OFFICE OF THE NATIONAL CHIEF

Assembly of First Nations

BUREAU DU CHEF NATIONAL

Assemblée des Premières Nations

January 19, 2009

Mr. Fali S. Nariman
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c/o Katia Yannaca-Small
Secretary of the Tribunal
International Centre for the Settlement
Of Investment Disputes
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Dear Members of the Honourable Tribunal:

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

I write to express my support for the claimants in the above-mentioned arbitration proceeding under the North American Free Trade Agreement, and to provide you with an informed view about some of the arguments made by the parties concerning the rights of Indigenous peoples under international law.

The Assembly of First Nations and Its Mission

I am the present National Chief of the Assembly of First Nations. The AFN is the representative body that serves as the national voice for First Nations in Canada. The National Chief of the AFN is elected by Chiefs across Canada, who in turn are elected by their citizens (living on- and off-reserve). The Chiefs of the Assembly of First Nations meet bi-annually to set national policy and direction through resolution. I am currently completing my third term as the National Chief of the AFN, having been elected to the position in 1997, 2003 and 2006. I am also a proud member of the Sagkeeng Anishnabe First Nation, located in Manitoba, Canada.

The Assembly of First Nations represents the views of First Nations both domestically and internationally in areas such as: aboriginal and treaty rights, economic development, education, languages and literacy, health, housing, social development, justice, taxation, land claims, environment, and a whole array of issues that are of common concern which arise from time to time. There are over 630 First Nations communities in Canada, some of which occupy territory extending beyond the political borders. The Haudenosaunee serve as one of the best examples of First Nations whose shared land, culture, family, business partnerships and investments extend beyond the border that now exists between Canada and the United States of America, as they have for time immemorial.

The Assembly of First Nations supports the *United Nations Declaration on the Rights of Indigenous Peoples* and the customary international law principles it reflects. The AFN mandate traditionally includes advocating for the Government of Canada's adherence to international law standards and principles protecting the rights of Indigenous peoples.

The recognition of Indigenous rights are owed both collectively and individually, by all three NAFTA parties, meaning that they should be taken into account whenever a NAFTA arbitration involves First Nations investors or investments. Understanding the desperate economic conditions that afflict the lives of so many Indigenous peoples, it should be a priority of government to encourage investments made by First Nations business people to help their communities. These investments are crucial for improving the well being of all First Nations.

The Claimants and Their Investment in the United States

I have known Jerry Montour and other people responsible for establishing Grand River Enterprises Six Nations Ltd., which remains the largest employer on the Six Nations of the Grand River. I have personally witnessed how Mr. Montour and his colleagues have used their business success to contribute to charitable causes that foster economic and cultural development in First Nations communities. I understand that they achieved their success by creating original, First Nations tobacco brands designed especially for both US and Canadian markets. As Haudenosaunee citizens, it is understandable why they would have expected to receive treatment from US government officials that was not contrary to the rights owed to them under international law. The Haudenosaunee have been engaged in the tobacco trade for centuries.[1]

I have reviewed relevant portions of the Memorial submitted by the claimants in this case, on July 7, 2018, and the Counter Memorial submitted by the Respondent, the Government of the United States of America, on December 22, 2008. I applaud the claimants for having managed to successfully establish their "Seneca" brand, first on-reservation and later "off-reserve" in a number of states. I am disappointed that they have been treated poorly, both as First Nations and as Canadian investors in the United States, by US state government officials who have apparently chosen to treat other industry members better than they have treated the claimants and their US tobacco brands.

[1] See: Jose Antonio Brandao, Report on Trade and Tobacco Use Among the Six Nations Iroquois; Attached to Claimants' Memorial.

I am concerned that United States has fundamentally misunderstood both the basic nature of the claim and of its responsibilities to First Nations under international law. My understanding is that the claimants initially launched their brand on-reserve but that were forced to change their strategy when state officials started attempting to apply their regulation to them, hurting their new brand.[2] The claimants then established markets for their "Seneca" brand in a small number of states, off-reservation, and when they became successful in those states, officials changed the rules again.[3] These rule changes provided a competitive advantage to direct competitors of the claimants, none of whom were First Nations based, because of the "grandfathered" status they enjoyed under the rules, which made their costs lower than the claimants' costs.[4] Instead of responding directly to the claimants' position, the United States of America has adopted a tactic commonly used by opponents of First Nations rights: they argue that the claimants are seeking "special treatment" rather than simple equality.[5]

"Fair & Equitable" Treatment and International Law

The Assembly of First Nations believes that Government officials are required, as a matter of international law, to honour treaty promises made by their predecessors recognizing First Nations rights. In its Counter Memorial, the United States claims that "treaties with Indian Nations" have no force in international law, relying on an old case that itself reflects a Eurocentric approach to legal philosophy.[6] This approach ignores the reality that we, the Indigenous peoples, have owned and occupied our lands, and conducted our businesses with each other, since time immemorial. The position advocated by the United States in this case should be rejected by the Tribunal because it perpetuates the same type of colonial mentality that has undermined the efforts made by Indigenous peoples to ensure that their rights, to economic, social and political development, are both recognized and implemented in countries worldwide, including the three NAFTA parties.

At its root, all law is based upon the principle of good faith. The same is true for international law, which obliges countries to act in a manner consistent with the promises they have made to, or for the benefit of, Indigenous peoples.[7] These rights cannot be abrogated by the unilateral act of a national legislature without full consultation first taking place, on a nation-to-nation basis, with the Indigenous peoples whose interests would be affected by any proposed changes to the status quo.

For it to mean anything, good faith must also work on an individual level as well. As cited by the claimants in their Memorial, international law recognizes that governments should not take measures that will directly harm the interests of Indigenous peoples without first taking steps to consult them and take steps to mitigate that harm. It is a matter of simple good faith. If First Nations business owners, such as the claimants, cannot rely upon government officials to act in a

[2] Claimants' Memorial, at paragraphs 66 to 70.
[3] Claimants' Memorial, at paragraphs 71 to 74.
[4] Claimants' Memorial, at paragraphs 81 to 87.
[5] Respondent's Counter Memorial, at pages 2 to 3, 79 to 80 & 86.
[6] Respondent's Counter Memorial, at page 126.
[7] Claimants' Memorial, at paragraphs 161 to 163 & 171 to 174.

manner consistent with their domestic and international obligations, the term "fair and equitable" treatment will lose any meaningful authority.

The Tribunal should accordingly find that First Nations investors who have been promised "fair and equitable treatment" under NAFTA Article 1105 are entitled to have their legitimate expectations – based upon their rights as Indigenous peoples – honoured by NAFTA government officials. The respondent cannot be correct that the Tribunal should only engage in an abstract exercise of determining whether a particular international rule involving Indigenous peoples has achieved "the status of customary international law."

The claimants explained in their Counter Memorial how concept of "fair and equitable treatment" is itself what the United States owes to all Canadian investors, including those from First Nations, under customary international law.[8] The principles reflected in the international instruments cited by both parties, concerning the protection of Indigenous peoples, reflect the very essence of what "fair and equitable" treatment should mean within the circumstances of the case before the Tribunal.

The Assembly of First Nations supports the basic principles set out in international instruments such as ILO Treaty 169, including the good faith duty to consult Indigenous peoples when government action threatens their rights to territory or their economic livelihood. The AFN also supports the principles of non-discrimination reflected in ILO Treaty 169 and many international human rights treaties, which entitle First Nations individuals to receive treatment no less favourable than that which a government provides to similarly situated persons. The claimants were entitled to expect to receive this kind of treatment for the business they established in the United States with their "Seneca" brand, and which has provided desperately needed economic growth for the hundreds of Six Nations families that their business supports.

Conclusion

Both the United States of America and Canada have had a history of making high-minded statements about the protection of human rights under international law, but both have a less than stellar record of making good on those promises when the subject turns to Indigenous peoples. While it is truly unfortunate that neither government has so far indicated a willingness to sign the United Nations Declaration on the Rights of Indigenous Peoples, such intransigence cannot mean that their officials should be free to ignore the basic principles of international law reflected in it.

Sincerely,

Phil Fontaine, National Chief

[8] Claimants' Memorial, at paragraphs 154 to 156.

cc. Hon. Mr. Chuck Strahl, Minister of Indian and Northern Affairs, Canada
Hon. Mr. Stockwell Day, Minister of International Trade, Canada
Hon. David H. Wilkins, Ambassador, United States of America