April 25, 2007

By E-Mail and Courier

Ms. Ana Palacio
Secretary-General
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 Ms. Palacio:

Pursuant to Article 12(1) of the UNCITRAL Arbitration Rules and Article 1124(1) of the NAFTA, Respondent United States of America respectfully requests that you decide its challenge to Professor James Anaya, the arbitrator appointed by the Claimants in this matter. The challenge concerns whether a person may sit in judgment of a party in arbitration at the same time that he is representing parties in multiple pending matters who are adverse to that party. Such facts plainly give rise to "justifiable doubts as to the arbitrator's impartiality or independence" within the meaning of Article 10 of the UNCITRAL Arbitration Rules and, in this case, support the removal of Professor Anaya as an arbitrator.

As disclosed in his April 16, 2007 letter, Professor Anaya, either personally or through the International Human Rights Advocacy Workshop, which he directs, currently represents parties in multiple matters who are adverse to the United States.[1] Before the Inter-American Commission on Human Rights ("Commission"), for example, Professor Anaya personally serves as an attorney of record for both the claimant in *Dann v. United States* (alleging United States interference with the use and occupation of traditional Western Shoshone ancestral lands in Nevada)[2] and the Border Action Network (asserting United States responsibility for alleged failures to prevent and prosecute acts of violence against immigrants near the U.S.-Mexico border).[3] Before the United Nations Committee on the Elimination of Racial Discrimination ("CERD"), Professor Anaya continues to supervise submissions on behalf of Western Shoshone tribes urging the CERD to "continue monitoring" the implementation of its March 2006 decision, which called upon

[1] *See* Letter from Professor James Anaya to Andrea J. Menaker (Apr. 16, 2007) ("Anaya Letter").

[2] *See id.* at 1-2.

[3] *See id.* at 3.

the United States to cease authorization of actions in Nevada found by the CERD "to be undermining the human rights of the Western Shoshone people in relation to ancestral lands."[4] Also on behalf of certain Western Shoshone groups, Professor Anaya has supervised submissions to (i) the United Nations Special Rapporteur on the Fundamental Human Rights and Freedoms of Indigenous People, and (ii) the United Nations Human Rights Committee, informing those bodies "of the situation of the Western Shoshone" and urging their assistance.[5] In addition, among other adverse matters discussed below, Professor Anaya has disclosed his personal representation of the Chiricahua Apache Alliance in opposing federal and state authorizations of mining activities on lands considered sacred to the Chiricahua people in Arizona and New Mexico.[6]

As illustrated by the recently-disclosed information above, Professor Anaya is simultaneously sitting in judgment of the United States as an arbitrator in the *Grand River* NAFTA Chapter Eleven arbitration while representing parties in multiple matters who are adverse to the United States. Furthermore, Professor Anaya did not disclose those representations until requested to do so by the United States. As discussed below, under the UNCITRAL Arbitration Rules, which govern this arbitration, as well as the *IBA Guidelines on Conflicts of Interest in International Arbitration* ("*IBA Guidelines*"), the views of respected commentators, the decisions of U.S. courts, and the past practice of ICSID in considering arbitrator challenges, Professor Anaya's concurrent adversarial relationships warrant his removal as an arbitrator in this case.

Below, the United States first sets forth the relevant facts and then outlines the legal basis for its challenge. The documents and authorities cited, as well as a copy of the Notice of Arbitration in this case, are reproduced for your convenience in the accompanying appendix. Arrangements are being made to transfer the requisite fee to ICSID for deciding this matter.

Facts

Claimants appointed Professor Anaya to the Tribunal on August 17, 2004.[7] At the time of Professor Anaya's appointment, Claimants' counsel provided the United States with a website link to Professor Anaya's *curriculum vitae*, which disclosed his representation, from 1997 to 2002, of the Danns before the Commission.[8] Neither Claimants nor Professor Anaya disclosed any post-2002 representation of the Danns. Nor did Professor Anaya or Claimants disclose any post-2002 representation of any party in any matter adverse to the United States. Since the time of his appointment, Professor Anaya has made no further disclosures, other than those contained in his April 16 letter.

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[4] *Id.* at 2.

[5] *Id.*

[6] *Id*. at 3.

[7] *See* Letter from Todd Weiler, Counsel for Claimants, to Roberto Dañino, Secretary-General, International Centre for Settlement of Investment Disputes (Aug. 17, 2004).

[8] *See curriculum vitae* of Professor James Anaya, attached in Appendix to letter from Todd Weiler to Roberto Dañino (printed by the U.S. Department of State on Aug. 20, 2004).

Recently, however, counsel for the United States in this arbitration learned that Professor Anaya appeared on behalf of the claimant in the *Dann* matter at an informal meeting before the Commission in March 2007, and would likely continue to represent the claimant in future proceedings.

The facts surrounding the *Dann* claim, as we understand them, are as follows. In 1993, Steven M. Tullberg and Robert T. Coulter of the Indian Law Resource Center lodged a petition with the Commission on behalf of the Danns. In 1998, the petitioners informed the Commission that Professor Anaya had been "added as an attorney of record" in the case.[9]

Before the Commission, the Danns alleged that the United States had interfered with their use and occupation of traditional Western Shoshone ancestral lands.[10] In response, the United States argued "that the Danns' title to the lands at issue has been extinguished by lengthy litigation in the United States' courts, including the U.S. Supreme Court," and that compensation for the loss of title had been placed in trust for the Danns and other Western Shoshone members, pending development of a plan for distribution of the funds.[11]

In a December 2002 decision, the Commission found that the United States had failed to ensure the Danns' right to property under conditions of equality contrary to the American Declaration of the Rights and Duties of Man ("American Declaration").[12] Based on those findings, the Commission recommended that the United States provide the Danns with "measures necessary to ensure respect for" their right to property in accordance with the American Declaration.[13]

In December 2003, the United States informed the Commission that it disagreed with and declined to implement the Commission's recommendations, for the reasons stated in earlier United States responses.[14] In its 2003 Annual Report, the Commission

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[9] *See Mary and Carrie Dann v. United States*, Case 11.140, Inter-American Commission on Human Rights, Report No. 99/99 (Sept. 27, 1999), *reprinted in* 1999 ANN. REP. INTER-AM. C.H.R. 286 ("September 1999 *Dann* Report"), ¶¶ 2, 35.

[10] *See Mary and Carrie Dann v. United States*, Case 11.140, Inter-American Commission on Human Rights, Report No. 75/02 (Dec. 27, 2002), *reprinted in* 2002 ANN. REP. INTER-AM. C.H.R. 860 ("December 2002 *Dann* Report"), ¶ 2.

[11] *See id.* ¶ 76. The United States also asserted, among other grounds for objecting to the *Dann* claim, that the Commission, when interpreting the American Declaration on the Rights and Duties of Man, could not rely on the draft Declaration on the Rights of Indigenous Peoples because that draft was a non-binding document that had not yet been agreed to by member states of the Organization of American States. *See id*. ¶¶ 161-62.

[12] *See id.* ¶ 172.

[13] *See id.* ¶ 173.

[14] *See* Annual Report of the Inter-American Commission on Human Rights 2003, Chapter III: The Petition System and Individual Cases, ¶ 251.

found that the United States had not yet complied with its December 2002 recommendations.[15]

In March 2007, the Commission held an informal meeting attended by representatives of the claimant and the United States. Professor Anaya appeared and argued on behalf on the claimant at that meeting. After hearing argument from the claimant and the United States, the Commission agreed to an informational site visit to the disputed Western Shoshone lands, as requested by the claimant. At the March 2007 meeting, Professor Anaya did not address whether, going forward, he would continue to represent the claimant.

Soon after learning of these circumstances, counsel for the United States wrote a letter to Professor Anaya, on March 30, seeking confirmation that he had appeared on behalf of the claimant in the *Dann* matter at the March meeting, and inquiring whether his representation of the claimant was ongoing.[16] In addition, given that Professor Anaya's *curriculum vitae* had indicated that his representation of the Danns had ended in 2002, the March 30 letter also requested information concerning any other representation, post-2002, of parties adverse to the United States.[17] Over the next ten days, the United States did not receive a response to that letter. Given the fifteen-day notice requirement for arbitrator challenges under the UNCITRAL rules,[18] on April 11 the United States notified the Tribunal and Claimants' counsel of its determination that Professor Anaya's apparent ongoing representation of the claimant in the *Dann* case "give[s] rise to justifiable doubts as to [his] impartiality or independence" in the *Grand River* matter,[19] and requested that Professor Anaya resign as an arbitrator in the case.[20]

On April 12, Professor Anaya responded by clarifying that due to travel demands, he had not been aware of the United States' March 30 letter, and requested an opportunity to address the issues raised in that letter.[21] Also on April 12, Claimants wrote to the Secretary of the Tribunal, characterizing the United States' challenge as "belated" and requesting that the United States "be ordered to" provide the Tribunal and Claimants with "any and all evidence" supporting the challenge.[22] On April 13, the United States responded by e-mail to Professor Anaya, agreeing not to take any further steps in support of its challenge pending receipt of Professor Anaya's response to the United States' March 30 letter.[23]

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[15] *See id*.

[16] *See* Letter from Andrea J. Menaker to Professor James Anaya (Mar. 30, 2007).

[17] *See id*.

[18] *See* UNCITRAL Arbitration Rules, art. 11(1).

[19] *Id*. art. 10(1).

[20] *See* Letter from Andrea J. Menaker to the Tribunal and Counsel (Apr. 11, 2007).

[21] *See* e-mails between Professor James Anaya and Andrea J. Menaker (Apr. 12-13, 2007).

[22] *See* Letter from Arif Hyder Ali, Co-Counsel for Claimants, to Ucheora Onwuamaegbu, Secretary of the Tribunal (Apr. 12, 2007).

[23] *See* e-mails between Professor James Anaya and Andrea J. Menaker (Apr. 12-13, 2007).

On April 16, Professor Anaya responded to the United States' March 30 letter, confirming that he had "resumed" representation of Carrie Dann "in 2005 in relation to the Commission's ongoing monitoring of the situation."[24] Professor Anaya also listed, "in the interests of full disclosure,"[25] the following additional post-2002 matters in which he worked on behalf of parties who were adverse to the United States:

- Supervising follow-up submissions of Western Shoshone tribes to the CERD "to urge its continuing monitoring of the situation" concerning alleged human rights violations by the United States relating to Western Shoshone ancestral lands. Professor Anaya also supervised earlier submissions to the CERD on behalf of Western Shoshone tribes, which resulted in a non-binding March 2006 decision by the CERD, calling upon the United States to cease authorization of actions in Nevada that, in the CERD's view, undermined human rights of the Western Shoshone people in relation to ancestral lands.
- Supervising submissions to the United Nations Special Rapporteur on the Fundamental Human Rights and Freedoms of Indigenous People to inform the Special Rapporteur of "the situation of the Western Shoshone" and to urge the Special Rapporteur's assistance.
- Supervising submissions to the United Nations Human Rights Committee to inform the Human Rights Committee of "the situation of the Western Shoshone" and to urge the Human Rights Committee's assistance.
- Serving as counsel of record for the Border Action Network in its petition before the Commission, which was filed in April 2005. The petition alleges United States responsibility for the failure of federal and state officials to prevent and prosecute acts of violence against immigrants in the area of the U.S.-Mexico border.
- Assisting Inuit parties in the development of a petition before the Commission, filed in December 2006, alleging "the United States' responsibility for global warming and its effects on the human rights of the Inuit people which are dependent on the Arctic environment."
- Representing the Chiricahua Apache Alliance "in their opposition to federal and state authorizations of mining activities on lands considered sacred to the Chiricahua Apache people in the states of Arizona and New Mexico."
- Assisting "with *amicus* submissions in cases challenging the actions of U.S. officials in detaining suspects of terrorist acts against the United States."[26]

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[24] Anaya Letter at 1.

[25] *Id.* at 2.

[26] *Id.* at 2-3.

Professor Anaya questioned whether the above matters were material to the issue of his "independence or impartiality in the present arbitration," which he characterized as an "international trade dispute."[27] In support of his assertion of independence and impartiality, Professor Anaya observed that the March 2007 meeting before the Commission "was not to be an adversarial proceeding," although "several representatives of the United States appeared at the meeting and vigorously contested the Commission's findings."[28] Professor Anaya also observed that petitions before the Commission "entail[] only the possibility of recommendations by the Commission and not a binding decision."[29]

Prior to April 16, Professor Anaya had not disclosed any of the above concurrent adverse representations to the United States.

Professor Anaya's Concurrent Adverse Relationships Warrant His Disqualification

Article 10(1) of the UNCITRAL Arbitration Rules governing this proceeding provides that "[a]ny arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence." Professor Anaya's current adversary relationships give rise to such justifiable doubts and warrant his removal from the panel. Removal is particularly warranted in this instance given Professor Anaya's failure to disclose his ongoing adverse representations.

As recognized in a widely-cited article on issues concerning arbitrator challenges, "an adversary relationship with a party" is "so indicative of partiality that [it] can reasonably be treated as generally disqualifying for a party-appointed arbitrator."[30]

The "generally disqualifying" nature of Professor Anaya's representations is further supported by the *IBA Guidelines,* which provide that justifiable doubts can arise from situations presenting less serious conflicts than Professor Anaya's ongoing adverse representations. The *IBA Guidelines* divide a nonexhaustive list of situations into three categories: Green, Orange, and Red. The Green List sets forth situations that *do not* give rise to justifiable doubts concerning arbitrator independence or impartiality. The Red List sets forth situations that *do* give rise to justifiable doubts, which are categorized as waivable or non-waivable. The Orange List sets forth situations that, in the eyes of the parties, *may* give rise to justifiable doubts.

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[27] *Id.* at 2.

[28] *Id.*

[29] *Id*. at 3.

[30] Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L 395, 408, 411 (1998) (listing an adversary relationship with a party as one of six grounds that presumptively require disqualification).

The Orange List contains two situations that are similar to – but present less serious conflicts than – the present situation: (i) "[t]he arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter"[31]; or (ii) "[t]he arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties."[32]

The conflict here plainly is more severe than either scenario contemplated by the *IBA Guidelines* above. *First*, many of Professor Anaya's adverse representations are not merely recent ("within the past three years"), but are in fact ongoing.[33] Notably, a current relationship between an arbitrator and a party is more indicative of bias than a past relationship. For example, under the *IBA Guidelines*, an arbitrator's representation of a party more than three years prior to the dispute generally does not give rise to justifiable doubts as to his impartiality,[34] a representation within three years may give rise to justifiable doubts,[35] and a representation that is current presumptively gives rise to justifiable doubts.[36] *Second*, Professor Anaya personally – rather than a law firm with which he is affiliated – is acting, in several matters, adverse to a party in the arbitration.

Justifiable doubts as to impartiality are further amplified by Professor Anaya's failure to disclose the multiple concurrent matters in which he is representing parties adverse to the United States. Article 9 of the UNCITRAL Arbitration Rules governing this proceeding provides that an arbitrator shall disclose to the parties "any circumstances likely to give rise to justifiable doubts as to impartiality or independence."[37] As the *IBA Guidelines* provide, "[a]ny doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favor of disclosure."[38] Article 9 "places on the

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[31] *IBA Guidelines on Conflicts of Interest in International Arbitration* (May 22, 2004) ("*IBA Guidelines*"), Part II, ¶ 3.1.2; *see also* Bishop & Reed, *supra* note 30, at 411 ("[a] significant, unrelated role adverse to a party may create prejudice against the adverse party, thus providing grounds for disqualification").

[32] *IBA Guidelines*, Part II, ¶ 3.4.1.

[33] As noted, Professor Anaya's representation of the claimant in the *Dann* matter is ongoing. *See* Anaya Letter at 1. Professor Anaya does not indicate whether his work on behalf of the Western Shoshone before the United Nations Special Rapporteur and the United Nations Human Rights Committee, or his work on behalf of the Chiricahua Apache Alliance, is merely recent or ongoing. *See id.* at 2-3. Professor Anaya also does not indicate whether his work on behalf of Inuit parties is ongoing. *See id*. at 3.

[34] *See IBA Guidelines*, Part II, ¶ 7 ("Situations falling outside the time limit used in some of the Orange List situations should generally be considered as falling in the Green List.").

[35] *Id*. Part II, ¶ 3.1.1.

[36] *Id*., Part II, ¶ 2.3.1. Likewise, whereas "former employ[ment]" with one of the parties may cause justifiable doubts, current employment with the appointing party creates partiality. *See id*. ¶ 3.4.2; Bishop & Reed, *supra* n. 30, at 408.

[37] *See also IBA Guidelines*, Part I, ¶ (3)(a) ("[I]f facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority . . . and to the co-arbitrators.").

[38] *See id.* ¶ (3)(c); s*ee also Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules*, U.N. COMMISSION ON INTERNATIONAL TRADE LAW, 6th Sess., U.N. doc. A/CN.9/97 (1974), *reprinted in* VI UNCITRAL Y.B. 163, 171 (1975) (commentary on draft Article 8(3)) (Article 9's

arbitrators a continuing duty to disclose circumstances which arise or become known to them after their appointment."[39] Lack of disclosure of relevant circumstances may provide a separate ground for challenge, and a basis for vacating an arbitral award.[40]

United States courts have vacated arbitral awards where an arbitrator has failed to disclose a concurrent involvement, as counsel or otherwise, in a proceeding adverse to one of the parties. In *Continental Insurance Co. v. Williams*, for example, the court vacated an award on the basis of such a nondisclosure, holding that it was "fatal to the arbitration award."[41] Likewise, in *Middlesex Mut. Ins. Co. v. Levine*, the court vacated an award where one of the arbitrators failed to disclose that he was concurrently engaged in a dispute with two of the parties, holding that the inference of bias was "direct, definite and capable of demonstration."[42] And in *Sun Refining & Mktg Co. v. Statheros Shipping Corp.*, the court vacated an award where an arbitrator was participating in an unrelated, contemporaneous arbitration as a witness and agent of a company in a dispute with one of the parties.[43]

In addition, the standard of bias under Article 10 of the UNCITRAL Rules is an objective one, requiring that arbitrators at all times avoid the *appearance* of bias.[44] The

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disclosure requirement reflects the reality that "[n]o one knows better than the arbitrator himself whether such circumstances exist"); D. CARON, L. CAPLAN, & M. PELLONPÄÄ, THE UNCITRAL ARBITRATION RULES: A COMMENTARY, 225 (2006) ("Much of the information that would be most helpful in the most egregious cases will be in the control of the arbitrator and not the parties. That the arbitrator may know, better than any other, of likely grounds for challenge, returns us to the importance and desirability of the early disclosure required by Article 9.").

[39] CARON, CAPLAN, & PELLONPÄÄ, *supra* n. 38, at 201.

[40] *See*, *e.g.*, *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 147-148 (1968) (vacating arbitral award where an arbitrator failed to disclose prior business relationship with a party); *see also* Bishop & Reed, *supra* note 30, at 427 ("In many situations, arbitrators have been disqualified because of failure to disclose relationships that might not have been disqualifying if initially disclosed."); International Bar Association, *Guidelines for International Arbitrators* § 4.1 (1986), *reprinted in* 26 I.L.M. 583, 587 (1987) ("Failure to make such disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification."); *id*. § 3.2, *reprinted in* 26 I.L.M. at 586 ("[t]he appearance of bias is best overcome by full disclosure"); CARON, CAPLAN, & PELLONPÄÄ, *supra* n. 38, at 226 ("a failure to disclose may give rise to justifiable doubts . . .").

[41] No. 84-24646-CIV, 1986 WL 20915, *5 (S.D. Fla. Sept. 17, 1986) (unreported).

[42] 675 F.2d 1197, 1202 (11th Cir. 1982).

[43] 761 F. Supp. 293, 302-303 (S.D.N.Y. 1991) (holding that the challenging party "was not unreasonable in fearing that either the conduct or the ultimate outcome, or both, of the [other arbitration] might color [the arbitrator's] judgment," and that the arbitrator "should have acceded to [the party's] timely request that he step down as an arbitrator.").

[44] *See Draft Joint Report of the Working Group on Guidelines Regarding the Standard of Bias and Disclosure in International Commercial Arbitration* § 2.1 (Oct. 7 & 15, 2002) ("All jurisdictions agree that the standard of bias refers to the *appearance* of bias and not *actual* bias.") (emphasis in original); *see also IBA Guidelines,* Part I, ¶ (2)(c) (providing that doubts are justifiable if a reasonable third person would conclude "that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision").

same standard applies in U.S. courts: the U.S. Supreme Court has held that arbitrators have a duty to disclose any dealings that "might create an impression of possible bias."[45] Concurrent, undisclosed adversarial relationships give rise to the appearance of partiality, irrespective of the reputation or personal integrity of the arbitrator in question, and notwithstanding any denials of subjective bias, such as Professor Anaya's assurance that his multiple concurrent adverse representations "in no way undermin[e]" his independence or impartiality as a member of the Tribunal in the *Grand River* arbitration.[46]

In questioning the materiality of his multiple representations adverse to the United States, Professor Anaya appears to rely on two factors: (i) the "unrelated" nature of those representations to the *Grand River* arbitration; and (ii) the non-binding nature of recommendations issued by the Commission. But these two proffered grounds do not render his representations unobjectionable.

First, the *IBA Guidelines* expressly provide that an adverse matter need not be related to give rise to justifiable doubts as to the arbitrator's impartiality.[47] ICSID's own past practice recognizes this. In the *Glamis Gold v. United States of America* NAFTA Chapter Eleven arbitration, the United States raised an arbitrator challenge before the ICSID Secretary-General, premised on the grounds of concurrent adverse representation, which resulted in the resignation of the challenged arbitrator. Like Professor Anaya here, the challenged arbitrator in *Glamis* argued that the concurrent matter was unrelated to the arbitration and that his representation of a party adverse to the United States while sitting in judgment of the United States did not give rise to any justifiable doubts as to his impartiality or independence. The challenged arbitrator offered a detailed response to the United States' request that he step down, and, subsequently, a detailed submission to the Secretary-General in support of his continued service on the tribunal.

As the Secretary-General is aware, it is ICSID's practice to notify arbitrators of its intention to uphold a party's challenge before issuing a decision in order to grant the arbitrator an opportunity to resign. Presumably, this is what occurred in the *Glamis* matter: two months after the issue had been fully briefed, and notwithstanding his vigorous defense, the challenged arbitrator ultimately resigned from the tribunal prior to the issuance of a formal determination by the ICSID Secretary-General. In accordance with the past practice of ICSID in considering arbitrator challenges, Professor Anaya's removal is warranted here.

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[45] *Commonwealth Coatings*, 393 U.S. at 149.

[46] Anaya Letter at 1.

[47] *See IBA Guidelines*, Part II, ¶ 3.1.2 (listing as an Orange List conflict the situation where an arbitrator previously "served as counsel against one of the parties . . . in an *unrelated matter*") (emphasis added); *see also* Bishop & Reed, *supra* n. 30, at 411 ("A significant *unrelated* role adverse to a party may create prejudice against the adverse party, thus providing grounds for disqualification.") (emphasis added); *Sun Refining*, 761 F. Supp. at 296 (vacating arbitral award based on arbitrator's "evident partiality" notwithstanding arbitrator's refusal "to withdraw voluntarily because he saw no connection between the two [unrelated arbitrations] and felt that he could hear the . . . arbitration [at issue] in a fair and unbiased manner").

Second, submissions supported by Professor Anaya undermine any attempt to characterize the proceedings before the Commission, or before any of the other fora in which he is supporting claims against the United States, as something other than adversarial. For example, Professor Anaya has disclosed that through his work directing the International Human Rights Advocacy Workshop at the University of Arizona College of Law, he has supervised CERD submissions made on behalf of Western Shoshone tribes.[48] Such submissions, prepared "with the [a]ssistance of" the University of Arizona's Indigenous Peoples Law and Policy Program, assert, among other charges, that the United States is in violation of its international obligations.[49] Similarly, in the *Border Action Network* matter, in which Professor Anaya represents the claimant, the claimant's allegations plainly illustrate the adversarial nature of the proceeding.[50]

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[48] Anaya Letter at 2.

[49] *See*, *e.g.*, Western Shoshone National Council, et al., *Update to Committee on the Elimination of Racial Discrimination on the Early Warning and Urgent Action Procedure Decision 1(68)* (Feb. 7, 2007), ¶ 3 ("the United States has failed to respond or comply with the [CERD's] recommendations and has in fact increased the threats against Western Shoshone peoples"); *id*. ¶ 9 ("in direct violation of CERD's recommendations, the U.S. Congress passed legislation, in December 2006, to allow up to 45,000 acres of Western Shoshone lands to be privatized"); *id*. ¶ 11 ("the United States . . . is now considering expansion of corporate [mining] operations, actions which are in clear violation of CERD's recommendation to desist from such activities"); *id*. ¶ 16 ("[t]he U.S. has not complied with its obligation to consult with and obtain the consent of the Western Shoshone when planning or conducting activities on their land"); Western Shoshone People, *Second Request for Urgent Action under Early Warning Procedure to the Committee on the Elimination of Racial Discrimination of the United Nations* (July 29, 2005), at 2 ("[t]he United States . . . is also openly defiant of the recommendations of the Inter-American Commission of Human Rights to respect the rights of Western Shoshone people in relation to the American Declaration of the Rights and Duties of Man"); *id*. at 3 ("the U.S. at present disregards its obligations under [the 1863 Treaty of Ruby Valley] and instead treats Western Shoshone lands as public and open for use and distribution"); *id*. at 4 ("[t]he United States perpetually bases its actions against the Western Shoshone on discriminatory proceedings that determined without any legal foundation that Western Shoshone property rights were extinguished"); *id*. at 6 (proposed measures "to privatize Western Shoshone lands represent a complete defiance . . . of the United States' obligations under international law"); *id*. at 10 ("The principles of [ILO] Convention No. 169 [On Indigenous and Tribal Peoples] . . . demonstrate that the Western Shoshone are entitled to compensation, either through land restitution or monetary payment, even if . . . Western Shoshone land title was 'properly' extinguished at some point. Therefore, the current demand by the Western Shoshone for the compounded interest due under the purported title extinguishment is also something that they are entitled to under international law – if not more."); *id*. at 12 ("the Western Shoshone are subject to racial discrimination by the United States and its officials, in violation of Article 1 of the Convention [On the Elimination of Racial Discrimination]").

[50] *See* Complaint Summary, Border Action Network Preparing to File Petition to IACHR Concerning Harassment of Persons Identified as Undocumented Immigrants in Border Area, at 2 (Apr. 2005) (attached to Border Action Network Press Release) ("The failure of the United States through various governmental entities to prosecute anti-immigrant crimes and provide relief for victims violates undocumented immigrants' rights to physical integrity and freedom from bodily harm, non-discrimination and equality before the law, and judicial protection. The American Declaration of the Rights and Duties of Man and other provisions of international human rights law affirm and protect these rights, and bind the U.S. government to respect these rights.").

The parties represented by Professor Anaya allege, in multiple settings, that the United States is not in compliance with its international legal obligations.[51] In response, the United States maintains that it is in compliance with its international legal obligations.[52] Clearly, the parties are adverse to one another. The adversarial nature of this relationship is not diminished by the fact that the Commission or other international bodies issue recommendations rather than binding decisions.

Professor Anaya's ongoing adverse representations give rise to justifiable doubts under the UNCITRAL rules and warrant his removal from the Tribunal.

The United States' Challenge Is Timely

Finally, Claimants mischaracterize the United States' challenge as "belated."[53] On March 27, counsel for the United States learned that Professor Anaya's representation of the claimant in the *Dann* matter was likely ongoing. On March 30, the United States wrote to Professor Anaya, seeking to confirm this information. On April 11 – fifteen days after learning of Professor Anaya's ongoing representation of a party adverse to the United States – the United States notified the Tribunal and Claimants' counsel of its challenge. Accordingly, consistent with UNCITRAL Arbitration Rule 11(1), the United States sent notice of its challenge "within fifteen days after" the circumstances giving rise to the challenge "became known" to the United States. Contrary to Claimants' assertions, therefore, there is nothing "belated" about the challenge.

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[51] *See*, *e.g.*, December 2002 *Dann* Report ¶ 2; Western Shoshone People, *Second Request for Urgent Action under Early Warning Procedure to the Committee on the Elimination of Racial Discrimination of the United Nations* (July 29, 2005), at 5; *id*. at 10.

[52] *See*, *e.g.*, *Mary and Carrie Dann v. United States*, Case No. 11.140, Inter-American Commission on Human Rights, Response of the Government of the United States to October 10, 2002 Report No. 53/02 ("In sum, at all times during the events that gave rise to the petition herein, the United States has acted in full compliance with its domestic and international legal obligations.").

[53] *See* Letter from Arif Hyder Ali, Co-Counsel for Claimants, to Ucheora Onwuamaegbu, Secretary of the Tribunal (Apr. 12, 2007).

The United States holds Professor Anaya in high regard. It is critically important to the institution of investor-State arbitration under the NAFTA, however, that such proceedings are conducted in a manner that is immune from appearances of bias. The *Grand River* Tribunal, unfortunately, cannot conduct its proceedings in such a manner with Professor Anaya's continued participation as an arbitrator under these circumstances. Accordingly, the United States respectfully requests that its challenge be sustained.

Respectfully submitted,

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Enclosures

Copies w/enclosures:
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