

GRAND RIVER ENTERPRISES *ET AL*

V.

UNITED STATES OF AMERICA

(NAFTA / UNCITRAL Arbitration)

Minutes of the First Session of the Tribunal

Washington D.C.

March 31, 2005

Grand River Enterprises *et al* v. United States of America**Minutes of the First Session of the Tribunal****March 31, 2005**

The First Session of the Arbitral Tribunal was held on Thursday, March 31, 2005, from 3:00 pm to 5:50 pm at the seat of the World Bank in Washington, D.C.

Present at the session were:

Members of the Tribunal

Mr. Fali Nariman, President
Prof. James Anaya, Arbitrator
Mr. John R. Crook, Arbitrator

ICSID Secretariat

Mr. José Antonio Rivas, Secretary of the Tribunal

Representing the Claimants

Mr. Leonard Violi, Law Offices of Leonard Violi
Mr. Todd Weiler, NAFTA Law.org
Mrs. Chantell Macinnes Montour, Inch Hammond Professional Corporation

Representing the Respondent

Mr. Mark A. Clodfelter, U.S. Department of State
Mrs. Andrea J. Menaker, U.S. Department of State
Mrs. CarrieLyn Guymon, U.S. Department of State
Mr. David A. Pawlak, U.S. Department of State
Mrs. Jennifer I. Toole, U.S. Department of State

Assisting the Respondent

Mr. Mark S. McNeill, U.S. Department of State
Mr. William Lieblich, National Association of Attorneys General

The session considered matters listed in the provisional agenda circulated by the Secretary in his letter of February 22, 2005. The agenda is attached to these Minutes as Annex 1. The parties had in advance of the meeting, by separate letters of March 8 and 9, 2005, notified the Tribunal of their areas of agreement on the points in the agenda. By the same letter the parties had also indicated those procedural matters of the agenda on which they were not able to agree. These minutes reflect the agreement of the parties, as expressed in their letters of March 8 and 9, 2005, and reaffirmed at the meeting. Copies of the letters are annexed hereto, for ease of reference, as Annex 2.

I. Procedural Matters**1. Constitution of the Tribunal and Declarations by the Members of the Tribunal**

The parties agreed that the Tribunal had been duly constituted in accordance with the UNCITRAL Arbitration Rules. Declarations of the Members of the Tribunal as to their independence were distributed during the session.

2. Fees and Expenses of the Tribunal Members (Articles 38-40 of the UNCITRAL Arbitration Rules)

The parties agreed that the Tribunal should rely on the ICSID fee schedule, including allowances and reimbursement of travel expenses within limits as set forth in ICSID Administrative and Financial Regulation 14.

3. Representation of the Parties (Article 4 of the UNCITRAL Arbitration Rules)

The Claimants are represented by:

- Mr. Leonard Violi, Law Offices of Leonard Violi, LLC
- Mr. Todd Weiler, NAFTALaw.org
- Mrs. Chantell Macinnes Montour, Inch Hammond Professional Corporation

The Respondent is represented by:

- Mark A. Clodfelter, Assistant Legal Adviser, Office of International Claims and Investment Disputes, U.S. Department of State
- Andrea J. Menaker, Chief, NAFTA Arbitration Division, Office of International Claims and Investment Disputes, U.S. Department of State
- CarrieLyn Guymon, Attorney-Adviser, U.S. Department of State
- David A. Pawlak, Attorney-Adviser, U.S. Department of State
- Jennifer I. Toole, Attorney-Adviser, U.S. Department of State

Assisting the Respondent who were also present were: Mr. Mark S. McNeill and Mr. William Lieblich.

4. Applicable Arbitration Rules (Article 1 of the UNCITRAL Arbitration Rules)

The parties agreed that the applicable arbitration rules are the UNCITRAL Arbitration Rules, except to the extent that they are modified by the provisions of Section B of NAFTA Chapter 11.

5. Applicable Law (Article 1131 of NAFTA; Article 33 of the UNCITRAL Arbitration Rules)

It was confirmed that pursuant to NAFTA Article 1131, the governing law for this arbitration is the NAFTA and applicable rules of international law.

6. Apportionment of Costs and Advance Payments to the Centre (Articles 38-41 of the UNCITRAL Arbitration Rules)

The Claimants on the one hand, and the Respondent on the other, agreed to share equally advance payments to the Centre. It was noted that the parties understand that in accordance with Articles 38-41 of the UNCITRAL Arbitration Rules, upon the issuance of an award, the Tribunal may apportion the costs of the arbitration between the parties if it determines apportionment is reasonable under the circumstances of the case.

It was recalled that the Centre had requested each Party to pay an amount of US\$75,000 to defray the costs of the proceeding until further notice. The Secretary confirmed that payment had been received from both parties which is noted.

7. Records of Hearings (Article 25(3) of the UNCITRAL Arbitration Rules)

It was agreed that substantive proceedings before the Tribunal should be transcribed. The parties agreed that the First Session as well as other procedural or organizational hearings would not be transcribed, but only tape-recorded. The parties also agreed to the use of Live Note transcription software, or a comparable means of making the hearing transcript instantaneously available to the parties and Members of the Tribunal in the hearing room. The parties further agreed that transcripts of proceedings should be made available on a same day service basis. Finally, the parties agreed that transcripts of proceedings may be made available to the public.

8. Means of Communications and Copies of Instruments (Article 15(3) of the UNCITRAL Arbitration Rules)

The parties agreed that correspondence and submissions, including pleadings and memorials (without attachments), should be sent by e-mail on the date the submission is due simultaneously to opposing counsel, the Secretary of the Tribunal, and the Members of the Tribunal. Such documents also should be sent by facsimile to opposing counsel and to the Secretary of the Tribunal at ICSID for further distribution.

The parties agreed that voluminous submissions, such as evidentiary materials and legal authorities, as well as the memorials, should be sent by overnight delivery service to opposing counsel and the Secretary of the Tribunal. The parties agreed to provide two hardcopies of voluminous

submissions to opposing counsel and five hardcopies thereof to the Secretary of the Tribunal for further distribution.

9. Quorum

It was noted and agreed that three Members of the Tribunal shall constitute a quorum. It was also agreed that procedural matters could be decided independently by the presiding arbitrator, subject to revision, if any, by the Arbitral Tribunal.

10. Confidentiality (Article 25(4) of the UNCITRAL Arbitration Rules)

The parties agreed that orders, awards (including interim awards), pleadings, written submissions, transcripts and other materials may be made available to the public by either party, with the exception of confidential business information ("CBI").

The parties also agreed to confer and communicate any agreement to the Tribunal concerning their designation and treatment of CBI within their submissions.

Absent any agreement however: it is directed that should a party wish to protect CBI from disclosure it must designate the particular confidential business information in its submission and provide a redacted version of the submission to opposing counsel, the Secretary of the Tribunal at ICSID and to the Members of the Tribunal; the redacted version could be used for dissemination to the public. If no redacted version of a submission is supplied, as directed, then it would be assumed by all concerned that the submission does not contain any confidential business information.

The parties further agreed that substantive hearings on merits would be open to the public via a live closed-circuit television transmission, provided that ICSID is able to make the appropriate logistical arrangements. It was also noted that no member of the public would be admitted into the hearing room.

11. Decisions of the Tribunal (Article 31 of the UNCITRAL Arbitration Rules)

The parties agreed that decisions of the Tribunal should be made in accordance with Article 31 of the UNCITRAL Arbitration Rules.

12. Procedural Language (Article 17 of the UNCITRAL Arbitration Rules)

The parties agreed that English would be the language of the proceedings. They also confirmed that any supplementary documents or exhibits in a different language would be submitted along with a translation in English.

13. Place of Proceedings (Article 1130 of NAFTA; Article 16 of the UNCITRAL Arbitration Rules)

At this stage it was agreed that the Tribunal shall hold arbitration proceedings in Washington or New York City, as directed by the Tribunal, it being also agreed that at a later date the Tribunal will determine, after hearing the parties, the place of arbitration.

14. Bifurcation

The Respondent stated its intention to seek bifurcation of its preliminary objections from the merits of the dispute; and proposed that, if necessary, damages should be treated in a separate phase from the merits.

The Claimants raised objections to any bifurcation (i.e., a jurisdictional and a merits phase) or trifurcation (i.e., jurisdictional, merits and damages – phase) of the proceedings.

The Tribunal directed that a decision on the above shall be communicated to the parties after perusing the Statement of Claim, the Statement of Defense, Grand River *et al*'s Pleading on Bifurcation and the U.S.' Pleading on Bifurcation.

15. Brief presentation of the case by the parties

During the session each party made a brief presentation of its case.

16-17. Written and Oral Procedures – Pleadings: Number, Sequence, Time Limits (Articles 18-23 of the UNCITRAL Arbitration Rules)

It was agreed by the Parties that the schedule for the written submissions would be as follows:

Grand River <i>et al</i> — Statement of Claim:	Monday, May 16, 2005
U.S. — Statement of Defense:	Thursday, June 30, 2005
Grand River <i>et al</i> — Pleading on Bifurcation:	Friday, July 15, 2005
U.S. —Pleading on Bifurcation:	Friday, July 29, 2005

It was directed by the Tribunal that in their respective Pleadings on Bifurcation, Grand River *et al*, as well as the United States should address the issue as to the appropriateness of the preliminary issues being (or not being) bifurcated.

Finally, it was decided by the Tribunal that it would notify the parties in due course of further oral proceedings in this arbitration.

18. Delegation of Power to Fix Time Limits

The parties agreed that the Tribunal shall, in consultation with the parties, fix the time limits in respect of documents to be filed; and in case of urgency the Chairman would do so.

19. Dates of Subsequent Sessions

It was noted that dates of subsequent sessions would be notified by the Tribunal in due course.

20. Production of Evidence (Articles 24-25 of the UNCITRAL Arbitration Rules)

The parties agreed that Article 3 of the International Bar Association's Rules on the Taking of Evidence ("IBA Rules") shall govern the exchange of documents (excepting Article 3.12, regarding confidentiality); Articles 4 and 5 of the IBA Rules shall govern the presentation of testimony by expert and fact witnesses; Article 8 of the IBA Rules shall govern the conduct of the evidentiary hearing; and Article 9 of the IBA Rules shall govern the admissibility and assessment of evidence.

The Claimants proposed that after the exchange of all written statements as directed above – but before the election of the parties as to which of the witnesses should be cross-examined – the parties should be provided with a right to submit interrogatories to persons in the control of either party who did not provide any evidence in chief; and that responses of such persons would be subject to cross-examination at the election of the party submitting the interrogatory.

The Respondent United States, however opposed the Claimant's aforesaid proposal that the Tribunal grant to the parties a right to obtain testimonial evidence.

It was directed by the Tribunal that this matter would be dealt with appropriately at a subsequent date.

II. Other Matters

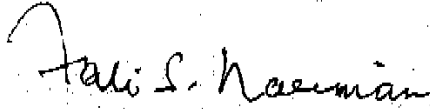
1. *Amicus Curiae* Participation:

The parties agreed that the Tribunal should later adopt a process for receiving and considering *amicus* submissions, as necessary (but not at this stage), by having recourse to the recommendations of the North American

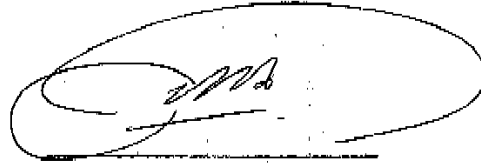
Free Trade Commission on non-disputing party participation, (issued on October 7, 2003, as a guideline).

After consultation with the other members of the Tribunal and the parties, there being no further business, the President adjourned the meeting at 5:50 pm.

Sound recordings were made of the session and deposited in the archives of the Centre. Copies thereof are being distributed to the Members of the Tribunal and to the parties.



Mr. Fali Nariman
President of the Tribunal



José Antonio Rivas
Secretary of the Tribunal

Annex 1

GRAND RIVER ENTERPRISES *ET AL*

v.

UNITED STATES OF AMERICA

**Provisional Agenda
First Session of the Arbitral Tribunal
March 31, 2005**

NAFTA / UNCITRAL Arbitration

I. Procedural Matters

1. Constitution of the Tribunal and Declarations by the Members of the Tribunal
2. Fees and Expenses of the Tribunal Members (Articles 38-40 of the UNCITRAL Arbitration Rules)
3. Representation of the Parties (Article 4 of the UNCITRAL Arbitration Rules)
4. Applicable Arbitration Rules (Article 1 of the UNCITRAL Arbitration Rules)
5. Applicable Law (Article 1131 of NAFTA; Article 33 of the UNCITRAL Arbitration Rules)
6. Apportionment of Costs and Advance Payments to the Centre (Articles 38-41 of the UNCITRAL Arbitration Rules)
7. Records of Hearings (Article 25(3) of the UNCITRAL Arbitration Rules)
8. Means of Communications and Copies of Instruments (Article 15(3) of the UNCITRAL Arbitration Rules)
9. Quorum
10. Confidentiality (Article 25(4) of the UNCITRAL Arbitration Rules)
11. Decisions of the Tribunal (Article 31 of the UNCITRAL Arbitration Rules)
12. Procedural Language (Article 17 of the UNCITRAL Arbitration Rules)
13. Place of Proceedings (Article 1130 of NAFTA; Article 16 of the UNCITRAL Arbitration Rules)

14. Bifurcation
15. Brief presentation of the case by the parties (10 minutes for each party)
- 16-17. Written and Oral Procedures – Pleadings: Number, Sequence, Time Limits
(Articles 18-23 of the UNCITRAL Arbitration Rules)
18. Delegation of Power to Fix Time Limits
19. Dates of Subsequent Sessions
20. Production of Evidence (Articles 24-25 of the UNCITRAL Arbitration
Rules)

II. Other Matters

Annex 2



United States Department of State

Washington, D.C. 20520

March 8, 2005

By Facsimile & E-mail

Mr. José Antonio Rivas
International Centre for Settlement
Of Investment Disputes
1818 H Street, N.W.
Washington, D.C. 20433

Re: *Grand River Enterprises et al. v. United States of America*

Dear Mr. Rivas:

On behalf of respondent United States of America and in accordance with your letter dated February 22, 2005, we list below the items identified in the Tribunal's Provisional Agenda and set forth the parties' agreement on items 1-12, 18-19 and their partial agreement with respect to item 20. The parties could not reach agreement on items 13-17. Therefore, the United States sets forth below its proposal for the manner in which the Tribunal should address those agenda items.

I. Procedural Matters

1. Constitution of the Tribunal and Declarations by the Members of the Tribunal

The parties agree that the Tribunal has been duly constituted in accordance with the UNCITRAL Arbitration Rules. While declarations by the members of the Tribunal as to their independence and impartiality are not required under the UNCITRAL Arbitration Rules, neither party has any objection to the members providing such declarations, should they wish to provide them.

2. Fees and Expenses of the Tribunal Members (Articles 38-40 of the UNCITRAL Arbitration Rules)

The parties agree that the Tribunal should rely on the ICSID fee schedule dated March 8, 2004, including allowances and reimbursement of travel expenses within limits as set forth in ICSID Administrative and Financial Regulation 14.

3. Representation of the Parties (Article 4 of the UNCITRAL Arbitration Rules)

The respondent shall be represented by the following individuals:

Mark A. Clodfelter, Assistant Legal Adviser, Office of International
Claims and Investment Disputes
Andrea J. Menaker, Chief, NAFTA Arbitration Division
CarrieLyn Guymon, Attorney-Adviser
David A. Pawlak, Attorney-Adviser
Jennifer I. Toole, Attorney-Adviser

4. Applicable Arbitration Rules (Article 1 of the UNCITRAL Arbitration Rules)

Pursuant to NAFTA Article 1120, the claimant has submitted its claim to arbitration under the UNCITRAL Arbitration Rules, which shall apply except to the extent modified by Section B of Chapter Eleven.

5. Applicable Law (Article 1131 of NAFTA; Article 33 of the UNCITRAL Arbitration Rules)

Pursuant to NAFTA Article 1131, the parties agree that the governing law for this arbitration is the NAFTA and applicable rules of international law.

6. Apportionment of Costs and Advance Payments to the Centre (Articles 38-41 of the UNCITRAL Arbitration Rules)

The parties agree to share equally advance payments to the Centre. The parties understand that in accordance with Articles 38-41 of the UNCITRAL Arbitration Rules, upon the issuance of an award, the Tribunal may apportion the costs of the arbitration between the parties if it determines apportionment is reasonable under the circumstances of the case.

7. Records of Hearings (Article 25(3) of the UNCITRAL Arbitration Rules)

The parties agree to request that ICSID arrange for proceedings before the Tribunal to be transcribed, with the exception that the first session as well as other procedural or organizational hearings need not be transcribed, but only tape-recorded. The parties also agree to the use of Live Note transcription software, or a comparable means of making the hearing transcript instantaneously available to the parties and members of the Tribunal in the hearing room. The parties further agree that transcripts of proceedings should be made available on a same day service basis. Finally, the parties agree that transcripts of proceedings will be made available to the public (see item 10 below).

8. Means of Communications and Copies of Instruments (Article 15(3) of the UNCITRAL Arbitration Rules)

Correspondence and Submissions

The parties agree that correspondence and submissions directed to the Tribunal members, including pleadings and memorials (without attachments), shall be sent by e-mail simultaneously to opposing counsel, the Secretary of the Tribunal at ICSID, and the members of the Tribunal. Such documents also shall be sent by facsimile to opposing counsel and to the Secretary of the Tribunal at ICSID for further distribution, as appropriate.

With respect to correspondence and submissions, the parties agree that the Tribunal and opposing counsel shall receive a submission via e-mail on the date the submission is due.

Voluminous Submissions

The parties agree that voluminous submissions, such as evidentiary materials and legal authorities, as well as the memorials, will be sent by overnight delivery service (Federal Express, DHL, UPS, etc.) to opposing counsel and the Secretary of the Tribunal at ICSID. The parties agree to provide two hardcopies of voluminous submissions to opposing counsel and five hardcopies of voluminous submissions to the Secretary of the Tribunal at ICSID for further distribution, as appropriate.

9. Quorum

The parties agree that three arbitrators shall constitute a quorum. As noted below under item 11, procedural matters may be decided independently by the presiding arbitrator, subject to revision, if any, by the arbitral tribunal.

10. Confidentiality (Section A of the Notes of Interpretation of Certain Chapter 11 Provisions of the NAFTA Free Trade Commission of 31 July 2001; and Article 25(4) of the UNCITRAL Arbitration Rules)

The parties agree that orders, awards (including interim awards), pleadings, written submissions, transcripts and other materials may be made available to the public by either party, with the exception that confidential business information ("CBI") shall be withheld. The parties further agree that should a party wish to protect CBI from disclosure, that party must designate the CBI in its submission and provide a redacted version of the submission to opposing counsel, the Secretary of the Tribunal at ICSID, and the members of the Tribunal. The redacted version will be used for dissemination to the public. If no redacted version of a submission is supplied, then the parties may assume that the submission does not contain CBI.

The parties agree that substantive hearings shall be open to the public via a live closed-circuit television transmission, provided that ICSID is able to make the appropriate logistical arrangements. Only members of the Tribunal, members of the other NAFTA Parties, ICSID personnel and its representatives and the parties and their representatives shall be admitted into the hearing room.

11. Decisions of the Tribunal (Article 31 of the UNCITRAL Arbitration Rules)

The parties agree that decisions of the Tribunal shall be made in accordance with Article 31 of the UNCITRAL Arbitration Rules.

12. Procedural Languages (Article 17 of the UNCITRAL Arbitration Rules)

The parties agree that English will be the language of the proceedings.

13. Place of Proceedings (Article 1130 of NAFTA; Article 16 of the UNCITRAL Arbitration Rules)

The parties have not agreed to the place of arbitration. The United States proposes that Washington, D.C. be designated as the legal situs of the arbitration.

14. Bifurcation

The parties have not reached agreement with respect to bifurcation.

The claimant has not submitted a Statement of Claim pursuant to Article 18 of the UNCITRAL Arbitration Rules. Based on a review of claimant's Notice of Arbitration, the United States intends to seek bifurcation of its preliminary objections from the merits of the dispute. The United States also proposes that, if necessary, damages be treated in a separate phase from the merits.

15. Brief presentation of the case by the parties (10 minutes for each party)

The parties have not agreed with respect to a brief presentation of the case by the parties. The United States respectfully submits that it would be premature to make such presentations at the first organizational hearing. The United States, however, reserves its right to respond to any such presentation made by the claimant.

16-17. Pleadings: Number, Sequence, Time Limits (Articles 18-23 of the UNCITRAL Arbitration Rules)

Due to an inability to agree on the place of arbitration and bifurcation, the parties could not agree to a schedule for the proceedings. The United States proposes that, upon receipt of the Statement of Claim required by Article 18 of the UNCITRAL Arbitration Rules, the Tribunal fix a time for the submission of the

United States' Statement of Defense. See UNCITRAL Arbitration Rules, art. 23. The United States further proposes that submissions in all phases of the arbitration shall consist of a memorial, a counter-memorial, a reply and a rejoinder.

18. Delegation of Power to Fix Time Limits

The parties agree that the Tribunal shall, in consultation with the parties, fix the time limits in these proceedings.

19. Dates of Subsequent Sessions

The parties agree that, after consultation with the disputing parties, the Tribunal shall determine the dates of any subsequent sessions.

20. Production of Evidence (Articles 24-25 of the UNCITRAL Arbitration Rules)

The parties agree that Article 3 of the International Bar Association's Rules on the Taking of Evidence ("IBA Rules") shall govern the exchange of documents (excepting Article 3.12, regarding confidentiality), Articles 4 and 5 of the IBA Rules shall govern the presentation of testimony by expert and fact witnesses, Article 8 of the IBA Rules shall govern the conduct of the evidentiary hearing and Article 9 of the IBA Rules shall govern the admissibility and assessment of evidence.

The United States understands that the claimant may propose that the Tribunal grant the parties a right to obtain testimonial evidence in a manner not contemplated by the IBA Rules. The United States opposes any such proposal.


II. Other Matters

21. Non-disputing Party (Amicus) Submissions

The parties call the Tribunal's attention to the October 2003 Free Trade Commission statement on non-disputing party submissions.

We look forward to meeting the members of the Tribunal on March 31, 2005.

Respectfully submitted,


Andrea J. Menaker
Chief, NAFTA Arbitration Division
Office of International Claims and
Investment Disputes

Copies:
Todd Weiler, Esq.
Leonard Violi, Esq.

(by e-mail only)
Mr. Fali Nariman
Prof. James Anaya
Mr. John R. Crook

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3007 Turner Road, Windsor ON N8W 3L6

PH: 313-686-6969
FX: 309-210-2352

18 February 2004

José Antonio Rivas
Secretary to the Tribunal
International Centre for the Settlement of Investment Disputes
1818 H Street, N.W.
Washington, D.C.
20433
U.S.A.

Dear Mr. Rivas:

**RE: Grand River Enterprises *et al v.* United States of America
NAFTA / UNCITRAL Proceedings**

Further to your letter of 22 February 2005, counsel for the Claimants and Respondent entered into discussions concerning the topics contained within the Chairman's Provisional Agenda, which was attached to your letter. We have been able to agree on a number of topics, although some outstanding issues remain. The following is a record of the topics upon which the parties agree and disagree. A similar letter will be sent by counsel for the Respondent, as scheduling issues prevented them from preparing a single draft memorializing their positions.

Constitution of the Tribunal and Declarations by the Members of the Tribunal

The parties agree that the Tribunal has been duly constituted. They further agree that, while the applicable arbitration rules do not require it, they would welcome the completion of declarations by the Tribunal Members similar to those used for tribunals constituted under the ICSID Rules.

Fees and Expenses of the Tribunal Members

The parties agree that the fees and expenses of Tribunal Members should follow those established under the ICSID schedule of fees, and administered as provided by the ICSID's Administrative and Financial Regulation 14.

Representation of the Parties

The Claimants will be represented by the following counsel:

Leonard Violi
Law Offices of Leonard Violi, LLC
910 E. Boston Post Road
Mamaroneck, New York 10543

Tel. (914) 698-6200
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Len.Violi@violilaw.com

Todd Weiler
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Tel. (313) 686-6969
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Inch Hammond Professional Corporation
1 King Street West, Suite 1500
Hamilton, Ontario L8P4X8
Tel. (905) 525-4481
Fax. (905) 525-0031
montour@inchlaw.org

Applicable Arbitration Rules

The parties agree that the applicable arbitration rules are the UNCITRAL Arbitration Rules, except to the extent that they are modified by the provisions of Section B of NAFTA Chapter 11.

Applicable Law

The parties agree that the applicable law for this arbitration is set out in Article 1131 of the NAFTA. The claimants note that NAFTA Article 102 also establishes the manner in which the provisions of the NAFTA must be interpreted by the Tribunal.

Apportionment of Costs and Advance Payments to the Centre

The parties agree that they will equally bear the burden of the costs of the arbitration, through the submission of advance payments to the ICSID Secretariat, as requested by the Tribunal from time to time. The parties also agree that the Tribunal is authorised under the UNCITRAL Rules and international law to issue an order for the payment of costs based on any apportionment that it sees as appropriate in the circumstances.

The Claimants have already made their first advance payment, in the amount of US\$75,000.00, as requested by the Tribunal.

Records of Hearings

The parties agree that substantive hearings will be simultaneously transcribed using a "Live Notes" computer software system that will include the delivery of transcripts on the next business day after which they were made. Procedural meetings will not be transcribed.

Means of Communication and Copies of Instruments

The parties agree that communications shall take place by electronic mail, with the date of such transmissions constituting the effective date of delivery, based upon the Eastern Standard Time Zone, for purposes of complying with any time requirements established by the Tribunal. Electronic mail messages will be sent to counsel for both parties, the Tribunal Secretary, and Tribunal Members. In addition, facsimile messages will be sent between counsel for the parties and copied to the Tribunal Secretary, for distribution to the Tribunal as he sees fit.

For the submission of written arguments, the parties agree to provide each other with two copies of their submissions and appendices, and to send five copies to the Tribunal Secretary.

Quorum

The parties agree that quorum for the Tribunal shall be three, although their agreement does not derogate from the authority of the Chairman to issue orders on matters of procedure, in consultation with the other Tribunal Members, if requested by them.

Confidentiality

The parties agree that records of this arbitration are not confidential. Either party may make public the written arguments and hearing transcripts, as well as the Tribunal orders and awards, generated through this arbitration, subject to redactions to be made at the discretion of either party for the protection of confidential business information. The parties agree that whenever a party submits a document to the tribunal, for which it intends to retain confidentiality, it will provide a redacted version of the document and label the non-redacted version as being "Confidential Business Information."

The parties agree that the ICSID Secretariat shall be entitled to make a closed-circuit television viewing room available to the public, for the transmission of the non-confidential portions of substantive proceedings held in Washington, D.C. The Claimants understand that this agreement is subject to the willingness of the ICSID Secretariat to bear the costs of making a closed-circuit television viewing room available.

Decisions of the Tribunal

The parties confirm their understanding that a majority of the Tribunal can take a decision on behalf of the Tribunal, involving any substantive issue of law or fact raised before the Tribunal.

Procedural Language

The parties agree that English shall be the language of the arbitration.

Place of Proceedings

The parties do not agree on the place of arbitration. The Claimants submit that the legal seat of the arbitration should be New York City. Witness hearings can be held in New York City or Washington, D.C. as the Tribunal deems necessary.

The parties agree to brief the Tribunal further on this issue on a schedule it sees fit. The Claimants are prepared to submit a brief within seven days of the Tribunal's order. The claimants also submit that, in the interests of efficiency, the parties' briefs should be limited to no more than twelve double-spaced pages.

Bifurcation

The parties do not agree on issues of bifurcation.

The Claimants submit that they have asserted a *prima facie* claim as required under the jurisdiction-granting provisions of the NAFTA: Articles 1101, 1116 and 1117. As such, jurisdiction has vested in the Tribunal to hear their claim. The Claimants note that previous UNCITRAL tribunals established under the NAFTA have concluded that they do not have the authority to entertain objections as to the admissibility of a claim, regardless of whether such objections are styled as "jurisdictional" by the Respondent.

The Claimants further submit that theirs is a simple claim for which there is no need to hold separate hearings on merits and damages issues. It is the Claimants' burden to make their case, both for liability and damages. Accordingly, if the Claimants are prepared to put on their entire case in the coming months, there can hardly be any reason why the Respondents cannot be ready to defend the claim, so long as an appropriate discovery process has taken place.

Brief Presentation of the Case by the Parties

The parties do not agree on the appropriateness of providing the Tribunal with a brief presentation of their respective cases. For their part, the Claimants would welcome such an opportunity and will be prepared to make a presentation at the first procedural meeting.

Written and Oral Procedures – Pleadings: Number, Sequence, Time Limits

The parties could not agree on procedures regarding the number, sequence or time limits appropriate for this arbitration. Unlike the ICSID Rules, the UNCITRAL Rules do not specify any particular number or sequence for written submissions beyond the delivery of the statements of claim and defence. As per Article 22, the Tribunal is free to fix the number and sequence of written submissions as it sees fit.

The Claimants understand that the Respondent envisages having the consecutive exchange of potentially as many as nine to twelve memorials; three or four on jurisdiction; four on liability; and two to four on damages. Such a process would likely take a number of years to complete.

The Claimants propose a much different approach. The Claimants submit that there is no reason why the parties cannot complete the entire arbitration within the current calendar year. They further submit that there is a very good reason as to why the parties and Tribunal should move with great efficiency: their investments are quickly dying because of the governmental conduct complained of in the notice of arbitration. In a nutshell, the Claimants may no longer be in business in the territory of any of the forty-six states in question, much less in the five states in which they have been able to remain operating, if this arbitration was allowed to drag on for a number of years.

The Claimants note that as the notice of arbitration clearly satisfies the requirements of Article 18 of the UNCITRAL Rules, it should accordingly be treated as a "statement of claim" for the purposes of this arbitration. As such, all that is required to move forward with the evidentiary phase of these proceedings is the delivery of a statement of defence – of similar breadth and detail – by the Respondent, as required under Article 19 of the UNCITRAL Rules.

After the statement of defence has been received, the parties can undertake a single exchange of requests for documentary evidence and subsequently prepare particularised memorials of fact and law, which would include any evidence in chief relied upon to elaborate their respective cases. After the simultaneous exchange of these memorials, the parties would have the option of exchanging interrogatory questions for witnesses not put forward by the other party in chief (as described in more detail below). Once in receipt of the answers to these questions, both parties – and the Tribunal – will be well-placed to conduct an evidentiary hearing at which cross examination of all of the witnesses would take place.

The Claimants submit that one or two hearing days should also be reserved to argue the applicable law, as identified in their respective memorials. The process, as outlined above, would provide both parties with an equal opportunity to marshal all of the evidence and legal arguments necessary to fully make their respective cases, while preserving the kind of efficiency in decision-making contemplated for arbitrations held under the UNCITRAL Rules.

Delegation of Power to Fix Time Limits

The Parties confirm their understanding that the Tribunal has the authority to fix time limits for the efficient conduct of this arbitration.

The Claimants further understand that the power to fix time limits is a procedural one, which may be exercised by the Chairman acting alone, although they would expect the other Members of the Tribunal to be consulted before time limits are fixed for the submission of substantive memorials.

Dates of Subsequent Sessions

As the parties do not agree on the questions of bifurcation or the number, sequence and time limits of the hearings, they were not able to agree upon dates for subsequent sessions of the Tribunal.

In lieu of such agreement, the Claimants propose the following schedule, which maximises efficiency while perfectly addressing the need for formal and effective equality between the parties:

- 27 May 2005 United States delivers its Statement of Defence
- 24 June 2005 The parties submit their requests for documents
- 22 July 2005 The parties submit their replies to each other's request for documents
- 30 September 2005 The parties submit their Particularised Memorials of Fact and Law
- 14 October 2005 Exchange of interrogatory questions by the parties (if necessary)
- 11 November 2005 Submission of replies to interrogatory questions (if necessary)
- 11 November 2005 Submission of amicus briefs (if any)
- 11 November 2005 Submission of Article 1128 briefs by Canada and Mexico (if any)
- 11 November 2005 Parties identify witnesses for cross-examination
- 7 December 2005 Oral hearings, 3 to 5 witness cross-examinations
- 12 December 2005 Oral hearings, 1 to 2 days for legal arguments
- 13 January 2006 Submission of Post-hearing briefs (if necessary)

Such a schedule generously extends the 45-day time limit established under Article 22 of the UNCITRAL Rules for the exchange of written submissions. The claimants have offered to vary the standard 45-day rule in acknowledgement of the fact that the Respondent, as a federal government entity, will be required to coordinate its defence with the sub-federal entities whose conduct is actually at issue in this claim.

Production of Evidence

The parties agree that the Tribunal should adopt certain provisions of the *International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration*, specifically: Article 3 (with the exclusion of paragraph 12 regarding confidentiality); Articles 4 to 5 and Articles 8 to 9.

In addition, the Claimants propose that, after the final exchange of memorials but before the election of the parties concerning to cross-examine witnesses at the oral hearing, the parties should be provided with a right to submit interrogatory questions to persons in the control of either party who did not provide any evidence in chief. Responses to these questions would be subject to cross-examination at the election of the party that posed the questions.

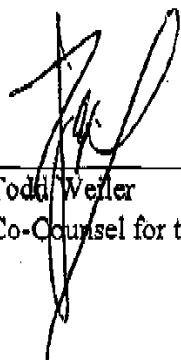
The purpose of providing the parties with recourse to an interrogatory question mechanism is to ensure that the Tribunal is provided with the best evidence possible with which to make its findings of fact. Particularly in investor-state arbitrations, it is often the case that a party may chose not to select the person whom the other party believes can provide the best evidence on the matter, to provide evidence in chief. The use of an interrogatory questions mechanism forestalls the ability of either party to shield a potentially damaging witness from cross-examination by the other party.

An interrogatory question process, undertaken only after the designation of witnesses in chief has taken place, provides the Tribunal with an efficient and unobtrusive means of ensuring that it receives the benefit of best evidence available, as presented by the parties. This process provides the parties and the Tribunal with some of the benefits of the more wide-ranging discovery process available in many common law jurisdictions, without imposing any of the attendant costs.

Other Matters – Amicus Participation

The parties agree that the Tribunal should adopt a process for receiving and considering amicus submissions, as necessary, by having recourse to the recommendations of the North American Free Trade Commission on non-party participation, issued October 7, 2004, as a guideline.

All of which is respectfully submitted.



Todd Wexler
Co-Counsel for the Claimants

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Andrea Menaker, Esq.

Mr. Fali Nariman
Prof. James Anaya
Mr. John R. Crook



United States Department of State

Washington, D.C. 20520

March 9, 2005

By Facsimile & E-mail

Mr. José Antonio Rivas
International Centre for Settlement
Of Investment Disputes
1818 H Street, N.W.
Washington, D.C. 20433

Re: *Grand River Enterprises et al. v. United States of America*

Dear Mr. Rivas:

On behalf of respondent United States of America, we write in response to claimants' letter of yesterday¹ regarding the parties' positions with respect to items listed in the Tribunal's Provisional Agenda. After conferring with claimants' counsel yesterday, it was our understanding that the parties would not propose specific schedules in their letters to the Tribunal due to their lack of agreement on the issues of place of arbitration and bifurcation, but would continue to discuss the matter. The United States first learned of claimants' proposed schedule only upon receipt of their letter to the Tribunal, after our letter already had been sent. Accordingly, the United States takes this opportunity to present its proposed schedule for a preliminary phase.

The schedule and sequence of submissions proposed by claimants is unacceptable. In particular, the adoption of a schedule providing for a simultaneous exchange of memorials would be unprecedented in the NAFTA Chapter Eleven context, and is unorthodox practice in investor-State arbitration generally. In every NAFTA Chapter Eleven case to date, the parties undertook a consecutive exchange of memorials in any preliminary, substantive and damages phases. While simultaneous exchange may be appropriate in rare circumstances, such as when addressing procedural issues, it is not an appropriate means for addressing the entirety of each party's legal and factual case. Under claimants' proposal, the United States has no opportunity to respond to claimants' case-in-chief based on a review of claimants' legal and evidentiary submissions. The United States respectfully submits that adopting such a schedule would preclude the parties from joining issue in advance of any hearing before the Tribunal. By contrast, the schedule proposed below would provide each party an opportunity to respond in writing to the other party's legal arguments and evidentiary materials.

¹ Claimants inadvertently dated their letter February 18, 2004, but the letter's facsimile line makes clear that it was transmitted on March 8, 2005.

Statement of Claim	X
Respondent's Statement of Defense (including request for bifurcation)	45 days after the later of Claimants' submission of a Statement of Claim or the Tribunal's issuance of a scheduling order
Claimants' Objections to Bifurcation (if any)	15 days from Respondent's Statement of Defense
Respondent's Reply on Bifurcation	15 days from Claimants' Objection to Bifurcation
Claimants' Rejoinder on Bifurcation	15 days from Respondent's Reply on Bifurcation
Decision on Bifurcation	TBD
Respondent's Memorial on Preliminary Objections	60 days from Decision on Bifurcation
Claimants' Counter-Memorial on Preliminary Objections	60 days from Respondent's Memorial on Preliminary Objections
Non-disputing Party submissions pursuant to NAFTA Article 1128 and Amicus Submissions on Preliminary Objections (if any)	30 days from Claimants' Counter-Memorial on Preliminary Objections
Respondent's Reply on Preliminary Objections	45 days from Claimants' Counter-Memorial on Preliminary Objections
Claimants' Rejoinder on Preliminary Objections	45 days from Respondent's Reply on Preliminary Objections
Hearing on Preliminary Objections	TBD
Decision on Preliminary Objections	TBD

We welcome the opportunity to elaborate on the reasons for adopting our proposed schedule, as well as the United States' position on other open issues, on March 31, 2005.

Respectfully submitted,

Andrea J. Menaker

Andrea J. Menaker
Chief, NAFTA Arbitration Division
Office of International Claims and
Investment Disputes

Copies:
Todd Weiler, Esq.
Leonard Violi, Esq.

³ This proposed schedule does not take into account any briefing on open procedural issues such as the place of arbitration. The United States will be prepared to comment on any proposed briefing schedule for those issues at the March 31 hearing.

(by e-mail only)
Mr. Fali Nariman
Prof. James Anaya
Mr. John R. Crook

NAFTALaw.org

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9 March 2005

José Antonio Rivas
Secretary to the Tribunal
International Centre for the Settlement of Investment Disputes
1818 H Street, N.W.
Washington, D.C. 20433
U.S.A.

Dear Mr. Rivas:

**RE: Grand River Enterprises *et al* v. United States of America
NAFTA / UNCITRAL Proceedings**

The Claimants make the following comments in response to the letter sent to your attention by the Respondent earlier this evening.

With respect to the conversations undertaken between counsel prior to the submission of their respective letters yesterday, it was the Claimants' understanding that the Respondent was not prepared to provide a detailed schedule in time to respond to the March 8th deadline for submissions. The Claimants did inform the Respondent that they had already prepared a detailed schedule based upon the Claimants' preferred method of organizing the arbitration, which the Respondent confirmed would not be satisfactory in its opinion.

The Claimants further expected the Respondent to provide some sort of general timetable with its submission, not unlike that which was provided by the Respondent today. It was also the Claimants' understanding that the parties would continue to discuss the subject in advance of the hearing, in order to discover whether some common ground could be found on scheduling issues, based upon the differing scenarios (for bifurcation and written submissions) envisaged by the parties. The Claimants regret that the parties may have shared some misunderstanding in this regard, and are pleased that the Respondent has taken the initiative to clarify its position.

With respect to the Respondent's remark that the simultaneous exchange of particularised submissions of evidence and law is "unprecedented" in the practice of NAFTA arbitration, the Claimants first note that the discretion granted to the Tribunal under Articles 22 and 23 of the UNCITRAL Rules is very broad. As confirmed by Article 15(1) of the UNCITRAL Rules, the Tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity to make its case. The Claimants would only note that it is certainly not unheard of, at least in UNCITRAL arbitrations, for a simultaneous exchange of memorials to be preferred by parties and tribunals to the consecutive approach favoured by the Respondent.

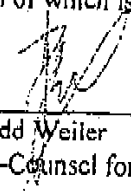
The Claimants have already provided the Respondent and Tribunal with a substantial document, styled as a 'notice of arbitration,' which sets out the entirety of the case it plans to make. All that is left for the Claimant is to 'fill in the details' by way of a particularised memorial containing both its evidence-in-chief and its detailed submissions on the law. The Respondent has an equal opportunity to make out its case – with the submission of its statement of defence – to be followed by an equal opportunity for the Respondent to provide a detailed submission of evidence and law to fully support it.

There is no reason why this arbitration needs to be staggered, and no reason to believe that a consecutive proceeding is more somehow more suited to preserving the equality of the parties than a simultaneous one.

Finally, it may be trite to say that there is no rule of *stare decisis* which could oblige this Tribunal to follow the same path set by other tribunals for other cases, but the Claimants submit that the point is that this Tribunal is empowered to shape these proceedings as it sees fit, regardless of what other NAFTA tribunals may have done. The guiding principles for the exercise of such discretion are: (1) safeguarding the equality of the parties and (2) maximising efficiency in the administration of these proceedings. The Claimants submit that its proposal provides both parties with a full and fair opportunity to make their respective cases on a timely basis, without providing an advantage to either side of 'having the last word.'

With respect to the schedule proposed by the Respondent, the Claimants will reserve the bulk of their observations for the preliminary meeting. They will only note that it makes no sense for a tribunal to first decide whether to bifurcate the proceedings and then to decide, on a preliminary basis, whether it has jurisdiction to hear the claim. The first decision would presuppose the necessity of the second. Article 21 of the UNCITRAL Rules establishes the Tribunal's authority to accept and determine, on a preliminary basis, whether it has jurisdiction to hear a claim. It does not vest an UNCITRAL Tribunal with authority to hear "preliminary objections" other than those that truly go to the root of its jurisdiction to hear the claim.

All of which is respectfully submitted.



Todd Weiler
Co-Counsel for the Claimants

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