencer Ackerman, *Ex-CIA Contractor Makes Millions Flying Immigrant Kids to Shelters*, DAILY BEAST (June 20, 2018), <https://www.thedailybeast.com/intelligence-contractor-makes-millions-flying-immigrant-kids-to-shelters> [<https://perma.cc/DKH7-T66H>]; Urbi, *supra* note 238. However, several U.S. airlines, including American Airlines and United Airlines, have been quick to distance themselves from the immigration issue. *Id.*

²⁴² Ilana Novick, *Bank Funds and Profits from Private Immigration Prisons*, SALON (Dec. 17, 2017, 7:29 PM), https://www.salon.com/2017/12/17/bank-funds-and-profits-from-private-immigration-prisons_partner [<https://perma.cc/N9KM-8ACX>].

in border towns difficult.²⁴³ Rabobank and HSBC have both been fined for servicing accounts associated with money laundering.²⁴⁴ Currency exchange and savings accounts too are under increased scrutiny by ICE for their mismanagement of border operations.²⁴⁵ ICE has “seen a substantial increase in cases in which private parties are acting as money service businesses to exchange digital currencies into fiat currency to enjoy the illicit proceeds of narcotics smuggling.”²⁴⁶

Construction industries in towns near the border are benefiting from federal contracts too. In Arizona, the government has spent \$15 million in constructing two-story and three-story houses to better meet the needs of federal agents who have moved closer to the region.²⁴⁷ Several companies cashed in on contracts to expand President Trump’s border wall. In Texas, SLSCO, Ltd. was awarded a \$145 million federal contract to construct six miles of an eighteen-foot reinforced concrete wall along the U.S.-Mexico border in the Rio Grande Valley.²⁴⁸ Another company is replacing existing stretches of chain-linked fences near El Paso with a bollard steel wall as part of a \$22 million contract.²⁴⁹

In 2018, Congress approved \$1.6 billion of the \$25 billion that President Trump had requested for the wall.²⁵⁰ This money has been

²⁴³ Ivana Kottasová, *European Bank Caught Laundering Mexican Drug Money*, CNN (Feb. 8, 2018, 8:42 AM), <https://money.cnn.com/2018/02/08/news/rabobank-mexico-drug-money-laundering> [<https://perma.cc/7PZ9-8CRR>].

²⁴⁴ *Id.*

²⁴⁵ Stan Higgins, *Boom in Drug Dealer Digital Currency Use Sparks Worries Among US Officials*, COINDESK (Mar. 22, 2017, 9:20 AM), <https://www.coindesk.com/boom-in-drug-dealer-digital-currency-use-sparks-worries-among-us-officials> [<https://perma.cc/F9A5-6CFG>].

²⁴⁶ *Id.*

²⁴⁷ Brenna Goth, *Feds Pay Millions for Border-agent Housing in Arizona*, USA TODAY (Aug. 12, 2013, 11:41 AM), <https://www.usatoday.com/story/news/nation/2013/08/12/immigration-border-agent-housing/2642491> [<https://perma.cc/N7Q4-ZPB8>].

²⁴⁸ *Texas Construction Firm Wins \$145 Million Contract to Build Border Wall in Rio Grande Valley*, DALL. MORNING NEWS (Nov. 3, 2018, 10:15 AM), <https://www.dallasnews.com/news/mexico/2018/11/03/texas-construction-firm-wins-145-million-contract-build-border-wall-rio-grande-valley> [<https://perma.cc/M6RR-RWT5>].

²⁴⁹ Michel Marizco, *Tucson Company Building Border Wall in Texas*, ARIZ. PUB. MEDIA (Sept. 25, 2018), <https://news.azpm.org/p/news-topical-biz/2018/9/25/137839-tucson-company-building-border-wall-in-texas> [<https://perma.cc/7NJM-P5SB>].

²⁵⁰ *Border Wall Construction Underway*, U.S. CUSTOMS & BORDER PROT. (Mar. 30, 2018), <https://www.cbp.gov/newsroom/spotlights/border-wall-construction-underway> [<https://perma.cc/6VHV-DVJN>].

used to fund border wall projects throughout the southwestern border in cities such as El Centro, San Diego, and Santa Teresa, and in the Rio Grande Valley.²⁵¹ Many segments of the U.S.-Mexico border were made with Vietnam-era helicopter landing mats.²⁵² In 2017, these mats were replaced with steel bollard-style walls that promote the safety of border patrol agents.²⁵³ During the Trump administration, “the federal government built 52 miles of new wall along the U.S.-Mexico border, according to the Office of Management and Budget (OMB), with some stretches of barrier costing as much as \$46 million per mile.”²⁵⁴ On June 11, 2021, however, the Biden administration announced that “the unspent balance of \$3.6 billion” in funds allocated by the Trump administration would be sent back and used to fund projects that the money was originally intended for—military projects including “re-vamp[ing] an elementary school for the children of U.S. service members stationed in Germany.”²⁵⁵

All of this is punctuated by daily human activity, with much of it regulated through the levers of immigration, national security, and commerce laws. These three overlapping themes constitute the Border Industrial Complex. Immigration from Mexico to the United States “is a longer, historical experience, but it is not an accident of history. It is a logistical process complementing the long-range construction of a U.S.-dominated national as well as international system.”²⁵⁶

The shift is part of a transitioning sovereignty. According to Saskia Sassen, sovereignty has been unbundled and relocated in “supranational or non-governmental institutions” which have become “alternative subjects of international law and actors in international relations.”²⁵⁷ Now, “[t]he formal and informal opportunities for [NSAs] to participate in international policy-making processes are frequently

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Biden Returns \$2 Billion in Border Wall Funds to the Military*, WSGW NEWS RADIO (June 11, 2021, 2:31 PM), <https://www.wsgw.com/biden-returns-2-billion-in-border-wall-funds-to-the-military> [<https://perma.cc/M7GC-UGTT>].

²⁵⁵ Camilo Montoya-Galvez & Nicole Sganga, *Biden Returns \$2 Billion in Funds Trump Had Diverted from Pentagon to Use for Border Wall*, CBS NEWS (June 11, 2021, 2:28 PM), <https://www.cbsnews.com/news/biden-returns-border-wall-funds-pentagon> [<https://perma.cc/UH6Q-3QJD>].

²⁵⁶ Mario T. Garcia, *Mexican Immigration in U.S.-Mexico History: Myths and Reality*, in MYTHS, MISDEEDS AND MISUNDERSTANDINGS: THE ROOTS OF CONFLICT IN U.S.-MEXICAN RELATIONS 201 (Jamie E. Rodriguez & O. Kathryn Vincent eds., 1997).

²⁵⁷ SASSEN, *supra* note 207, at 92–93.

identified both as a factor driving the growth in transnational activity and as a vital source of transnational influence on world politics.”²⁵⁸

Political scientists have noted this transition and power grab. Matthew Horsman and Andrew Marshall have explained that:

the nation-state can no longer be held accountable on the very issues which so directly and persistently affect the daily lives on those that it purports to represent, mirror, sponsor, and protect. Once the citizen discerns this trend, the exercise of authority by the state is undermined, and authority necessarily shifts.²⁵⁹

Further, in 1972, Kjell Skjelsbaek wrote that “[t]he interstate model is especially unfit for the projections and predictions about the future.”²⁶⁰ On top of that, the very membership of that interstate model—sovereign States themselves—is at risk. So it may be that the State in a traditional sense has morphed into a new kind of political unit, one that is more elastic than in years past. Sabino Cassese has written that “there is no eclipse of the State, but rather a restructuring of the State, which sheds the old paradigm of ‘the State as a unit’ but gains new roles as a disaggregated body.”²⁶¹

Some of its traditional powers will continue, since “[s]tates continue to care deeply about security, relative power, autonomy and internal control.”²⁶² After all, “[t]he basic function of any state is to impose and maintain political order Even if a government professes a developmental ideology . . . its first responsibility is to guard the integrity and security of the territorial realm.”²⁶³

States will still be the dominant players in the process by which international law is made because “all states have certain common interests and resources by virtue of their international and domestic rules.”²⁶⁴ States also have the power of the purse, which trumps everything at the U.S.-Mexico border when it comes to solving the Tijuana River Valley wastewater crisis.

²⁵⁸ Tallberg & Jönsson, *supra* note 164, at 5.

²⁵⁹ MATTHEW HORSMAN & ANDREW MARSHALL, *AFTER THE NATION-STATE: CITIZENS, TRIBALISM AND THE NEW WORLD DISORDER* 261 (1994).

²⁶⁰ Skjelsbaek, *supra* note 89, at 435.

²⁶¹ Cassese, *supra* note 163.

²⁶² Stiles, *supra* note 173, at 34.

²⁶³ Michael Bratton, *The Politics of Government-NGO Relations in Africa*, 17 *WORLD DEV.* 569, 573 (1989).

²⁶⁴ Stiles, *supra* note 173, at 35.

V. CONCLUSION: REVENGE OF THE STATE (INTERNATIONAL TRADE AGREEMENTS WILL SAVE US ALL)

The sewage kept on coming into U.S. territory from Mexico long after that Citizens Forum on December 7, 2017. After a two-day rain-fall in early December of 2018, more than six million gallons of raw sewage spilled into the Tijuana River each day, forcing the closure of beaches from Imperial Beach up to Coronado.²⁶⁵ Sewage reaching Coronado Island, a tiny city just off the coast of San Diego, forced some San Diego beaches to close.²⁶⁶ Data concerning beach closures from San Diego County confirms that Imperial Beach has had sections of its shoreline off-limits to swimmers for more than a third of each year, on average, in the last decade.²⁶⁷

Over the last two decades, much of the funding to support infrastructure projects in Tijuana and other border communities has come not from the IWBC, but instead flowed through the North American Development Bank (“NADB”), a bi-national financial institution created under the auspices of the North American Free Trade Agreement.²⁶⁸ Funded by the U.S. and Mexican governments, the NADB has channeled \$124.38 million in bank loans, Mexican matching funding, and U.S. Environmental Protection Agency (“EPA”) grants made through its Border Environment Infrastructure Fund.²⁶⁹ International agreements bring benefits and it is important to note that sovereign States are the parties to those agreements.

After much negative media coverage, local complaints like those aired at the December 2017 Citizens Forum meeting and lawsuits from

²⁶⁵ Joshua Emerson Smith, *Ongoing Spill in Mexico is Flooding Tijuana River and U.S. Beaches with Millions of Gallons of Raw Sewage*, L.A. TIMES (Dec. 11, 2018), <https://www.latimes.com/local/lanow/la-me-ln-border-sewage-spill-20181211-story.html> [<https://perma.cc/42G6-XJTD>].

²⁶⁶ Joshua Emerson Smith, *Sewage Contamination on Tijuana River Prompts San Diego County Beach Closures*, L.A. TIMES (Nov. 8, 2017), <http://www.latimes.com/local/lanow/la-me-tj-river-closed-20171108-story.html> [<https://perma.cc/FF3U-SGH7>].

²⁶⁷ Joshua Emerson Smith, *Focus: Tijuana Pollution Contaminates South Bay Beaches at Astounding Rate*, SAN DIEGO UNION-TRIB. (Apr. 27, 2017), <http://www.sandiegouniontribune.com/news/environment/sd-me-beach-closures-20170427-story.html> [<https://perma.cc/PQP6-93WG>].

²⁶⁸ The North American Development Bank (“NADB”) was created under U.S. law. *See* Implementation of Border Environment Cooperation Commission and North American Development Bank, Exec. Order No. 12,916, 19 U.S.C. § 3473 (1994).

²⁶⁹ *See* North American Free Trade Agreement Implementation Act, 22 U.S.C. §§ 290, 541.

NGOs and local municipalities on the U.S. side, the U.S. government eventually sprang into action by providing three pieces of legislation designed to address the Tijuana sewage crisis. First, on July 23, 2019, the San Diego Congressional delegation unveiled the North American Development Bank Pollution Solution Act (“NADBPSA”), which would reduce the existing financial burden stalling pollution mitigation efforts in the Tijuana River Valley through changes to the North American Development Bank.²⁷⁰ This bill would increase NADB capital by \$1.5 billion and establish a U.S.-Mexico Border Public Health Trust Fund, where federal agencies can deposit unallocated funding to design, implement, and finance environmental infrastructure projects relating to water and sewage.²⁷¹ Second, the Border Water Infrastructure Improvement Act, also introduced in July of 2019, would increase the authorization for the EPA’s Border Water Infrastructure Program (“BWIP”) funding to \$150 million a year for the next five years.²⁷² Third, the symbolic Tijuana River Navy Impact Resolution, which encouraged the Department of the Navy to take a leading role in cross-border sewage mitigation and its consequences for national security, was introduced in the House, where it was referred to the House Committee on Armed Services and then to the Subcommittee on Readiness, but has yet to be adopted to date.²⁷³ Introducing legislation is not the same as passing legislation; both the NADBPSA and the Border Water Infrastructure Improvement Act were introduced in the 116th Congress but failed to be voted out of committee.²⁷⁴ On March 8, 2021, however, Representative Juan Vargas from California’s 51st Congressional District again pushed for legislation similar to the Border Water Infrastructure Improvement Act, introducing the Border Water

²⁷⁰ North American Development Bank Solution Act, H.R. 3895, 116th Cong. (2019–2020).

²⁷¹ *Id.* § 6; *see also* N. AM. DEV. BANK, *Our Impact in Mexico: Overview*, <https://www.nadb.org/our-impact/region/mexico> [<https://perma.cc/KNE4-ZKSV>] (last visited Jan. 15, 2022).

²⁷² Border Water Infrastructure Improvement Act, H.R. 4039, 116th Cong. (2019–2020); *see also* Press Release, U.S. House Rep. Scott Peters, Peters and San Diego Delegation Secure \$300 Million in USMCA to Combat Tijuana Sewage Spills (Dec. 11, 2019).

²⁷³ *See* Tijuana River Navy Impact Resolution, H.R. Res. 511, 116th Cong. (2019) (expressing the sense of the House of Representatives that the Department of the Navy should take a leading role in the mitigation of cross-border spills, discharges, and debris in the Tijuana River that impact national security interests of the United States).

²⁷⁴ *See* H.R. 3895; H.R. 4039.

Quality Restoration and Protection Act of 2021.²⁷⁵ U.S. Senator Diane Feinstein introduced a similar bill on March 2, 2021.²⁷⁶ Both bills currently sit in committee awaiting a vote.²⁷⁷

The U.S. government was trying to solve the sewage problem after the public relations disaster that the environmental pollution provided because a new trade pact to replace NAFTA was in the midst of negotiations among the United States, Mexico, and Canada.²⁷⁸ This free trade agreement created an even more vertically integrated supply chain for the North American continent, and it was designed to stem Mexican immigration into the United States by providing jobs south of the border.²⁷⁹ In the end, the United States-Mexico-Canada Agreement was agreed to, ratified by Congress, and implemented nationally.²⁸⁰

Chapter 24 of the USMCA provides for environmental protection standards and meaningful dispute resolution mechanisms.²⁸¹ Unlike the NAFTA regime which featured environmental provisions as a side agreement—the North American Agreement on Environmental Cooperation,²⁸² which provided little meaningful enforcement provisions²⁸³—the USMCA has the environmental chapter in the main

²⁷⁵ Border Water Quality Restoration and Protection Act of 2021, H.R. 1663, 117th Cong. (2021); Border Water Quality Restoration and Protection Act of 2021, H.R. 1663, 117th Cong. (2021); *see also* Border Water Quality Restoration and Protection Act of 2020, H.R. 7991, 116th Cong. (2020).

²⁷⁶ Border Water Quality Restoration and Protection Act, S. 572, 117th Cong. (2021).

²⁷⁷ *See id.*; H.R. 1663.

²⁷⁸ James Cooper, *Woe Is the United States-Mexico-Canada Agreement*, THE HILL (May 13, 2019), <https://thehill.com/opinion/finance/443049-woe-is-the-united-states-mexico-canada-agreement> [<https://perma.cc/YX2Y-ZD6T>].

²⁷⁹ *See generally* James Cooper, *The New US-Mexico-Canada Trade Pact Holds Opportunity for Distributed Tech*, YAHOO FIN. (July 1, 2020), <https://www.yahoo.com/news/us-mexico-canada-trade-pact-162726253.html> [<https://perma.cc/KFU8-XWJY>].

²⁸⁰ USMCA, *supra* note 62, art. 32.10.

²⁸¹ *Id.* ch. 24.

²⁸² North American Agreement on Environmental Cooperation, Sept. 13, 1993, 32 I.L.M. 1480 [hereinafter NAAEC].

²⁸³ David L. Markell, *The Commission for Environmental Cooperation's Citizen Submission Process*, 12 GEO. INT'L ENV'T L. REV. 545 (2000). In the environmental side accords, there was no minimum standard of environment protection but rather each of the three partner countries agreed to enforce their own respective national laws concerning the environment. USMCA, *supra* note 62, arts. 10.3, 10.10; *see also* Linda J. Allen, *The North American Agreement on Environmental Cooperation: Has It Fulfilled Its Promises and Potential - An Empirical Study of Policy Effectiveness*, 23 COLO. J. INT'L ENV'T L. & POL'Y 121 (2012).

agreement. There are real sanctions for the failure to protect the environment that can be accessed by the parties.²⁸⁴ Although the USMCA includes this mechanism to sanction environmental violations, neither the United States nor Mexico have yet to use this mechanism in the context of cross-border pollution.²⁸⁵

The U.S. Congress stepped in by designing the implementing legislation for the USMCA to earmark about \$300 million for the construction of priority wastewater treatment works to address transboundary pollution in the Tijuana River Valley, and other areas of the border.²⁸⁶ The funding is referenced in Title IX of the United States-Mexico-Canada Agreement Implementation Act.²⁸⁷ Section 821 also includes direction to the EPA concerning project work to address the Tijuana/San Diego area transboundary pollution.²⁸⁸

In May of 2020, the EPA proposed dedicating its entire \$300 million dollar budget allocation for infrastructure projects along the U.S.-Mexico Border to solve the issue of sewage pollution in the Tijuana River.²⁸⁹ The USMCA allocated millions of dollars for the BWIP, with the priority project being the South Bay International Wastewater Treatment Plant.²⁹⁰ This response was in large part due to the U.S. Government Accountability Office, which released a report that concluded the Commission has not taken comprehensive steps to resolve the problem, so we recommended that Congress consider directing the Commission to identify alternatives—including cost estimates and funding sources—to help resolve continuing water quality problems.²⁹¹

There is also litigation to force the U.S. government, through the USIBWC, to deal with the sewage disaster befalling the Tijuana River

²⁸⁴ Beatriz Bugada, *Is NAFTA Up to Its Green Expectations? Effective Law Enforcement Under the North American Agreement on Environmental Cooperation*, 32 U. RICH. L. REV. 1591 (1999).

²⁸⁵ USMCA, *supra* note 62, art. 32.10.

²⁸⁶ Chris Jennewein, *New USMCA Trade Deal Includes \$300 Million to Stop Tijuana River Pollution*, TIMES SAN DIEGO (Dec. 11, 2019), <https://timesofsandiego.com/politics/2019/12/11/new-trade-agreement-includes-300-million-to-stop-tijuana-river-pollution> [<https://perma.cc/X44V-MXW6>].

²⁸⁷ United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113, 134 Stat. 11 (2020).

²⁸⁸ *Id.* § 821.

²⁸⁹ Debbie L. Sklar, *EPA Commits to Spending \$300 Million to Solve Border Sewage Problem*, TIMES OF SAN DIEGO (May 12, 2020), <https://timesofsandiego.com/politics/2020/05/12/epa-commits-to-spending-300-million-to-solve-border-sewage-problem> [<https://perma.cc/53GU-FFMU>].

²⁹⁰ USMCA, *supra* note 62, art. 32.10.

²⁹¹ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 18, at 61.

Valley.²⁹² Veolia Water North America West, LLC (“Veolia”) has been named as a defendant—for work done, or rather, allegedly not done well, at the U.S.-Mexico border.²⁹³ Veolia’s alleged violation relates to Minute 283, which the USIBWC entered into to address the border sanitation problem in San Diego, California and Tijuana, Baja California.²⁹⁴ Minute 283 led to the construction of the South Bay International Wastewater Treatment Plant, which is located in the Tijuana River Valley in San Diego.²⁹⁵ South Bay Plant was designed to handle twenty-five million gallons of sewage per day, based on a thirty-day average for facilities in Mexico.²⁹⁶ The USIBWC owns the South Bay Plant and Veolia operates it.²⁹⁷ The South Bay Plant and its associated facilities are subject to the terms of the National Pollution and Discharge Elimination System (“NPDES”) Permit.²⁹⁸ The NPDES Permit authorizes discharges of pollutants at the South Bay Ocean Outfall only after such pollutants have gone through secondary sanitation treatment at the South Bay Plant.²⁹⁹ All other discharges are prohibited.³⁰⁰

Water crosses the border from Mexico into the United States at six locations: Yogurt Canyon, Goat Canyon, Smuggler’s Gulch, Canyon Del Sol, Silva Drain, and Stewart’s Drain. USIBWC owns and Veolia operates water canyon collectors at all locations except Yogurt Canyon.³⁰¹ The canyon collectors are among the facilities that operate under and are subject to the South Bay Plant NPDES Permit.³⁰² They are “designed to capture and detain polluted wastewater the moment it crosses the U.S./Mexico Border into the United States.”³⁰³ Each concrete collector touches the border and spans the opening of one of these drainage points. The canyon collectors collect and direct

²⁹² *City of Imperial Beach v. Int’l Boundary & Water Comm’n*, 337 F. Supp. 3d 916 (S.D. Cal. 2018).

²⁹³ *Id.* at 918.

²⁹⁴ Foreign Relations and Intercourse New Treaty Minute, 22 U.S.C. § 277d-45 (2013).

²⁹⁵ *City of Imperial Beach*, 337 F. Supp. 3d at 921.

²⁹⁶ *Id.*

²⁹⁷ *San Diego Region - International Wastewater Treatment Plant*, CAL. WATER BOARDS SAN DIEGO – R9 (Mar. 9, 2018), https://www.waterboards.ca.gov/sandiego/water_issues/programs/iwtp/ [<https://perma.cc/83VY-8BHK>].

²⁹⁸ *Id.*

²⁹⁹ *City of Imperial Beach*, 337 F. Supp. 3d at 921.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² 22 U.S.C. § 277d-45(c).

³⁰³ *City of Imperial Beach*, 337 F. Supp.3d at 921 (internal quotation omitted).

wastewater into a shallow detention basin, where the wastewater is then directed to a screened drain inlet (“collector inlet”) regulated by a valve.³⁰⁴ When open, the water in the detention basin is accepted into a pipe system and conveyed to the South Bay Plant for treatment and eventual discharge at the South Bay Ocean Outfall.³⁰⁵ When closed, the water cannot drain into the treatment system and instead overflows the detention basin and travels into the downstream drainages.³⁰⁶ Imperial Beach, Chula Vista, and San Diego allege that the USIBWC and Veolia are responsible for sewage flows that regularly contaminate U.S. waters.³⁰⁷

These nearby cities banded together to launch the lawsuit.³⁰⁸ The City of Imperial Beach, San Diego Unified Port District, and the City of Chula Vista (collectively, “Plaintiffs”) sued the USIBWC and Veolia (collectively, “Defendants”).³⁰⁹ Plaintiffs claimed that Defendants violated the Clean Water Act³¹⁰ by allowing wastewater from canyon water-capture basins to spill into the surrounding environment without the proper permit.³¹¹ On June 12, 2018, Defendants filed a motion to dismiss the case.³¹² The court generally denied Defendants’ motion to dismiss for lack of standing, but granted their motions to dismiss Plaintiffs’ third cause of action with leave to amend,³¹³ allowing the lawsuit to proceed.³¹⁴

³⁰⁴ Balachander Kalappan & Vijayakumar Ponnusamy, *Modeling, Simulation and Optimization of Hybrid Renewable Power System for Daily Load Demand of Metropolitan Cities in India*, 2 AM. J. ENG’G & RSCH. 174 (2013).

³⁰⁵ Erik Anderson, *San Diego’s Cross-Border Sewage Suit Will Move Forward*, KPBS (Aug. 30, 2018, 12:31 PM), <https://www.kpbs.org/news/2018/aug/30/san-diego-cross-border-sewage-suit-will-move-forw> [<https://perma.cc/2LNQ-C9EB>].

³⁰⁶ *City of Imperial Beach*, 337 F. Supp. 3d at 922.

³⁰⁷ Anderson, *supra* note 305.

³⁰⁸ *San Diego Joins South Bay Cities in Suing Feds Over Cross-Border Sewage Spills*, KPBS (Oct. 4, 2017, 1:53 PM), <http://www.kpbs.org/news/2017/oct/04/san-diego-joins-chula-vista-imperial-beach-in> [<https://perma.cc/2F58-S29D>].

³⁰⁹ *City of Imperial Beach*, 337 F. Supp.3d at 916; *see also The History of Veolia: 1853 – 1900*, VEOLIA, <https://www.veolia.com/en/veolia-group/profile/history/1853-1900> [<https://perma.cc/892B-VPFF>] (last visited Jan. 20, 2022).

³¹⁰ 33 U.S.C. §§ 1251–1387.

³¹¹ Davis, *supra* note 10.

³¹² *City of Imperial Beach*, 337 F. Supp.3d at 920.

³¹³ *Id.* at 931 (Plaintiffs’ third cause of action under the Resource Conservation and Recovery Act at 42 U.S.C. § 6972(a)(1)(B)).

³¹⁴ *Id.* at 920 (denying Defendants’ motions to dismiss Plaintiffs’ first and second causes of action and granting Defendants’ motions to dismiss Plaintiffs’ third cause of action with leave to amend).

The Plaintiffs also alleged that the USIBWC violated the Resource Conservation and Recovery Act (“RCRA”)³¹⁵ because it “contributed and continues to contribute to the design, construction, operation, maintenance, and monitoring of the transnational wastewater collection and treatment system that originates in Mexico . . . [,] causing sewage and other solid and/or hazardous waste to enter the United States and discharge from the USIBWC Flood Control Conveyance.”³¹⁶ Plaintiffs further argued that USIBWC, “has systematically and routinely contributed to the past and/or present handling, storage, treatment, transport, and/or disposal of hazardous and/or solid wastes in the Tijuana River Valley . . . through operating, maintaining, and/or controlling the USIBWC Flood Control Conveyance, canyon collectors, and other infrastructure.”³¹⁷ Mark Edling, attorney for Plaintiffs, said:

The law is very clear from the Supreme Court on down. So you do not have to be the original source of pollution to be liable under our laws. And you don’t even have to look any farther than why does the IBWC exist at all. It exists to capture and treat transboundary contamination and they are not doing it.³¹⁸

The DOJ argued that under the RCRA, the USIBWC cannot be liable for the water treatment system in Mexico because it is not actively involved and does not have any degree of control over the system.³¹⁹ Under Minute 283, the operation and maintenance of the treatment plant in Tijuana “shall be charged to Mexico,” not the USIBWC.³²⁰ Defendants argued they do not contribute to the pollution within the meaning of the RCRA because the polluted waters originated in Mexico and flowed into the United States by gravity, unaided by the USIBWC or Veolia.³²¹

The USIBWC also argued it does not exert any control over waste that enters the Tijuana River in Mexico and flows across the border, and that, at best, the USIBWC transports waste through the flood control conveyance.³²² However, that transportation is passive in nature,

³¹⁵ 42 U.S.C. §§ 6901–92k.

³¹⁶ *City of Imperial Beach*, 337 F. Supp.3d at 931 (referring to a section of the Resource and Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B)).

³¹⁷ *Id.*

³¹⁸ Anderson, *supra* note 196.

³¹⁹ *City of Imperial Beach*, 337 F. Supp.3d at 931.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.* at 932.

merely permitting the waste from Mexico to flow through the system. The First Amended Complaint (“FAC”) does not allege that the USIBWC is in any way the source of the wastewater that eventually travels into and through the flood control conveyance and it did not allege that the USIBWC actively handles or treats any wastewater in the flood control conveyance.³²³

Federal Judge Jeffrey Miller rejected, in part, the DOJ bid to have this cross-border sewage case dismissed. Judge Miller decided that Plaintiffs had standing to sue in relation to the Clean Water Act violations, so a portion of the lawsuit moved forward.³²⁴ Judge Miller split the ruling however, upholding the DOJ’s position that federal rules regulating hazardous waste did not apply in this case and dismissing the challenge linked to violations of the Resource Conservation and Recovery Act.³²⁵ The ruling also rejected a bid by Veolia, who runs the South Bay International Wastewater Treatment Plant, to be dismissed from the lawsuit.³²⁶

Since August of 2018, the case has appeared twice before a judge, most recently in front of a magistrate judge on July 2, 2020.³²⁷ Initially, in December of 2018, Judge Miller held:

USIBWC’s motion to dismiss on sovereign immunity grounds is denied. Defendants’ motions to dismiss Plaintiffs’ RCRA claim under Rule 12(b)(1) are granted in part and denied in part. Plaintiffs’ allegations relating to the dispersal of waste by wind are dismissed as the court lacks jurisdiction over these allegations Defendants’ motions to dismiss Plaintiffs’ RCRA claim pursuant to Rule 12(b)(6) are granted in part and denied in part. Plaintiffs state a claim for violation of RCRA under Rule 12(b)(6), but only as to the allegations that Defendants’ temporary slowing and obstruction of wastewater changes the character of the waste flowing from Mexico and exacerbates environmental and human endangerment.³²⁸

In a surprising turn of events, U.S. Magistrate Judge Linda Lopez recommended that the parties’ joint motion to stay be granted in the wake

³²³ *Id.* at 931.

³²⁴ Anderson, *supra* note 305.

³²⁵ *City of Imperial Beach*, 337 F. Supp.3d at 926.

³²⁶ *Id.*

³²⁷ *City of Imperial Beach v. Int’l Boundary & Water Comm’n*, No. 18cv457-JM-LL, 2020 U.S. Dist. LEXIS 117230, at *1 (S.D. Cal. July 2, 2020).

³²⁸ *City of Imperial Beach v. Int’l Boundary & Water Comm’n*, 356 F. Supp.3d 1006, 1026 (S.D. Cal. 2018).

of the EPA announcing a \$300 million budget allocation for infrastructure projects along the U.S.-Mexico border to solve the ongoing sewage pollution crisis.³²⁹ In response to the creation of this fund, the parties to the lawsuit filed a joint motion to stay for a twelve-month period in June of 2020, due to the EPA allocation of \$300 million to support the project.³³⁰ The “EPA has already initiated a process to evaluate the technical feasibility, and perform an environmental review, of potential infrastructure projects that would address the pollution that underlies this litigation (the ‘EPA Process’).”³³¹ Additionally:

The Parties believe that staying the litigation while the EPA Process moves forward is the fastest and most efficient means of addressing future transboundary flows in the Tijuana River Valley Further, staying these cases will conserve the Court’s and Parties’ resources while EPA gathers information that may reduce disputed factual issues, including those that may require expert testimony, that would otherwise need to be resolved via litigation Additionally, upon the entry of the requested stay, USIBWC has committed to spend up to \$2 million in the near term to purchase equipment it needs to mitigate transboundary pollution while the EPA Process is underway. For those reasons, the Parties jointly move the Court to stay these cases.³³²

It is unclear at this stage how many more corporations will get part of the pork being doled out by the EPA to clean the Tijuana sewage and prevent more from coming to the United States.

The court ordered a twelve-month stay on July 2, 2020, to provide time for the EPA to identify and move toward the construction of transboundary pollution control infrastructure in the Tijuana River Valley.³³³ Several infrastructure projects have been subject to a “process to evaluate the technical feasibility, and perform an environmental review, of potential infrastructure projects that would address the pollution that underlies this litigation.”³³⁴

On June 30, 2021, an order to extend the stay until February 28, 2022 was issued by Judge Miller, after the parties reached an

³²⁹ *City of Imperial Beach*, No. 18cv457-JM-LL, 2020 U.S. Dist. LEXIS 117230, at *9 (S.D. Cal. July 2, 2020).

³³⁰ *Id.*

³³¹ *Id.* at *3.

³³² *Id.* at *3–4.

³³³ *California v. Int’l Boundary & Water Comm’n*, No. 18CV2050-JM-LL, 2020 WL 3604128 (S.D. Cal. July 2, 2020).

³³⁴ *Id.* at *1.

“agreement in principle” to further stay proceedings.³³⁵ Since the sewage keeps spewing, “[t]he Surfrider Foundation is prepared to revive its lawsuit,” according to Gabriela Torres, former Policy Coordinator of the Surfrider Foundation’s San Diego County Chapter.³³⁶ At the time of writing, the EPA awards process has not been completed.³³⁷

Several infrastructure projects are currently under review. As required under the National Environmental Policy Act (“NEPA”), the EPA must evaluate the environmental impacts associated with the range of potential projects prior to making any final decisions about how the USMCA project funds are spent.³³⁸ According to an EPA spokesperson: “Although we can identify preferred alternatives sooner, the EPA cannot make final funding commitments until this process is concluded.”³³⁹

The money is divided into four annual installments of \$75 million each and paid through EPA grants under the agency’s BWIP.³⁴⁰ This is a sizeable increase from the annual federal budget for the BWIP, which in the fiscal year 2020 was only \$30 million.³⁴¹ As required under the NEPA, the EPA must evaluate the environmental impacts associated with the range of potential projects prior to making any final decisions about how the USMCA project funds are spent.³⁴² Although the EPA can identify preferred alternatives sooner, it cannot make final funding commitments until this process is concluded.

³³⁵ *City of Imperial Beach v. Int’l Boundary & Water Comm’n*, No. 18cv457 JM(LL), 2021 U.S. Dist. LEXIS 123452 (S.D. Cal. June 30, 2021).

³³⁶ Erik Anderson, *Sewage Flows Continue to Foul South San Diego County Beaches*, KPBS (Apr. 6, 2021), <https://www.kpbs.org/news/2021/apr/06/sewage-flows-continue-foul-south-san-diego-county-> [<https://perma.cc/MN7N-BDZM>].

³³⁷ Email from Julia Giarmoleo, Press & Cong. Liaison, U.S. Env’t Prot. Agency, to James Cooper, Professor & Dir. of Int’t Legal Stud., Cal. W. Sch. of L. (Feb. 17, 2022, 02:08 PM PST) (on file with author).

³³⁸ The Environmental Impact Statement requirement is codified at 40 C.F.R. 1506.10–1505.11 (2021).

³³⁹ Email from Julia Giarmoleo, Press & Cong. Liaison, U.S. Env’t Prot. Agency, to James Cooper, Professor & Dir. of Int’t Legal Stud., Cal. W. Sch. of L. (Apr. 19, 2021) (on file with author).

³⁴⁰ *U.S.-Mexico Border Water Infrastructure Grant Program*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/small-and-rural-wastewater-systems/us-mexico-border-water-infrastructure-grant-program> [<https://perma.cc/7XP3-3YGE>] (last visited Jan. 15, 2022).

³⁴¹ *U.S.-Mexico Border 2020 Program*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/usmexicoborder> [<https://perma.cc/Y3YU-S27J>] (last visited Jan. 15, 2022).

³⁴² *Tijuana River Watershed NEPA Implementation*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/sustainable-water-infrastructure/tijuana-river-watershed-nepa-public-scoping> [<https://perma.cc/Z3X9-WHLB>] (last visited Jan. 15, 2022).

On September 2, 2020, the EPA announced that it would invest \$300 million to help reduce transborder Tijuana River pollution.³⁴³ The Section 821 implementing legislation in H.R. 5430 passed in the 116th Congress, entitled “Subtitle B—Other Matters,” and it directs the EPA to address polluted transboundary flows in the Tijuana River Watershed.³⁴⁴ By naming the Tijuana River Watershed as a “covered area,” the law provided an appropriation of \$300 million for infrastructure projects in connection with wastewater facilities in along the U.S.-Mexico border. The law states, in part:

The Administrator of the [EPA] shall, in coordination with eligible public entities, carry out the planning, design, construction, and operation and maintenance of high priority treatment works in the covered area to treat wastewater (including stormwater), nonpoint sources of pollution, and related matters resulting from international transboundary water flows originating in Mexico.³⁴⁵

In addition, the EPA is convening an interagency consultation group comprised of senior-level members from key U.S. federal, state, and local agencies to implement the provisions of the USMCA related to the Tijuana River Valley.³⁴⁶ The EPA is managing a binational technical expert consultation process to ensure infrastructure options utilize the best available technical and scientific information.³⁴⁷

Such as when NAFTA was sold as the solution to the United States’ immigration problem with Mexico,³⁴⁸ the USMCA is being used to solve the environmental disasters befalling the Tijuana River Valley. International trade agreements appear to be the preferred mechanism to solve systemic disputes along the U.S.-Mexico border. The State remains relevant and, most importantly, so does the source of funding—all \$300 million worth.

³⁴³ *EPA Announces Two Near-Term, Clean Water Projects in the Tijuana River*, U.S. ENV’T PROT. AGENCY (Sept. 2, 2020), <https://www.epa.gov/newsreleases/epa-announces-two-near-term-clean-water-projects-tijuana-river> [<https://perma.cc/E6KD-MUMR>].

³⁴⁴ Border Water Infrastructure Improvement Authority, 19 U.S.C. § 4731.

³⁴⁵ *Id.*

³⁴⁶ U.S. ENV’T PROT. AGENCY, *supra* note 343.

³⁴⁷ *Id.*

³⁴⁸ New Mexico Representative Bill Richardson whipped the Democratic votes for President Bill Clinton to get NAFTA legislation passed in the House of Representatives. See JOHN R. MACARTHUR, *THE SELLING OF “FREE TRADE”: NAFTA, WASHINGTON, AND THE SUBVERSION OF AMERICAN DEMOCRACY* 261 (2000).

At the USMCA Tijuana River Watershed Public Information Meeting, held via Zoom on May 24, 2021 at 1 PM PST,³⁴⁹ Jake Strickler of the EPA Headquarters Conflict Resolution Unit moderated and announced the finalists of the government projects under the United States-Mexico-Canada Agreement.³⁵⁰ Andrew Sawyers, Director of the Office of Wastewater Management at the EPA in Washington, D.C., welcomed everyone and referred to comments and letters from community members to allow for a “comprehensive process” in deciding what projects to fund with the \$300 million allocation.³⁵¹ Doug Eberhardt, Infrastructure Manager for EPA Region 9, described the ten different projects to address the problems that the EPA was trying to solve. Some of the projects were “unfeasible.” For example, the EPA would not be pursuing the purchase of the South Bay International Wastewater Plant nor a pilot channel for wastewater to be sent for treatment in Point Loma. The consultant for the EPA, he announced, had eliminated those projects.

In fact, the EPA had outsourced much of the assessment work to a contractor that was undertaking some supplemental analysis to complete a feasibility assessment. The EPA would be moving to “more comprehensive sets of projects,” so as to “identify a preferred alternative.”³⁵² The EPA would also be providing a technical analysis of each of the nine projects (one project did not go forward). There was no one project that addressed all the problems the EPA has identified. But all of them had one thing in common: they were all proposals from for-profit corporations.

Morgan Rogers of the USIBWC presented next, providing a report on the CILA Pump Station, which was built in 1991. He concluded that the pump station was working well, adding that there is a “good story on the pump station.”

One question that came up in the chat box during the Zoom meeting was:

³⁴⁹ Zoom Meeting, USMCA Tijuana River Watershed Public Information Meeting (May 24, 2021, 1:00 PM). Observations are from the Author’s firsthand account, as he was present at the meeting.

³⁵⁰ See *Sustainable Water Infrastructure, USMCA Tijuana River Watershed and Adjacent Coastal Transboundary Wastewater Flows*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/sustainable-water-infrastructure/usmca-tijuana-river-watershed> [<https://perma.cc/N3UQ-V42S>] (last visited Jan. 15, 2022).

³⁵¹ There was a Spanish interpreter also attending the Zoom meeting, but these services went unused.

³⁵² Zoom Meeting, *supra* note 349.

CILA has been shutting off the pumps for no clear reason the last 4 months. So why are you saying the pumps operations has been improved? Answer: The PBCILA pump station is currently being expanded in capacity. It is our understanding that some of these repairs have required the pump station to be shut off at times. Further questions regarding the operation of PBCILA can be directed to Mr. Rogers at the IBWC.³⁵³

Sarah Shadid, from Ross Strategic,³⁵⁴ the “Contractor/Partner” (the EPA’s expression during the Zoom meeting), presented on an “alternatives analysis.” Ross Strategic provides services under a number of North American Industry Classification System service codes and is a pre-qualified vendor for the General Services Administration.³⁵⁵ Its revenues derive, in part, from government contracting. As DiIulio Jr. explained: “Many for-profit firms, from small businesses to huge corporations, have the federal government as a major or sole customer.”³⁵⁶ The presentation from Ms. Shadid was focused on the evaluation method (but notably not the evaluation itself). To evaluate the alternatives, process identification and next steps, Ross Strategic announced it would be doing the “alternatives analysis.” There were questions about “metrics” and how they relate to “objectives.”³⁵⁷

During the Zoom meeting, Doug Eberhardt also explained that the EPA’s goal was to identify three alternatives, including a preferred alternative. The EPA has hired another consultant to compile information on Environmental Impact Statements. With all these contracts for private firms available, the Border Industrial Complex is alive and well along the U.S.-Mexico border.

According to the EPA’s Andrew Sawyers, a fund of \$300 million was allocated to the USIBWC, but if the projects go beyond that amount, the EPA may have other budgets if other projects are not utilizing that funding. “\$300 million plus . . . That’s a congressional decision to go beyond that,” he explained on the Zoom meeting. So, other BWIP funding from the EPA may supplement the USMCA funding, but this remains unclear. While design and construction, according to

³⁵³ *Id.*

³⁵⁴ See ROSS STRATEGIC, <https://www.rossstrategic.com> [<https://perma.cc/2XND-PUCK>] (last visited Jan. 20, 2022).

³⁵⁵ “The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy.” *Introduction to NAICS*, U.S. CENSUS, <https://www.census.gov/naics/> [<https://perma.cc/2X45-VW4V>] (last visited Jan. 23, 2022).

³⁵⁶ DI IULIO, *supra* note 203, at 17.

³⁵⁷ *Id.*

Doug Eberhardt, is scheduled to start in 2023, Andrew Sawyers interjected that some projects may get underway before that date.³⁵⁸

Doug Eberhardt concluded the Zoom meeting by discussing the elephant in the room—the United States’ partner on the other side of the border:

We have been talking with Mexico. Any solution that is going to be effective dealing with Tijuana sewage has to be done in a binational context. Depending on which alternative we settle on, based on our discussion with Mexico, it will require coordination with Mexico.³⁵⁹

And as the region waits for the USMCA funding to be deployed to a variety of corporations as the favorite projects are announced, the situation is not getting any better for the Tijuana River Valley nor for the coastline from Imperial Beach to Coronado. The San Diego County Board of Supervisors declared a public health emergency crisis for the Tijuana River Valley at its February 10, 2021, meeting.³⁶⁰ District 1 Supervisor Nora Vargas tweeted that she initiated the declaration to address a decades-old problem in the region.³⁶¹

Sewage—a scary mixture of human waste and industrial toxins—continues to flow into the Tijuana River Valley, a waterway which has long been an environmentally sensitive area. Same as it ever was.

³⁵⁸ *Id.*; see also *USMCA Tijuana River Watershed, Public Information Meeting*, U.S. ENV’T PROT. AGENCY (May 24, 2021, 1:00 PM to 3:00 PM), https://www.epa.gov/sites/default/files/2021-05/documents/usmca_tijuana_river_watershed_meeting_materials_may_24_2021.pdf [<https://perma.cc/WLJ7-TL3T>].

³⁵⁹ Zoom Meeting, *supra* note 349.

³⁶⁰ Alessandra Selgi-Harrigan, *Board of Supervisors Declares Public Health Crisis in Tijuana River Valley*, EAGLE & TIMES (Feb. 19, 2021), http://www.imperial-beachnewsca.com/news/article_0c9bb8ea-7606-11eb-bdac-a3bf7ba0fb54.html [<https://perma.cc/W239-RK9N>]; see also *County Supervisors Declare Public Health Crisis in Tijuana River Valley*, NBC NEWS (Feb. 10, 2021), <https://www.nbcsandiego.com/news/local/county-supervisors-declare-public-health-crisis-in-tijuana-river-valley/2517549> [<https://perma.cc/GYD6-JKQ5>].

³⁶¹ Supervisor Nora Vargas (@SupNoraVargas), TWITTER (Feb. 9, 2021, 1:21 PM), <https://twitter.com/SupNoraVargas/status/1359205816385998849> [<https://perma.cc/V99S-QP66>].