October 30, 2007

By E-mail and Facsimile

Nassib G. Ziadé
Deputy 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 Deputy Secretary-General Ziadé:

In response to ICSID's October 23 letter to Professor Anaya, and to Professor Anaya's October 25 reply to that letter, the United States submits that existing facts continue to give rise to justifiable doubts as to Professor Anaya's impartiality or independence in this matter within the meaning of Article 10 of the UNCITRAL Arbitration Rules. Accordingly, for the reasons set forth herein and in our prior submissions,[1] the United States reconfirms its request that its challenge be sustained.

In its October 23 letter, ICSID asked Professor Anaya to indicate whether, during his service as an arbitrator in this matter, he would continue representing or assisting parties in ongoing non-NAFTA procedures that involve evaluating United States compliance "with international human rights norms."[2] ICSID further indicated that its decision on the pending challenge would be made once it received Professor Anaya's response.

The October 23 letter reported ICSID's conclusion that Professor Anaya's "representing or assisting parties in the [non-NAFTA proceedings] would be incompatible with simultaneous service as arbitrator in the NAFTA proceeding."[3] This was the core premise of the United States' challenge. The ICSID letter asked

[1] *See* Letter from United States to Ana Palacio, Secretary-General, dated April 25, 2007; Letter from United States to Ana Palacio, Secretary-General, dated May 29, 2007.

[2] Letter from Nassib G. Ziadé, Deputy Secretary-General, to Prof. James Anaya, dated October 23, 2007, at 1.

[3] *Id*.

Professor Anaya whether he would "continue to represent or assist parties in the above-mentioned non-NAFTA procedures [before the Inter-American Commission on Human Rights and the United Nations Committee on the Elimination of Racial Discrimination ("CERD")] during [his] service as arbitrator in the present NAFTA proceeding."[4] In his October 25 response, Professor Anaya effectively rejected the conclusion in the ICSID letter, as he had done in his prior letters to ICSID, and did not pledge to terminate all representations or assistance to parties in matters adverse to the United States during the course of the arbitration. Instead, while stating that his adverse representations in some matters would for other reasons be coming to an end, Professor Anaya indicated that, with respect to assisting Western Shoshone groups before the CERD, his work would be ongoing.

Thus, Professor Anaya has failed to comply with the condition that the ICSID letter implies would be prerequisite to his continuing as an arbitrator in the present proceeding. In view of this, the United States continues to maintain that its challenge should be upheld. Furthermore, the United States submits that removal is particularly warranted in this case, given the particular facts surrounding the Western Shoshone's efforts before the CERD, the troubling assertions made by Professor Anaya in his communications to ICSID, as well as Professor Anaya's earlier failure to disclose the very representations that are at issue in this challenge.

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First, Professor Anaya has clearly indicated that he intends to continue assisting parties in proceedings for evaluating compliance by the United States with its international commitments. Professor Anaya characterizes his role in the CERD matter involving the Western Shoshone as merely "supervis[ing] students and staff" in a "clinical course" who are "assisting Western Shoshone organizations and their attorneys"[5] Supervising attorneys who are assisting parties that are engaged in proceedings to evaluate United States compliance with its international obligations amounts to assisting parties in those ongoing proceedings.

In his October 25 letter, Professor Anaya attempts to minimize the adversarial nature of the work he intends to continue by assisting Western Shoshone groups in their submissions before the CERD. In its promotional materials, however, the Indigenous Peoples Law & Policy Program ("IPLP") highlights the extensive and adversarial nature of its clinical work on behalf of the Western Shoshone before the CERD.[6]

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[4] *Id*. at 2.

[5] Letter from Prof. James Anaya to Nassib G. Ziadé, Deputy Secretary-General, dated October 25, 2007 at 1.

[6] *See* University of Arizona College of Law, Indigenous Peoples Law & Policy Program, Western Shoshone Advocacy Summary ("IPLP Program Advocacy Summary"), at 2-3 (attached as Tab 1 to Letter from United States to Ana Palacio, Secretary-General, dated May 29, 2007) (describing, under the heading "Advocacy at the United Nations Committee on the Elimination of Racial Discrimination," "seven years of communication between the IPLP program and CERD," which led to a March 2006 CERD decision "urging the United States to 'freeze,' 'desist from,' and 'stop' actions being taken or threatened to be taken

In a law school clinic setting, an instructor provides far more than mere "orientation" for his or her students,[7] and cannot credibly distance himself from the student work he supervises. Professor Anaya's letter confirms that he intends to continue to supervise student and staff work supporting Western Shoshone groups with their ongoing submissions to the CERD. As indicated by Professor Anaya, this work currently is focused on assisting the Western Shoshone in their preparations for responding to the upcoming United States submission, which is due in early 2008.[8] This ongoing work is being undertaken in a matter in which the CERD, according to the IPLP, already has "condemn[ed]" the United States in "sweeping terms for its problematic legal and political posture concerning Native Americans."[9] Such facts plainly give rise to justifiable doubts as to Professor Anaya's impartiality or independence in this matter.

Second, Professor Anaya's letter declined to address whether he intended to continue representing or assisting parties in other proceedings adverse to the United States that had been disclosed in his April 16 letter.[10] Specifically, Professor Anaya's ongoing direct or supervisory work in connection with (i) the Western Shoshone's efforts before the United Nations Human Rights Committee, (ii) representation of the Chiricahua Apache Alliance in its opposition to federal and state authorizations of mining activities, and (iii) *amicus* submissions challenging the actions of U.S. officials in detainee cases also raises impartiality issues.[11]

Finally, Professor Anaya's letters to ICSID illustrate why the doubts as to Professor Anaya's independence and impartiality in this matter are justifiable, in three respects.

First, it appears from Professor Anaya's May 15 and June 5 letters that he does not accept the standard set out in Article 10 of the UNCITRAL Rules. This can be seen from his statements that "the United States attempts to apply such vague standards as 'appearance of bias,'" and that the United States "tries to apply what amount to presumptions of partiality based on formalistic assessments of [] 'adversity' toward the

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against the Western Shoshone peoples" and voicing "an unprecedented expression of concern for aspects of U.S. law that are contrary to the human rights of indigenous peoples in general and of particular concern for the situation of the Western Shoshone").

[7] *See* October 25 Letter from Prof. James Anaya to Nassib G. Ziadé, Deputy Secretary-General, at 2.

[8] *See id*. at 1.

[9] IPLP Program Advocacy Summary at 3.

[10] *See* Letter from Prof. James Anaya to Andrea J. Menaker, dated April 16, 2007, at 2-3.

[11] *See* April 16 Letter from Prof. James Anaya to Andrea J. Menaker, at 2-3. The October 23 ICSID letter did not specifically include within its query, and Professor Anaya did not address, whether he intends to discontinue such work during the course of this arbitration. In his October 25 letter, Professor Anaya indicates that he is withdrawing from the "Inter-American Commission proceedings." While unclear, the United States assumes that Professor Anaya intends to refer to both the *Dann* and *Border Action Network* matters; a failure to withdraw from either proceeding would continue to give rise to justifiable doubts under Article 10. Furthermore, any residual supervisory role to be undertaken by Professor Anaya in connection with any ongoing clinical work in either matter would likewise give rise to justifiable doubts.

United States rather than inviting a searching inquiry into actual bias."[12] Professor Anaya criticizes the United States' "far-reaching" interpretation of the UNCITRAL Rules, which he claims would have a "broad and indeterminate sweep."[13] He deems it "unfortunate that the [United States] has raised its challenge upon accusations of impartiality that are *difficult to fathom in common sense*."[14] These comments must be read as disagreement with, or rejection of, the conclusion adopted in ICSID's October 23 letter – that ongoing adverse representations are disqualifying – which formed the basis of ICSID's query concerning whether Professor Anaya's work in matters adverse to the United States was continuing.

Second, Professor Anaya accuses the United States of making legal arguments that it knows to be false. Professor Anaya first notes the United States' contention that his involvement "in cases impugning the acts or omissions" of the United States places him in a position adverse to the United States in this proceeding.[15] He then concludes: "There is no objective basis to support such a bold assertion, *and I very much doubt that the [United States'] counsel actually believes this*."[16] The suggestion, then, is that United States' counsel has advanced its argument in bad faith. To the contrary, as ICSID's letter recognizes, the basis for the United States' challenge was well-founded. Professor Anaya's rhetoric in opposition to this challenge casts further justifiable doubt as to whether he is prepared to consider the United States' arguments on their merits, and thus on his independence and impartiality.

Third, Professor Anaya accuses the United States of doubting his loyalty to, or patriotism for, the United States. In his May 15 letter, Professor Anaya states, "I am a patriot."[17] He further assures ICSID that his "human rights work is not subversive to the United States," and that he does not "challenge its basic institutions."[18] Rather, he notes, his representations are "in the tradition of loyal dissent that has been critical to the maturing of the country's democratic institutions."[19]

The United States, however, has never questioned Professor Anaya's loyalty or patriotism in any way whatsoever. Nor has the United States questioned whether human rights advocacy is compatible with service as an arbitrator. The fact that Professor Anaya seems to believe that counsel for the United States in this arbitration considers him unpatriotic, disloyal, and possibly even subversive suggests that he could not, under any circumstances, fairly adjudicate the current arbitration.

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[12] Letter from Prof. James Anaya to Ana Palacio, Secretary-General, dated June 5, 2007, at 1.

[13] *Id.* at 2.

[14] Letter from Prof. James Anaya to Ana Palacio, Secretary-General, dated May 15, 2007, at 5 (emphasis added).

[15] *Id.* at 5-6.

[16] *Id.* at 6 (emphasis added).

[17] *Id.*

[18] *Id.*

[19] *Id.*

In any event, the issue is not one of loyalty or patriotism, but one of independence and impartiality, including the *appearance* of bias. The United States considers – and the ICSID Secretariat apparently, and correctly, agrees – that an arbitrator cannot be called upon fairly to adjudicate a dispute between two parties while simultaneously acting in a separate matter adverse to one of those parties. The United States has serious, and justifiable, doubts as to Professor Anaya's independence and impartiality in this proceeding, and his letters to ICSID merely exacerbate those doubts.

Such doubts are further amplified by Professor Anaya's failure to disclose, until prompted by the United States, any of the adverse representations at issue in this challenge.

Article 9 of the UNCITRAL Arbitration Rules requires arbitrators to disclose "any circumstances likely to give rise to justifiable doubts as to . . . impartiality or independence." The IBA Guidelines further provide that "[a]ny doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favor of disclosure."[20]

Disclosure plainly was required here, given Professor Anaya's work assisting in matters where the United States ultimately was, according to Professor Anaya's own clinic, "condemn[ed]" in "sweeping terms for its problematic legal and political posture concerning Native Americans,"[21] and where the United States was alleged to have exhibited "overall disregard for international law and institutions."[22] Professor Anaya's failure to disclose such work only confirms the appropriateness of disqualification in this case.

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In view of the foregoing, it appears clear that an undertaking by Professor Anaya to cease his work that is adverse to the United States for the pendency of the present matter would be insufficient to remove the justifiable doubts as to his independence and impartiality. But, as shown above, he has not even made such an undertaking here. Therefore, the United States reconfirms its request that its challenge be sustained.

[20] IBA Guidelines on Conflicts of Interest in International Arbitration, Part I, ¶ (3)(c) (May 22, 2004).

[21] IPLP Program Advocacy Summary at 3.

[22] *Id*.

Respectfully submitted,

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