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June 5, 2007

Ms. Ana Palacio
Secretary-General
c/o Mr. Ucheora Onwuamaegbu
ICSID, 1818 H Street, NW
Washington, DC 20433

Re: ***Grand River Enterprises et al. v. United States of America***
NAFTA-UNCITRAL Arbitration

Dear Ms. Palacio:

In accordance with the Secretary of the Tribunal's letter dated May 21, 2007, Claimants submit the following response in reply to Respondent's letter dated May 29, 2007.

Respondent continues to seek Professor Anaya's removal from the Tribunal in this matter by obscuring the applicable legal standard and relevant facts. As with its earlier submissions, Respondent's most recent correspondence avoids addressing several critical points that refute any basis for Professor Anaya's removal.

Carried to its logical conclusion, Respondent would have any academic involved in law school clinic work concerning the vast interests of the United States, and all of its levels of government, disqualified from serving as an arbitrator should the United States unilaterally deem such work to be an "adversarial proceeding" somehow adverse to any such potential interests. That is not, and never has been, the standard applicable to the service of arbitrators in an international or even domestic context. In short, there has been and continues to be no cognizable legal or factual basis to remove Professor Anaya from the Tribunal, particularly at this late stage and in light of the extensive proceedings already undertaken thus far in this arbitration.

The Applicable Standard

Respondent accepts that the UNCITRAL Arbitration Rules govern this arbitration. Other norms, such as the IBA Code of Conduct or the opinions of domestic courts, can only be of illustrative effect; they do not and cannot govern the Secretary-General's decision in the instant matter. The test provided in the UNCITRAL Arbitration Rules is as follows:

> **Article 10**
> 1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.[1]

[1] The leading commentary on the UNCITRAL Arbitration Rules provides well-considered guidance regarding the meaning and effect of the term "justifiable" in Article 10(1):

Respondent cites the Article 10 test[2] but refrains from actually applying it. Instead, Respondent fabricates a different test: that "unrelated, ongoing, adverse representations by an arbitrator against a party are disqualifying."[3] Respondent crafts this test using its own unsupported and unsupportable[4] definition of "adverse representations" – where "adverse" means any argument made by any person in any proceeding in which any personality of the United States of America is involved. Respondent's fabrication, although artful, is misplaced, because it poses a test that relieves it of the burden to prove why its doubts about Professor Anaya's independence and impartiality must be justifiable on an objective basis. Respondent instead asks the Secretary-General to accept as "justifiable" its alleged doubts about Professor Anaya on an exaggerated definition of "adverse" – glossing over the many differences concerning the parties involved, the issues involved, the law involved, the forums involved and even the remedies involved. Such doubts are simply not justifiable under any definition of the word.

Respondent also attempts to add a new element to the applicable standard, proposing that a "failure to disclose [an arbitrator's] ongoing adverse representations aggravates the appearance of bias."[5] It does so in spite of the fact that Respondent, at all times, has had full knowledge of Professor Anaya's professional and humanitarian activities throughout the course of this

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> The inclusion of the word "justifiable" in Article 10(1) to define the kind of doubt required to sustain a challenge reflects UNCITRAL's clear intention of establishing an objective standard for impartiality and independence. While a party's subjective concerns about an arbitrator's bias may prompt a challenge, it is the objective reasonableness of these concerns that is ultimately determinative." The appointing authority in the Challenge Decision of 11 January 1995 aptly explained the standard:
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> > If the doubt had merely to arise in the mind of a party contesting the impartiality of an arbitrator, "justifiable" would have been almost redundant. The word must import some other standard – a doubt that is justifiable in an objective sense. In other words, the claimant here has to furnish adequate and solid grounds for its doubts. Those grounds must respond to reasonable criteria. In sum, would a reasonably well informed person believe that the perceived apprehension – the doubt – is justifiable? Is it ascertainable by that person and so serious as to warrant the removal of the arbitrators?

David D. Caron, Lee M. Caplan, and Matti Pellonpaa, The UNCITRAL Arbitration Rules, Oxford University Press, pg. 210 (citing Challenge Decision of 11 January 1995, para 30, reprinted in (1997) XXII YCA 227, 234).

[2] *See* Letter from United States to Ana Palacio, Secretary General, of May 29, 2007, ("Respondent's May 29 Letter"), at p. 2.

[3] *See id.*, at p. 11.

[4] Respondent disingenuously argues that various statements made by Professor Anaya are unsupported, likely in order to distract the reader from the fact of its own practice of asserting unsupported, and unsupportable, positions of law or fact.

[5] Respondent's May 29 Letter, at p. 1. Respondent attempts to ground this departure from the UNCITRAL standard by referring to the *IBA Guidelines*,[5] even though the Guidelines are not applicable here and, even if they were, they expressly stipulate that failure of an arbitrator to disclose "orange list" conduct cannot be used as grounds for disqualification. *See IBA Guidelines*, Part II at *para* 3 (May 22, 2004).

arbitration, and the fact that what is required under Article 9 of the UNCITRAL Rules is disclosure of circumstances which are "likely" to give rise to "justifiable doubts as to [the arbitrator's] impartiality or independence. Thus, there is no requirement that every conceivable activity of an arbitrator, no matter how remotely connected to the dispute that he or she is being called upon to arbitrate, be included in the arbitrator's disclosures or be taken into consideration by the arbitrator when certifying his or her impartiality and independence to decide the specific dispute between the parties. Indeed, it is well-accepted that no one knows better than the arbitrator as to whether circumstances likely to give rise to justifiable doubts as to his impartiality or independence are present.[6] Here, Professor Anaya has repeatedly confirmed that he did not in any way consider those of his professional and academic activities that he did not disclose as "likely" giving rise to "justifiable doubts" as to his impartiality or independence.

The IBA Guidelines

With respect to the usefulness of the *IBA Guidelines*, Respondent attempts to take advantage of its mischaracterisation of Claimants' position, found at footnote 8 of its letter. Claimants noted that Professor Anaya is not a member of a "law firm" to demonstrate how his human rights work is not of a kind nor character envisaged by the IBA Working Group as being encompassed in the term "law firm" for purposes of justifying an arbitrator challenge. Professor Anaya is not a full-time lawyer for hire (i.e., who may be engaged in the same manner as a private practitioner). Rather, he holds a tenured Chair in international human rights law. One of the obvious responsibilities of holding this prestigious academic position is to supervise and participate in projects undertaken by the Law School's Indigenous Peoples' Law and Policy Program (IPLPP), one of the United States' leading law school clinics focused on indigenous peoples.[7]

Justifiable Doubts

Respondent disingenuously alleges that State Department lawyers "who have now been made aware" of Professor Anaya's role as a NAFTA arbitrator will be compelled to change their behaviour in the *Dann* matter. Respondent fails, however, to demonstrate how or why that would be so. As Respondent has known, throughout the course of this arbitration, Professor Anaya and the IPLPP are acting in matters where the only relief available is non-binding and advisory. Nothing that these "other" State Department lawyers could say or do, or refrain from saying or doing, can change that fact.

Respondent claims: "ongoing adverse representations in unrelated matters are generally disqualifying,"[8] and that they should be in this case. It does so only by ignoring all of the

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[6] *See* Report of the Secretary General on the Preliminary Draft Set of Arbitration Rules, UNCITRAL, 8th Session, UN Doc A/CN.9/97 (1974), reprinted in (1975) VI UNCITRAL Ybk. 163, 171, Commentary on Draft Article 8(3).

[7] *See* footnote 8. Also note that Claimants argued that the *IBA Guidelines* were designed primarily for use in commercial arbitration, and that the citation provided by Respondent to demonstrate the opposite position only confirms that the *Guidelines* were indeed originally drafted with the commercial context in mind.

[8] *See* Respondent's May 29 Letter, at 5.

differences between Professor Anaya's human rights clinic work that touches upon the United States and a NAFTA damages claim brought by unrelated nationals of Canada, arising from enforcement measures adopted by 46 individual state governments. Indeed, Respondent's current position is in direct conflict with its position in the *Canfor* v. *United States* NAFTA arbitration. In *Canfor*, Respondent took the position that its party-appointed arbitrator, Mr. Conrad K. Harper, was entitled to direct the defence of a large fraud claim brought against his institution, Harvard University, by the United States at the same time as he served as an arbitrator in a NAFTA claim against the United States.

Unlike Professor Anaya, Mr. Harper was in a position where he could materially benefit the United States by either agreeing to a higher damages settlement in the domestic court case or denying the claimant any damages in the NAFTA case. Nothing Professor Anaya decides in this NAFTA arbitration can, or will, have any impact on his human rights clinic work, or vice versa. Respondent nonetheless stretches credulity by arguing against Professor Anaya's service on this NAFTA tribunal while so recently arguing in favour of Professor Harper's service in the *Canfor* case.

Respondent's contention about the result in the *Glamis* arbitrator challenge[9] is even more perplexing. Respondent's argument is apparently that its doubts about Professor Anaya are more justifiable because his human rights clinic work involves international law, rather than domestic law.[10] Obviously, the circumstances of the challenge decision in *Glamis* was nothing like the present case. The challenged arbitrator in *Glamis* was representing a paying client in domestic court on the issue of mining claim determinations by the Department of the Interior, a subject that was directly at issue in the *Glamis* arbitration. Thus, the arbitrator in *Glamis* would have been required to make factual findings on the very same governmental measures that were at issue in his other case, whose outcome was one in which he had a pressing commercial interest as a paid attorney. Professor Anaya's clinic work has absolutely nothing to do with the measures at issue in this NAFTA case and he stands to gain nothing from any factual determinations made therein.

The circumstances in this case are not dissimilar to the circumstances that were addressed in a challenge reported by Caron, Caplan and Pelonpaa.[11] In that international arbitration matter, claimant, Country X, challenged the appointment of an arbitrator appointed by respondent, Company Q, on grounds that justifiable doubts existed as to his impartiality. In that UNCITRAL arbitration, the claimant alleged that the respondent's arbitrator had served as a high-ranking legal advisor to Country A during a period of demonstrably hostile relations between Country A and Country X. The claimant also alleged that the challenged arbitrator had served as legal counsel to an official of Country A in connection with Country A's military activities in Country X, and that the arbitrator "had a recent connection with a matter relevant to the underpinnings of

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[9] *See id.*, at 6.

[10] *Id.*, at 6.

[11] *See* Challenge Decision of 11 January 1995, reprinted in part, in (1997) XXII YCA 227, and discussed in Caron, Caplan and Pelonpää at 222.

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the dispute in his capacity as one of the attorneys for a former government official."[12] The essential basis of the challenge was thus the apparent concern of claimant that the respondent's party-appointed arbitrator would be partial, as his previous advocacy on behalf of Country A had aligned him so closely with the policies of Country A, which historically were adverse to those of Country X. The challenge was adjudicated by an appointing authority designated by the Secretary-General of the Permanent Court of Arbitration pursuant to Article 6 and 12(1)(c) of the UNCITRAL Rules. In support of its challenge, Country X (claimant), submitted a legal opinion and a brief written by the challenged arbitrator in his respective capacities as legal advisor and legal counsel. (Notably, in this case, the United States has adduced absolutely no documents or testimonial evidence in support of its challenge.)

The appointing authority in the case reported by Professors Caron et al recognized how the unique political backdrop, between Country X and Country A, distinguished the dispute from the typical commercial arbitration. The appointing authority thus concluded that the standard for resolving the challenge "cannot ... be a uniquely commercial one in a case such as this" and that the "general political factors" require "a most careful weighing of all elements." Though highly relevant, the politics surrounding the case were not dispositive. The appointing authority concluded that the real test was whether there was "some direct relationship, something of real substance, that establishes a link on the record in the case, with that [political] background and that points to possible eventual partiality on the arbitrator's part."[13]

The appointing authority's review of the evidence revealed no signs of partiality on the part of the challenged arbitrator. The appointing authority found the legal brief drafted on behalf of an official of Country A to be nothing more than "a robust defence of his [client's] position," which properly cast "his [client's] position in as persuasive and as forceful terms as possible." According to the appointing authority, the legal opinion was also innocuous because it addressed "a peripheral but not directly related issue;" that it contained "no evidence whatsoever of the arbitrator's personal views on the matter... [nor] evidence of his involvement in policy making for Country X;" that it was given "in the discharge of his duties as legal counsel" in which he was required to consider "the important legal, as distinct from the policy, questions;" and that the "legal issues [were] unconnected with the arbitration at hand." Accordingly, the appointing authority dismissed the challenge.

The position of the United States of America, in the instant case, can be likened to that of claimant in the challenge precedent discussed above. Distilled to its essence, Respondent here is arguing that Professor Anaya's involvement in teaching, studying and advocating in connection with the international human rights of unrelated native Americans, constitutes adversity towards the interests of the United States of America of such a nature that he would not be able to decide impartially and independently an investment dispute under the North American Free Trade Agreement between Canadian nationals, who are members of the Six Nations Confederacy, and the United States of America. What Respondent has not demonstrated is why the positions taken by Professor Anaya as an academic, or as a supervising professor in connection with the advocacy activities of his law clinic students, or as an advocate in the *Dann* matter, would in any

[12] *Id.*, at para. 3.

[13] *Id.*, paras. 37-38.

way lead him to prejudge the present NAFTA dispute that he has been asked to arbitrate as a member of a three-person arbitral tribunal. Respondent has completely failed to demonstrate how the legal issues involved in Professor Anaya's other activities are also directly at issue in this arbitration, or that the positions that he has taken as an advocate on those issues are – in fact – adverse to the United States in connection with the international law issues that are at stake in this arbitration. It has not done so, because it cannot.

In sum, under available precedent and taking into consideration the writings of noted arbitration scholars and practitioners, Claimants submit that Respondent's challenge must be rejected because it has utterly failed to prove – either by way of evidence or argument – that justifiable doubts exist.

Timing

Respondent also devotes much of its letter in attempting to buttress its argument that the United States is a single, unitary and all-encompassing actor – albeit only for the purposes of alleging circumstances leading to justifiable doubt about Professor Anaya's impartiality. It simultaneously soft-peddles its position that, for the purposes of being aware of circumstances of potential conflict, the United States is made up of no more than a handful of lawyers working in the NAFTA Arbitration Division.[14] Respondent cannot have it both ways. The applicable standard, for construction of notice, is very clear:

> **Article 11**
> 1. A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.[15]

Article 11(1) of the UNCITRAL Arbitration Rules does not say that an arbitrator may be challenged within fifteen days after the circumstances in question became known to counsel for that party. It says: "became known to that party." If Respondent is correct that any kind of unrelated professional activity impacting upon the United States' international interests, writ large, can serve as grounds for arbitrator disqualification, then as a "party" to this arbitration (and as defined in the NAFTA) the United States cannot simultaneously claim that the only persons capable of "knowing" about Professor Anaya's activities – for the purposes of such challenge – are the few people who act as counsel in the NAFTA case.

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[14] *See* Respondent's May 29 Letter.

[15] As noted by Caron, Caplan and Pelonpää: "The drafters of the UNCITRAL Rules wanted to ensure that challenges were made at the earliest possible stage of the arbitral proceedings due to the high costs of challenges made once proceedings are well under way. Challenges result in the interruption of the course of proceedings, and a successful challenge creates serious delays because a substitute must be appointed and there may be a need to repeat hearings. Caron, Caplan and Pelonpää at 241, citing Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, UNCITRAL, 9th Sess., Addendum 1 (Commentary), UN Doc A/CN.9/112/Add.1 (1975), reprinted in (1976) VII UNCITRAL Ybk 166, 170.

For example, the State Department official who greeted Professor Anaya with other lawyers from the Office of the Legal Advisor in tow had contemporary knowledge of his work. Respondent does not dispute this fact. Respondent nonetheless claims[16] that even these other State Department officials – whose job it is to articulate the very interests upon which Respondent attempts to justify its "doubts" – are not relevant when it comes to construing the United States' knowledge of Professor Anaya's work with the IPLPP. Respondent's claim, that "the United States" – as a "party" defined under the NAFTA – was not aware of Professor Anaya's ongoing human rights clinic work, cannot be accepted.

If the facts were otherwise, Respondent would have provided evidence supporting its position, for example, by way of witness testimony from these other State Department officials. That Respondent has completely failed to provide any independent evidence to support its challenge demonstrates the utter vacuity of its position.

Respondent is also being disingenuous with respect to its own counsel's knowledge of Professor Anaya's ongoing work.[17] Respondent's April 25th letter actually cites documents found on the IPLPP web site to support its position,[18] even though it argues that Claimants are trying to impose some sort of undue burden upon its counsel in terms of their knowledge of Professor Anaya's human rights clinic work.[19] Claimants' position on compliance with Article 11 of the UNCITRAL Arbitration Rules is not onerous at all; it merely expects Respondent's officials to have actually read the information found on Professor Anaya's web-based CV when it was presented to them. The information available on these web pages[20] – as of the time of Professor Anaya's appointment – allowed Respondent to know that he and the IPLPP were still very much involved in international human rights matters relevant to the United States, including very public proceedings that took place before two United Nations committees in support of the Western Shoshone indigenous peoples (i.e. the *Dann* matter).

Relevance of U.S. Law

Respondent also argues that U.S. law is relevant to this proceeding because "any resulting award may be subject to set aside proceedings in the United States."[21] It omits mention of the fact that the Tribunal has yet to determine the place of arbitration in the instant case, having decided during the preliminary meeting that the issue did not need be resolved at that

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[16] *See* Respondent's May 29 Letter.

[17] Respondent's May 29 Letter, at footnote 20 and p. 10.

[18] *See* Letter from United States to Ana Palacio, Secretary-General, of April 25, 2007 ("Respondent's April 25 Letter"), at p. 10.

[19] *Id.*

[20] *See* Claimants' May 18 Letter, at footnote 12.

[21] *See* Respondent's May 29 Letter, at footnote 34.

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time.[22] Respondent therefore presumes a finding of the Tribunal that has not yet been made, even if it were true that U.S. law supported its challenge, which it does not.

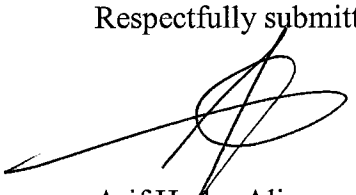
Summary

Under the UNCITRAL Arbitration Rules the applicable standard for challenge of an arbitrator is "justifiable doubts" as to the impartiality or independence of that arbitrator. Respondent has failed to demonstrate that Professor Anaya's human rights clinical work raises "justifiable doubts" as to his impartiality and independence under the circumstances. Moreover, Respondent self-servingly consolidates – without citing any authority – all of the myriad interests of the 'United States of America' to justify its position, while simultaneously complaining of how "practicably untenable"[23] it would be to construe the knowledge of other U.S. government officials about Professor Anaya's work – including that of other State Department officials – as knowledge for the purposes of the timing requirements of Article 11 of the UNCITRAL Arbitration Rules.

Respondent has attempted to gloss over the numerous, crucial differences between Professor Anaya's human rights clinic work and the instant NAFTA damages claim, assuming that it need only state that his academic responsibilities are "adversarial" in order to justify its challenge. It hopes the same for its failure to challenge Professor Anaya on a timely basis, when its officials should have simply read his web CV more carefully upon his appointment. Finally, even if Professor Anaya's representation in human rights matters before and after his appointment to this Tribunal was not materially sufficient to raise a "red flag" for purposes of Respondent's identification of justifiable doubts both during and at the times before and after such appointment, it cannot be argued that his involvement in those human rights matters are sufficiently material to raise the spectre of such doubts at this time.

Respondent concludes with an appeal to principle supporting the integrity of the Investor-State arbitration system. Systemic integrity will not be safeguarded by acceding to capricious and belated challenges issued at the whim of a party or State, especially where that challenge is made three years into the arbitration and following the expenditure of hundreds of thousands of dollars by both parties. The United States has neither substantiated the justifiability of its doubt nor explained why its challenge can be submitted years late. As such, Claimants respectfully request that the challenge by denied.

Respectfully submitted,



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[22] Minutes of First Session of Tribunal, March 31, 2005, at p. 6, para. 13.

[23] *See id.*, at p. 9.

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