

May 29, 2007

By E-Mail and Courier

Ms. Ana Palacio
Secretary-General
International Centre for Settlement
of Investment Disputes
1818 H Street, N.W.
Washington, D.C. 20433

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

Dear Ms. Palacio:

In accordance with the Secretary of the Tribunal's letter of May 21, the United States hereby responds to Professor Anaya's letter of May 15, and Claimants' letter of May 18, concerning the United States' challenge to Professor Anaya as an arbitrator in the above-captioned case. As set forth in the United States' letter of April 25, and as further demonstrated herein, undisclosed, ongoing representations adverse to one of the parties in an arbitration, as are present here, give rise to "justifiable doubts as to the arbitrator's impartiality or independence" and constitute clear grounds for disqualification under the applicable arbitral rules.

Professor Anaya does not contest that he represents multiple parties in various fora that are seeking formal determinations that the United States is in violation of its international legal obligations. Nor does Professor Anaya contest that ongoing adverse representations by an arbitrator are generally disqualifying. Instead, Professor Anaya asserts that his concurrent representations are not adversarial in nature "for the present purposes" or "in any way relevant to the present case."¹ Similarly, Claimants argue that the multiple matters in which Professor Anaya is engaged against the United States are unrelated to the present proceeding, and therefore are not disqualifying. As discussed below, these arguments are unavailing and do not reflect the general rule in international arbitration that ongoing adverse representations by an arbitrator against a party are disqualifying.

Furthermore, as discussed below, Professor Anaya's failure to disclose his ongoing adverse representations aggravates the appearance of bias in this matter and

¹ See Letter from Professor S. James Anaya to Ana Palacio, Secretary-General (May 15, 2007) ("Anaya May 15 Letter"), at 3.

undermines any claim that the United States' challenge was untimely. The attorneys representing the United States in this arbitration did not learn of Professor Anaya's representation in the *Dann* matter until fifteen days before the United States filed its challenge. It was not until five days *after* the United States filed its challenge that Professor Anaya disclosed that he was, in fact, representing clients adverse to the United States in an extensive list of other matters.²

Article 9 of the UNCITRAL Arbitration Rules, which governs this arbitration, places a continuing duty on arbitrators to disclose "any circumstances likely to give rise to justifiable doubts[.]" Likewise, the *IBA Guidelines on Conflicts of Interest in International Arbitration* ("*IBA Guidelines*") provide that arbitrators have a duty to disclose *all* Orange List situations,³ which plainly encompass concurrently acting as counsel adverse to a party in the arbitration.⁴ By questioning the timeliness of the United States' challenge,⁵ Professor Anaya attempts to benefit from his own failure to comply with basic disclosure requirements applicable to arbitrators in international arbitration.

For the reasons set forth herein, and those in its April 25 letter, the United States respectfully requests that its challenge be sustained.

1. Professor Anaya's Ongoing Representations Are Adversarial In Nature And Generally Disqualifying

As a threshold matter, Professor Anaya asserts that an adversary relationship "*may*," but need not, give rise to justifiable doubts about impartiality, citing the Bishop & Reed article relied on by the United States in its April 25 letter.⁶ Professor Anaya, however, fails to acknowledge the inclusion of "an adversary relationship with a party" in the Bishop & Reed article as one of "six factors that are so indicative of partiality that they can reasonably be treated as *generally disqualifying* for a party-appointed arbitrator."⁷ Similarly, Claimants fail to convincingly address the fact, as demonstrated in the United States' April 25 letter, that two situations analogous to – but far less problematic than – that presented here are listed on the IBA Guidelines Orange List, which lists situations that must be disclosed and may give rise to justifiable doubts.⁸

² See Letter from Professor S. James Anaya to Andrea J. Menaker, at 2-3 (Apr. 16, 2007).

³ See *IBA Guidelines*, Part II ¶ 3 (May 22, 2004).

⁴ See Letter from the United States to Ana Palacio, Secretary-General (Apr. 25, 2007) ("United States April 25 Letter"), at 7 (discussing two Orange List situations that present less problematic adverse relationships than those at issue here).

⁵ See Anaya May 15 Letter at 5.

⁶ See *id.* at 1 (citing Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L 395, 411 (1998)).

⁷ Bishop & Reed, *supra* note 6, at 408 (emphasis added).

⁸ See United States April 25 Letter at 7. Claimants contend that Professor Anaya has not served in any type of "matter" that is contemplated by the *IBA Guidelines* because the *IBA Guidelines* "are primarily intended for application in international commercial arbitrations and in which an arbitrator may not be eligible to sit

Instead, Professor Anaya argues that his ongoing representations are not adversarial in nature “for the present purposes” or “in any way relevant to the present case” because the other matters in which he is involved (i) concern acts or omissions of particular agencies or political subdivisions of the United States, rather than the United States generally; (ii) are unrelated to the present case; and (iii) result in non-binding determinations.⁹ As explained below, Professor Anaya’s ongoing representations are unquestionably adversarial in nature and plainly relevant to the issue of whether there is an appearance of bias in this matter.

a. A Party Seeking A Determination That The United States Has Violated Its Legal Obligations Is Adverse To The United States For Purposes of Determining Arbitrator Impartiality, Regardless of Which U.S. Agency Or Political Subdivision Carried Out The Alleged Acts Or Omissions At Issue

Professor Anaya maintains that the United States “is a multi-faceted and multi-tiered federal state [that] hardly represents a singular set of interests[,] policies, or positions, notwithstanding its singular international legal personality.”¹⁰ He then asserts that his representations in the matters cited would be adverse to the United States “in any way relevant to the present case” *only if* he had been in a “role adverse to U.S. trade interests or to agents charged with formulating or executing U.S. trade policy.”¹¹ Professor Anaya maintains that his ongoing efforts are “directed at the actions and omissions of government agencies that have little or nothing to do with U.S. international trade policy,” and thus concludes that those efforts do not give rise to an adversary relationship for purposes of this case.

Professor Anaya cites no authority for his novel argument. The United States does, in fact, have a unitary interest when defending litigation. Moreover, even if Professor Anaya’s proposition were correct, that would be irrelevant for this purpose

on one damages claim while prosecuting another.” Claimants Letter from Arif Hyder Ali to Ana Palacio, Secretary-General (May 18, 2007) (“Claimants May 18 Letter”), at 5. Not only do Claimants fail to provide any authority to support this assertion, but it is also directly contradicted by the *IBA Guidelines* themselves: “Originally, the Working Group developed the Guidelines for international commercial arbitration. However, in light of the comments received, it realized that the Guidelines should equally apply to other types of arbitration, such as investment arbitrations (insofar as these may not be considered as commercial arbitrations).” *IBA Guidelines*, Introduction ¶ 5. Furthermore, Claimants’ observation that Professor Anaya is not a member of a law firm is inapposite. The fact that Professor Anaya himself, rather than a member of a law firm with which he is affiliated, is representing parties adverse to the United States heightens, rather than lessens, doubts about Professor Anaya’s impartiality. *See* United States April 25 Letter at 1, 7.

⁹ Anaya May 15 Letter at 2-3.

¹⁰ *Id.* at 2.

¹¹ *Id.* at 2-3. Professor Anaya errs in characterizing this NAFTA Chapter Eleven arbitration as a “trade dispute.” Indeed, Claimants’ similar misunderstanding forms the basis for one of the United States’ principal jurisdictional objections in this matter.

because his current representations do, in fact, target the United States generally: as detailed in the United States' April 25 letter, Professor Anaya's ongoing efforts seek formal determinations that the United States is in violation of its international legal obligations.¹² Thus, regardless of which particular U.S. agencies or political subdivisions are alleged to have carried out the acts or omissions at issue, Professor Anaya's efforts ultimately target the United States as a "singular international legal personality."¹³ And it is that very singular international legal personality that ultimately must defend itself against those claims.

In addition to the submissions cited in the United States' April 25 letter,¹⁴ additional assertions made by the University of Arizona's Indigenous Peoples Law & Policy Program ("IPLP Program") make clear that Professor Anaya's ongoing representations are targeted directly at the United States. As characterized by the IPLP Program: the Inter-American Commission on Human Rights ("Commission") in the *Dann* matter "issued a report in which it condemned the United States for violating the Dann sisters' human rights"; the March 2006 decision by the United Nations Committee on the Elimination of Racial Discrimination ("CERD") "is notable in that it is the first time a United Nations body has issued a decision condemning the United States in such sweeping terms for its problematic legal and political posture concerning Native Americans"; the February 2006 submission to the United Nations Special Rapporteur on the Fundamental Freedoms and Human Rights of Indigenous People "urges the Special Rapporteur to take note of and respond to the situation the Western Shoshone have continued to endure, of the United States' inaction regarding the recommendations of international human rights bodies, and of its overall disregard for international law and institutions."¹⁵

Similarly, in this NAFTA Chapter Eleven arbitration, Claimants are seeking a determination that the United States has violated its international legal obligations under the NAFTA, regardless of the fact that it is the acts or omissions of various states that purportedly give rise to this violation. And, if Claimants are successful, an award will be made against the United States, not against any particular state or governmental agency of the United States.

Professor Anaya's ongoing efforts to obtain formal determinations that the United States has violated its international legal obligations as a "singular international legal personality,"¹⁶ concerning "its overall disregard for international law and institutions,"¹⁷

¹² See United States April 25 Letter at 10 & nn.49-50.

¹³ Anaya May 15 Letter at 2.

¹⁴ See United States April 25 Letter at 10 & nn.49-50.

¹⁵ University of Arizona College of Law, Indigenous Peoples Law & Policy Program, Western Shoshone Advocacy Summary ("IPLP Program Advocacy Summary"), at 2-3, at <http://www.law.arizona.edu/depts/iplp/advocacy/shoshone/index.cfm?page=advoc>.

¹⁶ Anaya May 15 Letter at 2.

¹⁷ IPLP Program Advocacy Summary at 3.

constitutes an adversary relationship with the United States and is plainly relevant to determining whether there is an appearance of bias against the United States in this matter.

b. Ongoing Adverse Representations Are Relevant To Questions of Arbitrator Impartiality, Regardless of Whether the Concurrent Proceedings Are Related To The Present Case

Professor Anaya maintains that his international human rights work is “so unrelated to the trade dispute in this case that one strains to find an adversary relationship for the present purposes.”¹⁸ But ongoing adverse representations in *unrelated* matters are generally disqualifying.¹⁹ Professor Anaya and Claimants cite no authority for any contrary conclusion. Indeed, the potential conflict arising from adverse representations in unrelated matters is illustrated by the possible effect that the United States’ arguments in opposition to Professor Anaya before the Commission and various U.N. bodies may have or be seen to have on his decision-making in the present case. (The corollary to this conflict is that those lawyers who have now been made aware of Professor Anaya’s role as an arbitrator in the *Grand River* arbitration, and who continue to represent the United States before the Commission and other bodies, must bear in mind, while opposing arguments made by Professor Anaya, that he continues to sit in judgment of the United States in this matter.)²⁰

Moreover, and in any event, Professor Anaya’s international law work on behalf of Native Americans is not wholly unrelated to this case. Both the *Dann* matter and the present matter involve allegations of Native American rights under international law.²¹

Claimants’ attempt to distinguish the ICSID precedent in the *Glamis Gold v. United States of America* NAFTA Chapter Eleven case, where the challenged arbitrator resigned prior to the issuance of a presumably disqualifying determination by the Secretary-General, is likewise unavailing. Claimants assert that the challenge in *Glamis* does not “even remotely resembl[e]” the present challenge because in *Glamis*, the

¹⁸ Anaya May 15 Letter at 2. As noted above, Professor Anaya errs in characterizing the NAFTA Chapter Eleven arbitration as a “trade dispute.”

¹⁹ See Bishop & Reed, *supra* note 6, at 408; United States April 25 letter at 9 & n.47.

²⁰ Such potential conflicts illustrate that the distinctions drawn between past and ongoing representations in the *IBA Guidelines* do not elevate “form over substance,” as asserted by Professor Anaya. See Anaya May 15 Letter at 5. It is precisely because ongoing representations raise more problematic issues than past representations that the United States did not object when Professor Anaya disclosed a past representation in the *Dann* matter, but did object when Professor Anaya later confirmed his ongoing work in the matter.

²¹ *Cf. Mary and Carrie Dann v. United States*, Case 11.140, Inter-American Commission on Human Rights, Report No. 75/02 (Dec. 27, 2002), reprinted in 2002 ANN. REP. INTER-AM. C.H.R. 860 (“December 2002 Dann Report”), ¶ 65 (“[T]he Petitioners argue that the Danns and other Western Shoshone groups are unable to exercise their right to self-determination as guaranteed by international law.”); Claimants’ Particularized Statement of Claim, Section E, ¶ 130 (June 30, 2005) (“The Investors are not ‘normal’ claimants; they are aboriginal nationals of Canada who are entitled, under international law, to expect a specific level of treatment from the United States . . .”).

disqualifying conflict arose from the arbitrator's action against "the very same government officials, about the very same kind of rights and interests" that were at issue in the NAFTA arbitration, while here "Professor Anaya does not represent any party in domestic litigation against any of the State Attorneys General involving the tobacco industry or trade."²²

But Professor Anaya's ongoing, multiple adverse representations are at least as problematic as the ongoing adverse representation at issue in *Glamis*. In *Glamis* – a case that only involves issues of *international* law – the ongoing adverse representation implicated issues of U.S. mining law: the challenged arbitrator, in what he characterized as an unrelated action for judicial review, sought a domestic court ruling that the Department of Interior should process certain mining applications in accordance with his client's legal position. Here, by contrast, Professor Anaya's ongoing efforts are not primarily concerned with domestic litigation or domestic law. Rather, Professor Anaya seeks formal determinations that the United States is not in compliance with its obligations under international law. Thus, a review of the two challenges only confirms that disqualification is warranted here.

c. A Party Seeking A Determination That The United States Has Violated Its International Legal Obligations Is Adverse to the United States, Regardless of Whether Such A Determination Is Binding Or Advisory In Nature

Professor Anaya also maintains that, for purposes of determining impartiality, an arbitrator can be considered adverse to a party in a concurrent matter only when that matter "can lead to a legally binding outcome" for the parties involved.²³ Otherwise, Professor Anaya contends, "any expression of opposition to any part or agency of the United States regarding any subject could be held to cast one in a role 'adverse' to the United States."²⁴

This premise is incorrect. Representations involving non-binding proceedings can create adversity of interests, and in the present case, they have. Professor Anaya's concurrent adverse representations have involved far more than mere "expression[s] of opposition" to U.S. policy decisions or "work that is in the nature of lobbying."²⁵ As detailed in the United States' April 25 letter, Professor Anaya has made submissions in multiple matters brought against the United States, seeking formal determinations that the United States is in violation of its international legal obligations.²⁶ Seeking such formal determinations in no way resembles "lobbying."²⁷ The IPLP Program, for example, has

²² Claimants May 18 Letter at 13.

²³ Anaya May 15 Letter at 3-4.

²⁴ *Id.* at 3.

²⁵ *Id.* at 3.

²⁶ *See* April 25 United States Letter at 10 & nn.49-50.

²⁷ Anaya May 15 Letter at 3.

characterized its work on behalf of the Dann family as occurring in “precedent-setting proceedings” before the Commission and the CERD.²⁸

A party seeking multiple formal determinations that the United States has violated its international legal obligations is adverse to the United States, regardless of whether a particular forum’s determinations are advisory or binding in nature. The issue seized on by Professor Anaya – *i.e.*, whether advocating for the adoption of a multilateral declaration that is opposed by the United States constitutes an adverse relationship for impartiality purposes – is simply not before the Secretary-General.²⁹ The matters that are before the Secretary General, including urging a United Nations Special Rapporteur to respond to, as characterized by the IPLP Program, the United States’ alleged “inaction” and “overall disregard for international law and institutions”³⁰ cannot credibly be characterized as anything other than engaging in adversarial conduct vis-à-vis the United States.³¹

2. The United States’ Challenge is Timely

The United States brought its challenge within fifteen days after discovering the circumstances giving rise to the challenge, as required by Article 11(1) of the UNCITRAL Arbitration Rules. On March 27, counsel for the United States in the present arbitration learned that Professor Anaya’s representation of the claimant in the *Dann* matter was likely ongoing. On March 30, the United States wrote to Professor Anaya, seeking to confirm this information. On April 11 – fifteen days after the date that the United States learned of Professor Anaya’s likely representation in the *Dann* matter – the United States notified the Tribunal and Claimants’ counsel of its challenge. On April 16, as a result of Professor Anaya’s letter, the United States learned for the first time that Professor Anaya was representing numerous other parties in adversarial matters involving issues of international law against the United States. The time for making a challenge under the UNCITRAL Arbitration Rules does not begin to run until the party has actual knowledge of the conflict.³² Given Professor Anaya’s failure to disclose, the United States cannot be deemed to have forfeited its right to challenge by virtue of the fact that it did not discover this fact sooner.³³ Such an argument is “inappropriate in view of the

²⁸ IPLP Program Advocacy Summary at 1. Moreover, as characterized by the IPLP Program, the Commission in the *Dann* matter found that “[i]nasmuch as United States law is contrary to international human rights law, the Inter-American Commission indicated that U.S. law must be reformed.” *Id.* at 2.

²⁹ See Anaya May 15 Letter at 3.

³⁰ IPLP Program Advocacy Summary at 3.

³¹ See Claimants May 18 Letter at 5.

³² UNCITRAL Arbitration Rules, art. 11(1) (“A party who intends to challenge an arbitrator shall send notice of his challenge . . . within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.”).

³³ Contrary to Professor Anaya’s assertion, the United States’ appointment of Mr. Crook as an arbitrator in this case did not set any “implicit standard.” Anaya May 15 Letter at 5. Mr. Crook’s past employment with the Department of State was disclosed to all concerned at the time of his appointment. If Claimants believed that Mr. Crook’s past role gave rise to justifiable doubts as to his impartiality or independence, they could have raised that issue with the Secretary-General at that time. The United States, by contrast,

code of strict morality and fairness which shapes the arbitrator's affirmative duty of disclosure."³⁴

As Professor Anaya acknowledges, he has an ongoing duty to disclose circumstances that are likely to give rise to justifiable doubts as to his impartiality.³⁵ Article 9 of the UNCITRAL Arbitration Rules places a continuing duty on arbitrators to disclose "any circumstances likely to give rise to justifiable doubts[.]" And under the IBA Guidelines, arbitrators have a duty to disclose Orange List situations, which include situations less problematic than that presented here.³⁶ By questioning the timeliness of the United States' challenge, Professor Anaya is attempting to gain an advantage from his own failure to comply with basic disclosure requirements. Arbitrators should not be permitted, through their nondisclosure of facts that may give rise to justifiable doubts as to their impartiality, to benefit from the time-bar provisions of the UNCITRAL Arbitration Rules.

was not given the same opportunity because Professor Anaya made no such disclosure. Moreover, Mr. Crook's employment was terminated more than three years prior to his appointment. *See supra* n.20.

³⁴ *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1204 (11th Cir. 1982). Claimants err in contending that the United States mistakenly relies on U.S. law in support of its challenge. *See* Claimants May 18 Letter at 5-6. The UNCITRAL Arbitration Rules and applicable rules of international law govern the challenge. Nevertheless, given that any resulting award may be subject to set aside proceedings in the United States, the standards governing enforceability of arbitral awards in the United States are relevant insofar as the parties and the Secretary-General have an interest in ensuring the enforceability of any resulting award.

As set forth in the United States' April 25 letter, a review of United States jurisprudence also supports the United States' application for disqualification. *See* United States April 25 Letter at 8-9. Contrary to Claimants' assertion, *see* Claimants May 18 Letter at 6, the domestic law cases cited by the United States are not distinguishable on grounds that they involved "patently biased and unethical conduct" not present here. *See Middlesex Mut. Ins. Co.*, 675 F.2d at 1202 (vacating award where arbitrator was adverse to party; "significant" business dealings" were not between arbitrator and other party, as might give rise to a Red List conflict, but rather were basis of adversary proceedings between arbitrator and challenging party); *Sun Refining & Mktg. Co. v. Statheros Shipping Corp.*, 761 F. Supp. 293, 302-03 (S.D.N.Y. 1991) (finding arbitrator's concurrent adverse relationship sufficient to mandate his withdrawal apart from the unequal distribution of arbitral fees); *Cont'l Ins. Co. v. Williams*, No. 84-2646-CIV, 1986 WL 20915, *3-5 (S.D. Fla. Sept. 17, 1986) (unreported) (vacating arbitral award because the arbitrator failed to disclose concurrent involvement in adverse matter; challenged arbitrator's "shared financial interests" with one of the arbitrators and counsel for one of the parties not determinative). Furthermore, the domestic law cases cited by Claimants, which do not concern adverse relationships between an arbitrator and a party, are inapposite. *See Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 682 (D.C. Cir. 1996) (award not vacated where arbitrator was not aware of representation of a party by arbitrator's former law firm); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 145 (4th Cir. 1993) (award not vacated where arbitrator was not aware that former counsel for party joined separate office of arbitrator's law firm six months after arbitration proceedings began and arbitrator and former counsel had never met or spoken to one another); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 677 (7th Cir. 1983) (District Court's decision to vacate award overturned where arbitrator failed to disclose former supervisory relationship with one of the parties that involved "little professional contact" and had ended more than ten years prior to the arbitration).

³⁵ *See* Anaya May 15 Letter at 4.

³⁶ *See* United States April 25 Letter at 7.

In his defense, Professor Anaya notes an interaction, at a meeting convened by the Commission on the *Dann* matter, with representatives of the Department of State’s Bureau of Democracy, Human Rights, and Labor, and the Office of the Legal Adviser, who allegedly “acknowledged [his] past activities and reputation in the field of indigenous human rights.”³⁷ According to Professor Anaya, this interaction indicates that the United States knew of his human rights work and, thus, its challenge is untimely.³⁸ But the mere fact that Professor Anaya has worked for some time in the human rights field could not have put the United States on notice that he would be acting as a representative in a manner *adverse to* the United States at the same time that he was sitting in judgment of the United States as an arbitrator.

Nor could the fact that Professor Anaya has acted in a capacity adverse to the United States in past matters, or the fact that he has long “been highly critical of the United States’ government’s treatment of indigenous peoples” have put the United States on notice that he is *currently* acting as a representative in a manner adverse to the United States.³⁹

It is irrelevant that other U.S. Government officials, including other officials of the State Department, may have been aware of Professor Anaya’s representation in the *Dann* matter as a result of his appearance at the March 5 meeting. This knowledge cannot be imputed to every individual or office of the U.S. Government, including counsel for the United States in this arbitration. It is legally and practically untenable that an arbitrator could give notice to one government office or employee of his representation of a party adverse to the United States – without so much as mentioning to that individual or office that he is currently sitting as an arbitrator in another matter in which the United States is a party – and thus start the fifteen-day clock on the party’s ability to bring a challenge. Yet this is the approach suggested by Professor Anaya, and directly argued by Claimants.⁴⁰ It is a particularly indefensible proposition where, as here, the arbitrator could simply have informed the parties in the present case of his representation, but chose not to do so.

Claimants’ contention that “[i]f the ‘United States’ can be construed so broadly as to encompass all of the interests claimed for the purposes of alleging conflict, it must also be construed as broadly for the purposes of determining how and when it had knowledge of Professor Anaya’s involvement in them,” is incorrect.⁴¹ The United States has a unitary interest when defending litigation. This is an entirely separate and unrelated

³⁷ Anaya May 15 Letter at 4.

³⁸ *Id.* at 4-5.

³⁹ *Id.* at 4.

⁴⁰ *See id.* at 4-5; Claimants May 18 Letter at 11-12 (“The point at which the Respondent knew or should have known about each of the matters, in which Professor Anaya and his students were involved, was as soon as any of these projects reached a stage where contact was made with *any governmental entity . . .*”) (emphasis added).

⁴¹ Claimants May 18 Letter at 11.

inquiry from the question of whether one office's knowledge of an arbitrator's actions can be imputed to every individual and office within the U.S. Government.⁴²

Furthermore, Professor Anaya's response addresses only the *Dann* matter. But in his initial response to the United States' request for more information regarding his representation of parties adverse to the United States, Professor Anaya cited numerous other similar representations of parties adverse to the United States – on issues of international law – that took place after his appointment in this case.⁴³ These matters were first disclosed to counsel in the present case by Professor Anaya on April 16, 2007, five days *after* the United States filed its challenge. The United States' challenge with respect to Professor Anaya's representation in the *Dann* matter is timely, as explained above, and its challenge is certainly timely with respect to the other adversarial matters disclosed by Professor Anaya on April 16.

Finally, Claimants' suggestion that the United States bore the burden of discovering Professor Anaya's continuing adverse representations should be rejected. Indeed, Claimants attempt to turn an arbitrator's duty to disclose on its head by arguing that the United States' challenge is untimely given the United States' purported failure to piece together, within fifteen days of their online publication, various clues concerning Professor Anaya's most recent representations. Specifically, in Claimants' view, the onus fell on the United States to discover Professor Anaya's ongoing adverse representations by: first, observing that a list of courses taught on Professor Anaya's *curriculum vitae* included a course entitled Indigenous Peoples Law and Policy Clinic; second, locating a website maintained by that Clinic; third, discovering on the Clinic's website that Professor Anaya was associated with the Clinic; fourth, reviewing the list of Clinic projects provided on the website, and fifth, inferring that Professor Anaya works on every Clinic project.⁴⁴

Claimants' proffered "duty to discover" adverse representations (in place of an arbitrator's duty to disclose) would have required the United States in this matter to initiate, and repeat, online monitoring of the Clinic's website every fifteen days to avoid forfeiting a challenge on timeliness grounds. Such a framework would run directly contrary to the UNCITRAL Arbitration Rules: "That the arbitrator may know, better than any other, of likely grounds for challenge, returns us to the importance and desirability of the early disclosure required by Article 9."⁴⁵

⁴² See *Roeder v. Iran*, 195 F.Supp.2d 140, 156 (D.D.C. 2002) (holding that the "appropriate starting point for the timeliness inquiry is not the date that the would-be intervener became aware of the existence of the litigation, but the date the intervener became aware of the implications of the litigation" and concluding that, because there was no evidence that the "relevant officials in the State Department" were aware of plaintiffs' lawsuit until thirty days before filing a motion to intervene, the motion was timely, notwithstanding the fact that other federal government employees had been made aware of the lawsuit months before) (emphasis added).

⁴³ See Letter from Professor S. James Anaya to Andrea J. Menaker, at 2-3 (Apr. 16, 2007).

⁴⁴ See Claimants May 18 Letter at 8-9.

⁴⁵ D. CARON, L. CAPLAN, & M. PELLONPÄÄ, *THE UNCITRAL ARBITRATION RULES: A COMMENTARY*, 225 (2006).

In conclusion, neither Professor Anaya nor Claimants offer any grounds for departing from the general rule in international arbitration that ongoing, adverse representations by an arbitrator against a party are disqualifying. By making this challenge, the United States does not intend any disrespect toward Professor Anaya. But it is imperative as a matter of principle, and to maintain the integrity of the investor-State arbitral mechanism, that an arbitrator sitting in judgment of a party not be concurrently engaged in adversarial proceedings against that party. Accordingly, the United States respectfully requests that its challenge be sustained.

Respectfully submitted,

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Enclosures

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