

## International Centre for Settlement of Investment Disputes

1818 H Street, N.W., Washington, D.C. 20433, U.S.A.  
Telephone: (202) 458-1587 Faxes: (202) 522-2615 / (202) 522-2027  
Website: <http://www.worldbank.org/icsid>

November 28, 2007

By courier (advance copy by e-mail)

Professor James Anaya  
Room 245  
The University of Arizona  
James E. Rogers College of Law  
1201 East Speedway Boulevard  
P.O. Box 210176,  
Tucson, Arizona 85721-0176, U.S.A.

### **Re: Grand River Enterprises *et al* v. United States of America – NAFTA/UNCITRAL Arbitration Rules Proceeding**

Dear Professor Anaya,

I write in regard to the challenge that the Respondent has raised to your service as an arbitrator in this proceeding under the UNCITRAL Arbitration Rules. As explained in our letter of October 23, 2007, a copy of which is attached herewith for your ease of reference, we consider the challenge to have been made within the time limit set out in Article 11(1) of the UNCITRAL Arbitration Rules.

In our October 23, 2007 letter, we also explained that our understanding from the correspondence that we received from you and the parties on the challenge is that you have, in the course of your service as arbitrator in the present NAFTA proceeding which is aimed at evaluating compliance by the Respondent with its international commitments under the NAFTA, also been representing or assisting parties in procedures before the Inter-American Commission on Human Rights and before the United Nations Committee on the Elimination of Racial Discrimination (CERD), which also involve evaluating compliance by the Respondent with its international commitments.

In view of their basic similarity, therefore, we concluded that representing or assisting parties in the latter set of procedures would be incompatible with simultaneous service as arbitrator in the NAFTA proceeding, and asked that you inform us whether you would continue to represent or assist parties in the non-NAFTA procedures during your service as arbitrator in the present NAFTA proceeding.

In your response of October 25, 2007, you informed us that you are ceasing your involvement in the procedures before the Inter-American Commission on Human Rights. We

also understand from your letter that you are not now engaged in any advocacy before the CERD, although in the course of your work as an Instructor in a clinical course at the University of Arizona College of Law, you provide orientation to students that is relevant to their work in connection with the Western Shoshone, other indigenous peoples, and the CERD.

The applicable standard in deciding whether to sustain a challenge of an arbitrator in the present case is set out in Article 10(1) of the UNCITRAL Arbitration Rules, which provides that an “arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.” This is an objective standard in that it requires not only a showing of doubt, but doubt that is justifiable. Further, as the standard requires an exercise of judgment, it is only logical to conclude that all relevant facts and circumstances must be considered in reaching that judgment.

A reasonable distinction can be made between: (i) representing parties in international fora where the underlying aim is similar to the aim of the current arbitration (i.e., assessing whether the United States is in compliance with its international legal obligations); and (ii) supervising students as part of a clinical course. The former requires advocacy of a position; the latter involves instruction and mentoring.

Therefore, the continued provision of orientation to students, as described in your letter of October 25, 2007 does not, in my view, amount to representing or assisting parties in procedures before the CERD such as to give rise to justifiable doubts as to impartiality or independence for purposes of Article 10(1) of the UNCITRAL Rules. This is a finding that has been made after careful consideration of the totality of the facts and circumstances of this case, including all the submissions filed in connection with the challenge.

Consequently, I have decided not to sustain the challenge and I am by separate communication notifying the parties accordingly.

Sincerely yours,



Ana Palacio  
Secretary-General

Attachment

cc by e-mail (with attachment):

Mr. Fali S. Nariman

Mr. John R. Crook

cc by e-mail (with attachment):

Grand River Enterprises Six Nations, Ltd.,

Jerry Montour, Kenneth Hill and

Arthur Montour

United States of America  
c/o Mr. Ronald J. Bettauer,  
Ms. Andrea J. Menaker,

c/o Mr. Todd Grierson-Weiler  
Calgary, Alberta, Canada  
and  
Mr. Robert Luddy  
Windels Marx Lane & Mittendorf LLP  
New York, NY, U.S.A.  
and  
Mr. Arif Hyder Ali  
Crowell & Moring LLP  
Washington, D.C., U.S.A.  
and  
c/o Mr. Leonard Violi  
Law Offices of Leonard Violi, LLC  
Mamaroneck, NY, U.S.A.  
and  
c/o Mrs. Chantell MacInnes Montour  
Inch Hammond Professional Corporation  
Hamilton, Ontario, Canada

Mark E. Feldman and  
Jeremy Sharpe  
Office of International Claims and  
Investment Disputes  
United States Department of State  
Washington, D.C. 20037-2800, U.S.A.

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October 23, 2007

By courier (advance copy by e-mail)

Professor James Anaya  
Room 245  
The University of Arizona  
James E. Rogers College of Law  
1201 East Speedway Boulevard  
P.O. Box 210176,  
Tucson, Arizona 85721-0176

### **Re: Grand River Enterprises *et al* v. United States of America – NAFTA/UNCITRAL Arbitration Rules Proceeding**

Dear Professor Anaya,

I write in regard to the challenge that the Respondent in this proceeding has raised to your service as an arbitrator in the proceeding.

I wish first to let you know that we consider the challenge to have been made within the time limit set out in Article 11(1) of the UNCITRAL Arbitration Rules, the challenge having been notified fifteen days after the circumstance mentioned in the Respondent's letter of March 30, 2007 became known to counsel for the Respondent.

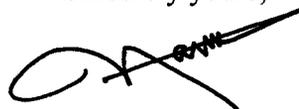
As we understand it from the correspondence that we have received from you and the parties, you are representing or assisting parties in procedures before the Inter-American Commission on Human Rights and the United Nations Committee on the Elimination of Racial Discrimination. It is our understanding that these procedures are ongoing and are for evaluating compliance by the Respondent with international human rights norms. The present proceeding in which you are serving as arbitrator similarly aims at the evaluation of compliance by the Respondent with its international commitments (under the NAFTA). Without in any way questioning your integrity or competence as an arbitrator, we have, in view of their basic similarity, concluded that representing or assisting parties in the first set of procedures would be incompatible with simultaneous service as arbitrator in the NAFTA proceeding.

In another proceeding under the UNCITRAL Arbitration Rules, we concluded, as appointing authority, that a challenged arbitrator's lobbying of the respondent State would be incompatible with his simultaneous service as arbitrator in the proceeding. We therefore wrote to the arbitrator, with a copy to the parties and the other arbitrators, asking the challenged

arbitrator to inform us, before taking a decision on the challenge, whether the arbitrator would continue to act as lobbyist during his service as arbitrator.

By the present letter, we likewise ask that you inform us whether you will continue to represent or assist parties in the above-mentioned non-NAFTA procedures during your service as arbitrator in the present NAFTA proceeding. Our decision on the challenge will be made once we receive your response.

Sincerely yours,



Nassib G. Ziadé  
Deputy Secretary-General

cc:

Mr. Fali S. Nariman  
Mr. John R. Crook

cc:

Grand River Enterprises Six Nations, Ltd.,  
Jerry Montour, Kenneth Hill and  
Arthur Montour  
c/o Mr. Todd Grierson-Weiler  
Calgary, Alberta, Canada  
and  
Mr. Robert Luddy  
Windels Marx Lane & Mittendorf LLP  
New York, NY  
and  
Mr. Arif Hyder Ali  
Crowell & Moring LLP  
Washington, D.C.  
and  
c/o Mr. Leonard Violi  
Law Offices of Leonard Violi, LLC  
Mamaroneck, NY  
and  
c/o Mrs. Chantell MacInnes Montour  
Inch Hammond Professional Corporation  
Hamilton, Ontario, Canada

United States of America  
c/o Ms. Andrea Menaker  
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