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June 5, 2007

By Email and Courier

Ms. Ana Palacio
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 Ms. Palacio:

I am taking this opportunity to comment on the United States' letter of May 29, in which it responds the Claimants' and my letters of, respectively, May 18 and May 15. My intention here is not to engage in a point by point rebuttal of the United States' most recent exposition of its effort to have me removed from the Tribunal in this matter, but rather to make a few observations about that exposition that may be useful in determining its validity.

The United States has not articulated actual doubt in my partiality or justifiable grounds to do so

It is striking how the United States avoids in its arguments strict adherence to the governing standard of the UNCITRAL rules for dismissal of an arbitrator. What is required for dismissal are circumstances giving rise to "justifiable doubts as to the arbitrators impartiality or independence." Rather, the United States attempts to apply such vague standards as "appearance of bias," which have not been imported into the UNCITRAL rules, and it tries to apply what amount to presumptions of partiality based on formalistic assessments of my "adversity" toward the United States rather than inviting a searching inquiry into actual bias.

Under the applicable UNICTRAL rule, in order for the United States' challenge to be sustained, there must be actual "doubts" of my lack of impartiality or independence, and such doubts must be "justifiable."

The United States has not clearly expressed *actual* doubts on the part of any of its agents about my partiality, but rather it has pointed to circumstances that effectively it

would have regarded as *per se* doubt. And even if such actual doubts were to exist, they must be justifiable. Under the totality of circumstances, as I have argued before, they are not. My human rights work, which is entirely unrelated to the present investment dispute, simply does not justify doubts as to my partiality under any objective standard.

The United States' position is far-reaching, novel, and would make for a standard difficult to administrate

The United States confirms that that it is challenging me as an arbitrator because it regards me as "generally" adverse to the United States.[1] For the United States, I have acquired this condition because of multiple human rights matters which put into question actions of United States agencies, even though those actions are unrelated to the present investment dispute and are of an entirely different character.[2] To be declared "generally" adverse to the United States – in effect a person hostile to it for all purposes (as my Apache ancestors were regarded) – is startling.

The United States characterizes my defense to its challenge as novel, but any such novelty is owing to the novelty of the United States' rebuke of an arbitrator it regards as being "generally" adverse to it. The United States attempts to mitigate the broad and indeterminate sweep of its position by characterizing my adversity as involving efforts at "formal determinations" against the United States.[3] What exactly is a formal determination, if not one that is binding and obligatory? Why is not the adoption of a United Nations declaration that is opposed by the United States, and advocated by me, a formal determination, while a nonbinding decision of the Inter-American Commission on Human Rights is? The United States declines to say so, stating only and unresponsively that the matter of the declaration "is simply not before the Secretary-General."[4]

Not only is the standard advocated by the United States far-reaching and novel, it would be difficult to administrate. Arbitrators adjudicating international claims against a state party would be subject to challenge any time they are engaged in any activity that impugns the state, being regarded as "generally" adverse to the state, no matter how unrelated to the dispute being adjudicated; so long as their adverse activity could be characterized as seeking a "formal determination" against the state, even when such determination is nonbinding or advisory. The kind of challenges such a standard would invite and the difficulty in deciding these challenges under that standard would not be conducive to the fair and efficient constitution and functioning of arbitration tribunals.

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[1] *See* Letter of Mark A. Clodfelter et al. to Ana Palacio (May 29, 2007) ("Clodfelter May 29 letter"), p. 3-4 ("his current representations do, in fact, target the United States generally")

[2] The United States feigns an argument that my work on Native American matters "is not wholly unrelated to this case." *Id.* p. 5. The only common denominator offered is the assertion of Native American rights, hardly a unifying factor given the multifaceted nature of Native rights and the multiple and vastly different contexts in which they arise. The fact that the United States devotes only two sentences to this argument shows that not even the United States finds it convincing.

[3] *Id.* pp. 6-7.

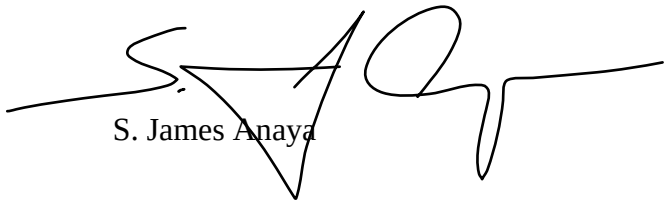
[4] *Id.* p. 7.

The United States' accusation that I am attempting to benefit from a failure to affirmatively disclose is unwarranted

The United States argues that I am attempting to benefit improperly from a failure to affirmatively disclose my various human rights activities by questioning the timeliness of its challenge. This accusation is unwarranted. The United States ignores the thrust of my argument, which questions timelessness only in the context of explaining why I did not affirmatively disclose my human rights activities and why my failure to affirmatively disclose should not be regarded as an aggravating factor. The United States does not address this argument, but rather attempts to treat my failure to disclose as *per se* aggravating, with the result that it not only enhances the specter of my bias but also effectively estops me from raising the issue of timeliness.

Whether or not the United States adequately addresses my reasons for not affirmatively disclosing, I urge that the Secretary-General take them fully into consideration. Those reasons relate to my long and well known history of advocacy and dealings with people within the United States government on the very matters that now give rise to the United States' challenge, including people within the U.S. Department of States Office of the Legal Advisor, the same office that houses the attorneys for the United States in this matter. Among these persons from the Office of the Legal Advisor who knew of my involvement in human rights matters against the United States was Ms. Evelyn Aswad, who appeared on behalf of the United States at the hearing in the *Dann* case on March 5. It is entirely reasonable for me to impute to the United States knowledge of my human rights activities through persons such as Ms. Aswad. Even if the United States was not on notice for the purpose of timeliness, the circumstances of my failure to affirmatively disclose should not suggest partiality or bias on my part with regard to the present dispute.

Sincerely,



S. James Anaya

Copies by email to:

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Mr. Ucheora Onwuamaegbu
Mr. Mark Clodfelter and Ms. Andrea Menaker
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Ms. Chantell MacInnes Montour, Esq.
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