

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.*

**OBJECTION TO JURISDICTION OF  
RESPONDENT UNITED STATES OF AMERICA**

Mark A. Clodfelter  
*Assistant Legal Adviser*  
Andrea J. Menaker  
*Chief, NAFTA Arbitration Division*  
CarrieLyn D. Guymon  
*Attorney-Adviser*  
*Office of International Claims*  
*and Investment Disputes*  
UNITED STATES DEPARTMENT OF STATE  
Washington, D.C. 20520

December 5, 2005

## CONTENTS

PRELIMINARY STATEMENT .....	1
I. FACTS .....	3
A. Claimants And Their Businesses .....	3
B. Implementation Of The MSA .....	6
1. The Opportunity For Other Tobacco Companies To Join The MSA .....	9
2. The Model Statute (Escrow Statute).....	10
3. Publicity Surrounding The MSA And Escrow Statutes.....	14
4. Enforcement Of The Escrow Statutes.....	18
5. Complementary Legislation.....	23
C. Additional State Measures .....	26
II. CLAIMANTS’ CLAIMS ARE TIME-BARRED .....	27
A. Claimants Should Have Known Of The Impact Of The MSA More Than Three Years Prior To Submitting Their Claims To Arbitration .....	29
1. Claims Regarding Any Alleged Breach And Loss Presented By The MSA’s Negotiation Are Time-Barred.....	31
2. Claimants’ Challenge To The Payment Exemption For Grandfathered SPMs Is Time- Barred.....	32
B. Claimants Should Have Known Of Any Breach And Damage Presented By The Escrow Statutes No Later Than The Date Those Statutes Were Enacted .....	35
C. State Enforcement Of The MSA Regime Provided Claimants With Actual Knowledge Of The Alleged Breaches and Damages .....	42
1. Claimants Knew The Escrow Statutes Were Being Enforced Against Them More Than Three Years Before Submission Of Their Claims To Arbitration .....	43
2. Ongoing Enforcement Efforts By States Do Not Extend The Limitations Period .....	47
III. CLARIFICATION.....	51
CONCLUSION.....	53

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.*

**OBJECTION TO JURISDICTION OF  
RESPONDENT UNITED STATES OF AMERICA**

Pursuant to Article 21 of the UNCITRAL Arbitration Rules, and in accordance with the schedule established by the Tribunal on October 26, 2005, respondent United States of America respectfully submits this memorial in support of its Objection to Jurisdiction on the ground that the claims are time-barred under Articles 1116(2) and 1117(2) of the NAFTA.

**PRELIMINARY STATEMENT**

The United States has not consented to arbitrate claims submitted by Grand River Enterprises Six Nations, Ltd., Jerry Montour, Kenneth Hill, and Arthur Montour, Jr. (collectively “claimants”) regarding the legislative and enforcement regime created by the tobacco Master Settlement Agreement (“MSA”). In treaty-based investor-State arbitrations, such as those under NAFTA Chapter Eleven, “the arbitrators’ jurisdiction results from the initial consent of the state” expressed in the agreement “and the

subsequent consent of the plaintiff, who accepts the arbitrator's jurisdiction by beginning the arbitration."<sup>1</sup> In NAFTA Chapter Eleven arbitrations, the NAFTA Parties have consented only to arbitrate claims in accordance with the terms of the NAFTA.<sup>2</sup>

NAFTA Chapter Eleven prescribes a three-year limitations period in which claims may be brought.<sup>3</sup> The United States has thus only consented to arbitrate claims that are submitted to arbitration within three years of the date that the investor or enterprise first knew or should have known of the alleged breach and any resulting loss or damage. Claimants submitted their claim to arbitration in March 2004, more than five years after the MSA was concluded amidst great attention and publicity. Claimants' contention that they were unaware until 2002 that they had been injured by the MSA regime is simply not credible. As demonstrated herein, claimants knew or should have known of the alleged breaches and losses well before March 12, 2001, three years before they submitted their claim to arbitration. Accordingly, the Tribunal must dismiss the claims in their entirety.

Below, we first review the facts relevant to the Tribunal's jurisdiction. Second, we demonstrate that claimants should have first acquired knowledge of the various alleged breaches and losses either at the time the MSA was made public or when the states enacted Escrow Statutes, all of which occurred more than three years before submission of their claims. Third, we show that claimants knew of the breaches and

---

<sup>1</sup> FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 29-30 (Emmanuel Gaillard & John Savage eds., 1999).

<sup>2</sup> NAFTA art. 1122(1) ("Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement."); *id.* art 1121(1) ("A disputing investor may submit a claim . . . to arbitration only if: (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement . . .").

<sup>3</sup> NAFTA art. 1116(2) & 1117(2).

losses they now allege well in advance of March 2001. Finally, in accordance with the Tribunal's request, we discuss the inadequacy of claimants' proof of Arthur Montour, Jr.'s nationality in a separate section ("III. Clarification").

## I. FACTS

### A. Claimants And Their Businesses

Claimant Grand River Enterprises Six Nations, Ltd. ("Grand River") is a Canadian corporation established in 1996, and is in the business of manufacturing cigarettes at its plant located on Six Nations tribal land in Ohsweken, Ontario, Canada.<sup>4</sup> Claimant Jerry Montour allegedly owns thirty percent of Grand River's common shares, and serves as Grand River's Chief Executive Officer.<sup>5</sup> Claimant Kenneth Hill purportedly owns ten percent of Grand River's common shares, and serves as an officer of the company.<sup>6</sup> Both Jerry Montour and Kenneth Hill have provided copies of official Canadian government documents demonstrating their Canadian nationality.<sup>7</sup> Steve Williams, not a claimant in this arbitration,

---

<sup>4</sup> *Grand River Enters. Six Nations, Ltd. ("Grand River") v. United States of America*, Particularized Statement of Claim (June 30, 2005) ("Stmt. of Claim") Facts ¶ 1 and Exh. 1 (Certificate of Incorporation) (this exhibit is incomplete; the Certificate states that the Articles of Incorporation are attached, but they were not included in claimants' submission). The terms Six Nations, Iroquois, or Haudenosaunee are used interchangeably to refer to the confederacy comprising the Mohawk, Oneida, Onondaga, Tuscarora, Cayuga and Seneca nations whose reservations are located in New York, Ontario and Quebec. See Treaty with the Six Nations, Jan. 9, 1789, art. 1 ("a treaty held with the said Six Nations, viz: with the Mohawks, Oneidas, Onondagas, Tuscaroras, Cayugas, and Senecas . . ."), available at <http://www.honorindian-treaties.org/learn/files/Treatyof1789.pdf> (Appendix to Objection to Jurisdiction of Respondent United States of America ("App.") tab 121); ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 9 (1970) (App. tab 122); S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 131, 142 ("The political philosophy for the Iroquois Confederacy, or the Haudenosaunee, is expressed in the Great Law of Peace . . .") (App. tab 123). "Six Nations of the Grand River" refers to the reservations (or reserves) near Brantford, Ontario, Canada where a group of Iroquois led by Joseph Brant settled at the time of the American Revolution. See DEBO at 68; Six Nations of the Grand River Territory, at <http://www.sixnations.ca>AboutUs.htm> (App. tab 124).

<sup>5</sup> Stmt. of Claim Facts ¶ 4 and Exh. 5.

<sup>6</sup> *Id.* Facts ¶ 4. Claimants have not identified the owners of the remaining sixty percent of the common shares of Grand River.

<sup>7</sup> See *id.* Exhs. 2 & 3.

is the president of Grand River.<sup>8</sup> Neither Grand River, nor Jerry Montour, nor Kenneth Hill purports to own or control any enterprise located in the United States.

Claimant Arthur Montour, Jr. is allegedly the “sole named shareholder, and President, of both Native Tobacco Direct Company and Native Wholesale Supply Company.”<sup>9</sup> Native Tobacco Direct and Native Wholesale Supply are United States corporations incorporated under the tribal law of the Sac and Fox Nation of Oklahoma, in January 1999 and January 2000, respectively.<sup>10</sup> Both companies have their place of business on tribal reservation land in upstate New York.<sup>11</sup> Native Wholesale Supply and Native Tobacco Direct appear to hold the United States trademarks for the “Seneca” brand of cigarettes, manufactured by Grand River.<sup>12</sup> Those trademarks appear to have first been used in the United States in June 1999.<sup>13</sup> Since 1999, both Native Tobacco Direct and Native Wholesale Supply purportedly have served as Grand River’s importer for its cigarette sales in the United States on reservation land.<sup>14</sup> Tobaccoville, USA, a South Carolina-based company, allegedly serves as the importer and distributor for off-reservation sales in the United States of cigarettes manufactured by Grand River.<sup>15</sup>

---

<sup>8</sup> *See Grand River v. Beebe*, Case No. 05-5051 (W.D. Ark.), Declaration of Steve Williams (Mar. 28, 2005) (App. tab 32).

<sup>9</sup> Stmt. of Claim Facts ¶ 5.

<sup>10</sup> *Id.* Facts ¶ 5 and Exh. 6 (Certificates of Incorporation for Native Tobacco Direct Company and Native Wholesale Supply Company).

<sup>11</sup> *See id.* Facts ¶ 5.

<sup>12</sup> *See id.* Exh. 12 (U.S. Patent and Trademark Office Reg. Nos. 2,827,776 & 2,460,960).

<sup>13</sup> *Id.*

<sup>14</sup> *See id.* Facts ¶ 24.

<sup>15</sup> *Id.*

Arthur Montour, Jr. purports to be a Canadian national, but has not provided any official Canadian government documentation in support of that claim.<sup>16</sup> Arthur Montour, Jr. currently resides, and has long resided, in the United States.<sup>17</sup> He possesses a U.S. Social Security number.

Claimants were allegedly involved in various tobacco-related ventures prior to January 1999, none of which is the subject of their arbitration claim. For an unspecified period, they claim to have been involved in the sale and distribution on Six Nations land of tobacco products manufactured by the four major U.S. tobacco companies.<sup>18</sup> Claimants also allegedly entered into a production agreement with Star Tobacco, a company located in Virginia, to produce a greater volume of cigarettes to be sold on the Six Nations reservation.<sup>19</sup> From 1996 to 1998, claimants were allegedly involved in a partnership with the Omaha Tribe for the purpose of manufacturing cigarettes.<sup>20</sup> Only “after successfully launching production in Omaha” did claimants focus their attention on production at Grand River’s facility in Ontario.<sup>21</sup>

Approximately 2.2 billion cigarettes manufactured by Grand River were sold in the United States in 2004, out of a total of 400.8 billion cigarettes sold nationwide that year.<sup>22</sup> Grand River has never revealed whether it manufactured cigarettes for sale in the United

---

<sup>16</sup> See *id.* Facts ¶ 3 and Exh. 4; see also Section III, Clarification, *infra* at p. 51.

<sup>17</sup> See Stmt. of Claim at 2 and Facts ¶ 8.

<sup>18</sup> See *id.* Facts ¶¶ 12, 14.

<sup>19</sup> See *id.* ¶ 14

<sup>20</sup> See *id.* ¶¶ 18-20; see also Stmt. of Claim Exh. 5 ¶ 6.

<sup>21</sup> See *id.* Facts ¶¶ 20-22.

<sup>22</sup> See *id.* Exh. 24 ¶ 11 (LECG, Preliminary Calculation of Losses).

States prior to January 1999.<sup>23</sup> Regardless, its U.S. market share has actually increased since the conclusion of the MSA in 1998.<sup>24</sup>

## **B. Implementation Of The MSA**

Smoking-related deaths and illnesses present one of the greatest public health problems in the United States.<sup>25</sup> Tobacco contains the highly addictive drug nicotine,<sup>26</sup> and most smokers in the United States begin smoking before age 18.<sup>27</sup> Tobacco use is responsible for nearly one in five deaths in the United States, amounting to 440,000 preventable deaths per year from 1995 through 1999.<sup>28</sup> Smoking-related illnesses increase the cost of health insurance for everyone, and the costs for treating non-insured smokers is absorbed by state governments and, ultimately, borne by the public. Smoking-related medical costs in the United States totaled \$75.5 billion in 1998, the year the MSA was signed.<sup>29</sup>

---

<sup>23</sup> Grand River's distributors, Native Wholesale Supply Company and Native Tobacco Direct Company, did not exist until after January 1999. *See id.* Exh. 6 (Certificates of Incorporation). *See also Grand River v. Pryor*, 03-9179 (2d Cir.), Brief of Defendants-Appellees (Jan. 14, 2005) at 58 ("nor does the Complaint allege whether Grand River manufactured cigarettes in 1998.") (App. tab 37); Stmt. of Claim Facts ¶ 22 ("The process of consolidating their investments and centrally locating production and distribution was ultimately completed in January 1999, when the Investors *began to manufacture* their brands exclusively at Grand River.") (emphasis added).

<sup>24</sup> Grand River's 2004 market share of 0.55% is approximately the same as the total combined market share held in 1998 by all tobacco product manufacturers that, like Grand River, never joined the MSA as participating manufacturers. *See Freedom Holdings v. Spitzer*, Case No. 02 Civ. 2939, Declaration of Patricia Tilton (May 28, 2004) ("Tilton Decl."), Table 1 (App. tab 31); Stmt. of Claim Exh. 24 ¶ 11 (LECG, Preliminary Calculation of Losses).

<sup>25</sup> *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (App. tab 30).

<sup>26</sup> *Prevention and Early Detection: Cigarette Smoking*, AMERICAN CANCER SOCIETY, available at [http://www.cancer.org/docroot/PED/content/PED\\_10\\_2x\\_Cigarette\\_Smoking.asp?sitearea.pdf](http://www.cancer.org/docroot/PED/content/PED_10_2x_Cigarette_Smoking.asp?sitearea.pdf) (App. tab 126).

<sup>27</sup> *Tobacco & Cancer Fact Sheet*, AMERICAN CANCER SOCIETY, available at <http://www.cancer.org/downloads/PRO/Tobacco.pdf> (App. tab 127).

<sup>28</sup> *Smoking Costs US \$157 Billion Each Year*, AMERICAN CANCER SOCIETY, available at [http://www.cancer.org/docroot/NWS/content/NWS\\_1\\_1x\\_Smoking\\_Costs\\_US\\_157\\_Billion\\_Each\\_Year.asp](http://www.cancer.org/docroot/NWS/content/NWS_1_1x_Smoking_Costs_US_157_Billion_Each_Year.asp) (App. tab 125).

<sup>29</sup> *Id.*

In 1998, at least forty U.S. states had lawsuits pending against tobacco companies seeking reimbursement for the enormous costs that they were incurring to treat smoking-related illnesses in persons eligible for medical assistance.<sup>30</sup> These lawsuits claimed, among other things, that the tobacco companies were responsible for the damage caused by use of their products and, therefore, should be held responsible for the costs of treating patients suffering from smoking-related illnesses such as heart disease and lung cancer.<sup>31</sup> On November 23, 1998, the attorneys general of forty-six states, the District of Columbia, Puerto Rico and four U.S. territories signed the MSA with the United States' four largest tobacco companies.<sup>32</sup> The MSA settled the lawsuits previously filed by the signatory states' ("Settling States") attorneys general against the major tobacco companies.<sup>33</sup> Collectively, the causes of action in all of these lawsuits are referred to as "Released Claims."<sup>34</sup>

The MSA is the largest civil settlement in U.S. history, and commits signatory tobacco companies to pay an estimated \$200 billion to the Settling States over the first twenty-five years of the agreement, with additional payments thereafter.<sup>35</sup> In addition to these annual payment obligations, the signatory tobacco companies ("Original Participating Manufacturers" or "OPMs") must fund a national foundation devoted to public health, and make substantial changes in their advertising and marketing practices in order to discourage

---

<sup>30</sup> See Master Settlement Agreement, *available at* [http://www.naag.org/upload/1109185724\\_1032468605\\_cigmsa.pdf](http://www.naag.org/upload/1109185724_1032468605_cigmsa.pdf) ("MSA") at 1 (App. tab 1); *id.* Exh. T at T-1.

<sup>31</sup> *Id.* Exh. T at T-1.

<sup>32</sup> The four territories are American Samoa, Guam, Northern Mariana Islands and the Virgin Islands. The four tobacco companies are Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, Philip Morris Incorporated and R.J. Reynolds Tobacco Company. These four companies are referred to as the "Original Participating Manufacturers" or "OPMs." See MSA § II(hh).

<sup>33</sup> Other states that had not previously initiated litigation could join the MSA and file suit within thirty days after the signing of the MSA. MSA Exh. D at D-4.

<sup>34</sup> MSA § II(nn).

<sup>35</sup> *Id.* § IX(c).

underage smoking.<sup>36</sup> At the time the MSA was negotiated and signed, the OPMs represented ninety-six to ninety-seven percent of the tobacco market in the United States.<sup>37</sup>

The four states not party to the MSA – Florida, Minnesota, Mississippi and Texas – had previously reached separate settlements with the tobacco companies that collectively require payments of \$40 billion over twenty-five years.<sup>38</sup>

It would not have been possible to conclude the MSA if that agreement had not addressed the role of all tobacco manufacturers that sold, or intended to sell, cigarettes in the United States. Nor would the MSA have succeeded in attaining its public health objectives if it had not addressed the role of tobacco companies other than the four OPMs. The cigarettes manufactured by non-parties to the MSA (referred to as “non-participating manufacturers” or “NPMs”) contribute to the health care costs imposed on the states, but the NPMs would not be obligated to reimburse the states for those costs unless they were addressed in some fashion by the MSA. The MSA’s negotiators also feared that NPMs would take advantage of the settlement costs imposed by the MSA on participating manufacturers to “derive large, short-term profits in the years before liability may arise” and then become “judgment proof.”<sup>39</sup> Finally, the drafters were concerned that NPMs would engage in the types of advertising, marketing and other practices that promote underage smoking.<sup>40</sup> It was

---

<sup>36</sup> *Id.* § II(hh) (definition of “Original Participating Manufacturer”) and Exh. T at T-1, ¶ (e); *Id.* §§ III, VI.

<sup>37</sup> See Tilton Decl., Table 1 (market share of OPMs was 97.07026% in 1997 and 96.41866% in 1998) (App. tab 31).

<sup>38</sup> Stmt. of Claim Exh. 14 at 3 (General Accounting Office, *Tobacco Settlement: States’ Use of Master Settlement Agreement Payments* (“GAO Report”)).

<sup>39</sup> MSA Exh. T at T-1-T-2, ¶ (f).

<sup>40</sup> See Stmt. of Claim Exh. 15 (Nov. 16, 1998 Media Briefing with Attorneys General, statement of North Dakota Attorney General Heidi Heitkamp) (“If a manufacturer elects not to opt in to this agreement, the manufacturer won’t be required to follow the restrictions. What does that mean if there is a change in the types of brands because there is a big, huge influx in marketing programs by a non-participating manufacturer? We are deeply concerned about so-called renegades or rogue manufacturers who are not

essential, therefore, for the MSA to address the role of non-participating manufacturers.<sup>41</sup>

Accordingly, the MSA presented NPMs with two options: either join the MSA as a subsequent participating manufacturer (“SPM”), or remain an NPM and make payments into escrow.

### **1. The Opportunity For Other Tobacco Companies To Join The MSA**

The MSA exhibits the negotiators’ intent to accord all tobacco product manufacturers the opportunity to join the MSA and agree to the advertising restrictions aimed at preventing youth smoking. In part as an incentive for tobacco product manufacturers to join, the MSA provides that any manufacturer that joined as an SPM within ninety days of its signing would be exempt from making any payments to the states unless its market share exceeded the greater of its 1998 market share or 125% of its 1997 market share.<sup>42</sup> These SPMs are sometimes referred to as “Grandfathered SPMs.”

The opportunity to become a Grandfathered SPM was available to all tobacco product manufacturers intending their products to be sold in the United States. The invitation to join was open, public, and knowable, and should have been known to anyone interested or involved in the U.S. tobacco market, including claimants. The publicly-available text of the MSA itself, as well as the public statements of its negotiators, announced this invitation to join.<sup>43</sup>

---

subject to these same restrictions. And so, consequently, there are incentives built into this deal all around for us to bring as many of those folks in as what [sic] we can.”)

<sup>41</sup> MSA Exh. T at T-1, ¶¶ (b)-(d) (Model Statute “Findings and Purpose” Section).

<sup>42</sup> MSA § IX (i)(1). The initial period was sixty days when the MSA was signed, but an amendment extended the period to ninety days. *See* Amendment No. 1 to MSA, *available at* [http://www.naag.org/issues/tobacco/pdf/Amendment\\_01.pdf](http://www.naag.org/issues/tobacco/pdf/Amendment_01.pdf) (App. tab 2).

<sup>43</sup> *See, e.g.*, Stmt. of Claim Exh. 15 (Media Briefing with Attorneys General from Seven States, Federal News Service, Nov. 16, 1998); MSA, *available at* [http://www.naag.org/upload/1109185724\\_1032468605\\_cigmsa.pdf](http://www.naag.org/upload/1109185724_1032468605_cigmsa.pdf); *States Get a Week’s Review of Tobacco Industry’s Offer to Pay \$206 Billion*, 12 MEALEY’S LITIG. REP. TOBACCO 1, No. 14, Nov. 19, 1998 (App. tab 95).

In response to the public invitation, several tobacco product manufacturers besides the four OPMs promptly joined the MSA within the ninety-day period to qualify for the payment exemption. Among these Grandfathered SPMs are several foreign-owned tobacco product manufacturers, including Dhanraj (an Indian company); Imperial Tobacco (a Canadian company); Japan Tobacco (a Japanese company); King Maker (an Indian company); and Société National d'Exploitation Industrielle des Tabacs et Allumettes (SEITA) (a French company).<sup>44</sup> By the end of the ninety-day period, participating manufacturers – including OPMs and SPMs – represented more than ninety-nine percent of the U.S. tobacco market.<sup>45</sup> Other foreign and domestic tobacco product manufacturers joined the MSA as SPMs after the ninety-day window closed, and do not receive any payment exemption.<sup>46</sup>

## **2. The Model Statute (Escrow Statute)**

Those tobacco product manufacturers that decline to join the MSA are subject to the obligations set forth in the “Model Statute,” attached to the MSA as Exhibit T. Under the terms of the MSA, Settling States must enact a “Qualifying Statute” (adhering to the Model Statute automatically satisfies this requirement), or face potential reductions in their

---

<sup>44</sup> Imperial Tobacco, Japan Tobacco and King Maker signed the MSA pursuant to amendments that allowed them as importers to fulfill the obligations of the foreign manufacturers for which they serve as exclusive importers. *See* Amendment Nos. 4, 5 & 11 to MSA, *available at* [http://www.naag.org/issues/tobacco/pdf/Amendment\\_04.pdf](http://www.naag.org/issues/tobacco/pdf/Amendment_04.pdf) (App. tab 3); [http://www.naag.org/issues/tobacco/pdf/Amendment\\_05.pdf](http://www.naag.org/issues/tobacco/pdf/Amendment_05.pdf) (App. tab 4); [http://www.naag.org/issues/tobacco/pdf/Amendment\\_11.pdf](http://www.naag.org/issues/tobacco/pdf/Amendment_11.pdf) (App. tab 5).

<sup>45</sup> *See* Tilton Decl., Tables 1 & 2 (market share of OPMs in 1998 was 96.41866%; market share of Grandfathered SPMs in 1998 was 3.03285%; total of market shares for OPMs and Grandfathered SPMs is therefore 99.45151%) (App. tab 31).

<sup>46</sup> *See* Participating Manufacturers under the Master Settlement Agreement, *available at* [http://www.naag.org/upload/1130515405\\_PM\\_list\\_as\\_of\\_October\\_28\\_05.pdf](http://www.naag.org/upload/1130515405_PM_list_as_of_October_28_05.pdf) (list of SPMs available on NAAG’s website indicating date on which each manufacturer became an SPM) (App. tab 128). U.S. companies that joined the MSA after February 1999 and do not receive any payment exemption include Alliance Tobacco Corp., Liberty Brands, LLC, Premier Manufacturing Inc., and others. *See id.* Foreign companies joining after February 1999 include Canary Islands Cigar Co., Chancellor Tobacco Co., Eastern Company S.A.E. and House of Prince A/S, among others. *See id.*

payments from participating manufacturers if certain other conditions are satisfied.<sup>47</sup> One purpose of the Model Statute is to ensure that funds are available to satisfy a judgment or settlement on a claim brought against an NPM for medical costs associated with tobacco-related illnesses.<sup>48</sup>

In 1999 and 2000 every one of the forty-six Settling States enacted an Escrow Statute, following the Model Statute.<sup>49</sup> As a result, by the end of 2000 (more than three years before claimants submitted their claims to arbitration), an NPM was required to comply with the payment obligations in the Escrow Statutes in order to do business in any of those forty-six states.<sup>50</sup>

The Escrow Statutes require NPMs to deposit into escrow each year an amount per cigarette sold (“Unit Sold”) that is slightly less than what they would have been required to pay in MSA settlement payments, had they joined the MSA.<sup>51</sup> The escrow payment obligation applies to any NPM whose products are sold in the United States.<sup>52</sup> NPMs retain

---

<sup>47</sup> See MSA § IX(d)(2)(B) (Settling State’s payment not subject to adjustment if it had a “Qualifying Statute” (meaning a statute in the form of the “Model Statute”) in force during the preceding year); *id.* § IX(d)(2)(E) (“A ‘Qualifying Statute’ means a Settling State’s statute, regulation, law and/or rule (applicable everywhere the Settling State has authority to legislate) that effectively and fully neutralizes the cost disadvantages that the Participating Manufacturers experience vis-à-vis Non-Participating Manufacturers within such Settling State as a result of the provisions of this Agreement.”).

<sup>48</sup> MSA Exh. T at T-1-T-2, ¶ (f); *id.* T-4, ¶ (b)(2)(A).

<sup>49</sup> The District of Columbia, American Samoa, Puerto Rico and the Virgin Islands also enacted Escrow Statutes before March 12, 2001. Only two territories party to the MSA enacted Escrow Statutes after March 12, 2001: Guam enacted its Escrow Statute one day later on March 13, 2001 and the Northern Mariana Islands enacted its Escrow Statute on April 20, 2001.

<sup>50</sup> See Table listing citations and effective dates for Escrow Statutes in all Settling States with text of Escrow Statutes attached (App. tab 6).

<sup>51</sup> The amount to be placed in the escrow fund per year per “unit sold” is calculated using the following formulae, with an additional adjustment for inflation: for 1999, \$.0094241; for 2000, \$.0104712; for 2001 and 2002, \$.0136125; for 2003 through 2006, \$.0167539; for 2007 and thereafter, \$.0188482. MSA Exh. T at T-4, ¶ (b)(1) (“Requirements”).

<sup>52</sup> *Id.* at T-3, ¶ (i)(1) (definition of “Tobacco Product Manufacturer”).

title to the funds they place into escrow and receive interest on the funds as it is earned.<sup>53</sup> Funds in escrow revert to the NPM twenty-five years after they are placed into escrow provided that they have not already been released to the depositor and the state has not sought to recover the funds to satisfy judgments or settlements of any Released Claims brought against the NPM by the state.<sup>54</sup>

The number of “Units Sold” used for calculating NPMs’ payment obligations under the MSA’s Model Statute equals the number of individual cigarettes sold in the state as measured by state excise taxes collected on packs bearing the state excise tax stamp.<sup>55</sup> A significant volume of cigarettes produced by Grand River is sold on Indian reservations, and some states (including New York) do not require tax stamping of cigarettes sold on reservations.<sup>56</sup> As to those sales, no payment obligation arises under the Escrow Statutes because the cigarettes are not stamped and no excise taxes are collected.

The Escrow Statutes permit an NPM to obtain a partial release from escrow if the amount placed into escrow in a state in a particular year is greater than the amount that state would have received as its “Allocable Share” of the total payments that manufacturer would have made under the MSA if it had been a participating manufacturer.<sup>57</sup> If, for example, an NPM made all of its sales in a single state, and that

---

<sup>53</sup> *Id.* at T-4.

<sup>54</sup> *Id.* at T-5, ¶ (b)(2)(C).

<sup>55</sup> *Id.* at T-3, ¶ (j) (definition of “Units Sold”). In its pleadings in federal court in New York, Grand River acknowledges that the states calculate NPMs’ escrow payment obligations using “reports from distributors and wholesalers to State authorities,” referring to the responsibility of these entities as stamping agents to report to the states the number of cigarettes to which tax stamps have been affixed. *Grand River v. Pryor*, 03-9179 (2d Cir.), Brief of Plaintiffs-Appellants (Nov. 12, 2004) at 19 n.14 (App. tab 36).

<sup>56</sup> *See* Stmt. of Claim Exh. 24 at 3 (showing Grand River’s 2004 “on-reserve sales” to be more than 1 billion cigarettes out of 2.2 billion cigarettes sold that same year); *id.* Facts ¶ 89 (identifying New York as one of the states that does not require payment of excise taxes for cigarette sales “on-Reserve”).

<sup>57</sup> “Allocable Share” is defined in the MSA as “the percentage set forth for the State in question as listed in Exhibit A hereto . . .; or, solely for the purpose of calculating payments under subsection IX(c)(2) (and

state had an Allocable Share of one percent of the annual payments under the MSA, the NPM would receive an immediate release of ninety-nine percent of its escrow deposit, and it would have no escrow obligations in any other state. Several tobacco product manufacturers, including Grand River, have exploited this Allocable Share release provision by concentrating their sales in a small number of states to maximize the amount released from escrow.

The Escrow Statutes require that NPMs annually certify to the states that they are in compliance with the escrow requirements.<sup>58</sup> The Escrow Statutes authorize state officials to bring civil actions against NPMs for failure to comply.<sup>59</sup> A finding of a violation of the payment and certification obligations can result in a civil penalty in addition to a judgment requiring immediate payment of the amount owed in escrow. In the case of a knowing violation, a court may impose a civil penalty of up to fifteen percent of the amount improperly withheld from escrow per day of the violation, and a total amount up to 300% of the original amount improperly withheld.<sup>60</sup> After a second knowing violation, the state may ban the NPM from selling cigarettes in the state for up to two years.<sup>61</sup>

Grand River has not joined the MSA. As an NPM, it is subject to the Escrow Statutes in every Settling State where its cigarettes are sold.

---

corresponding payments under subsection IX(i)), the percentage disclosed for the State in question pursuant to subsection IX(c)(2)(A) prior to June 30, 1999 . . . .” MSA § II(f). *See also id.* Exh. T at T-4-T-5, ¶ (b)(2)(B).

<sup>58</sup> *Id.* at T-5 ¶ (b)(3).

<sup>59</sup> *Id.*

<sup>60</sup> Stmt. of Claim Exh. T at T-5, ¶ (b)(3)(B).

<sup>61</sup> *Id.* at T-5, ¶ (b)(3)(C).

### 3. Publicity Surrounding The MSA And Escrow Statutes

The conclusion of the MSA was widely reported. The state attorneys general held press conferences to announce the landmark deal. For example, on November 16, 1998, the attorneys general of seven states, including New York, where Native Wholesale Supply and Native Tobacco Direct are located, held a press conference in Washington, D.C. heralding the agreement and expressing their hope that all tobacco manufacturers would join.<sup>62</sup> Other attorneys general held separate press conferences to announce the MSA.<sup>63</sup>

The tobacco industry also made public announcements about the deal. Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard released a statement on November 16, 1998, the same date the attorneys general held their press conference.<sup>64</sup> Tobacco industry publications monitored the negotiations, and also reported on the conclusion and impact of the MSA.<sup>65</sup>

The text of the MSA in its entirety – including Exhibit T, the Model Statute – was publicly available during the time it was open for signature by the states. Throughout the ninety-day period after the MSA was signed, any tobacco product manufacturer could have reviewed the MSA’s terms and discovered the payment exemption offered to SPMs who joined during that time.<sup>66</sup> Among other places, the MSA could (and still can) be found on the website of the National Association of Attorneys General (“NAAG”).<sup>67</sup> The full text of the

---

<sup>62</sup> Stmt. of Claim Exh. 15 (Media Briefing with Attorneys General from Seven States, Federal News Service, Nov. 16, 1998).

<sup>63</sup> *Id.* (referring to separate public announcements by the attorneys general for California and North Carolina).

<sup>64</sup> *Tobacco Industry Statement on AG Settlement*, PR NEWSWIRE, Nov. 16, 1998 (App. tab 86).

<sup>65</sup> *Settlement hopes revived*, WORLD TOBACCO (Nov. 1998) (App. tab 80); George Hradecky & Beckie Kelly, *A new year for tobacco*, TOBACCO RETAILER (Dec. 1998) (App. tab 101).

<sup>66</sup> See MSA § IX (i).

<sup>67</sup> MSA, available at [http://www.naag.org/upload/1109185724\\_1032468605\\_cigmsa.pdf](http://www.naag.org/upload/1109185724_1032468605_cigmsa.pdf).

MSA was also published in November 1998 in Mealey's Litigation Report: Tobacco.<sup>68</sup> The accompanying article in the Mealey's reporter explained that NPMs could either join the settlement and accept its obligations, or subject themselves to the payment requirements under the Model Statute that would be enacted in each of the Settling States.<sup>69</sup>

Major media outlets across the country, including *The New York Times*, *The Washington Post*, *L.A. Times* and *Chicago Tribune*, reported on the MSA and its impact.<sup>70</sup> Smaller regional newspapers in locales where the claimants resided at the time, including the *Buffalo News*<sup>71</sup> and the *Omaha World Herald*,<sup>72</sup> also featured news about the MSA. Several stories reported on the relevance of the MSA for tobacco product manufacturers other than the four OPMs. For example, a contemporaneous *New York Times* article discussed the MSA's impact on "the little guys" and the general terms on which they could join the MSA and be exempt from payment until their sales exceeded 125% of 1997 levels.<sup>73</sup>

Other newspapers across the country also published articles around the time of the signing of the MSA. These articles identified the features in the agreement intended to

---

<sup>68</sup> *States Get a Week's Review of Tobacco Industry's Offer to Pay \$206 Billion*, 12 MEALEY'S LITIG. REP. TOBACCO I, No. 14, Nov. 19, 1998 (App. tab 95).

<sup>69</sup> *Id.*

<sup>70</sup> Sylvia Nasar, *The World: Smokescreen; The Ifs and Buts of the Tobacco Settlement*, N.Y. TIMES, Nov. 29, 1998, at 41 (App. tab 100); *Big Tobacco Strikes Deal with States*, WASH. POST, Nov. 15, 1998, at A20 (App. tab 84); *Negotiators Finish Work on Tobacco Pact Settlement*, L.A. TIMES, Nov. 15, 1998, at A26 (App. tab 85); *\$206 Billion Settlement Reported Tobacco Firms Reach Tentative Deal with States*, CHI. TRIB., Nov. 15, 1998, at 3 (App. tab 83).

<sup>71</sup> Tom Precious, *State Could Get \$20 Billion from Tobacco Settlement*, BUFFALO NEWS, Nov. 13, 1998, at C1 (App. tab 82); Douglas Turner & Tom Precious, *Tobacco Windfall County Could Receive \$518 Million in Settlement*, BUFFALO NEWS, Nov. 17, 1998, at A1 (App. tab 89); Margaret Hammersley, *Tobacco Cash Should Go to Cut Taxes, Both Parties Agree*, BUFFALO NEWS, Nov. 18, 1998, at B1 (App. tab 93); Dan Burns, *Cigarette Makers Ready Historic Price Increase*, BUFFALO NEWS, Nov. 24, 1998, at A1 (App. tab 98). Buffalo is the closest major metropolitan area to Perrysburg, where claimant Arthur Montour, Jr. and Native Wholesale Supply reside.

<sup>72</sup> Robynn Tysver, *State Accepts Tobacco Deal*, OMAHA WORLD HERALD, Nov. 17, 1998, at 11 (App. tab 91); Robynn, Tysver, *Nebraska Eyes Tobacco Money*, OMAHA WORLD HERALD, Nov. 17, 1998, at 1 (App. tab 90). Claimant Jerry Montour allegedly was living in Omaha in 1998. Stmt. of Claim Facts ¶ 19.

<sup>73</sup> Nasar at 41 (App. tab 100).

ensure that smaller companies would not be able to undermine the MSA's goals. For example, they noted that the MSA included provisions for state legislation designed to "level the playing field" for OPMs and NPMs and for exemptions from payment for smaller companies that opted into the agreement to the extent that their market shares remained at or around current levels.<sup>74</sup> Media coverage also contemporaneously revealed that smaller tobacco companies had agreed to sign on to the agreement.<sup>75</sup>

News of the MSA was widely reported in Canada where Grand River is located. The *Hamilton Spectator*<sup>76</sup> reported on the "mammoth legal settlement" and described its provisions and impact.<sup>77</sup> Contemporaneous reports in the major Toronto newspapers announced that negotiators had reached a deal, and that most states were likely to join the MSA.<sup>78</sup> And provincial officials in British Columbia and Manitoba, finding inspiration in

---

<sup>74</sup> *State's share of tobacco settlement uncertain*, DENVER POST, Nov. 25, 1998, at B08 (App. tab 99); Jeff Zimmer, *Tobacco Firm Liggett Could Benefit from Cigarette Price Increase*, HERALD SUN (Durham, NC), Nov. 17, 1998 (App. tab 92).

<sup>75</sup> AP, *Tobacco Deal Gains Approval*, COLUMBUS LEDGER-ENQUIRER (GA), Nov. 21, 1998, at A1 (App. tab 96).

<sup>76</sup> Hamilton is one of the major media markets closest in proximity to Ohsweken, where Grand River Enterprises is located. The *Hamilton Spectator* frequently reports news on Grand River and the Six Nations. See Lisa Grace Marr, *Export, eh; Six nations tobacco manufacturer is growing success in markets abroad*, HAMILTON SPECTATOR, June 6, 2005, at G04 (App. tab 120); Jacquie De Almeida & Daniel Nolan, *Six Nations at the polls; Six candidates want to be chief of largest reserve*, HAMILTON SPECTATOR Nov. 20, 2004, at A08 (App. tab 119); Daniel Nolan, *Natives helping natives object of special fund; Six Nations firm sets up \$2-million endowment for First Nations youth in Ontario*, HAMILTON SPECTATOR, Aug. 7, 2004, at A03 (App. tab 118).

<sup>77</sup> Skip Wollenberg, *Tobacco firm runs anti-smoking ads*, HAMILTON SPECTATOR, Dec. 5, 1998, at D14 (App. tab 102); Dennis Bueckert, *Smuggling factor keeps tobacco taxes down*, HAMILTON SPECTATOR, Feb. 3, 1999, at C3 (App. tab 105).

<sup>78</sup> AP, *Cigarette makers to cough up \$319 billion, British Columbia eyeing U.S. deal for Canadian suit*, TORONTO STAR, Nov. 17, 1998, at A15 (App. tab 87); AP, *States, Cig Giants Settle Suit*, TORONTO SUN, Nov. 17, 1998, at 12 (App. tab 88).

the signing of the MSA in November 1998, emulated attorneys general in the U.S. states in designing their own legal actions to recover medical costs from tobacco companies.<sup>79</sup>

Other foreign media outlets also reported on the landmark settlement. The *Financial Times* reported on the final stages of the negotiations in November 1998 leading up to the final conclusion of the MSA on November 23.<sup>80</sup> The *Financial Times* coverage reported contemporaneously on the negotiators' concern that small tobacco companies would undermine the MSA by taking advantage of the participating manufacturers' higher settlement costs and the negotiators' consideration of the possibility of charging fees to non-participating companies.<sup>81</sup>

Several state legislatures acted quickly to enact the Escrow Statutes, even before the ninety-day window had closed for non-participating manufacturers to sign and gain a payment exemption. As state legislatures enacted their Escrow Statutes, the local media typically reported on that fact as well. For example, newspaper coverage of the South Dakota legislature's consideration of its proposed statute during January 1999 detailed the obligations of NPMs under the Escrow Statute and the potential that "foreign corporations that refuse to fund the escrow" could be banned from selling their products in the state.<sup>82</sup> Similarly, the *Seattle Times* reported in February 1999 on the progress of the House Bill that would enact the Escrow Statute in Washington State, conveying the "ultimatum" for NPMs

---

<sup>79</sup> Anthony DePalma, *In Canada, One Province Stands Alone vs. Tobacco*, N.Y. TIMES, Nov. 22, 1998, at 115 (App. tab 97); Reuters, *Manitoba may sue tobacco firms*, TORONTO STAR, Nov. 18, 1998, at A3 (App. tab 94).

<sup>80</sup> Richard Tomkins, *The Americas: Smoke signals say relief is in sight for tobacco companies*, FINANCIAL TIMES MANDATE, Nov. 12, 1998, at 6 (App. tab 81).

<sup>81</sup> *Id.*

<sup>82</sup> Dennis Gale, *Committee Endorses Tobacco Escrow Fund*, ABERDEEN AM. NEWS, Jan. 21 1999, at 3A (App. tab 103). *See also*, *Tobacco Account Bill Passes*, ABERDEEN AM. NEWS, Jan. 23, 1999, at 1B (App. tab 104).

to either “join or pay up.”<sup>83</sup> The *Augusta Chronicle* also reported on the approval of the Escrow Statute by lawmakers in Georgia in February 1999.<sup>84</sup> And one of the oldest tobacco trade journals, *Smokeshop*, reported in February/March 2000 that thirty-seven states had enacted “Model Statute Legislation which requires manufacturers not participating in the MSA agreement to establish and maintain escrow accounts for any potential State Medicaid-related recovery claims.”<sup>85</sup>

#### **4. Enforcement Of The Escrow Statutes**

After enacting Escrow Statutes, some states notified NPMs that were known to them of their payment and other obligations, even though neither the MSA nor the Escrow Statutes, nor any other provision of law, required the states to provide such direct and individualized notice. For example, on April 25, 2000, the Missouri Department of Revenue mailed a letter to Grand River, reminding the company of its obligations under Missouri’s Escrow Statute, which took effect on July 1, 1999.<sup>86</sup> The letter described in detail the obligations to establish an escrow account, certify in writing to Missouri officials that the account had been established, deposit the correct amount in the account each year (the method of calculating that amount was also explained), and annually certify in writing to Missouri officials that the deposits had been made.<sup>87</sup> The letter also notified Grand River of the penalties for failure to comply, including fines of fifteen percent per day, up to a maximum of 300% of the amount improperly withheld in the case of a knowing violation

---

<sup>83</sup> AP, *Bill: Join Settlement or Pay Up*, SEATTLE TIMES, Feb. 13, 1999, at A16 (App. tab 106).

<sup>84</sup> *House approves tobacco measure*, AUGUSTA CHRON., Feb. 16, 1999, at C10 (App. tab 107).

<sup>85</sup> *Legislation Update: Targeting Tobacco*, SMOKESHOP, (Feb./March 2000), at 1 (App. tab 109).

<sup>86</sup> Letter from Quentin Wilson, Director of Revenue, Missouri Dept. of Revenue, to Grand River Enterprises (April 25, 2000) (App. tab 16).

<sup>87</sup> Arthur Montour, Jr., on behalf of Native Tobacco Direct, had previously reported to the Missouri Department of Revenue in 1999 on sales activity in the state. Letter from Arthur A. Montour, Vice President, Native Tobacco Direct Co., to State of Missouri, Dept. of Revenue (Nov. 3, 1999) (App. tab 15).

and, in the case of a second knowing violation, the prohibition on sales in the state for up to two years.

Star Tobacco Corporation of Virginia, with whom Grand River alleges it had a production agreement prior to the signing of the MSA, received similar notice of the Escrow Statutes shortly after their enactment.<sup>88</sup> The Office of State Tax Commissioner for North Dakota sent a letter on July 8, 1999 to numerous tobacco product manufacturers, including Star Tobacco, informing them that North Dakota had enacted legislation requiring NPMs to establish escrow accounts, deposit the appropriate amount into the accounts, and certify compliance in writing to the state.<sup>89</sup> The letter also advised that similar statutes had been enacted elsewhere, including in Alaska, Arkansas, Delaware, the District of Columbia, Georgia, Hawaii, Idaho, Iowa, Maine, Maryland, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, Oklahoma, Rhode Island, South Carolina, Utah, Washington, and West Virginia.

Omaha Nation Tobacco, with which claimants Jerry Montour and Kenneth Hill allegedly worked, received direct notice of its obligations under the Escrow Statutes from the State of Nebraska at least as early as May 2000.<sup>90</sup> In a May 17, 2000 letter to Omaha Nation Tobacco, Nebraska's Office of the Attorney General cited and quoted from Nebraska's Escrow Statute, informed Omaha Nation Tobacco that the state had records of its company's

---

<sup>88</sup> See Stmt. of Claim Facts ¶ 14.

<sup>89</sup> Letter from John Quinlan, Compliance Officer, North Dakota Office of State Tax Commissioner, to NPMs (July 8, 1999) (mail merge list attached includes Star) (App. tab 14). In addition, Star filed a lawsuit challenging the MSA and Escrow Statutes – which was reported in the media – more than three years prior to claimants' submission of their claims to arbitration. *Star Scientific, Inc. v. Earley*, Civ. Action No. 3:00CV835, Compl. (Dec. 15, 2000) (App. tab 67). See also, e.g., *Star Threatens Court Action Over Settlement*, WORLD TOBACCO, Sept. 1, 2000 (App. tab 116); John Reid Blackwell, *Star Suit Dismissal Sought*, RICHMOND TIMES DISPATCH (Mar. 13, 2001) (App. tab 117).

<sup>90</sup> Stmt. of Claim Facts ¶ 19; Letter from Steve Grasz, Deputy Attorney General, Nebraska Office of the Attorney General, to Omaha Nation Tobacco (May 17, 2000) (App. tab 17).

cigarettes being sold in 1999, and demanded compliance with the obligation to place funds into escrow within fifteen days.

Settling States initiated enforcement proceedings against Grand River as early as 2000 for failing to make escrow payments or certify compliance with the Escrow Statutes. Missouri, for example, brought its original Petition against Grand River on June 13, 2000.<sup>91</sup> Missouri's lawsuit against Grand River received widespread media attention at the time it was filed, both in Canada and the United States, and in local media outlets where claimants reside.<sup>92</sup> Grand River's president, Steve Williams, acknowledged to the press in July 2000 that he was aware of the lawsuit and that Grand River had instructed its lawyers as to grounds for its defense.<sup>93</sup> In federal court litigation in New York, Grand River admitted in its pleadings that it had known about the states' enforcement of the Escrow Statutes since at least January 2001 – more than three years before it submitted its NAFTA claims to arbitration.<sup>94</sup>

Many other states subsequently initiated enforcement proceedings against Grand River for sales of its products in those states in 1999 and 2000. In those cases, the

---

<sup>91</sup> *Missouri v. Native Tobacco Direct Co.*, Case No. 00CV324140, Pet. for Prelim. and Permanent Injunctive Relief, and Recovery of Civ. Penalties, Attorney's Fees and Costs (June 13, 2000) (App. tab 48).

<sup>92</sup> See, e.g., Agnes Palazzetti, *Tobacco seller sued for Missouri arrears*, BUFFALO NEWS, July 20, 2000 (App. tab 110); Kate Barlow, *Six Nations' cigarettes in lawsuit*, HAMILTON SPECTATOR, July 31, 2000 (App. tab 112); *BC-Cigarette-Suit*, CANADIAN PRESS, July 31, 2000 (App. tab 113); AP, *Missouri sues Native American cigarette company for failing to pay health dues*, July 31, 2000 (App. tab 111); *Native cigarette company sued by Missouri for failing to pay health dues*, CANADIAN PRESS NEWSWIRE, July 31, 2000 (App. tab 114); *Prep-Business Report*, BROADCAST NEWS, Aug. 1, 2000 (App. tab 115).

<sup>93</sup> Kate Barlow, *Six Nations' cigarettes in lawsuit; Missouri launches bid to recoup health costs*, HAMILTON SPECTATOR, July 31, 2000 (App. tab 112).

<sup>94</sup> See *Grand River v. Pryor*, Case No. 02 CV 5068 (S.D.N.Y.) Am. Compl. (Oct 23, 2003) ¶ 11 (“Since January 2001, defendants and the remaining Attorneys General of the forty-six MSA States, through the coordinated efforts of the National Association of Attorneys General (“NAAG”), have enforced, threatened to enforce, and publicly announced their enforcement of the Escrow Statutes against NPMs, including Grand River, through *inter alia* the commencement and threatened commencement of litigation against Grand River and the Native American and non-Native entities that sell tobacco products produced and packaged by Grand River.”) (App. tab 35).

complaints alleged that Grand River “knowingly” violated the Escrow Statutes. Iowa, for example, filed its Petition against Grand River on November 28, 2001 relating to sales of Grand River’s tobacco products during part of 1999 and all of 2000.<sup>95</sup> The Iowa Petition alludes to written notice provided to a large number of NPMs as early as July 8, 1999, notifying them of their obligations under Escrow Statutes implemented in many of the Settling States.<sup>96</sup> Nebraska and South Dakota also brought actions against Grand River in 2001 relating to sales in those states during the year 2000.<sup>97</sup> Oklahoma filed its petition in 2002 relating to Grand River’s sales in that state from July 1, 1999 through 2001.<sup>98</sup> The Oklahoma petition alleges that all of Grand River’s violations were “knowing,” and refers to written notice sent on multiple occasions to Grand River’s importer, Native Tobacco Direct, as well as to Grand River itself.<sup>99</sup> Those states that initially sued Native Tobacco Direct substituted Grand River as the proper defendant upon learning that it was the tobacco product manufacturer.<sup>100</sup>

In total, at least thirty civil enforcement actions have been brought against Grand River by states where its tobacco products were sold, but where no funds had been placed in escrow as required by the Escrow Statutes.<sup>101</sup> In most of these proceedings, Grand River

---

<sup>95</sup> *Iowa v. Grand River*, Equity No. CE43095, Pet. (Nov. 28, 2001) (App. tab 45).

<sup>96</sup> *Id.* ¶ 15.

<sup>97</sup> *Nebraska v. Native Tobacco Direct Co.*, Case No. C101-4034, Pet. (Oct. 31, 2001) (App. tab 54); *South Dakota v. Grand River Enters., Inc.*, Civ. No. 01-465, Compl. (Nov. 5, 2001) (App. tab 64).

<sup>98</sup> *See, e.g., Oklahoma v. Grand River*, Case No. CJ2002-19814, Pet. (Dec. 31, 2002) (App. tab 60).

<sup>99</sup> *See id.* ¶¶ 27, 48; *see* Letter from Neal Leader, Senior Assistant Attorney General, Oklahoma Office of Attorney General, to Native Tobacco Direct Co. (March 19, 2001) (App. tab 18).

<sup>100</sup> *See, e.g.,* Agreement between the State of Nebraska and Grand River (April 1, 2005) (settling lawsuit against Native Tobacco Direct Co. and others, Petition dated October 31, 2001) (App. tab 20).

<sup>101</sup> *See Arizona v. Grand River*, CV2002-010502, Compl. (June 4, 2002) (App. tab 21); *Arizona v. Grand River*, CV2004-015177, Compl. (Aug. 6, 2004) (App. tab 23); *California v. Grand River*, Case No. 02AS07518, Verified Compl. for Civ. Penalties and Injunctive Relief (Dec. 6, 2002) (App. tab 25); *Colorado v. Grand River*, Case No. 04CV2032, Compl. For Injunctive and Other Relief (Mar. 9, 2004)

failed to answer, resulting in court judgments ordering immediate compliance with the Escrow Statutes, payment of penalties, and, for second or subsequent knowing violations, a two-year prohibition on sales of cigarettes in those states.<sup>102</sup> Grand River responded in a few of the state proceedings, including those in Nebraska, North Carolina, Oklahoma, and

---

(App. tab 26); *Delaware v. Grand River*, C.A. No. 02C-09-084 RRC, Compl. (Sep. 11, 2002) (App. tab 28); *Delaware v. Grand River*, C.A. No. 03C-07-029 RRC, Compl. (July 3, 2003) (App. tab 29); *Idaho v. Grand River*, Case No. CV OC 0205249M, Verified Compl. (July 9, 2002) (App. tab 39); *Illinois v. Changde Cigarette Factory*, No. 02CH16585, Verified Compl. for Injunctive and Other Relief (Sep. 11, 2002) (App. tab 41); *Indiana v. Grand River*, No. 49D04-0301-PL-00098, Compl. (Jan. 17, 2003) (App. tab 43); *Iowa v. Grand River*, Equity No. CE43095, Pet. (Nov. 28, 2001) (App. tab 45); *Kentucky v. Grand River*, No. 02-CI-001077, Compl. for Injunctive and Other Relief (Aug. 12, 2002) (App. tab 46); *Missouri v. Native Tobacco Direct Co.*, Case No. DOCV324140, Pet. for Prelim. and Permanent Injunctive Relief, and Recovery of Civ. Penalties, Attorney's Fees and Costs (June 13, 2000) (App. tab 48); *Missouri v. Grand River*, Case No. 012-10225, Pet. for Prelim. and Permanent Injunctive Relief and Recovery of Civ. Penalties, Attorney's Fees and Costs (Dec. 4, 2001) (App. tab 49); *Missouri v. Grand River*, Case No. 022-10724, Pet. for Prelim. and Permanent Injunctive Relief and Recovery of Civ. Penalties, Attorney's Fees and Costs (Sept. 18, 2002) (App. tab 51); *Montana v. Grand River*, No. CDV-2002-672, Compl. for Injunctive and Other Relief (Nov. 18, 2002) (App. tab 52); *Nebraska v. Native Tobacco Direct Co.*, CI01-4034, Pet. (Oct. 31, 2001) (App. tab 54); *Nevada v. Grand River*, CV05 00602, Compl. (Mar 18, 2005) (App. tab 55); *North Carolina v. Grand River*, 02 CV010771, Compl. (Aug. 12, 2002) (App. tab 56); *Ohio v. Grand River*, Case No. 03-CVH-06-06660, Franklin County, Compl. (June 17, 2003) (App. tab 58); *Oklahoma v. Grand River*, CJ-2002-10814, Pet. (Dec. 31, 2002) (App. tab 60); *Oregon v. Grand River*, Case No. 03C-16202, Compl. (July 10, 2003) (App. tab 61); *Oregon v. Grand River*, Case No. 04CI7535, Compl. (Aug. 19, 2004) (App. tab 63); *South Dakota v. Grand River*, Civ. No. 01-465, Compl. (Nov. 5, 2001) (App. tab 64); *South Dakota v. Grand River*, Civ. No. 02-459, Am. Compl. (Aug. 21, 2002) (App. tab 65); *South Dakota v. Grand River*, Civ. No. 03-308, Compl. (Aug. 12, 2003) (App. tab 66); *Tennessee v. Grand River*, No. 03C-3625, Compl. (Dec. 23, 2003) (App. tab 69); *Virginia v. Grand River*, Ch. No. CH03-000075, Bill of Compl. (Jan. 16, 2003) (App. tab 70); *Virginia v. Grand River*, Ch. No. CH04-0001455-1, Bill of Compl. (Aug. 27, 2004) (App. tab 71); *Virginia v. Grand River*, Ch. No. CH05-713, Bill of Compl. (May 13, 2005) (App. tab 72); *Washington v. Grand River*, No. 04-2-01230-6, Compl. for Injunctive Relief, Civ. Penalties, Costs and Attorneys' Fees (June 17, 2004) (App. tab 73); *West Virginia v. Grand River*, Civil Action No. 03-C2419, Compl. (Oct. 7, 2003) (App. tab 75); *Wisconsin v. Grand River*, Case No. 02CV2314, Compl. (July 23, 2002) (App. tab 77); *Wyoming v. Grand River*, Docket No. 162-881, Compl. for Injunctive Relief and Statutory Penalties Pursuant to the Wyoming Tobacco Settlement Funds Act (Nov. 3, 2003) (App. tab 78).

<sup>102</sup> See, e.g., *Arizona v. Grand River*, Case No. CV2002-010502, Default Judgment (Oct. 4, 2002) (App. tab 22); *Arizona v. Grand River*, Case No. CV2004-015177, Default Judgment (Jan 31, 2005) (App. tab 24); *Idaho v. Grand River*, Case No. CV OC 0205249M, Default Judgment (Sept. 4, 2002) (App. tab 40); *Illinois v. Changde Cigarette Factory*, No. 02 CH 16585, Order Granting Default Judgment (May 20, 2003) (App. tab 42); *Indiana v. Grand River*, Cause No. 49D04-0301-PL-00098, Order Granting Default Judgment (Feb. 27, 2003) (App. tab 44); *Kentucky v. Grand River*, Civ. Action No. 02-CI-1077, Default Judgment (Apr. 29, 2004) (App. tab 47); *Montana v. Grand River*, Cause No. CDV-2002-672, Order and Judgment by Default (Sept. 24, 2003) (App. tab 53); *Ohio v. Grand River*, Case No. 03-CVH-06-06660, Franklin County, Entry and Order Granting Summary Judgment in Favor of Plaintiff State of Ohio (June 24, 2004) (App. tab 59); *Oregon v. Grand River*, 03C16202, Notice of Entry of Judgment Docketed (Sept. 26, 2003) (App. tab 62); *Washington v. Grand River*, No. 04-2-01230-6, Order Granting Motion for Order of Default and Default Judgment (Oct. 15, 2004) (App. tab 74); *West Virginia v. Grand River*, 03-C-2419, Final Judgment Order (Jan 14, 2004) (App. tab 76); *Wyoming v. Grand River*, No. 162-881, Default Judgment (May 27, 2004) (App. tab 79).

Tennessee, sometimes by answer, in other cases by belatedly complying or seeking a settlement to lift the injunction on sales entered as part of the default judgments.<sup>103</sup> In a few other states, including Arkansas, Georgia, Kansas, Louisiana and South Carolina, Grand River has complied with the Escrow Statutes and its products may legally be sold in those states.<sup>104</sup>

Various lawsuits have been filed in United States courts challenging the MSA. Among the earliest was a suit filed in June 1999 by a coalition of over 100 Indian tribes seeking a portion of the settlement payments.<sup>105</sup> In 2002, Grand River commenced a legal challenge to the MSA against the attorneys general of more than thirty states in federal court in New York.<sup>106</sup> That case is pending.<sup>107</sup>

## 5. Complementary Legislation

Despite early enforcement by some states of their Escrow Statutes, many NPMs continued to sell cigarettes without complying with the Escrow Statutes. In particular, compliance lagged for NPMs located in foreign countries.<sup>108</sup> Some NPMs also devised

---

<sup>103</sup> Agreement between the State of Nebraska and Grand River (April 1, 2005) (App. tab 20); *North Carolina v. Grand River*, 01 CV 010771, Judgment by Default (Amended) (May 5, 2003) (App. tab 57); Stipulation and Agreement between the State of Oklahoma and Grand River (undated) (App. tab 68); Compliance Agreement between the State of Tennessee and Grand River (March 21, 2005) (App. tab 27).

<sup>104</sup> In Arkansas, for example, Grand River belatedly complied with its escrow obligations after several years of selling its products in the state. *See Grand River v. Beebe*, Case No. 05-5051 (W.D. Ark.), Plaintiffs' Reply to Defendant's Supplement to Response to Plaintiffs' Motion for Preliminary Injunction (May 6, 2005) at 3-4 (App. tab 33). In the litigation Grand River initiated against the state of Arkansas, Grand River admitted that it had previously been aware of the obligations imposed by the Escrow Statutes, but had excused itself from compliance based on its belief that the Escrow Statutes were not applicable to it. *See id.* at 1.

<sup>105</sup> Douglas Casgraux, *Coalition of tribes seeks injunction against tobacco settlement*, NEWS FROM INDIAN COUNTRY (July 15, 1999) (App. tab 108).

<sup>106</sup> *Grand River v. Pryor*, Case No. 02 CV 5068 (S.D.N.Y.), Compl. (July 2, 2002) (App. tab 34).

<sup>107</sup> *See Grand River v. Pryor*, No. 03-9179 (2d Cir.), Judgment (Sept. 28, 2005) (App. tab 38).

<sup>108</sup> *Model Complementary Legislation, Introduction and Analysis*, NAAG TOBACCO PROJECT, January 2003, at 2 (App. tab 2).

schemes to evade compliance, or concentrated their sales in a small number of states to maximize the refund under the Allocable Share release provision.<sup>109</sup>

To address these evasion tactics, states enacted statutes, sometimes referred to as “Complementary Legislation.” New York was among the first states to implement a form of Complementary Legislation, enacting its statute in December 2001.<sup>110</sup> New York’s statute, in addition to reinforcing the pre-existing obligations on tobacco product manufacturers, also prohibits stamping agents from affixing tax stamps on brands manufactured by NPMs that have not complied with their escrow obligations.

As of January 2003, fifteen states had enacted similar legislation. This legislation generally prohibits tax stamping of tobacco products that are not in compliance with a state’s Escrow Statute, requires certification that a tobacco product manufacturer is either a participating manufacturer or in full compliance with the Escrow Statute, and requires the attorney general or revenue department for the state to maintain a list of tobacco product manufacturers that are in compliance with state laws.<sup>111</sup>

The effectiveness of these states’ Complementary Legislation in promoting compliance with the Escrow Statutes prompted the NAAG Tobacco Project to create a working group and develop model Complementary Legislation for other states to implement.<sup>112</sup> In 2003, a majority of the Settling States that had not previously enacted their own form of Complementary Legislation, implemented legislation along the lines of the NAAG model.

---

<sup>109</sup> *Id.*

<sup>110</sup> N.Y. TAX LAW § 480-b (2001) (App. tab 7).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

The Complementary Legislation is designed to ensure that tobacco product manufacturers do not evade the Escrow Statutes. Pursuant to the Escrow Statutes, an enforcement action is triggered if, by April 15, an NPM has not made escrow payments on its previous year's sales. The model Complementary Legislation ensures that no tobacco products are sold in the state unless they are listed in a directory of products that are manufactured by either a participating manufacturer or an NPM that has complied with the Escrow Statute.

The Complementary Legislation imposes no new payment obligations or penalties on tobacco product manufacturers.<sup>113</sup> Rather, it reinforces the obligations already imposed by the Escrow Statute by requiring that a tobacco product manufacturer certify compliance with the Escrow Statute before permitting the sale of that manufacturer's brands in the state.<sup>114</sup> Some states' Complementary Legislation requires that escrow deposits be made quarterly, rather than annually. But the only additional obligations in the model Complementary Legislation are administrative and reporting requirements, e.g., certifying compliance with the Escrow Statutes (by identifying the financial institution and account number), engaging an agent for service of process,<sup>115</sup> and regularly updating the state on any changes.<sup>115</sup>

The Complementary Legislation also formalizes the obligations and penalties for stamping agents and state-licensed distributors. States had already relied on reports from tax stamping agents as the basis for calculating the amount of a manufacturer's payment obligation under the Escrow Statute. Under the Complementary Legislation, this process became more transparent to stamping agents because the states must create and maintain a

---

<sup>113</sup> See Model Complementary Legislation (Jan. 21, 2003) (App. tab 9).

<sup>114</sup> *Id.* § 3(c).

<sup>115</sup> *Id.* § 3(a).

directory of brands manufactured by manufacturers that have complied with the Escrow Statute.<sup>116</sup> The Complementary Legislation prohibits the sale of any brands of cigarettes not listed in this directory.<sup>117</sup> Neither Arthur Montour, Jr., nor Native Wholesale Supply Company nor Native Tobacco Direct Company is, or ever has been, authorized as a tax-stamping agent for the State of New York, where they reside. Any cigarettes sold in violation of a state's Complementary Legislation that follows the NAAG model are subject to forfeiture and seizure as contraband.<sup>118</sup>

### **C. Additional State Measures**

A few states have adopted additional measures to ensure sufficient burden sharing by NPMs. Michigan, for example, enacted an equity assessment provision into its tobacco tax law, effective January 8, 2004. This tax measure requires an NPM to pay an "equity assessment" per cigarette sold in the state.<sup>119</sup> This tax – and others like it – functions as an excise tax on tobacco products. Similar provisions exist in other states including Utah, Alaska and Minnesota (which is not a signatory to the MSA).<sup>120</sup> Claimants do not allege that they have made sales in any state with an equity assessment law after the law took effect. Nor do they allege any loss or damage as a result of these tax measures.

---

<sup>116</sup> *See id.* § 3(b).

<sup>117</sup> *Id.* § 3(c).

<sup>118</sup> *Id.* § 6.

<sup>119</sup> *See* MICH. COMP. LAWS ANN. § 205.426d(4) (2004) ("The purpose of the equity assessment is to fund enforcement and administration of [the Escrow Statute] and this act.") (App. tab 11).

<sup>120</sup> UTAH CODE ANN. § 59-14-214 (2004) (App. tab 12); ALASKA STAT. § 43.50.200 (2005) (App. tab 13); MINN. STAT. ANN. § 297F.24 (2003) (Stmt. of Claim Exh. 20) (App. tab 10).

## II. CLAIMANTS' CLAIMS ARE TIME-BARRED

The Tribunal lacks jurisdiction over claimants' claims. Claimants submitted their claims to arbitration under Articles 1116 and 1117 of the NAFTA.<sup>121</sup> Those articles provide that “[a]n investor may not make a claim,” either on its own behalf or on behalf of an enterprise that it owns or controls, “if more than three years have elapsed from the date” on which the investor or enterprise “first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that [it] has incurred loss or damage.”<sup>122</sup>

As the NAFTA Chapter Eleven tribunal in *Marvin Roy Feldman Karpa v. United Mexican States* explained, the term “making a claim” “is used to denote the definitive activation of an arbitration procedure” by the filing of a notice of arbitration.<sup>123</sup> Article 1137(1)(c) defines that time, for a claim under the UNCITRAL Arbitration Rules, as the date on which the notice of arbitration “is received by the disputing Party.”

The limitations period in Articles 1116(2) and 1117(2) is triggered once the claimant has first acquired either constructive or actual knowledge of the alleged breach and loss. In using the phrase “first acquired, *or should have* first acquired,” NAFTA Articles 1116 and 1117 adopt the widely-accepted legal principle of constructive

---

<sup>121</sup> Stmt. of Claim at 3.

<sup>122</sup> NAFTA arts. 1116(2) & 1117(2).

<sup>123</sup> ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues at 21 (Dec. 6, 2000). The claim that has been made for purposes of Articles 1116(2) and 1117(2) is confined to the four corners of the Notice of Arbitration (which claims also must be asserted in a Notice of Intent at least three months prior to the submission of the claim to arbitration). While the March 12, 2004 Notice of Arbitration mentioned the Michigan “equity assessment” as “part of the ongoing application of the MSA,” it made no mention of acts taken by Minnesota or any other non-MSA state. Notice of Arbitration of Grand River Enterprises Six Nations, Ltd., *et al.* ¶¶ 59-60 (Mar. 10, 2004) (“NOA”). Accordingly, the Tribunal cannot consider whether the allegations relating to Minnesota’s equity assessment in the Statement of Claim were made within the three-year limitations period of Articles 1116(2) and 1117(2) because any claim in that regard has yet to be made. *See* Stmt of Claim Facts ¶¶ 72-74.

knowledge in fixing the time when a claim arises.<sup>124</sup> Limitations provisions such as the one in NAFTA Chapter Eleven are strictly enforced in international law.<sup>125</sup> Like the doctrine of prescription, limitations periods prevent the airing of stale claims, for which evidence may no longer be available and witness recollections may be infirm, and provide certainty for potential respondents.<sup>126</sup> As the *Feldman* tribunal observed:

---

<sup>124</sup> See, e.g., *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116, 139 (rejecting the United Kingdom’s claim of ignorance of Norway’s method of delimiting its boundaries, and finding that “[a]s a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government.”); *Genin v. Estonia*, ICSID Case No. ARB/99/2 (Award), 2001 WL 34788584 ¶ 345 (rejecting claim for misrepresentations made in the purchase of a bank and finding that claimant knew or should have known that bank was on the verge of bankruptcy); *Customs Classifications of Frozen Boneless Chicken Cuts*, W.T.O. Appellate Body Report, WT/DS269/AB/R ¶ 297 (Sept. 12, 2005) (finding fact that an act or instrument was officially published, and has been publicly available so that any interested party could have acquired knowledge of it, sufficient to impute knowledge of such act or instrument to party). See also BLACK’S LAW DICTIONARY (8th ed. 2004) (defining constructive knowledge as “[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person”).

<sup>125</sup> See, e.g., *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002) (characterizing the NAFTA’s limitations provision as a “clear and rigid . . . defense”); *United States of America v. Islamic Republic of Iran*, Case No. B/36, Award No. 574-B36-2 ¶ 61 (Dec. 3, 1996) (“The provision of Article 8 of the 1974 U.N. Convention that ‘the limitation period shall be four years’ is . . . a provision of treaty law binding on the Parties . . . .”); J.L. SIMPSON AND HAZEL FOX, INTERNATIONAL ARBITRATION LAW AND PRACTICE 123 (1959) (“Treaties have imposed express time limits barring claims not made or presented within a certain time.”); BIN CHENG, GENERAL PRINCIPLES OF LAW 376 (1987) (“Prescription is, therefore, the principle underlying municipal rules of limitation . . . . [This] rule is essentially practical and, moreover, binding.”) (internal quotation and citation omitted); THOMAS OEHMKE, INTERNATIONAL ARBITRATION § 6:5 (1990) (“If the parties have contractually imposed a ‘statute of limitations’ on themselves, the courts will uphold this.”).

<sup>126</sup> See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 482 (6th ed. 2003) (“Commonly a stale claim will be denied because of the difficulty the defendant has in establishing the facts . . . .”); BIN CHENG, GENERAL PRINCIPLES OF LAW 380 (1987) (“It is considered that long lapse of time inevitably destroys or obscures the evidence of the facts and, consequently delay in presenting the claim places the other party in a disadvantageous position. For, if it had not previously been warned of the existence of the claim, it would probably not have accumulated and preserved the evidence necessary for its defence.”); Case No. B/36, Award No. 574-B36-2 (“one of the main justifications of the principle [of extinctive prescription] is to avoid the embarrassment of the defendant by reason of its inability to obtain evidence in regard to a claim of which it only becomes aware when it is already stale . . . .”) (citing 1 OPPENHEIM’S INTERNATIONAL LAW 527 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992)); *Gentini*, 10 R.I.A.A. 551, 560 (1903) (“Great lapse of time is known to produce certain inevitable results, among which are the destruction or the obscuration of evidence by which the equality of the parties is disturbed or destroyed, and as a consequence renders the accomplishment of exact or even approximate justice impossible.”); *Williams* (1885), reported in 4 MOORE’S INTERNATIONAL ARBITRATIONS 4181, 4196 (1898) (“from long lapse of time . . . material facts including means of ascertainment pertaining to support or defence are lost, or so obscured as to leave the mind, intent on ascertaining the truth, reasonably in doubt about them, or in danger of mistaking the truth . . . .”) (internal quotations omitted).

NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense which, as such, is not subject to any suspension, prolongation or other qualification. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three years . . . .<sup>127</sup>

Claimants delivered their Notice of Arbitration to the United States on March 12, 2004. That Notice of Arbitration identified the MSA's application and its effect on competitors of the major tobacco companies in the United States market as the "principal gravamen" of the claim.<sup>128</sup> As demonstrated below, Claimants first acquired both constructive and actual knowledge of the alleged breaches identified in their Notice of Arbitration and any resulting loss or damage more than three years before they submitted their claims to arbitration.

**A. Claimants Should Have Known Of The Impact Of The MSA More Than Three Years Prior To Submitting Their Claims To Arbitration**

Claimants' assertion that they had no actual knowledge of the impact of the MSA and its provisions until July 2002 is not credible.<sup>129</sup> The MSA, which was signed in November 1998, was the largest civil settlement in U.S. history.<sup>130</sup> Anyone engaged in the manufacturing of cigarettes for the U.S. market would have been aware of the agreement. The MSA was widely publicized at that time, and its full text was made available to the public.<sup>131</sup> The publicity surrounding the MSA included reports that the settlement would impact other tobacco product manufacturers, not just the four OPMs.<sup>132</sup>

---

<sup>127</sup> *Feldman Award* ¶ 63.

<sup>128</sup> NOA ¶ 19.

<sup>129</sup> *See* Stmt. of Claim Facts ¶ 76.

<sup>130</sup> GAO Report at 3.

<sup>131</sup> *See* Facts *supra* § I(B)(3) at p. 14.

<sup>132</sup> *See, e.g.,* Sylvia Nasar, *The World: Smokescreen; The Ifs and Buts of the Tobacco Settlement*, N.Y. TIMES, Nov. 29, 1998, at 41 (discussing MSA's impact on "the little guys" and opportunity to join MSA and gain payment exemption) (App. tab 100); Richard Tomkins, *The Americas: Smoke signals say relief is*

In addition to holding press conferences and making public announcements about the MSA, its negotiators engaged in other efforts to inform all tobacco product manufacturers known to have sales in the U.S. about the agreement.<sup>133</sup> In fact, within three months of its signing, tobacco product manufacturers representing more than ninety-nine percent of the market at the time had joined the MSA. Claimants' argument that they were unaware of the MSA is untenable.

The United States, however, need not prove that claimants had actual knowledge of the terms of the MSA at the time it was concluded. Under these circumstances, they should have known about the MSA and its effects on them. Any tobacco product manufacturer selling, or planning to sell, its products in the United States would reasonably have studied the provisions of the MSA and understood this monumental agreement's impact on the United States market for tobacco products. Any manufacturer of cigarettes would reasonably have taken into account this development in formulating

---

*in sight for tobacco companies*, FINANCIAL TIMES MANDATE, Nov. 12, 1998, at 6 (referring to negotiators' deliberations on how to include non-settling companies in burden-sharing) (App. tab 81); *State's share of tobacco settlement uncertain*, DENVER POST, Nov. 25, 1998, at B08 (describing MSA's requirement for state legislation designed to "level the playing field" for OPMs and NPMs) (App. tab 99); Jeff Zimmer, *Tobacco Firm Liggett Could Benefit from Cigarette Price Increase*, HERALD SUN (Durham, NC), Nov. 17, 1998 (describing MSA's provision for exemptions from payment for smaller companies that opted into the agreement to the extent that their market shares remained at or around current levels) (App. tab 92); *States Get a Week's Review of Tobacco Industry's Offer to Pay \$206 Billion*, 12 MEALEY'S LITIG. REP. TOBACCO 1, No. 14, Nov. 19, 1998 (describing choice facing NPMs to either join MSA or be subjected to payments under Model Statute that would be enacted by the Settling States) (App. tab 95).

<sup>133</sup> Direct outreach by the MSA's negotiators could not reasonably have included contacts with entities that could not be identified because they had no sales in the U.S. market at the time. Claimants have not alleged that any cigarettes manufactured by Grand River were sold in the U.S. in 1998. Given claimants' own allegations, it is reasonable to infer that, rather than being ignorant of the MSA's provisions, claimants, in fact, orchestrated their business plans in response to the MSA. See Stmt. of Claim Exh. 6 (Certificate of Incorporation for Grand River's distributor, Native Tobacco Direct Co., indicating establishment in January 1999, shortly after the MSA was signed). See also *id.* Facts ¶ 22 (also in January 1999, claimants first "began to manufacture their brands exclusively at Grand River.") (emphasis added). Realizing that the MSA would impose financial burdens on the established tobacco companies, claimants may have decided to enter the U.S. market at this time hoping to take advantage of this situation.

its business plans in the United States as soon as the news of the MSA's provisions and the MSA's final text were made public.

Claimants knew, or should have known, of the terms of the MSA when it was concluded in November 1998. As soon as the MSA was made public, claimants knew or should have known of any alleged breaches and associated damage presented by (1) the alleged lack of transparency in negotiating the MSA; and (2) the payment exemption for Grandfathered SPMs.

**1. Claims Regarding Any Alleged Breach And Loss Presented By The MSA's Negotiation Are Time-Barred**

Claimants' claims concerning the alleged lack of transparency in the MSA's negotiation and uncertainty regarding the agreement's application to NPMs are time-barred. One basis for claimants' Article 1105(1) claim is the alleged lack of transparency in "the process by which the enforcement measures, which are at issue in this claim, came to relate to the Investors and their investments."<sup>134</sup> Claimants complain that they received no notice "at the time the MSA was negotiated and processes apparently [were] established for its implement[ation]."<sup>135</sup> They also challenge actions taken by the attorneys general for the Settling States in 1998 while they were negotiating the MSA.<sup>136</sup>

---

<sup>134</sup> Stmt. of Claim Argument ¶ 145.

<sup>135</sup> *Id.*

<sup>136</sup> *See, e.g.*, Stmt. of Claim Facts ¶ 36 (referring to the way "the MSA's payment obligations *were drafted*") (emphasis added); *id.* Facts ¶ 47 ("None of the Investors nor their investments were privy to the MSA negotiations"); *id.* Facts ¶ 53 ("notice of the foregoing negotiations or an invitation to join as an Exempt SPM was never given to the Investors nor to their investments"); *id.* Argument ¶ 145 (referring to lack of transparency in process of applying MSA enforcement measures to claimants, lack of notice at time MSA was negotiated, and "surreptitious manner" in which smaller companies were invited to join); *id.* Argument ¶ 148 (referring to "special back-room deals for smaller[] discounters connected to Big Tobacco").

As set forth above, however, the conclusion of the MSA was widely publicized and the MSA's text was made publicly available.<sup>137</sup> Thus, even assuming such a claim for lack of notice could give rise to a breach of NAFTA Chapter Eleven, and even if the negotiations were unknown to claimants at the time, the fact that negotiations had taken place and that claimants had not been involved was known or should have been known by claimants no later than November 1998, when the MSA was released to the public amidst widespread media coverage.<sup>138</sup> The time for submitting such a claim to arbitration challenging the negotiation of the MSA expired in November 2001 – more than two years before claimants submitted their claim to arbitration.

## **2. Claimants' Challenge To The Payment Exemption For Grandfathered SPMs Is Time-Barred**

The Tribunal lacks jurisdiction over claimants' claims that the payment exemption granted to Grandfathered SPMs, and denied to manufacturers like Grand River, breached Articles 1102, 1103, 1105(1) and 1110. Claimants knew or should have known of any alleged breach and damage resulting from the payment exemption more than five years before they submitted their claims to arbitration.

Claimants' allegations concerning violations of the national treatment and most-favored-nation treatment provisions have as their focus the MSA's grant of payment

---

<sup>137</sup> See Facts *supra* § I(B)(3) at p. 14.

<sup>138</sup> See, e.g., *Tobacco Industry Statement on AG Settlement*, PR NEWswire, Nov. 16, 1998 (App. tab 86); *Big Tobacco Strikes Deal with States*, WASH. POST, Nov. 15, 1998, at A20 (App. tab 84); *Negotiators Finish Work on Tobacco Pact Settlement*, L.A. TIMES, Nov. 15, 1998, at A26 (App. tab 85); *\$206 Billion Settlement Reported Tobacco Firms Reach Tentative Deal with States*, CHI. TRIB., Nov. 15, 1998, at 3 (App. tab 83); Sylvia Nasar, *The World: Smokescreen; The Ifs and Buts of the Tobacco Settlement*, N.Y. TIMES, Nov. 29, 1998, at 41 (App. tab 100); Richard Tomkins, *The Americas: Smoke signals say relief is in sight for tobacco companies*, FINANCIAL TIMES MANDATE, Nov. 12, 1998, at 6 (App. tab 81); *State's share of tobacco settlement uncertain*, DENVER POST, Nov. 25, 1998, at B08 (App. tab 99); Jeff Zimmer, *Tobacco Firm Liggett Could Benefit from Cigarette Price Increase*, HERALD SUN (Durham, NC), Nov. 17, 1998 (App. tab 92); *States Get a Week's Review of Tobacco Industry's Offer to Pay \$206 Billion*, 12 MEALEY'S LITIG. REP. TOBACCO 1, No. 14, Nov. 19, 1998 (App. tab 95).

exemptions to SPMs who joined the MSA within ninety days. Claimants allege that this treatment accorded to Grandfathered SPMs is “obvious discrimination.”<sup>139</sup> The treatment of Grandfathered SPMs also provides a basis for claimants’ assertion of a breach of Article 1105(1), the minimum standard of treatment provision. Claimants assert that “[t]he surreptitious manner in which smaller, discount manufacturers were invited to ‘join’ the MSA, in return for multi-million dollar exemptions in perpetuity, similarly fell below minimum standards of transparency.”<sup>140</sup> Claimants’ expropriation claim likewise rests on the payment exemptions for Grandfathered SPMs. Claimants allege that their market share was illegally taken from them by virtue of the Grandfathered SPM provision.<sup>141</sup> Finally, claimants allege that they were damaged as a result of being denied a payment exemption.<sup>142</sup> They assert that the exemption has value and that Grandfathered SPMs received more favorable treatment as soon as that value was granted to them and withheld from claimants.<sup>143</sup> In fact, claimants’ expert report calculates

---

<sup>139</sup> Stmt. of Claim Facts ¶ 52; *see also id.* ¶ 57 (asserting that claimants were “precluded from ‘joining’ the MSA on the same terms that have been made available to their competitors”); *id.* Argument ¶ 69 (arguing that the “MSA regime . . . constitutes a prima facie breach of both Article 1102 and Article 1103 because it provides an exemption from payment obligations to both domestic and foreign-owned tobacco businesses, while providing no exemption whatsoever to the Investors or their investment.”); *id.* ¶ 75 (stating that the “perpetual grand-fathered exemption” is the primary “type of more favorable treatment” alleged by claimants).

<sup>140</sup> *Id.* Argument ¶ 145; *see also id.* ¶ 148 (“in having carved out special, back-room deals for smaller, discounters connected to Big Tobacco – deals which would be memorialized nationally in their implementation measures – the forty-six MSA States demonstrated an utter disrespect for the special circumstances of the Investors as aboriginal nationals of Canada, and for the international rule of law generally.”).

<sup>141</sup> *See id.* Facts ¶ 50 (alleging that the so-called “Renegade Clause” was intended to “induce a group of smaller competitors . . . to join the MSA under a grant that effectively safeguarded their existing market share, while simultaneously and effectively taking the share held by other competitors, including the [claimants], for the benefit of these Exempt SPMs.”).

<sup>142</sup> *See id.* Argument ¶ 155 at p. 75 (claiming damages on the basis that claimants should have received an exemption) (claimants’ paragraph numbering sequence reverts from 173 to 138 on page 70. Consequently, there are multiple paragraphs within the Statement of Claim with the same paragraph number); *Id.* ¶ 160 at p. 76 (proposing assigning a value to the entitlement of an exemption as a means to calculate damages).

<sup>143</sup> *Id.* Argument ¶¶ 67, 70.

damages by valuing the cost of a payment exemption under the MSA based on how that exemption was allegedly valued in transactions involving the acquisitions of Grandfathered SPMs.<sup>144</sup>

The MSA, however, clearly established that SPMs that joined the agreement within ninety days would receive a payment exemption. Claimants erroneously state that the Escrow Statutes “memorialized” the arrangement under which early-joining SPMs would be granted a payment exemption.<sup>145</sup> The provision granting that exemption, however, is found in the MSA, which states that any SPM that becomes a signatory to the MSA within ninety days of its Execution Date “shall have payment obligations under this Agreement only in the event that its Market Share in any calendar year exceeds the greater of (1) its 1998 Market Share or (2) 125 percent of its 1997 Market Share.”<sup>146</sup>

In November 1998, when the text of the MSA was released, claimants knew or should have known that any tobacco product manufacturer was entitled to a payment exemption if it joined the MSA within the first few months after the agreement was concluded. Claimants’ alleged failure to learn of the ninety-day window “until years after the MSA” was concluded is not only incredible, it is legally irrelevant.<sup>147</sup> That several foreign-owned tobacco product manufacturers, along with numerous U.S. companies, took advantage of the opportunity to join the MSA and gain a payment exemption is further evidence that it was reasonable to expect any person or entity that sold or intended to sell cigarettes in the United States to have learned of this opportunity

---

<sup>144</sup> *Id.* Exh. 24, Preliminary Calculation of Losses, at 2.

<sup>145</sup> *See id.* Argument ¶ 63.

<sup>146</sup> MSA § IX(i)(1) & (4). Neither the Escrow Statutes nor the Model Statute attached to the MSA contain any mention of the exemption for Grandfathered SPMs.

<sup>147</sup> Stmt. of Claim Argument ¶¶ 64, 65.

in the first few months after the MSA was concluded. Any alleged breach and resulting damage stemming from the difference in treatment accorded to Grandfathered SPMs and NPMs like Grand River arose as soon as it was determined which tobacco product manufacturers were entitled to the exemption, and which were not. That occurred no later than February 23, 1999, when the ninety-day window closed for joining the MSA as a Grandfathered SPM, and more than five years before claimants submitted their claim to arbitration.

**B. Claimants Should Have Known Of Any Breach And Damage Presented By The Escrow Statutes No Later Than The Date Those Statutes Were Enacted**

Claimants knew or should have known of any alleged breach and resulting loss caused by the Escrow Statutes more than three years before they submitted their claims to arbitration. Claimants allege that the Escrow Statutes have caused them loss or damage because they have had to make annual payments into escrow and have been subjected to penalties for failure to comply with their escrow obligations.<sup>148</sup> They also challenge the exemption from escrow payments for cigarette sales not subject to state excise taxes as a violation of Article 1102.<sup>149</sup> And they claim that the Escrow Statutes violate Article 1110

---

<sup>148</sup> See, e.g., Stmt. of Claim Facts ¶¶ 41, 57, 63, Argument ¶ 76 (payment requirements), Argument ¶ 144 (penalties).

<sup>149</sup> *Id.* Facts ¶ 66 (alleging that the claimants’ “ability to compete against other Aboriginal tobacco companies, who – because they do not pay state taxes and their territories do not extend upon either side of the Canada-U.S. border – are effectively ‘exempt’ from the MSA measures (because they are apparently not enforced against them), has been even more seriously compromised.”); see *id.* Argument ¶ 75 (“two types of more favorable treatment are being provided . . . . One set of smaller, discount-brand tobacco companies has been granted a perpetual grand-fathered exemption . . . ; while another aboriginal tobacco enterprise with its own, new discount brand has been given a thoroughgoing *de facto* exemption for all of its on-Reserve sales.”).

by forcing them to make strategic decisions regarding the states in which they sell cigarettes.<sup>150</sup>

Articles 1116(2) and 1117(2) provide that the limitations period begins at the time claimants “*first* acquired, or should have *first* acquired” knowledge of any alleged breach and loss or damage.<sup>151</sup> In construing these articles, the NAFTA Chapter Eleven tribunal in *Mondev Int’l Ltd. v. United States of America* properly concluded that “[a] claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.”<sup>152</sup> Article 14 of the International Law Commission’s Articles on State Responsibility is in accord. That Article provides that a breach such as that alleged by claimants occurs “at the moment when the act is performed, even if its effects continue.”<sup>153</sup>

Under the MSA, a Settling State’s share of the settlement payments under the MSA is reduced unless the state enacts a statute in the form set forth in Exhibit T “without modification or addition (except for particularized state procedural or technical requirements)” and certain other conditions have been met.<sup>154</sup> As a result, it was not open to the Settling States to implement the MSA in a manner that did not impose the very payment obligations on NPMs provided for in the Model Statute and complained of

---

<sup>150</sup> *Id.* Argument ¶ 168.

<sup>151</sup> NAFTA arts. 1116(2) & 1117(2) (emphasis added).

<sup>152</sup> ICSID Case No. ARB(AF)/99/2, Award ¶ 87 (Oct. 11, 2002) (“*Mondev Awd.*”).

<sup>153</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, Int’l Law Comm’n, 53d Sess., art. 14(1), in U.N. Doc. A/56/10 (2001) (“ILC Arts.”).

<sup>154</sup> MSA § IX(d)(2)(E); *see also id.* § IX(d)(2)(B) (“A Settling State’s Allocated Payment shall not be subject to an NPM Adjustment: (i) if such Settling State continuously had a Qualifying Statute (as defined in subsection (2)(E) below) in full force and effect during the entire calendar year immediately preceding the year in which the payment in question is due).

by claimants.<sup>155</sup> Moreover, as admitted by claimants' own expert, it was a matter of straightforward accounting to quantify loss or damage arising from the Escrow Statutes because "the amount of payments is relatively certain given that the per carton payment amount is stipulated in the MSA."<sup>156</sup> Consequently, as soon as the MSA was made publicly available, claimants knew or should have known that each of the Settling States would be enacting Escrow Statutes that imposed payment obligations in the specific amounts set forth in the Model Statute. At that time, claimants could have reasonably ascertained the loss or damage that they would incur by virtue of having to comply with that legislation.

Claimants assert that they made no expenditures of any "monies which could be characterized as 'damages'" until May 2002 when they retained counsel to defend them against enforcement of the MSA regime.<sup>157</sup> But claimants incurred obligations under the Escrow Statutes as soon as those statutes became effective in the states in which they sold cigarettes. Thus, claimants first acquired, or should have first acquired, knowledge that they had incurred loss or damage as a result of the Escrow Statutes no later than the date that those statutes became effective.

Similarly, claimants knew or should have known that they would be penalized for non-compliance with the Escrow Statutes more than three years before they submitted

---

<sup>155</sup> See Stmt. of Claim Facts ¶ 57 (complaining that claimants are "required to make . . . multi-million dollar payments annually in order to stay in business"); see also *id.* ¶ 63 ("the MSA implementing measures of each state now require the Investors and their investments to deposit millions of dollars annually into [a] qualified escrow fund").

<sup>156</sup> Stmt. of Claim Exh. 24 at 4 ¶ 12. See also MSA Exh. T at T-4 (Paragraph (b) of "Requirements" Section) (providing the per cigarette amounts that NPMs must place into escrow each year beginning in 1999).

<sup>157</sup> *Id.* Facts ¶ 77.

their claims to arbitration.<sup>158</sup> In accordance with the terms of the Model Statute, the Escrow Statutes subject any NPM with sales in a Settling State that fails to comply with the escrow requirements to escalating penalties.<sup>159</sup> Each of these Escrow Statutes uniformly provides that Settling States' officials may file a civil action against any tobacco product manufacturer that fails to comply with its escrow payment obligations.<sup>160</sup>

The other claims of breach and loss allegedly arising out of the Escrow Statutes are likewise time-barred. Claimants' allegations of breach under Article 1102, for example, depend in part on the exemption afforded under the Escrow Statutes to manufacturers for sales that are not subject to state excise tax.<sup>161</sup> In accordance with the Model Statute, the Escrow Statutes provide an exemption from escrow payment obligations for cigarette sales that are exempt from state excise taxes.<sup>162</sup> Claimants knew or should have known when the first state enacted its Escrow Statute in 1999 that only those cigarette sales subject to state excise tax requirements would give rise to payment obligations under the Escrow Statutes. Any claim alleging that such an exemption breaches the NAFTA and caused claimants damage is therefore time-barred.

Claimants also allege as a basis for their expropriation claim that the Escrow Statutes have forced them to make "difficult strategic decisions about the markets in

---

<sup>158</sup> *Id.* Facts ¶ 82 (alleging that claimants have paid \$5 million in escrow deposits and penalties).

<sup>159</sup> *See, e.g.*, IOWA CODE ANN. § 453C.2(2)(c) (App. tab 6); MO. ANN. STAT. § 196.1003(b)(3) (App. tab 6), OKLA. STAT. ANN. tit. 37, § 600.23(E) (App. tab 6); MSA Exh. T at T-5. Unknowing failure to comply can result in a civil penalty up to five percent of the amount withheld from escrow per day, up to a maximum penalty of 100% of the amount withheld. *Id.* Knowing violations can result in a civil penalty of fifteen percent per day up to a maximum 300%. *Id.* A second knowing violation can lead to a ban on selling cigarettes in the state in question for a period of up to two years. *Id.*

<sup>160</sup> *See, e.g., id.*

<sup>161</sup> Stmt. of Claim Facts ¶ 66; *see id.* Argument ¶ 75.

<sup>162</sup> *See, e.g.*, IOWA CODE ANN. § 453C.1(10) (App. tab 6); MO. ANN. STAT. § 196.1000(j) (App. tab 6); OKLA. STAT. ANN. tit. 37, § 600.22(10) (App. tab 6); MSA Exh. T at T-3 (Definitions Section ¶ (j)).

which they would remain and the markets that they would be forced to surrender.”<sup>163</sup> The Escrow Statutes, however, all follow the Model Statute in subjecting NPMs to a prohibition from selling cigarettes in the state upon a finding of persistent failure to comply with their escrow payment obligations.<sup>164</sup> Furthermore, the Escrow Statutes in each of these states adopt the terms of the Model Statute that allowed claimants and other tobacco product manufacturers to deploy the strategy of localizing their sales in a few states, in order to maximize the amount of funds released from escrow. The release from escrow provision of the Model Statute, uniformly enacted by the Settling States, provides that if the amount a tobacco product manufacturer places into escrow in a state in a particular year is greater than that state’s share of the total payments the manufacturer would have made for its sales as a participant in the MSA, the tobacco product manufacturer is entitled to a release of the excess amount.<sup>165</sup> Claimants have been able to secure releases of the major part of their escrow payments in the states where they have chosen to concentrate their sales in a given year.<sup>166</sup> If being forced to make such strategic decisions constitutes a cognizable breach resulting in loss or damage under NAFTA Chapter Eleven (and the United States contends that it does not), that breach and accompanying loss or damage arose at the time the Escrow Statutes were enacted.

---

<sup>163</sup> Stmt. of Claim Argument ¶ 168.

<sup>164</sup> See, e.g., IOWA CODE ANN. § 453C.2(2)(c) (App. tab 6); MO. ANN. STAT. § 196.1003(b)(3) (App. tab 6); OKLA. STAT. ANN. tit. 37, § 600.23(E) (App. tab 6); MSA at T-5.

<sup>165</sup> See, e.g., IOWA CODE ANN. § 453C.2(2)(b)(2) (App. tab 6); MO. ANN. STAT. § 196.1003(b)(2)(B) (App. tab 6); OKLA. STAT. ANN. tit. 37, § 600.23(B)(2) (App. tab 6); MSA at T-4 to T-5.

<sup>166</sup> In Arkansas, for example, Grand River placed \$1,691,813.81 in escrow for its 2003 sales in April 2004. It received an immediate release from escrow of \$1,461,535.30. See *Grand River v. Beebe*, Case No. 05-5051 (W.D. Ark.), Declaration of Steve Williams (Mar. 28, 2005) ¶ 6 (attached as Exh. D to Plaintiffs’ Brief in Support of Motion for Preliminary Injunction) (App. tab 32).

The first Escrow Statutes enacted in states where Grand River's cigarettes were sold took effect in May, June and July 1999. Approximately 43,000 cigarettes made by Grand River were sold in Iowa in 1999 after its Escrow Statute took effect in May 1999.<sup>167</sup> Over 13 million Grand River cigarettes were sold in Missouri after its Escrow Statute became effective in July 1999.<sup>168</sup> And 7.5 million Grand River cigarettes were sold in Oklahoma during the period from June 1999 through December 1999 when Oklahoma's Escrow Statute was in effect.<sup>169</sup> By June 2000 – more than three years before claimants submitted their claims to arbitration – each of the relevant Settling States had enacted an Escrow Statute that followed the terms of the MSA's Model Statute.<sup>170</sup> Claimants knew, or should have known, at the time these statutes were enacted of any alleged breach and resulting damage arising therefrom.

---

<sup>167</sup> *Iowa v. Grand River*, Equity No. CE43095, Pet. ¶ 9 (Nov. 28, 2001) (App. tab 45).

<sup>168</sup> *Missouri v. Native Tobacco Direct Co.*, Case No. 00CV324140, Pet. for Prelim. and Permanent Injunctive Relief, and Recovery of Civ. Penalties, Attorney's Fees and Costs ¶ 28 (June 13, 2000) (App. tab 48).

<sup>169</sup> *Oklahoma v. Grand River*, No. CJ2002-19814, Pet. ¶ 22 (Dec. 31, 2002) (App. tab 60).

<sup>170</sup> See Table and attached text of all Escrow Statutes at App. tab 6; ALA. CODE §§ 6-12-1-3 (1999) (effective Sept. 1, 1999); ALASKA STAT. §§ 45.53.010-100 (1999) (effective June 4, 1999); ARIZ. REV. STAT. ANN. § 44-7101 (2000) (effective Mar. 29, 2000); ARK. CODE ANN. §§ 26-57-260-261 (1999) (effective Apr. 6, 1999); CAL. HEALTH & SAFETY CODE §§ 104555-104557 (2000) (effective Jan. 1, 2000); COLO. REV. STAT. ANN. §§ 38-28-201-203 (1999) (effective July 1, 1999); CONN. GEN. STAT. ANN. §§ 4-28h-28j (2000) (effective June 1, 2000); DEL. CODE ANN. tit. 29, §§ 6080-6082 (1999) (effective July 20, 1999); D.C. CODE ANN. §§ 7-1801.01-.02 (1999) (effective June 30, 1999); GA. CODE ANN. §§ 10-13-1-4 (1999) (effective Apr. 8, 1999); HAW. REV. STAT. ANN. §§ 675-1-3 (1999) (effective July 2, 1999); IDAHO CODE §§ 39-7801-7803 (1999) (effective July 1, 1999); 30 ILL. COMP. STAT. ANN. 168/1-999 (1999) (effective June 30, 1999); IND. CODE §§ 24-3-3-1-14 (1999) (effective July 1, 1999); IOWA CODE ANN. § 453C (1999) (effective May 20, 1999); KAN. STAT. ANN. §§ 50-6a01-6a03 (1999) (effective May 20, 1999); KY. REV. STAT. ANN. §§ 131.600-.602 (2000) (effective June 30, 2000); LA. REV. STAT. ANN. §§ 5061-5063 (1999) (effective July 1, 1999); ME. REV. STAT. ANN. tit. 22, §§ 1580-G-I (1999) (effective June 4, 1999); MD. CODE ANN., BUS. REG. §§ 16-501-503 (1999) (effective June 1, 1999); MASS. GEN. LAWS ANN. ch. 94E, §§ 1-2 (2000) (effective June 29, 2000); MICH. COMP. LAWS ANN. §§ 445.2051-2052 (1999) (effective Dec. 28, 1999); MO. ANN. STAT. §§ 196.1000-1003 (1999) (effective July 1, 1999); MONT. CODE ANN. §§ 16-11-401-404 (1999) (effective Apr. 21, 1999); NEB. REV. STAT. §§ 69-2701-2703.01 (1999) (effective Apr. 29, 1999); NEV. REV. STAT. ANN. 370A.010-.160 (1999) (effective May 24, 1999); N.H. REV. STAT. ANN. §§ 541-C:1-C:3 (1999) (effective July 1, 1999); N.J. STAT. ANN. §§ 52:4D-1-4 (1999) (effective June 28, 1999); N.M. STAT. ANN. §§ 6-4-9-14 (1999) (effective June 18, 1999); N.Y. PUB. HEALTH LAW §§ 1399-nn-pp (1999) (effective Nov. 27, 1999); N.C. GEN. STAT. §§ 66-290-291 (1999) (effective July 15, 1999); N.D. CENT. CODE §§ 51-25-01-02 (1999) (effective Apr. 8,

Like the conclusion of the MSA, passage of the Escrow Statutes by state legislatures was reported in the media, and thus claimants should have discovered them.<sup>171</sup> Given the widespread publicity surrounding the conclusion of the MSA, which attached the Model Statute, as well as the publicity surrounding the enactment of the Escrow Statutes, any manufacturer of cigarettes for the U.S. market would reasonably have known about their existence.

Whether or not claimants had actual knowledge of the challenged Escrow Statutes prior to March 12, 2001, however, is immaterial. Claimants intended their products to be sold in various states within the United States. They were responsible for ensuring that they complied with all applicable state and federal laws.<sup>172</sup> It is a well-accepted maxim

---

1999); OHIO REV. CODE ANN. §§ 1346.01–.02 (1999) (effective June 30, 1999); OKLA. STAT. ANN. tit. 37, §§ 600.21–.23 (1999) (effective June 8, 1999); OR. REV. STAT. ANN. §§ 323.800–.806 (1999) (effective Oct. 23, 1999); PA. STAT. ANN. tit. 35, §§ 5671–5675 (2000) (effective June 22, 2000); 24 P.R. LAWS ANN. §§ 15001–15003 (2000) (effective Sept. 29, 2000); R.I. GEN. LAWS §§ 23-71-1–3 (1999) (effective June 29, 1999); S.C. CODE ANN. §§ 11-47-10–40 (1999) (effective June 30, 1999); S.D. CODIFIED LAWS §§ 10-50B-1–13 (1999) (effective July 1, 1999); TENN. CODE ANN. §§ 47-31-101–103 (1999) (effective May 26, 1999); UTAH CODE ANN. §§ 59-22-201–203 (1999) (effective July 1, 1999); 27 V.I. CODE ANN. § 305d (2001) (effective Feb. 1, 2001); VT. STAT. ANN. tit. 33, §§ 1912–1914 (2000) (effective May 12, 2000); VA. CODE ANN. §§ 3.1-336.1–.2 (1999) (effective July 1, 1999); WASH. REV. CODE ANN. §§ 70.157.005–.030 (1999) (effective May 18, 1999); W. VA. CODE ANN. §§ 16-9B-1–4 (1999) (effective Mar. 12, 1999); WIS. STAT. ANN. § 895.10 (2000) (effective May 8, 2000); WYO. STAT. ANN. §§ 9-4-1201–1202 (2000) (effective Mar. 13, 2000). *See also* Stmt. of Claim Exh. 17 (table listing “Escrow Laws” for Settling States, excluding the District of Columbia, Kentucky, and the territories). Only Guam and the Northern Mariana Islands enacted their Escrow Statutes later than March 12, 2001. *See* GUAM CODE ANN. §§ 221201–221203 (2001) (effective Mar. 13, 2001) (App. tab 6); 12 N. MAR. I. CODE § 45 (2001) (effective Apr. 20, 2001) (App. tab 6). Grand River does not allege that it sold or intended to sell cigarettes in either of these two distant territories.

<sup>171</sup> *See, e.g.*, Dennis Gale, *Committee Endorses Tobacco Escrow Fund*, ABERDEEN AM. NEWS, Jan. 21 1999, at 3A (App. tab 103); *Tobacco Account Bill Passes*, ABERDEEN AM. NEWS, Jan. 23, 1999, at 1B (App. tab 104); AP, *Bill: Join Settlement or Pay Up*, SEATTLE TIMES, Feb. 13, 1999, at A16 (App. tab 106); *House approves tobacco measure*, AUGUSTA CHRON., Feb. 16, 1999, at C10 (App. tab 107); *Legislation Update: Targeting Tobacco*, SMOKESHOP, (Feb./March 2000), at 1 (App. tab 109).

<sup>172</sup> Claimants demonstrated on at least one occasion their actual knowledge of the obligation to comply with state law governing the sale of cigarettes. In a November 3, 1999 letter, Arthur Montour, Jr. informed the Missouri Department of Revenue that Native Tobacco Direct had no sales through its Missouri partner in the month of October 1999. The Missouri Department of Revenue is the agency responsible for ensuring compliance with Missouri’s Escrow Statute. *See* Letter from Arthur A. Montour, Vice President, Native Tobacco Direct Co., to State of Missouri, Dept. of Revenue (Nov. 3, 1999) (App. tab 15).

in municipal legal systems that ignorance of the law is no excuse.<sup>173</sup> Courts and tribunals applying international law have similarly recognized and applied this principle.<sup>174</sup>

Claimants must be deemed to have had knowledge of the law at the time they became subject to that law. Even accepting claimants' contention that the MSA did not become a "measure" until the Settling States "decided to implement its terms through legislation," that implementation date is still more than three years prior to the submission of these claims to arbitration.<sup>175</sup> All claims challenging the Escrow Statutes are therefore time-barred.

### **C. State Enforcement Of The MSA Regime Provided Claimants With Actual Knowledge Of The Alleged Breaches and Damages**

Settling States began actively attempting to secure compliance by Grand River with its obligations under the MSA regime as early as 1999. State officials mailed notices and warning letters to Grand River and its importer and filed civil lawsuits against

---

<sup>173</sup> See, e.g., *Bryan v. United States*, 524 U.S. 184, 196 (1998) (noting "traditional rule that ignorance of the law is no excuse"); *Albert v. Canada*, [1995] 91 F.T.R. (Can.) 237, 239 ¶ 10 ("Ignorance of the law is not an excuse. This is particularly so in the case of time limitations."); *Regina v. Jorgensen*, [1995] 4 S.C.R. (Can.) 55, 85 ("[I]t is well established that ignorance of the law is no defense"); *Johnson v. Youden*, [1950] 1 All. E.R. 300 (same); *Germany v. European Commission*, Case C-512/99, 2003 E.C.R. I-00845 ¶ 56 ("[T]here is no legal principle or rule which requires [the Commission] to inform a Member State of the provisions of Community law which are applicable at a given time. The general principle that ignorance of the applicable law is no excuse also applies to [E.U.] Member States.").

<sup>174</sup> See, e.g., *Maffezini v. Kingdom of Spain*, 40 I.L.M. 1148, 1159 (2001) ("Apart from the general principle that ignorance of the law is no defense, there is evidence in this case that the Claimant was informed of these requirements."); *Payment of Various Serbian Loans Issued in France (Fr. v. Serb.)*, 1929 P.C.I.J. (ser. A) No. 20 (July 12) at 56 (Bustamante, dissenting) ("Since ignorance of the law cannot be pleaded, all the holders of bonds or coupons of Serbian loans must be taken as knowing that, according to the law of France, the obligation resulting from a loan in money is always simply for the amount in figures indicated in the contract . . ."); *id.* at 72 (Pessoa, dissenting) (noting that the French Civil Code Article 1895 "was in force at the time when the Serbian loans were contracted and the subscribers could not be ignorant of it."); *Payment in Gold of Brazilian Federal Loans Contracted in France (Fr. v. Brazil)*, 1929 P.C.I.J. (ser. A) No. 21 (July 12) at 133 & 149 (dissenting opinions of Bustamante & Pessoa (same)); *MTD Equity Sdn. Bhd. v. Republic of Chile*, 44 I.L.M. 91, 115 (ICSID 2005) (finding that "it is the responsibility of the investor to assure itself that it is properly advised [regarding legal and regulatory requirements], particularly when investing abroad in an unfamiliar environment" and that respondent Chile had "no obligation to inform the Claimants and that the Claimants should have found out by themselves what the regulations and policies of the country were.").

<sup>175</sup> See Stmt. of Claim Argument ¶ 66.

Grand River more than three years prior to claimants' submission of their claims to arbitration. These efforts demonstrate that claimants actually knew of the alleged breaches and losses of which they now complain more than three years before they submitted their claims to arbitration.

Enforcement efforts continue to the present, in the form of additional letters, lawsuits, and Complementary Legislation that was enacted to prevent evasion of the payment obligations established by the MSA and Escrow Statutes. None of these ongoing efforts, however, gives rise to any additional claim. Moreover, the fact that claimants continue to incur loss or damage as a result of these measures does not save claimants' claims.<sup>176</sup> Thus, even under claimants' view that their claims did not arise and no damage occurred until Settling States actually enforced their laws directly against claimants and their businesses, the claims are time-barred.<sup>177</sup>

**1. Claimants Knew The Escrow Statutes Were Being Enforced Against Them More Than Three Years Before Submission Of Their Claims To Arbitration**

Although state governments are entitled to expect compliance with their laws without directly notifying all of those affected, some states took affirmative steps to notify affected companies, including Grand River, of the passage of their Escrow Statutes. The Missouri Department of Revenue, for instance, mailed a letter to Grand River on April 25, 2000.<sup>178</sup> At the time of the letter, Grand River was already delinquent

---

<sup>176</sup> See NAFTA arts. 1116(2) & 1117(2) (limitations period begins when claimant *first* acquires, or should have *first* acquired knowledge); *Mondev* Awd. ¶ 87 (“[a] claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.”); ILC Art. 14(1) (breach occurs “at the moment when the act is performed, even if its effects continue.”).

<sup>177</sup> See Stmt. of Claim Argument ¶¶ 15, 16 & 67.

<sup>178</sup> Letter from Quentin Wilson, Director of Revenue, Missouri Dept. of Revenue, to Grand River Enterprises (Apr. 25, 2000) (App. tab 16). It is likely that other states mailed similar notices and letters to Grand River. See, e.g., Letter from Neal Leader, Senior Assistant Attorney General, Oklahoma Office of

in placing funds into escrow, which were due by April 15, 2000. The April 25, 2000 letter provided Grand River with actual knowledge that Missouri had enacted its Escrow Statute on July 1, 1999. Missouri's letter not only "remind[ed]" Grand River that the Escrow Statute was in effect, the letter also attached the entire text of the statute and listed all of the actions Grand River was required to take: (1) establish an escrow account; (2) certify the establishment of the account in writing to state officials; (3) deposit funds into escrow by April 15 each year in the amounts specified in the Model Statute; and (4) certify annual sales figures and that deposits for those sales have been made.<sup>179</sup> The letter also warned Grand River of the penalties for noncompliance, including penalties of up to 300% of the amount owed in escrow.

Furthermore, Missouri's letter put claimants on notice of the enforcement of the Escrow Statutes in other states. Claimants reasonably should have recognized the loss or damage posed not only by Missouri's enforcement efforts, but also by all states' enforcement of the MSA and Escrow Statutes.

Grand River also should have known of the enactment of the Escrow Statutes as a result of direct notice provided to its alleged business partners, Star Tobacco and Omaha Nation Tobacco.<sup>180</sup> North Dakota's Office of State Tax Commissioner notified Star Tobacco, among other tobacco product manufacturers, of the Escrow Statute's passage

---

Attorney General, to Native Tobacco Direct Co. (March 19, 2001) (referring to other notices sent previously on multiple occasions to Grand River and Native Tobacco Direct) (App. tab 18). The passage of time, however, has compromised the United States' ability to obtain a complete set of all such documents. The difficulty in obtaining evidence is, of course, one of the policy reasons for imposing limitations periods for bringing claims. *See, e.g., supra* n. 126.

<sup>179</sup> *Id.*

<sup>180</sup> *See* Facts *supra* § I(B)(4) at pp 19-20.

and requirements on July 8, 1999.<sup>181</sup> The North Dakota letter also identified to all recipients the long list of other states where Escrow Statutes had already been enacted. Nebraska mailed direct notice to Omaha Nation Tobacco, with which Jerry Montour and Kenneth Hill claim to have had a business relationship, in May 2000. These multiple notices that claimants and their affiliates received from Settling States that the MSA was being implemented in a manner that affected them ensured that claimants knew of the alleged breach and resulting loss or damage at that time. This evidence of direct notice rebuts claimants' oft-repeated assertions that they were ignorant until 2002 that the MSA-related measures could cause them loss.<sup>182</sup>

Some states even filed lawsuits against Grand River based on its non-compliance with MSA-related legislation more than three years before claimants submitted their claims to arbitration. After Missouri's "reminder" letter to Grand River went unheeded, the Missouri Attorney General brought a civil action against Grand River and several other defendants (including Native Tobacco Direct) in June 2000 for the failure to establish and place funds into an escrow account for sales in Missouri of Grand River's cigarettes. The petition requested that the court find that Grand River knowingly violated the Escrow Statute, and assess penalties up to a total of \$394,115.85.<sup>183</sup> The Circuit

---

<sup>181</sup> Letter from John Quinlan, Compliance Officer, North Dakota Office of State Tax Commissioner, to NPMs (July 8, 1999) (App. tab 16).

<sup>182</sup> See Stmt. of Claim Argument ¶¶ 13, 15, 16, 64.

<sup>183</sup> *Missouri v. Native Tobacco Direct Co.*, Case No. 00CV324140, Pet. for Prelim. and Permanent Injunctive Relief and Recovery of Civ. Penalties, Attorney's Fees and Costs (June 13, 2000) at 13 (App. tab 48).

Court of Cole County, Missouri later held that Grand River knowingly violated Missouri's Escrow Statute by failing to place funds into escrow for its 1999 sales.<sup>184</sup>

Claimants were aware of this lawsuit shortly after it was filed in June 2000. Missouri's lawsuit received widespread contemporaneous media attention, including reports in the Canadian print and broadcast media and the local newspapers where claimants reside.<sup>185</sup> Steve Williams, Grand River's president, acknowledged in comments to the press at the time that the company was aware of the lawsuit and had already instructed its U.S. lawyers regarding its defense.<sup>186</sup> Williams made arguments at the time Missouri filed its lawsuit that bear a striking similarity to claimants' assertions before this Tribunal. He claimed that the Settling States were attempting to force small cigarette manufacturers to make payments despite their not being parties to the MSA: "It's the big (tobacco companies) that got into this problem and now they're making everyone else do it."<sup>187</sup>

Actual knowledge that a single state was suing Grand River for its failure to comply put claimants on notice of the loss or damage arising from noncompliance in any state with an Escrow Statute. As the media coverage of the Missouri lawsuit indicated, in July of 2000, more than thirty other states had enacted Escrow Statutes and were

---

<sup>184</sup> *Missouri v. Grand River*, Case No. 012-10225, Order and Judgment (July 26, 2002) (referring to previous judgment in the Circuit Court of Cole County Missouri) (App. tab 50).

<sup>185</sup> See, e.g., Agnes Palazzetti, *Tobacco seller sued for Missouri arrears*, BUFFALO NEWS, July 20, 2000 (App. tab 110); Kate Barlow, *Six Nations' cigarettes in lawsuit*, HAMILTON SPECTATOR, July 31, 2000 (App. tab 112); *BC-Cigarette-Suit*, CANADIAN PRESS, July 31, 2000 (App. tab 113); AP, *Missouri sues Native American cigarette company for failing to pay health dues*, July 31, 2000 (App. tab 111); *Native cigarette company sued by Missouri for failing to pay health dues*, CANADIAN PRESS NEWSWIRE, July 31, 2000 (App. tab 114); *Prep-Business Report*, BROADCAST NEWS, Aug. 1, 2000 (App. tab 115).

<sup>186</sup> Kate Barlow, *Six Nations' cigarettes in lawsuit*, HAMILTON SPECTATOR, July 31, 2000 ("He said U.S. lawyers have been instructed to fight the case on the grounds that First Nations cigarette manufacturing companies are exempt from paying into the escrow accounts.") (App. tab 112).

<sup>187</sup> *Id.*

expected to follow Missouri's lead in demanding compliance with escrow payment obligations.<sup>188</sup>

Grand River's insistence before this Tribunal that it was not aware of any actions against it until March 2002 is flatly contradicted by this evidence and its own statements.<sup>189</sup> In addition to Steve Williams' comments to the press, Grand River admitted in its Amended Complaint in federal court in New York that "[s]ince January 2001," the Settling States' attorneys general "have enforced, threatened to enforce, and publicly announced their enforcement of the Escrow Statutes against NPMs, including Grand River, through *inter alia*, the commencement and threatened commencement of litigation against Grand River and the Native American and non-Native entities that sell tobacco products produced and packaged by Grand River."<sup>190</sup>

Thus, claimants received direct notice and contemporaneously admitted that the MSA and Escrow Statutes applied to them – and were being enforced against them – more than three years prior to submission of these claims to arbitration.

## **2. Ongoing Enforcement Efforts By States Do Not Extend The Limitations Period**

Although enforcement efforts continued beyond March 12, 2001, and throughout the three years prior to claimants' submission of their Chapter Eleven claims, those efforts do not extend the date on which claimants knew or should have known of the

---

<sup>188</sup> Agnes Palazzetti, *Tobacco seller sued for Missouri arrears*, BUFFALO NEWS, July 20, 2000 (App. tab 110).

<sup>189</sup> See Stmt. of Claim, Argument ¶ 15.

<sup>190</sup> *Grand River v. Pryor*, Case No. 02 CV 5068 (S.D.N.Y.) Am. Compl. (Oct. 23, 2003) ¶ 11 (App. tab 35).

alleged breaches and resulting loss or damage.<sup>191</sup> International tribunals have recognized that subsequent efforts by a State to secure compliance with a regulatory regime established years earlier do not give rise to a new claim.<sup>192</sup>

All of the civil actions filed against Grand River continued the Settling States' efforts to secure compliance by claimants and other NPMs with pre-existing obligations under the MSA and the Escrow Statutes. Many of those actions seek payments for sales made by Grand River in 1999 and 2000.<sup>193</sup> Claimants' alleged breach and loss or damage arose at the time the Escrow Statutes imposed obligations on them, not at the conclusion of legal proceedings arising out of those Escrow Statutes.<sup>194</sup> Thus, the enforcement proceedings filed within the three-year limitations period do not give rise to new claims of breach and resulting loss or damage.

Settling States also implemented Complementary Legislation to improve their ability to enforce the Escrow Statutes without incurring the expense of filing civil

---

<sup>191</sup> See *Mondev Awd*, ¶ 87 (“[a] claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.”); ILC Art. 14(1) (breach occurs “at the moment when the act is performed, even if its effects continue.”).

<sup>192</sup> See *Empresas Lucchetti v. Republic of Peru*, ICSID Case No. ARB/03/4, Award ¶¶ 53-56 (Feb. 7, 2005) (dismissing claim for lack of jurisdiction and finding dispute arose before entry into force of the treaty when municipal authorities began “repeated efforts to compel Claimants to comply with the rules and regulations applicable to the construction of their factory in the vicinity of [an] environmental reserve,” and not when additional environmental decrees issued after the entry into force of the treaty because those decrees “merely continued the earlier dispute . . . .”); *Phosphates in Morocco*, 1938 P.C.I.J., Series A/B, No. 74 at 25-26 (June 14) (upholding objection to jurisdiction *ratione temporis* because the alleged “monopolization” of mining was a “régime instituted” prior to the treaty establishing consent to jurisdiction, and rejecting claimant’s argument that the tribunal had jurisdiction because that regime was still in operation after the treaty entered into force).

<sup>193</sup> See Facts *supra* § I(B)(4) at p. 20.

<sup>194</sup> See, e.g., *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 I.C.J. 12 ¶ 42 (Apr. 26) (rejecting argument that dispute over alleged conflict between Headquarters Agreement and legislation enacted and in force in the United States had not yet arisen because court proceedings to enforce the legislation were still pending).

actions.<sup>195</sup> These improved enforcement efforts similarly do not extend the date on which claimants knew or should have known about the Escrow Statutes and other requirements created by the MSA. Claimants acknowledge that the Complementary Legislation was designed to “further” the goals of the MSA and Escrow Statutes.<sup>196</sup> Claimants’ complaint about the Complementary Legislation, however, does not differ from their complaint about the previously-enacted Escrow Statutes. The Complementary Legislation imposed no new payment obligations or penalties on tobacco product manufacturers. Rather it reinforced those already imposed by the Escrow Statutes.<sup>197</sup> The fact that the Complementary Legislation was enacted less than three years before claimants submitted their claims does not cure the temporal infirmities of those claims.

Moreover, the Complementary Legislation cannot independently support a NAFTA claim because claimants have not alleged any additional loss or damage resulting from the Complementary Legislation. In order to submit a claim to arbitration under NAFTA Chapter Eleven, a claimant must allege that a Party has breached a provision in Section A of the NAFTA, and that the investor or enterprise “has incurred loss or damage *by reason of, or arising out of* that breach.”<sup>198</sup> That loss or damage, linked to the alleged breach, must have first occurred within three years of the date claimants submitted their claim to arbitration. As the NAFTA Chapter Eleven tribunal in

---

<sup>195</sup> States with Complementary Legislation typically post on their website or otherwise make public a list of the brands of compliant manufacturers and a list of those brands that cannot legally be stamped or distributed for sale. These directories allow tax-stamping agents to determine readily which brands they may legally stamp, thereby advancing states’ enforcement efforts and making it more difficult for manufacturers to avoid compliance.

<sup>196</sup> Stmt. of Claim Facts ¶ 68; *see also id.* Argument ¶ 68.

<sup>197</sup> Although the Complementary Legislation prohibits tax-stamping agents from stamping for sale any brands of cigarettes made by companies that have not certified compliance with the Escrow Statutes, neither claimants nor their alleged enterprises are authorized tax-stamping agents.

<sup>198</sup> NAFTA arts. 1116(1) & 1117(1) (emphasis added).

*Methanex Corp. v. United States of America* found, “Articles 1116 and 1117 [require] a claim of loss or damage that originates in the measure adopted or maintained by the NAFTA Party.”<sup>199</sup> The *Mondev* tribunal likewise read the terms of Articles 1116(2) and 1117(2) as requiring that the “‘loss or damage’ refer to the loss or damage suffered by the investor as a result of the breach.”<sup>200</sup> Because the Complementary Legislation imposed no new additional loss or damage on claimants, and because it merely continued the effects of the Escrow Statutes, claimants may not rely on the Complementary Legislation as a basis for their claims.

Similarly, claimants fail to allege that they have incurred any loss or damage “by reason of, or arising out of” the so-called “Additional State Measures” or equity assessment laws in Michigan and Minnesota.<sup>201</sup> To the contrary, claimants assert that they have been “excluded from participating in a number of State markets, including . . . Michigan.”<sup>202</sup> Michigan’s law took effect recently, in January 2004, merely two months before claimants submitted their claims to arbitration. Claimants do not allege that they have incurred any obligation in Michigan under that law. Claimants are also silent as to their involvement, if any, in the Minnesota market. Thus, the last-minute addition of the Michigan and Minnesota additional measures to the claim does not save the claims from being time-barred.

---

<sup>199</sup> Final Award of the Tribunal on Jurisdiction and Merits, at Part II, Ch. F, ¶ 26 (Aug. 3, 2005).

<sup>200</sup> *Mondev* Awd. ¶ 87.

<sup>201</sup> See Stmt. of Claim Facts ¶¶ 72-74 (making no allegation that claimants have made or been assessed any payment obligations under the Michigan or Minnesota acts).

<sup>202</sup> *Id.* Argument ¶ 170.

### III. CLARIFICATION

Pursuant to the Tribunal's October 26, 2005 letter, the United States elaborates on the insufficiency of claimants' proof that Arthur Montour, Jr. possesses the requisite nationality to pursue a claim against the United States under Chapter Eleven of the NAFTA. Article 1101(1) limits the scope and coverage of Chapter Eleven to claims against a Party by an investor who is a national of "another Party." Neither Chapter Eleven nor international law permits a claim by a person against the State of which he or she is a national.<sup>203</sup> In the case of dual nationality, a State is responsible for a claim only if the claimant's dominant and effective nationality is that of the other State.<sup>204</sup>

Claimants bear the burden of proving that they possess the requisite nationality to pursue their Chapter Eleven claims. Evidence of nationality is naturally in claimants'

---

<sup>203</sup> See *Loewen Group v. United States of America*, Case No. ARB(AF)/98/3, Award ¶ 223 (June 26, 2003) ("The format of NAFTA is clearly intended to protect the investors of one Contracting Party against unfair practices occurring in one of the other Contracting Parties. It was not intended to and could not affect the rights of American investors in relation to practices of the United States that adversely affect such American investors."); *Forêts du Rhodope Central (Fond) (Greece v. Bulg.)*, 3 R.I.A.A. 1389, 1421 (Mar. 29, 1933) ("A l'époque où s'est produit le fait dommageable – la prétendue confiscation des forêts – [deux des personnes en faveur desquelles la demande a été présentée] étaient donc incontestablement ressortissants du pays qui prenait les mesures incriminées. Dans ces conditions, il ne saurait être admissible, selon le droit international commun, de reconnaître au Gouvernement [demandeur] le droit de présenter des réclamations à leur profit pour ces faits dommageables, étant donné que ceux-ci ont été causés par leur propre Gouvernement.") ("At the time of the occurrence of the wrongful act – the supposed confiscation of forests – [two of the persons on whose behalf the claim was presented] were therefore indisputably nationals of the country that adopted the challenged measures. In these conditions, it would be impermissible, according to customary international law, to recognize in the claimant Government the right to present claims on their behalf for actionable damages, given that such damages were caused by their own Government.") (translation by counsel); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 460 (6th ed. 2003) (stating that in order for a claim to be admissible under international law, a claimant must "(a) hav[e] the nationality of the State by whom it is put forward, and (b) not hav[e] the nationality of the State against whom it is put forward").

<sup>204</sup> See *Mergé Case (Italy-U.S. Cl. Comm'n)* 14 R.I.A.A. 236, 241 (1955); *Case No. A/18*, 5 IRAN-U.S. CL. TRIBUNAL REP. 251 (1984). Customary international law looks to a State's municipal law to define who may be considered a national in any given situation. See 8 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* § 7, at 48 (1967); 2 OPPENHEIM'S *INTERNATIONAL LAW* 853 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992); see also Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 12, 1930, art. 1, 179 L.N.T.S. 89 ("It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.").

possession and control. Official government documents, such as the copies of Canadian Government-issued passports submitted on behalf of Jerry Montour and Kenneth Hill, are examples of the type of document that suffices to prove nationality.<sup>205</sup> It is therefore suspect that the only document supplied in support of Arthur Montour, Jr.'s nationality is a letter dated March 16, 2005, apparently signed by the Membership Registrar for the Mohawk Council of Kahnawake.<sup>206</sup> Arthur Montour, Jr. has provided neither a copy of a Canadian passport, nor any other document demonstrating that the Government of Canada considers him to be Canadian. While the Mohawk Council letter purports to "certify" that Arthur Montour, Jr. was born in Canada, that letter does not prove that Arthur Montour, Jr. has maintained Canadian nationality and is not now a United States national.

On the other hand, claimants' own allegations suggest that Arthur Montour, Jr. has long resided on reservation land on the United States side of the border with Canada.<sup>207</sup> The United States has also discovered that Arthur Montour, Jr. possesses a U.S. Social Security number. Consequently, claimants' failure of proof, combined with these contrary indications, provide reason to doubt that Arthur Montour, Jr. possesses the requisite Canadian nationality or that he has dominant and effective Canadian nationality. Absent sufficient evidence from claimants that Arthur Montour, Jr. is a Canadian national, this Tribunal lacks jurisdiction over his claims.

---

<sup>205</sup> See Stmt. of Claim. Exhs. 2 & 3 (copies of Canadian passports for Jerry Montour and Kenneth Hill).

<sup>206</sup> *Id.* Exh. 4.

<sup>207</sup> *Id.* Facts ¶ 8.

## CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Tribunal render an award: (a) in favor of the United States and against claimants, dismissing claimants' claims in their entirety and with prejudice; and (b) pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules, ordering that claimants bear the costs of this arbitration, including the United States' costs for legal representation and assistance.

*Respectfully submitted,*

---

Mark A. Clodfelter  
*Assistant Legal Adviser*  
Andrea J. Menaker  
*Chief, NAFTA Arbitration Division*  
CarrieLyn D. Guymon  
*Attorney-Adviser*  
*Office of International Claims and*  
*Investment Disputes*  
UNITED STATES DEPARTMENT OF STATE  
Washington, D.C. 20520

December 5, 2005