S. James Anaya
1201 East Speedway Blvd.
Tucson, Arizona 85745
Tel. +1 520 626 6341 * Fax +1 520 621 9140

May 15, 2007

By Email and Courier

Ms. Ana Palacio
Secretary-General
International Centre for Settlement
of Investment Disputes
1818 H Street NW
Washington, D.C. 20433

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

Dear Ms. Palacio:

As you know, the Respondent United States of America has challenged my role as an arbitrator in the above-referenced matter. I am writing to comment briefly on and provide additional information relevant to that challenge. I consider it important to my reputation to explain why I believe the challenge to be groundless and why I did not previously affirmatively disclose to the Respondent's counsel facts that now give rise to the Respondent's challenge.

Circumstances do not justify doubts as to my impartiality or independence

The Respondent does not assert that I lack independence because of a past or present relationship with one of the parties to the arbitration, the usual basis for challenging an arbitrator. Rather, the Respondent questions my impartiality because of my involvement in human rights matters that are unrelated to the present trade dispute, characterizing that involvement as work for parties "who are adverse to the United States." [1] Under Article 10 of the applicable UNCITRAL Arbitration Rules, any doubts about my impartiality must be "justifiable" in order to warrant my disqualification, and they are not.

Although an adversary relationship *may* give rise to justifiable doubts about impartiality,[2] it does not necessarily do so. As the *IBA Guidelines on Conflicts of Interest*

[1] *See* Letter of Mark A. Clodfelter et al. to Ana Palacio (April 25, 2007) ("Clodfelter letter"), p. 2.
[2] Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration,* 14 ARB. INT'L 395, 411 (1998) ("A

in International Arbitration ("*IBA Guidelines*")[3] and other authorities relied upon by the Respondent make clear, there is no rule establishing that an adversary relationship, *per se*, gives rise to justifiable doubts. What matters are the circumstances particular to that relationship. The circumstances here do not justify doubts about my impartiality so as to warrant my disqualification, and to find that they do would be unprecedented.

Foremost among the relevant circumstances is the entirely unrelated nature of my human rights work, so unrelated to the trade dispute in this case that one strains to find an adversary relationship for the present purposes. That work involves advancing the human rights interests of Western Shoshone and Chiricahua Apache people who are indigenous to the United States and who are trying to maintain and recover connections to their traditional lands, of Inuit people whose lives have been drastically affected by global warming, of indigenous peoples worldwide who are pressing for a United Nations Declaration on the Rights of Indigenous Peoples, of immigrants who have been subject to physical abuse when crossing the southern border into the United States, and of terror suspects imprisoned without the normal safeguards.[4]

Not only is the subject matter of my human rights work entirely unrelated to the present trade dispute, it is directed at the actions and omissions of government agencies that have little or nothing to do with U.S. international trade policy. My work for the Western Shoshone and the Chiricahua Apache targets acts of federal land management agencies within the U.S. Department of Interior and of the U.S. Congress, as well as of natural resource management agencies of the states of Nevada, Arizona, and New Mexico. The work on immigrant issues concerns mostly the omissions of federal and Arizona state prosecutors. Federal and state agencies that affect environmental policy both within and outside of the United states have been objects of my work for the Inuit. Representatives of the U.S. Department of State and Department of Justice have stepped forward to oppose adoption of the UN Declaration of the Rights of Indigenous Peoples, for which I have advocated for years. White House, Defense Department, and military officials are the targets of my relatively minor contribution to efforts to better the treatment of detainees.

Unlike commercial parties to arbitration, to which the *IBA Guidelines* and other authorities cited by the Respondent are mostly geared, the United States of America is a multi-faceted and multi-tiered federal state. It hardly represents a singular set of interests policies, or positions, notwithstanding its singular international legal personality. In fact, distinct agencies or states of the United States frequently find themselves opposed to each other in litigation or other settings. Most of the people for whom I carry out the human rights work that grounds the Respondent's challenge are themselves citizens of the United States, as am I, and as such we too are part of the United States, a republic. Because I have not been in any role adverse to U.S. trade interests or to agents charged

---

significant, unrelated role adverse to a party *may* create prejudice against the adverse party"(emphasis added)) [Appendix to Respondent's Letter of April 25, 2007 ("Respondent's Appendix") – Tab 19].

[3] IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines") (May 22, 2004) [Respondent's Appendix – Tab 16].

[4] *See* Letter from S. James Anaya to Andrea J. Menaker (April 16, 2007) ("Anaya April 16 letter").

with formulating or executing U.S. trade policy, I have not considered myself to have been in an adversary relationship with the Respondent in any way relevant to the present case.

My understanding that I am not an adversary of the United States for the present purposes is reinforced by yet another factor: None of my human rights activities entail representing a party to binding litigation or arbitration against the United States. The only binding litigation against a U.S. agent or agency in which I have been involved since being appointed an arbitrator in this case is litigation challenging the detention of suspects of terrorist acts; but my involvement there was only to assist with *amicus* submissions and not to represent a party to the litigation. My other activities involve proceedings that are advisory or entail work that is in the nature of lobbying. As the United States itself is frequently quick to point out, decisions of the Inter-American Commission on Human Rights – such as that rendered in the *Dann* case concerning Western Shoshone land rights or those hoped for in the *Inuit* and *Border Action Network* cases – are not legally binding on the United States.[5] Nor are decisions or views of the UN Committee on the Elimination of Racial Discrimination, the UN Human Rights Committee, or the UN Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People. Work on Chiricahua Apache land rights has involved direct appeals to federal and state agencies without litigation, such as my work to prevent the state of New Mexico from granting a permit to mine on Apache sacred land.

To be sure, as the Respondent stresses, in all of this work assertions are being made that are in opposition to positions taken, or potentially taken, by agents of the United States or one of its constituent parts. But that alone cannot be determinative. The non-obligatory nature of these proceedings must be taken into consideration, in addition to the other factors mentioned above; otherwise any expression of opposition to any part or agency of the United States regarding any subject could be held to cast one in a role "adverse" to the United States. The Respondent itself seems to understand that not all opposition makes for adversity in the relevant sense. My advocacy for adoption of the UN Declaration on the Rights of Indigenous Peoples is directly in opposition to the United States government, which urged against approval of the Declaration at the June 2006 session of the UN Human Rights Council and has sought to defeat final adoption of the Declaration by the UN General Assembly.[6] Yet, in its recounting of the human rights activities I listed in my letter of April 16, 2007, the Respondent excluded my advocacy for the UN Declaration.[7] Apparently for the Respondent, despite my disclosure of my opposition to the United States government in regard to the Declaration, that opposition does not constitute adversity. So if not all opposition to a party makes one "adverse" to it, where is the line drawn? I have considered the line to be where an arbitrator is or represents a party in a collateral proceeding that can lead to a legally binding outcome for

[5] *See, e.g.*, Case of Juan Raul Garza, No. 12.243 (United States), Inter-Am C.H.R. Report No.52/01, para. 11 (April 4, 2001) (United States characterized the Commission's request for precautionary measures to stay an execution as a non-binding "recommendation").
[6] *See* Valerie Taliman, "United States Opposes Declaration on Native Rights," Indian Country Today, posted Nov. 21, 2006, http://www.indiancountry.com/content.cfm?id=1096414049.
[7] *See* Clodfelter Letter, p. 5.

another party with adverse interests, and where that adverse party in the collateral proceeding is in real terms the same as one of the parties to the arbitration. These conditions are not met as to my advocacy for the UN Declaration, just as they are not met with regard to the other human rights work I have done since my appointment to the Tribunal.

Failure to affirmatively disclose to Respondent's counsel my human rights work does not warrant disqualification

I acknowledge that arbitrator's have a continuing duty to disclose facts that may give rise to justifiable doubts about their impartiality. I do not believe, however, that I have breached this duty by not affirmatively disclosing my human rights work to the Respondent's counsel before specifically being asked to do so. Moreover, the failure to disclose facts that might give rise to justifiable doubts could not in any event be a separate and independent ground for my disqualification.

I did not affirmatively disclose my human rights work until asked to do so because, under the totality of circumstances, that work could not reasonably be construed give rise to justifiable doubts about my impartiality. Added to the circumstances described above is the fact that my activities upon which the Respondent bases its challenge extend from a career of human rights work that is a matter of public record and that is known to agents of the United States, including colleagues of the Respondent's counsel within the United States Department of State Office of the Legal Adviser. For over two decades I have advocated the human rights of indigenous peoples in various domestic and international forums, often in confrontation with United States agencies. This fact is clear from my curriculum vitae,[8] which the Respondent acknowledges retrieving from the University of Arizona law school web site before acquiescing to my appointment as arbitrator, and also from various pages on or linked to that web site that are devoted to describing the human rights projects in which I am involved.[9] In several of my numerous published works I have been highly critical of the United States' government's treatment of indigenous peoples.[10]

When on March 5, 2007 I appeared at a meeting convened by the Inter-American Commission on Human Rights in the *Dann* case alongside the petitioner Carrie Dann, an appearance that sparked the Respondent's current challenge, Lynn Sicade of the U.S. Department of State greeted me and introduced me to her colleagues from the Department of State's Office of the Legal Advisor who were there to represent the United States. Ms. Sicade and her colleagues acknowledged my past activities and reputation in the field of indigenous human rights. Not only does this encounter illustrate how my

[8] Web version of S. James Anaya curriculum vitae reprinted in Respondent's Appendix – Tab 6.
[9] See http://www.law.arizona.edu/depts/iplp/advocacy/index.cfm?page=advoc
[10] *See, e.g.*, S. James Anaya, *Native Land Claims in the United States: The Unatoned for Spirit of Place, in* THE 1991 CAMBRIDGE LECTURES (Frank McArdle ed., 1993); S. James Anaya, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 23-26, 32, 146-147, 218 (2d ed. 2004).

human rights work has at all relevant times been known to the United States, it also would appear to render the United States challenge untimely under the UNCITRAL rules.

Also relevant to what might justifiably give rise to doubts about my impartiality in this case, and hence should be disclosed, is the implicit standard set by the Respondent's appointment of my fellow Tribunal member John Crook at the beginning of these proceedings. Mr. Crook was a long-time career member of the State Department Office of the Legal Adviser, the same unit that represents the United States in this matter. That fact was disclosed and known to all concerned at the commencement of these proceedings, and no one concerned questioned or now questions Mr. Crook's impartiality. I certainly do not doubt his impartiality and hold him in the highest esteem. But the fact remains, Mr. Crook maintained a long and close relationship with, and indeed was part of, the very bureaucracy that represents the Respondent in theses proceedings. It is hard to see how my unrelated human rights work might raise doubts about my impartiality, or the appearance of lack of impartiality, when Mr. Crook's long-time association with the Respondent does not. Of course the United States will point out that Mr. Crook's affiliation is in the past, beyond the three-year period flagged by the *IBA Guidelines*, whereas my human rights work is current and ongoing. But any reliance on such a distinction elevates form over substance.

Even if I was under a duty to affirmatively disclose my human rights work – and, again, I maintain I was not – my failure to do so cannot alone be ground for my disqualification. Professor Caron and his associates, in their work relied on by the Respondent, affirm: "A failure to disclose is not itself a ground for challenge in addition to those set forth expressly in Articles 10 and 13" of the UNCITRAL rules.[11]

Similarly, according the *IBA Guidelines*, upon which the Respondent also relies:

> [A] later challenge based on the fact that an arbitrator not disclose such facts or circumstances [as might give rise to doubts about impartiality or independence] should not result automatically in either non-appointment, later disqualification or a successful challenge to any award. In the view of the [IBA] Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts and circumstances that he or she did not disclose can do so.[12]

Conclusion

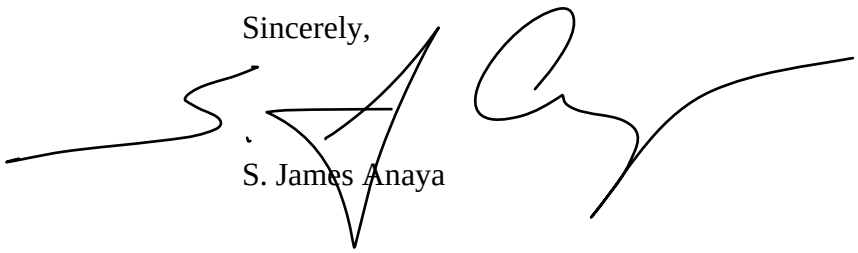
It is unfortunate that the Respondent has raised its challenge upon accusations of impartiality that are difficult to fathom in common sense. The challenge rests on an implicit assertion that my human rights work in cases impugning the acts or omissions of specific United States agencies and political subdivisions, although unrelated to the present dispute, places me in an position adverse to the United States generally and

[11] D. Caron, L. Caplan & M. Pellonpää, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 226 (2006) [Respondent's Appendix – Tab 20].
[12] IBA Guidelines, p. 18 [Respondent's Appendix – Tab 16]

poisons my ability to decide fairly any question involving the United States. There is no objective basis to support such a bold assertion, and I very much doubt that the Respondent's counsel actually believes this. Yet that is effectively what they are saying in their challenge. Such an assertion is simply wrong. As a United States citizen and descendent of the First Americans, I am a patriot. My human rights work is not subversive to the United States or challenge its basic institutions. Rather, it is inspired by devotion to the principles of human rights and democracy upon which the country is founded and to seeing those principles realized for all Americans and others touched by our influence in the world, and it is in the tradition of loyal dissent that has been critical to the maturing of the country's democratic institutions.

I decline to voluntarily withdraw as arbitrator, and I appeal to your good judgment. In the event of a decision sustaining the Respondent's challenge, I request that this letter and my letter to the Respondent of April 16, 2007 be made part of the public record of this case.

Sincerely,



S. James Anaya

Copies to:

Mr. Fali Nariman
Mr. John Crook
Ucheora Onwuamaegbu
Mr. Mark Clodfelter and Ms. Andrea Menaker
Mr. Todd Wieler, Esq.
Mr. Leonard Violi, Esq.
Ms. Chantell MacInnes Montour, Esq.
Mr. Robert Luddy, Esq.
Aril Ali, Esq.