

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,
JERRY MONTOUR, KENNETH HILL AND ARTHUR
MONTOUR, JR.,

Claimants/Investors,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

**SUBMISSION ON COSTS
OF RESPONDENT UNITED STATES OF AMERICA**

In accordance with the Tribunal's instruction at the conclusion of the February 2010 hearing,¹ and pursuant to Articles 38 and 40 of the UNCITRAL Arbitration Rules, the United States of America respectfully makes this submission on the quantification of costs. The United States already has demonstrated that the Tribunal should award costs to the United States in this matter.² As detailed below, the total cost incurred by the United States in these proceedings is \$2,792,592.23. The United States respectfully requests that, pursuant to Articles 40(1) and 40(2)

¹ See Hearing Transcript ("Hr'g Tr.") Vol. 7 (Feb. 14, 2010) at 2646:16-2647:11 (establishing a forty-five day deadline from the conclusion of the hearing for submissions on costs).

² See, e.g., Counter-Memorial of Respondent United States of America (Dec. 22, 2008) at 5-6 (asserting that Claimants should bear all costs in this arbitration due to, among other grounds, the consistently strong financial performance of Grand River both before and after the adoption of the challenged measures); Rejoinder of Respondent United States of America (May 13, 2009) at 7 (requesting an award of costs to the United States and observing that audited financial statements are "among the most important sources of financial data for any damages expert to review," but that no audited Grand River financial statements had been provided for 2006 and 2007); Hr'g Tr. Vol. 1 (Feb. 1, 2010) at 198:9-198:15 (Opening Statement of Jeffrey D. Kovar) (stating that "no damages could possibly be owed here . . . especially not on the basis of the severely unreliable evidence submitted in this case," and requesting an award of full costs to the United States).

of the UNCITRAL Arbitration Rules, the Tribunal order that those costs be borne by Claimants in this matter.

Article 38 of the UNCITRAL Arbitration Rules lists six categories of expenses to be included in the term “costs”: (a) “fees of the arbitral tribunal”; (b) “travel and other expenses incurred by the arbitrators”; (c) “costs of expert advice”; (d) “travel and expenses of witnesses”; (e) reasonable “costs for legal representation”; and (f) “fees and expenses of the appointing authority.” This submission quantifies the expenses of the United States that fall within those categories. As detailed below, the United States has been exceptionally conservative in quantifying its costs. Accordingly, and because the amount of those costs is fully warranted, the Tribunal should award the United States the full amount requested herein.

Article 40 divides the types of costs enumerated in Article 38 into two categories: the “costs of arbitration” and the “costs of legal representation and assistance.” Under Article 40(1), the “costs of arbitration shall in principle be borne by the unsuccessful party.” “Costs of arbitration” under Article 40(1) includes the categories of costs set out in Article 38(a), 38(b), 38(c), 38(d), and 38(f).

With respect to “the costs of legal representation and assistance” under Article 38(e), Article 40(2) provides that “the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.”

Accordingly, the United States will address its request for costs in two sections, namely “costs of arbitration” under Article 40(1) and “costs of legal representation and assistance” under Article 40(2).

I. COSTS OF ARBITRATION

The “costs of arbitration,” which “shall in principle be borne by the unsuccessful party” under Article 40(1), include “fees of the arbitral tribunal” under Article 38(a) and “travel and other expenses incurred by the arbitrators” under Article 38(b). In accordance with Article 41, the United States has deposited \$375,000.00 in advances toward such costs of the Tribunal. Those advances for Tribunal fees, travel, and other expenses are addressed in the attached Witness Statement of Gregory K. Holobaugh, Budget Analyst in the Office of the Executive Director in the Legal Adviser’s Office at the U.S. Department of State (“Holobaugh Statement”), which includes spreadsheets detailing all U.S. costs in the *Grand River* case. The spreadsheets compile entries for expenses in the *Grand River* case that were taken from the U.S. Department of State’s Global Financial Management System. The deposits made by the United States in response to requests from ICSID for advances to cover Tribunal expenses appear at Tab 1 of the spreadsheet, in lines 3, 4, and 5. Under Article 40(1), those costs should be borne by Claimants in this matter.

Second, “costs of arbitration” that “shall in principle be borne by the unsuccessful party” under Article 40(1) also include, under Article 38(d), “travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal.”

The Tribunal in this matter established a procedure for cross-examination pursuant to which the disputing parties were free to designate for cross-examination any or all of the opposing party’s witnesses.³ Such cross-examination was to occur at the merits hearing to be held in Washington, D.C. Pursuant to that procedure and Claimants’ notification,⁴ the United

³ See Tribunal Letter to Parties, Jan. 28, 2008, at 2 (“At least 15 days prior to the hearing, each party shall communicate to the Tribunal and to the other party information regarding witnesses it expects to call, as provided in Article 25(2) of the UNCITRAL Rules, which apply in this proceeding.”).

⁴ See Letter from Claimants, June 8, 2009 (designating witnesses for cross-examination).

States was required to make available for testimony in Washington, D.C. the witnesses designated by Claimants for cross-examination. Claimants designated six witnesses for cross-examination, four of whom live outside the Washington, D.C. region: Professor Jonathan Gruber (Boston, MA), Mr. Brett DeLange (Boise, ID), Mr. Dennis Eckhart (Sacramento, CA), and Mr. David Thomson (Santa Fe, NM). The United States thus had to pay travel expenses for those witnesses, which are detailed in the Holobaugh Statement at Tab 2 and total \$7,425.70. Those witnesses traveled in economy class at government rates, stayed in hotels at government rates, and received a modest per diem to cover meals and incidental expenses pursuant to U.S. Government guidelines. Under Article 40(1), those reasonable travel costs should be borne by Claimants in this matter.

For “costs of arbitration” under Article 40(1), which “shall in principle be borne by the unsuccessful party,” the United States seeks a total of \$382,425.70. As described above, that amount consists of “fees of the arbitral tribunal” under Article 38(a) and “travel and other expenses incurred by the arbitrators” under Article 38(b) (collectively, \$375,000.00), as well as “travel and other expenses of witnesses” under Article 38(d) (\$7,425.70).

II. COSTS OF LEGAL REPRESENTATION AND ASSISTANCE

Under UNCITRAL Article 40(2), the Tribunal is “free to determine” that the unsuccessful party should also bear the costs of “legal representation and assistance” under Article 38(e), so long as such apportionment is reasonable, “taking into account the circumstances of the case.” As the United States has demonstrated, those costs should be borne by Claimants in this case.⁵

⁵ See, e.g., *supra* note 2.

The United States has incurred four categories of costs for legal representation and assistance in this matter, namely: (a) costs for attorney, paralegal, and systems administrator time; (b) costs for attorney and paralegal travel; (c) costs for expert advice; and (d) copying expenses from an outside vendor. The four categories of costs are discussed below.

A. Attorney, Paralegal, and Systems Administrator Time

Costs for legal representation and assistance as referenced in Article 38(e) are discussed in the attached witness statements of Mark E. Feldman, Jennifer Toole, Mary Reddy, and Gregory K. Holobaugh. The first category of such costs, namely costs associated with attorney, paralegal, and systems administrator time, totals \$1,041,324.24⁶ and should be awarded in full to the United States.

Unlike their counterparts in the private sector, attorneys and paralegals in the U.S. State Department's Office of International Claims and Investment Disputes have only one client (the U.S. Government), and do not bill for their time by matter. Therefore, the United States has estimated the amount of attorney and paralegal time devoted to the *Grand River* case in the following manner. Mr. Feldman, who has supervised the attorneys and paralegals assigned to the *Grand River* case since he became Chief of NAFTA Arbitration in March 2008, estimated, on an annual basis, the percentage of attorney and paralegal time that was devoted to the *Grand River* case since he began working on the case in January 2006.⁷ Similarly, Ms. Toole, who worked on the *Grand River* case from the time Claimants submitted their Notice of Intent in

⁶ Holobaugh Statement at Tab 5.

⁷ See Witness Statement of Mark E. Feldman ("Feldman Statement").

September 2003 until the end of 2005, estimated, on an annual basis, the percentage of attorney and paralegal time that was devoted to the case in 2004 and 2005.⁸

Regarding the costs of such attorney and paralegal time, the Office of the Executive Director in the State Department's Office of the Legal Adviser has provided annual salary and benefits information for the individual attorneys and paralegals.⁹ The United States has calculated the relevant costs of attorney and paralegal time to the Department by multiplying the cost of an individual's salary and benefits for a given year by the estimated percentage of time that individual spent on the *Grand River* case in that year.¹⁰

The amount of costs claimed by the United States for attorney and paralegal time is conservative in a number of respects. *First*, the State Department could have retained outside counsel and paid prevailing market rates for attorney time, rather than the salaries and benefits of its employees.¹¹ Using the hourly billable rates for attorneys in the private sector with comparable experience would yield a much higher cost estimate for legal representation in this case.¹²

Second, the time estimates do not include time spent on the case by several senior attorneys within the Department's Office of the Legal Adviser, including, for example, Legal Adviser Harold Hongju Koh, former Deputy Legal Adviser Ronald J. Bettauer, former Assistant Legal Adviser Mark A. Clodfelter, and Deputy Assistant Legal Adviser Lisa J. Grosh. Nor do the time estimates include time spent on the case by attorneys in other offices of the State

⁸ See Witness Statement of Jennifer Toole. The United States does not seek costs for any attorney or paralegal time in 2003.

⁹ See Witness Statement of Mary Reddy ("Reddy Statement").

¹⁰ See Holobaugh Statement at Tab 5.

¹¹ This claim is without prejudice to the right of the United States to claim for the market value of the attorney and paralegal time devoted to a case (based on prevailing hourly rates for equivalent legal work) in any future cost submission.

¹² See Feldman Statement ¶ 13; Reddy Statement ¶ 2.

Department and other agencies of the federal government, including the Department of Commerce, the Department of Justice, the Department of the Treasury, the Department of the Interior, and the Office of the U.S. Trade Representative. Attorneys from those offices spent considerable time reviewing and commenting on U.S. submissions in this case.

Third, the value of administrative support services, from secretaries to information technology specialists, generally has not been included in the estimates, with the exception of four paralegal specialists and one technical systems administrator. Similarly, time estimates for interns and law clerks, who also spent time on the case, have not been included.

With respect to technical support, the United States seeks costs only for ten hours of time provided by Douglas Grandon, a technical systems administrator in the Office of the Executive Director in the State Department's Office of the Legal Adviser. Mr. Grandon's work on the *Grand River* case, which concerned mobile computer requirements related to the merits hearing, cost the Department \$966.70.¹³ Work by attorneys and paralegals on the *Grand River* case cost the Department \$971,616.16 and \$68,741.38 respectively.¹⁴ Accordingly, as one category of "legal representation and assistance" under Article 38(e), the United States seeks a total of \$1,041,324.24 in costs associated with attorney, paralegal, and systems administrator time spent on the *Grand River* case.¹⁵

B. Attorney and Paralegal Travel

Included in the costs of "legal representation and assistance" under Article 38(e) are costs for attorney and paralegal travel. Those travel costs have been quantified separately from costs

¹³ Holobaugh Statement at Tab 5.

¹⁴ *Id.*

¹⁵ *Id.*

for witness travel, which were discussed above in the context of “costs of arbitration” under Article 38(d). Attorney and paralegal travel costs are detailed in the Holobaugh Statement at Tab 4.

In March 2006, attorneys and a paralegal specialist for the United States traveled to New York City for the jurisdictional hearing in this matter. More recently, attorneys for the United States traveled to meet with expert and fact witnesses in preparation for witness testimony at the February 2010 hearing.

The United States seeks a total of \$8,245.77 in attorney and paralegal travel costs. Those travel expenses are reasonable, particularly when compared to travel costs that would be incurred by private sector attorneys. The attorneys and paralegal specialist who traveled in connection with this case did so in economy class at government rates, and stayed at hotels within U.S. Government guidelines at government rates. Travel expenses include a modest per diem to cover meals and other incidental expenses.¹⁶ Accordingly, the amount of those travel expenses is reasonable and should be borne by Claimants.

C. Expert Advice

The United States retained four experts to respond to Claimants’ claims. Those experts, respectively, addressed issues of damages, economics, federal Indian law, and taxation. Three of the four experts responded directly to expert reports that had been submitted by Claimants. The experts collectively submitted seven reports. The economics expert, Professor Jonathan Gruber, prepared for and provided cross-examination testimony at the merits hearing. The damages expert, Navigant Consulting, Inc., also prepared to testify at the merits hearing but ultimately was not called by Claimants on the day of the scheduled cross-examination.

¹⁶ *Id.* ¶ 8.

The United States has included expert expenses in the costs of legal representation and assistance under Article 38(e). The total cost to the United States for the seven expert reports and work relating to the scheduled cross-examination of two experts at the merits hearing was \$1,355,072.92,¹⁷ a reasonable amount that should be borne by Claimants.

D. Outside Vendor

For the *Grand River* case, the United States contracted only once with an outside vendor for copying services. That expense totaled \$5,523.60 and is shown at line 29 of the spreadsheet at Tab 3 of the Holobaugh Statement. The expense relates to charges from an outside vendor for copying and binding volumes of factual and legal authorities for the U.S. Counter-Memorial.

Like other costs claimed by the United States, the amount claimed for copying expenses is conservative. The United States does not seek any costs for in-house copying, telephone charges, facsimile charges, electronic research charges, local travel, or overtime meals. Apart from the one occasion on which the United States retained an outside vendor to perform copying services, the production of all U.S. submissions in the *Grand River* case was performed in-house, consuming significant amounts of administrative staff time. No charges for such time have been included in the U.S. request for costs.

For “legal representation and assistance” under Article 40(2), the United States seeks \$2,410,166.53 in total. As described above, that amount consists of: (a) costs for attorney, paralegal, and systems administrator time (\$1,041,324.24); (b) costs for attorney and paralegal travel (\$8,245.77); (c) costs for expert advice (\$1,355,072.92); and (d) copying expenses from an outside vendor (\$5,523.60). These reasonable costs should be borne by Claimants.

¹⁷ *Id.* at Tab 3. This total includes amounts already paid to the experts, plus amounts obligated for recently received invoices (for services related to the February 2010 hearing) that are currently being processed and are intended to be paid. For the amounts that have not yet been paid, the column in the spreadsheet entitled “Date Paid” (Column D) has been left blank. Additionally, attached at Tab 6 of the Holobaugh Statement are copies of all of the individual invoices from the experts for their services, as well as an invoice from an outside vendor for copying services.

* * * * *

As discussed above, the United States has incurred \$382,425.70 in “costs of arbitration” under UNCITRAL Articles 38(a), 38(b), and 38(d), and \$2,410,166.53 in costs of “legal representation and assistance” under Article 38(e). The relevant categories of costs are set out in the chart below. Pursuant to UNCITRAL Article 40(1) and 40(2), all such costs should be borne by Claimants in this matter.

| Article 40(1) Costs of Arbitration | |
|---|---------------------|
| Tribunal Fees | \$375,000.00 |
| Witness Travel | \$7,425.70 |
| Subtotal | \$382,425.70 |

| Article 40(2) Costs of Legal Representation and Assistance | |
|---|-----------------------|
| Attorney/Paralegal/Systems Administrator Time | \$1,041,324.24 |
| Attorney Travel | \$8,245.77 |
| Expert Advice | \$1,355,072.92 |
| Outside Vendor | \$5,523.60 |
| Subtotal | \$2,410,166.53 |

| | |
|--------------------|-----------------------|
| Total Costs | \$2,792,592.23 |
|--------------------|-----------------------|

CONCLUSION

For the foregoing reasons, as well as the reasons set out in previous U.S. written and oral submissions in this matter, the United States respectfully requests that the Tribunal render an award, pursuant to Article 40(1) and (2) of the UNCITRAL Arbitration Rules, ordering that Claimants bear the costs of this arbitration, as well as the United States' costs for legal representation and assistance, in the amount of \$2,792,592.23.

Respectfully submitted,



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