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

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

12

13 CLAIMANTS/INVESTORS,

14

15 V.

16

17 UNITED STATES OF AMERICA,

18

19 RESPONDENT/PARTY.

20 -----

21

VOLUME II

22

ARBITRATION HEARING

23

24

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0476

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2 TRANSCRIPT of the stenographic  
3 notes of the proceedings in the  
4 above-entitled matter, as taken by and  
5 before TAB PREWETT, a Registered  
6 Professional Reporter, a Certified  
7 Shorthand Reporter of the State of New  
8 Jersey, and Notary Public of the State of  
9 New Jersey, held at the Offices of the  
10 American Arbitration Association,  
11 International Centre for Dispute  
12 Resolution, 1633 Broadway, New York, New  
13 York, on Friday, March 24, 2006, commencing  
14 at 9:12 a.m.

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1 A P P E A R A N C E S:

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MEMBERS OF THE TRIBUNAL:

3

MR. FALI S. NARIMAN, PRESIDENT

4 PROFESSOR JAMES ANAYA

MR. JOHN R. CROOK

5

6 SECRETARY OF THE TRIBUNAL:

7 UCHEORA ONWUAMAEGBU, ICSID

8

9 ATTENDING ON BEHALF OF CLAIMANTS:

10 LEONARD VIOLI, ESQ.

ROBERT J. LUDDY, ESQ.

11 CHANTELL MACINNES MONTOUR, ESQ.

12

STEVE WILLIAMS

13 ARTHUR MONTOUR

TODD WEILER, ESQ.

14

15

ATTENDING ON BEHALF OF THE UNITED STATES:

16

MARK A. CLODFELTER, ESQ.

17 ANDREA T. MENAKER, ESQ.

CARRIELYN D. GUYMON, ESQ.

18 MARK E. FELDMAN, ESQ.

WILLIAM LIEBLICH, ESQ.

19 LEWIS POLISHOOK, ESQ.

20 RENEE GARDNER

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I N D E X

OPENING PRESENTATIONS

BY MR. VIOLI	488, 852
BY MR. WEILER	768

Grand River Arbitration

PROCEEDINGS

PRESIDENT NARIMAN: Have you managed to agree on your documentation.

MR. CLODFELTER: Let me say.

MR. VIOLI: I believe so.

MR. CLODFELTER: The documents --

(There was a discussion off the record.)

PRESIDENT NARIMAN: Shall we start, please.

MR. CLODFELTER: First, I just wanted to supplement the answer that we gave to Professor Anaya yesterday regarding our argument, that it is reasonable to expect that the Seneca Nation would have informed Native Tobacco Direct once they received the complaint in the Missouri action. As

22 I explained in my response, there was  
23 no suggestion of course that every  
24 member of the Seneca Tribe was  
25 automatically informed of everything

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1 Grand River Arbitration  
2 regarding the tribe.

3 It was specifically -- as I  
4 mentioned -- a prominent economic  
5 player in the particular industry.  
6 But beyond that, too, it was because  
7 they were co-defendants in the very  
8 same lawsuit. Native Wholesale Direct  
9 and Seneca Nation remained in the same  
10 Missouri lawsuit.

11 And Seneca Nation  
12 incontrovertibly was served, and it  
13 was reasonable to expect that they  
14 would have contacted their  
15 co-defendant in the Seneca Nation.

16 But, in addition, I would just  
17 like to supplement -- we had made this  
18 argument in our reply brief as well --  
19 and it was based upon the suggestion  
20 of the Claimants, in fact, that, had  
21 the parties to the MSA notified the  
22 Seneca attorney general that -- they  
23 suggest they would have learned about  
24 the negotiations with the MSA from the  
25 Seneca attorney general. The last --

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: There is an  
3 attorney general of Seneca.

4 MR. CLODFELTER: Apparently,  
5 yes.

6 The last point I wanted to make  
7 is --

8 PRESIDENT NARIMAN: You mean in  
9 the reservation, there is an attorney  
10 general.

11 PROFESSOR ANAYA: Yes.

12 (There was a discussion off the  
13 record.)

14 PRESIDENT NARIMAN: There is a  
15 letter on record, Exhibit 17 on that.

16 MR. CLODFELTER: The last point  
17 I wanted to make is one of the  
18 documents, which I believe the  
19 Claimants will be using today,  
20 indicates that, in fact, in that  
21 action the Seneca Nation formally  
22 undertook to assist the State of  
23 Missouri in notifying Native Wholesale  
24 Direct also of the lawsuit.

25 PRESIDENT NARIMAN: You will  
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1 Grand River Arbitration  
2 come to that.

3 MR. CLODFELTER: I will come to  
4 that, but you will see that in the  
5 document.

6 The second loose end we wanted  
7 to close up related to the default  
8 judgment. First of all, judgment in  
9 the Missouri action, we have obtained  
10 that document, and I would like  
11 Ms. Guymon to describe it and  
12 distribute it.

13 PRESIDENT NARIMAN: Is it the  
14 first default judgment?

15 MR. CLODFELTER: Yes.

16 MS. GUYMON: Do you have it?

17 PRESIDENT NARIMAN: Have you  
18 got it?

19 MR. VIOLI: No.

20 PRESIDENT NARIMAN: Against --  
21 that's Native Tobacco.

22 MS. GUYMON: No, the caption is  
23 Native Tobacco Direct, et al., as we  
24 explained -- the State of Missouri  
25 sued --

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: And all  
3 which includes --

4 MS. GUYMON: Which includes  
5 Grand River.

6 PRESIDENT NARIMAN: Grand  
7 River.

8 MS. GUYMON: As Mr. Clodfelter  
9 mentioned, the Seneca Nation and Ross

10 John and several other defendants, due  
11 to the confusion.

12 PRESIDENT NARIMAN: June 2002.  
13 Is that correct?

14 MS. GUYMON: Yes.

15 PRESIDENT NARIMAN: I think you  
16 mentioned that date, Mr. Violi,  
17 yesterday.

18 MR. VIOLI: Yes.

19 PRESIDENT NARIMAN: Thank you.  
20 Just a moment, would you like to read  
21 it please.

22 MS. GUYMON: The pertinent  
23 part --

24 PRESIDENT NARIMAN: The State  
25 of Missouri appears by assistant

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1 Grand River Arbitration  
2 attorney general. Defendant Grand  
3 River appears not after notice, states  
4 motion to amend the caption by Seneca  
5 Nation granted. Caption amended to  
6 include defendant as Grand River  
7 Enterprises, Incorporated, rather than  
8 Grand River Enterprises Nation.  
9 Evidence elicited from --

10 (There was a discussion off the  
11 record.)

12 PRESIDENT NARIMAN: Well, then  
13 let me read it myself.

14 MS. GUYMON: If I can read a  
15 couple of pertinent parts --

16 PRESIDENT NARIMAN: Let me read  
17 the whole thing. I want to read it.

18 Yes, please go ahead. Please  
19 go ahead.

20 MS. GUYMON: So as we were  
21 discussing yesterday, the court did  
22 find that this first violation was a  
23 knowing violation of the statute and  
24 ordered Grand River to pay penalties  
25 of 300 percent, three times the amount

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1 Grand River Arbitration  
2 owed into escrow, to total  
3 \$402,444.87.

4           PRESIDENT NARIMAN: And this  
5 was sales in Missouri during 1999.

6           MS. GUYMON: Yes.

7           PRESIDENT NARIMAN: What is the  
8 significance of this previous order of  
9 March 25, 2002? Do we have that, to  
10 establish an escrow?

11          MS. GUYMON: Yes, in the  
12 record, in Grand River's -- in  
13 Claimants' response, I believe, in the  
14 affidavit of Mr. Shock, there are  
15 several documents provided from the  
16 Missouri docket, and one of those is  
17 a -- is it in there?

18          PRESIDENT NARIMAN: I have not  
19 seen it.

20          MS. GUYMON: I can describe the  
21 document while we look for it. It was  
22 an interlocutory order that basically  
23 gave Grand River one more chance to  
24 please comply with your escrow  
25 obligations. You have 15 days before

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1           Grand River Arbitration  
2 a default judgment would be entered.

3           PRESIDENT NARIMAN: I would  
4 like to see what it says.

5           MS. GUYMON: Sure, if you will  
6 give us a moment we will find it.

7           MR. CROOK: Perhaps we have a  
8 good deal of time pressure today,  
9 Mr. Chairman. Perhaps the Claimants  
10 could provide that to us at an  
11 opportune later time and we can move  
12 on.

13          MS. GUYMON: That's fine.

14          PRESIDENT NARIMAN: Anything  
15 else.

16          MR. CROOK: Mr. Clodfelter, did  
17 you have other points that you wanted  
18 to raise with us?

19          MR. CLODFELTER: No, that was  
20 the two points.

21          MR. CROOK: We can move to the  
22 Claimants now.

23          MR. VIOLI: What is your last

24 exhibit number -- what is your last  
25 exhibit number?

0487

1 Grand River Arbitration  
2 (There was a discussion off the  
3 record.)

4 MS. GUYMON: 145.

5 MR. VIOLI: We will mark the  
6 Smoke Shop.

7 PRESIDENT NARIMAN: You have to  
8 mark the Smoke Shop.

9 MR. VIOLI: 146.

10 PRESIDENT NARIMAN: One second.

11 MR. CROOK: We can clear that  
12 up administratively, Mr. Chairman.

13 PRESIDENT NARIMAN: Just a  
14 second, 146 is the Smoke Shop.

15 MS. GUYMON: 146 is Smoke Shop;  
16 this will be 147.

17 MR. CROOK: It has been noted  
18 in the record, Mr. Chairman.

19 (There was a discussion off the  
20 record.)

21 MS. GUYMON: Actually, if you  
22 turn to the second page --

23 (There was a discussion off  
24 the record.)

25 MS. GUYMON: As I mentioned it

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1 Grand River Arbitration  
2 shows that the court ordered Grand  
3 River to establish an escrow account  
4 for the amount demanded in the  
5 petition within 15 days, and that was  
6 their kind of ultimate chance before  
7 default judgment was entered.

8 PRESIDENT NARIMAN: May we mark  
9 this 148.

10 Yes, Mr. Violi.

11

12 PRESENTATION BY MR. VIOLI

13

14 MR. VIOLI: Mr. President,  
15 Members of the Panel, good morning. I  
16 would like to begin just by briefly  
17 going over and reviewing what we



18 propose to demonstrate to the panel.  
19 And with that, I will be presenting  
20 the main part of the argument in the  
21 presentation. To the extent we have  
22 some questions regarding case law or  
23 authority, Mr. Weiler will speak to  
24 those issues, if necessary, and lend  
25 guidance and support, as he has to us

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1 Grand River Arbitration

2 all.

3 Essentially, we have broken  
4 down the -- Claimants have broken down  
5 the presentation today into five  
6 points. And the first thing we would  
7 like to do is start with some  
8 overriding points that speak directly  
9 to the reasons why Respondent's  
10 objections cannot be sustained.

11 These points address critical  
12 issues of fundamental core  
13 deficiencies to the jurisdictional  
14 objections; and in and of themselves,  
15 they require a denial of the  
16 application.

17 We will start with that as it  
18 cuts right to the chase. We will  
19 follow with a brief history and a  
20 review of Claimants and their  
21 investments and a chronology of the  
22 events of the Claimants' background.  
23 And we will present a contemporaneous  
24 time line of the measures at issue and  
25 the background for the measures at

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1 Grand River Arbitration

2 issue.

3 This way we can, in effect,  
4 superimpose and see how the measures,  
5 when they were implemented and  
6 enforced against the Claimants, was  
7 actually at a point well beyond March  
8 12, 2001.

9 And, significantly, when  
10 Claimants should have had or did have  
11 knowledge of a breach of the NAFTA and

12 knowledge that they sustained loss --  
13 that they had already sustained loss,  
14 in anticipation of a loss, or an  
15 expectation or even a belief that you  
16 would sustain, or might -- the key  
17 word -- might sustain a loss in the  
18 future is not valid, and is not the  
19 standard under NAFTA. It's actual  
20 loss.

21 We will proceed with the  
22 discussion of the NAFTA limitations  
23 provisions and then an application of  
24 those provisions to the facts. We  
25 will follow with a response to each of

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1 Grand River Arbitration  
2 the Respondent's arguments and, more  
3 importantly, the premises and the  
4 proffered facts upon which those  
5 arguments are based. Finally, we will  
6 conclude with a summary of the points  
7 that warrant denial of the  
8 Respondent's objections.

9 First, I think it's critically  
10 important that we review a matter that  
11 was brought up or an issue that was  
12 raised that, quite frankly, should not  
13 be an issue, clearly is not from  
14 anything that was filed. And that is  
15 the amendments to the escrow statutes  
16 that started to appear in 2003 in a  
17 number of states.

18 And the reason why -- which we  
19 will see in a short while that is  
20 significant -- because that is the  
21 implementation that actually gives  
22 effect to the discrimination. And  
23 it's a little bit complicated, but  
24 I'll get into it when we go through  
25 the slide presentation.

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1 Grand River Arbitration  
2 But what we heard yesterday was  
3 tantamount from the Respondent saying  
4 that the statute of limitations for a  
5 measure can actually run or expire

6 before the breach.

7 In other words, if a law is  
8 passed in the year 2000, and it's  
9 amended in 2005, and it's amended in  
10 2005 causes a distinct, separate and  
11 further injury, or additional injury  
12 or loss, the Respondent's position is  
13 you can't complain about the 2005  
14 amendment because it occurred three  
15 years after the enactment of the  
16 statute, which is just incredible.  
17 And it's not consistent with the law,  
18 and it's certainly not consistent with  
19 the NAFTA.

20 And when a party challenges a  
21 statute or a law, they don't challenge  
22 it in its 1965 version or its 1974  
23 version. They challenge it as it's in  
24 effect at the time of the challenge.  
25 And Respondent's statement of claim is  
0493

1 Grand River Arbitration  
2 replete with references to the  
3 statutes now, what they now require,  
4 paragraph 63.

5 PRESIDENT NARIMAN: I don't  
6 want to interrupt you; but, speaking  
7 for myself, I would feel more  
8 conversant with this whole affair if  
9 you could analyze for us what is this  
10 1116 statute. First and foremost,  
11 when does it come in -- an investor  
12 may not make a claim -- does it focus  
13 on the claim? And what is the word  
14 "should have" -- "incurred" you have  
15 already mentioned; it doesn't mean  
16 anticipated loss. All that you have  
17 said.

18 It would be very useful if you  
19 could briefly summarize your case, the  
20 Claimants' case, on an interpretation  
21 of this article.

22 MR. VIOLI: Okay.

23 PRESIDENT NARIMAN: Then the  
24 whole thing gets into focus. And then  
25 you come to the amendments of the

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1 Grand River Arbitration  
2 escrow statutes and so on -- which  
3 comes much later. At least, that is  
4 how I will appreciate it.

5 MR. VIOLI: Okay. Good point  
6 Mr. President, I will address that.

7 Section 1116 requires that an  
8 investor may not make a claim -- and  
9 whether a claim is a notice of  
10 arbitration or a notice of intent,  
11 there is no authority on that. I  
12 would suggest that it's the notice of  
13 intent. But even if you take the  
14 notice of filing -- the statement of  
15 claims, which is March --

16 PRESIDENT NARIMAN: By notice  
17 of intent, you mean the notice of the  
18 arbitration?

19 MR. VIOLI: Notice of intent to  
20 file arbitration, which triggers the  
21 sit down and confer to settle the  
22 case. You have meeting. You are  
23 required to do that. We did have the  
24 meeting in Washington, DC. We were  
25 expecting a response. We realized

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1 Grand River Arbitration  
2 that the statute of limitations was  
3 falling or coming near us. We didn't  
4 get a response from the State  
5 Department.

6 Granted, it was only two weeks  
7 or three weeks. But when we saw no  
8 response, after sitting down with  
9 them, we filed our notice of claim on  
10 March 10, 2001. But the notice of  
11 intent was filed in September of 2003.

12 PRESIDENT NARIMAN: Notice of  
13 intent is September.

14 MR. VIOLI: Excuse me.

15 MS. GUYMON: September.

16 MR. VIOLI: September 2003.

17 PRESIDENT NARIMAN: And notice  
18 of arbitration.

19 MR. VIOLI: March 10th, notice

20 of claim, March 10th of 2001. Excuse  
21 me. 2004.

22 MR. CROOK: Sorry, Mr. Violi,  
23 for the record, I think there is some  
24 NAFTA authority on the question; is  
25 there not?

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1 Grand River Arbitration

2 MR. VIOLI: The Feldman case, I  
3 believe refers to it, Mr. Crook. I  
4 don't think it's dispositive, and it's  
5 certainly nothing -- there is nothing  
6 that is contemporaneous with the  
7 drafting of the negotiation of the  
8 NAFTA which supported that, that I'm  
9 aware of. But --

10 MR. CLODFELTER: Mr. President,  
11 one question, can you show on the  
12 record where you made this argument  
13 before because we don't recall it  
14 being made before -- notice of intent  
15 as commencing the period or ending the  
16 period.

17 MR. VIOLI: It was never really  
18 raised by the Respondent.

19 MS. MENAKER: Well, actually,  
20 it is the -- it was. The very first  
21 point in our objection was a  
22 discussion as of when the time  
23 limitations commences, and we referred  
24 to the Feldman case.

25 MR. VIOLI: And we did not

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1 Grand River Arbitration

2 concede that.

3 MS. MENAKER: You also did not  
4 dispute it. That --

5 MR. VIOLI: We didn't concede  
6 it, and he's asking me the point. So  
7 I am responding.

8 MR. CLODFELTER: Today is the  
9 first time to clarify that. Thank  
10 you.

11 PRESIDENT NARIMAN: He says  
12 it's notice of intent and not notice  
13 of arbitration.

14 MR. VIOLI: But even still --  
15 PRESIDENT NARIMAN: You say it  
16 makes little difference.

17 MR. VIOLI: It makes little  
18 difference in the facts,  
19 Mr. President.

20 PRESIDENT NARIMAN: That's all  
21 right.

22 MR. VIOLI: What it requires --  
23 section 1116 is first that there be --  
24 let me put it in the order of priority  
25 that we looked at.

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1 Grand River Arbitration

2 First, there must be a loss, an  
3 actual loss or damage, or  
4 expropriation -- 1110 says  
5 expropriation. 1116 talks about loss  
6 of damage.

7 So first you must sustain loss  
8 of damage. Then you must have  
9 knowledge or should have had knowledge  
10 of that loss or damage. And then,  
11 lastly, you must have had knowledge or  
12 should have had knowledge that the  
13 loss or damage was attributable to a  
14 breach of the NAFTA.

15 And the reason why we present  
16 it that way is because it is our  
17 position and it's clear that the  
18 Claimants did not sustain loss or  
19 damage before March 12, 2001,  
20 absolutely no damage. They had no  
21 knowledge of loss or damage before  
22 March 12, 2001. And --

23 PRESIDENT NARIMAN: And that is  
24 that letter.

25 MR. VIOLI: There are three

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1 Grand River Arbitration

2 letters which we will refer to. Those  
3 are the only communications that were  
4 brought to our attention that -- as  
5 being purportedly sent to the  
6 Claimants.

7 An expectation of loss or

8 damage, a possibility that a statute  
9 applies to you -- how could one say  
10 that, on April 7th, when you receive a  
11 letter that says you have to do  
12 something, which is deposit money into  
13 escrow, if you are, when really that's  
14 not what it's supposed to be -- it's  
15 supposed to tell you you can join the  
16 MSA or deposit escrows, if you are a  
17 manufacturer.

18 How could that immediately  
19 constitute a breach and a loss or  
20 knowledge of a breach and loss?

21 "Well, because the law" -- they  
22 say -- "was already in effect."

23 Right.

24 But there was no certainty and  
25 the proof is legion that there was

0500

1 Grand River Arbitration  
2 confusion.

3 PRESIDENT NARIMAN: What is  
4 that proof?

5 PROFESSOR ANAYA: What is that  
6 proof?

7 MR. VIOLI: The proof is -- I  
8 will get to it -- the definition of a  
9 "tobacco product manufacturer" says,  
10 initially, in the MSA, when they were  
11 drafting it, it says it's a  
12 manufacturer or an importer of foreign  
13 products.

14 That was in '98 before they  
15 actually formalized the MSA. The MSA  
16 was then concluded on November 23,  
17 1998.

18 And it says a manufacturer of  
19 products intended to be sold in the  
20 United States, that the manufacturer  
21 intends to be sold in the  
22 United States -- what that means,  
23 "intends to be sold in the United  
24 States," was -- we never heard  
25 before -- or an importer -- or, and

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1 Grand River Arbitration

2 these are exclusive, mutually  
3 exclusive -- or an importer of  
4 products that the manufacturer does  
5 not intend to sell in the  
6 United States -- and, lastly, a  
7 successor of either of them.

8 Now, we will see that the first  
9 lawsuit.

10 PROFESSOR ANAYA: So you are  
11 saying that the statute on its face  
12 was ambiguous.

13 MR. VIOLI: On its face, yes.

14 MR. CROOK: Mr. Violi, are you  
15 representing that the Claimants were  
16 aware of this ambiguity because I  
17 thought you represented to us that  
18 only in 2002 did you meet with them  
19 and explain these.

20 MR. VIOLI: No, no, in March of  
21 2001, March 14, 2001, there was a  
22 letter received by Mr. -- well, not by  
23 Mr. -- by Grand River. And that is  
24 the first letter in the files of Grand  
25 River or in any of the Claimants,

0502

1 Grand River Arbitration  
2 including -- it's the first letter of  
3 any communication from a state saying  
4 that there is a possibility of an  
5 application of this law.

6 MR. CROOK: I understand,  
7 Mr. Violi, but I am just trying to get  
8 the context of your ambiguity  
9 argument. You represented to us that  
10 Claimants really did not become aware  
11 of matters relating to these statutes  
12 until you met with them in 2002; is  
13 that correct.

14 MR. VIOLI: No. No. What I --  
15 in 2002 they were apprised that it  
16 actually potentially has an effect on  
17 them if the states take the following  
18 position.

19 MR. CROOK: So were they  
20 previously aware of these matters  
21 and -- but believed them to be



22 ambiguous and therefore questioned as  
23 to whether they were applicable?

24 MR. VIOLI: Yes. In March of  
25 2001, as I said, Mr. Williams

0503

1 Grand River Arbitration  
2 received -- or Mr. Williams stated  
3 that Grand River received a letter.  
4 It's the first letter or communication  
5 that they received.

6 MR. CROOK: So ambiguity comes  
7 into play only upon receipt of that  
8 letter -- is that the case?

9 MR. VIOLI: No, it comes into  
10 play on the constructive knowledge.  
11 If you were to take the position that  
12 they should have known, and they are  
13 taking, instead of actual knowledge, a  
14 person who should have known that the  
15 MSA was concluded, that it applied  
16 to --

17 PRESIDENT NARIMAN: One minute.  
18 The point is it doesn't matter what  
19 they say.

20 MR. VIOLI: Yes.

21 PRESIDENT NARIMAN: We are now  
22 wanting to know from you that you knew  
23 that it was concluded at the time when  
24 it was concluded.

25 MR. VIOLI: Probably at or

0504

1 Grand River Arbitration  
2 about that the MSA was a settlement,  
3 four companies were sued, and they  
4 settled their case. Nobody else was  
5 sued, nobody else was --

6 PRESIDENT NARIMAN: You are  
7 aware of that?

8 MR. VIOLI: Yes, that the  
9 settlement was -- there is no dispute  
10 that --

11 PRESIDENT NARIMAN: There is a  
12 dispute from all of the objections  
13 that we have read, responses -- I  
14 mean, let's get it clear.

15 Your claim of process, that you

16 knew about it, this constitutes one of  
17 the beginning of the measures taken,  
18 with respect to which you are entitled  
19 to make a claim in NAFTA, and so on.

20 MR. VIOLI: Actually, the PSOC  
21 says it's the background for the  
22 claim. It doesn't say that the MSA --  
23 because the MSA can't be a measure.

24 PRESIDENT NARIMAN: But I just  
25 want to know what is your position on

0505

1 Grand River Arbitration  
2 the MSA. Did you know about the  
3 agreement which was widely advertised  
4 in the Toronto Star and all of those  
5 newspapers, journals, et cetera? Did  
6 you or did you not know? Let us have  
7 it perfectly clear. Or you were  
8 totally unaware. You only became  
9 aware in March of 2002.

10 MR. VIOLI: No, no, no, no --  
11 the industry I would say, including  
12 the Claimants, knew that the MSA was  
13 completed. That's very clear.

14 PROFESSOR ANAYA: Well, did  
15 they know that it was being described  
16 as an agreement that would require  
17 either joining through this  
18 grandfather provision or paying into  
19 escrow?

20 MR. VIOLI: No. That was  
21 nowhere publicly disseminated or  
22 even --

23 PROFESSOR ANAYA: We saw  
24 newspaper clippings that said that.

25 MR. VIOLI: Actually, we saw

0506

1 Grand River Arbitration  
2 Financial Times which had a small  
3 blurb. And we see in the report --

4 PROFESSOR ANAYA: That's not  
5 nowhere. I mean, you stated nowhere  
6 disseminated.

7 MR. VIOLI: But, no, the  
8 Claimants have said they didn't see  
9 it. They didn't subscribe it and they

10 didn't --

11 PROFESSOR ANAYA: Well, no, you  
12 said nowhere disseminated. You said  
13 they knew about this. And I am asking  
14 if they knew about the  
15 characterization of it as requiring --  
16 either joining into the grandfather  
17 provision or paying into an escrow  
18 account.

19 MR. VIOLI: I don't think that  
20 was widely -- that what you posed  
21 precisely, Professor Anaya, was not --  
22 widely or publicly disseminated.

23 We talked about -- I think that  
24 notice or that Financial Times just  
25 said a license fee for people who do

0507

1 Grand River Arbitration  
2 not join the MSA or something to that  
3 effect, nothing about exemptions.  
4 There is talk about exemption in  
5 Mealy's Litigation Report, I think  
6 maybe a Georgia article, but not --

7 PRESIDENT NARIMAN: If you knew  
8 that the MSA was concluded and the  
9 terms of that MSA were available to  
10 you, either on web site or on the  
11 inquiry or whatever it is -- I am  
12 asking you.

13 MR. VIOLI: That's a good  
14 question because the MSA to our  
15 knowledge they haven't --

16 PRESIDENT NARIMAN: Forget  
17 them, man. We are asking you. You  
18 have -- don't go on with them. They  
19 are --

20 MR. VIOLI: You are asking me  
21 when it was available on a web site.

22 PRESIDENT NARIMAN: I'm not  
23 asking you -- I am asking you, when  
24 would you be put through notice as  
25 of -- because you are arguing the case

0508

1 Grand River Arbitration  
2 that you said you knew it was  
3 concluded.

4           Then if it was concluded, you  
5 knew it was some massive document.  
6 God knows what it said.

7           But did you make any inquiry  
8 with regard to it. That's all I'm  
9 asking you. Did you at any point in  
10 time when you knew it was concluded,  
11 that it was going to affect you or may  
12 have affected you -- you have to read  
13 it. Surely the Claimants have to read  
14 something, or, otherwise, how do you  
15 fix them with knowledge?

16           MR. VIOLI: They had no duty  
17 read it.

18           PRESIDENT NARIMAN: I am not on  
19 duty. Later on --

20           MR. VIOLI: They had no  
21 occasion to read it either,  
22 Mr. President. The MSA was put on a  
23 web site apparently at some point in  
24 time. We don't know when. Respondent  
25 didn't tell us.

0509

1           Grand River Arbitration

2           PRESIDENT NARIMAN: Again, you  
3 are mentioning Respondent. We are not  
4 bothering with the Respondent. Nobody  
5 told you. I agree.

6           But when you say that the --  
7 that you knew that the MSA was, in  
8 fact, concluded, I ask you, then were  
9 you not put on inquiry as to its  
10 terms? What were its terms?

11           And if you had read it, it  
12 might have taken you three days to  
13 read it -- and if you had read it, you  
14 would have possibly come to the  
15 conclusion that it did affect you.  
16 That's the point that I'm asking you  
17 about.

18           MR. VIOLI: But the MSA does  
19 not apply. It's not a statute or a  
20 law. It's a --

21           PRESIDENT NARIMAN: I am not  
22 saying it's a statute or law. I am  
23 asking you if the MSA as a document,

24 when it was concluded, did you -- I  
25 mean, you said you knew. That's why I

0510

1 Grand River Arbitration  
2 am -- you said industry including the  
3 Claimants knew that the MSA was  
4 concluded, so the entire industry was  
5 affected. So in order to know whether  
6 you are being affected, would you not  
7 normally read that document or get it  
8 from whatever it is?

9 MR. VIOLI: Would someone  
10 normally read a settlement that is 300  
11 pages long?

12 PRESIDENT NARIMAN: You are  
13 asking me a question?

14 MR. VIOLI: It's a question.  
15 You are saying to me --

16 PRESIDENT NARIMAN: I may not  
17 read it.

18 MR. VIOLI: Four companies are  
19 sued in the industry. This is the set  
20 of facts.

21 Four companies are sued in the  
22 industry. The major companies in the  
23 industry, they are sued. And they  
24 enter into a settlement with the  
25 states.

0511

1 Grand River Arbitration  
2 Were the Claimants on notice --  
3 should they have read this to see if  
4 they could have joined the MSA?

5 PRESIDENT NARIMAN: You are  
6 asking again. You are entitled to,  
7 but our --

8 MR. VIOLI: No, our position  
9 is -- well, I know they didn't read  
10 it. I know they didn't read it, and  
11 they didn't have the duty to read it.  
12 And they had no occasion to be put on  
13 notice.

14 MR. CROOK: Mr. Violi, you just  
15 put up a slide that said, as of a  
16 certain time in June of 1999, the  
17 Claimants had invested tens of

18 millions of dollars in developing  
19 their program.  
20 Now, is it apparent anyplace in  
21 the record why that particular point  
22 in time was an opportune time for a  
23 company like Grand River Enterprises  
24 to invest tens of millions of dollars?  
25 Was it that the market had undergone  
0512

1 Grand River Arbitration  
2 some fundamental transformation?

3 MR. VIOLI: No, they had  
4 invested tens of million between 1992  
5 and 1999. I picked June of 1999  
6 because that is when my first  
7 knowledge of escrow statutes is.

8 MR. CROOK: When was the new  
9 plant opened?

10 MR. VIOLI: There was -- the  
11 plant in Oshweken or -- excuse me --  
12 in Ontario was opened in '94. They  
13 moved all of their exclusive  
14 production to that facility in 1999,  
15 in January of 1999 -- December '98,  
16 January of 1999.

17 MR. CROOK: So you are  
18 representing to us that they were  
19 producing product prior to that time?

20 MR. VIOLI: They were producing  
21 product. Absolutely.

22 MR. CROOK: Is that in the  
23 report any place?

24 MR. VIOLI: Well, yes. Sure,  
25 they have -- they had trademarks.

0513

1 Grand River Arbitration  
2 They were producing. They were  
3 distributing.

4 MR. CROOK: I'm sorry. The  
5 earliest trademark is 1999.

6 MR. VIOLI: I think the  
7 question is -- they had DK. Your  
8 question is, were they producing  
9 product for the US market out of  
10 Oshweken?

11 MR. CROOK: Out of any place.

12 MR. VIOLI: Yes.

13 MR. CROOK: Well, perhaps at  
14 the break or sometime, you could show  
15 us or indicate to us where that is in  
16 the record because Claimants or --  
17 excuse me -- Respondents fiercely deny  
18 that.

19 MR. VIOLI: It's in the  
20 particularized statement of claim.

21 MR. CLODFELTER: Which page is  
22 that?

23 PRESIDENT NARIMAN: He will  
24 probably tell you in due course.

25 MR. VIOLI: With respect to the

0514

1 Grand River Arbitration  
2 Racket Point facility and the Omaha  
3 Nation partnership, and with respect  
4 to Star Tobacco.

5 MR. CROOK: So they were  
6 producing in conjunction with Star and  
7 Omaha and not in their own way.

8 MR. VIOLI: No -- Star and  
9 Omaha or Star and Omaha?

10 MR. CROOK: Either. You tell  
11 me what is in your record.

12 MR. VIOLI: "Between '91 and  
13 '93, the investors expanded their  
14 business to develop their brand and  
15 distribution strategy relying on the  
16 production from Star Tobacco and the  
17 facility near Racket Point."

18 We talk about the Skidders --  
19 Larry Skidders who passed away was a  
20 co-venturer in the Racket Point  
21 facility. Then they went on to --

22 MR. CROOK: I'm sorry. I will  
23 read it. I don't want to divert you  
24 from your argument.

25 MR. VIOLI: So they did --

0515

1 Grand River Arbitration  
2 what -- what --

3 MR. CROOK: Sorry, your  
4 representation to us is that this  
5 \$10 million investment in June of --

6 MR. VIOLI: Tens of millions.  
7 MR. CROOK: Tens of millions  
8 was just part of a normal course of a  
9 preexisting pattern of business and  
10 had nothing to do with the MSA?  
11 MR. VIOLI: Absolutely.  
12 MR. CROOK: Nothing to do with  
13 the MSA.  
14 MR. VIOLI: Absolutely.  
15 MR. CROOK: Okay.  
16 MR. VIOLI: That facility was  
17 there in Canada from '94, '93 -- they  
18 were incorporated in '96. The Racket  
19 Point was in operation well before  
20 '99 -- November of '98, as well as the  
21 Omaha Nation production facility.  
22 What Respondents -- and I can  
23 understand the confusion -- what  
24 Respondents said -- they didn't say  
25 Claimants. They said Grand River  
0516  
1 Grand River Arbitration  
2 didn't produce product out of Oshweken  
3 for the US market before January of  
4 1999, January of 1999.  
5 MR. CROOK: Is that a correct  
6 statement?  
7 MR. VIOLI: That is what they  
8 said, see, but that is only half the  
9 story. Grand River is one of four  
10 Claimants here. And the Claimants  
11 themselves and their ventures and  
12 their partnerships long predated Grand  
13 River's production for the US market.  
14 And so -- and I did have that  
15 note, and, actually, I don't need to  
16 respond to it -- but that was the  
17 point, is that Grand River, but not  
18 the Claimants did not produce  
19 before -- before January of 1999. But  
20 they were well entrenched in the US  
21 market long before that.  
22 MR. CROOK: Again -- no, I  
23 don't want to take your time.  
24 MR. VIOLI: I understand -- I  
25 can understand the confusion. When I



0517

1 Grand River Arbitration  
2 heard that, it gave the impression  
3 yesterday that there was no production  
4 or manufacturing in the USA by the  
5 Claimants, but it was really was just  
6 Grand River, at least that sort of --

7 MR. CLODFELTER: Mr. President,  
8 to clarify, that was our point because  
9 they have never stated; but I take it  
10 now they are admitting that Grand  
11 River never manufactured cigarettes  
12 for the US market until 1999.

13 Is that correct? Simple  
14 question, again.

15 MR. VIOLI: I think Grand  
16 River -- let me just confer.

17 Yes, that's correct.

18 MR. CLODFELTER: All right.

19 MR. VIOLI: But Claimants and  
20 their other partnerships surely did.

21 So, Mr. President, we have the  
22 question of when did they incur loss  
23 or damage? When was the first time  
24 they incurred loss or damage? And  
25 knowledge of that, constructive

0518

1 Grand River Arbitration  
2 knowledge?

3 It's our position that -- and  
4 it's clear that they did not sustain  
5 loss or damage by reason of the  
6 discrimination exemptions before the  
7 allocable share amendment was  
8 effected.

9 As originally enacted -- when  
10 the escrow statute was originally  
11 enacted, it had a provision in there  
12 that allowed companies to sell -- if  
13 you sold in certain states, you  
14 lowered your escrow burden. Grand  
15 River's escrow burden lowered --

16 PRESIDENT NARIMAN: Is it your  
17 case that, when the escrow statutes  
18 were enacted, you or your lawyers had  
19 read it? That's all I want to know.

20 MR. VIOLI: "You" meaning the  
21 Claimants?

22 PRESIDENT NARIMAN: The  
23 Claimants.

24 MR. VIOLI: No, they did not  
25 read it.

0519

1 Grand River Arbitration

2 PRESIDENT NARIMAN: No, you or  
3 your lawyers -- you must have read it.  
4 Otherwise, how would you know? How  
5 would you tell us all of this about  
6 the provisions and so on?

7 Your case is -- your case is  
8 that, when the MSA was concluded --  
9 this is paragraph 75 -- this is where  
10 I want you to -- was concluded -- none  
11 of the investors had any reason to  
12 believe that they would be affected by  
13 it?

14 MR. VIOLI: That's correct.

15 PRESIDENT NARIMAN: Please,  
16 that's what I want you to say just  
17 now. That's what I am saying, if this  
18 is correct, then when the MSA was  
19 concluded, none of the investors had  
20 any reason to believe they would or  
21 could be affected by it. That would  
22 only be therefore after you read it,  
23 because, without reading it, how do  
24 you know whether that -- you would be  
25 affected by it?

0520

1 Grand River Arbitration

2 That's what I want to know.  
3 This is my point that I'm making. You  
4 say that:

5 "No, no, we never read it. We  
6 just kept it. We generally knew that  
7 there was this."

8 But how do you -- how did you  
9 know that you were not affected by it  
10 unless you read it?

11 MR. VIOLI: No, they had no  
12 reason to believe. They see an  
13 article that says four companies, who

14 have been sued by the states, have  
15 entered into a settlement. Why would  
16 someone think that that applies to  
17 them?

18 PRESIDENT NARIMAN: I am asking  
19 you for paragraph 75. I am not saying  
20 four companies sued.

21 When MSA was concluded, none of  
22 the investors had any reason to  
23 believe that they would or could be  
24 affected by it. My question only is  
25 that you would not know or would not

0521

1 Grand River Arbitration  
2 know whether you had any reason to  
3 believe unless you had read it or  
4 somebody on your behalf had read it.  
5 That's all I'm asking you. You read  
6 yours, a moment, paragraph 75.

7 PROFESSOR ANAYA: Could it be  
8 possible that someone read it and  
9 thought that it wouldn't apply?

10 PRESIDENT NARIMAN: Yes, yes,  
11 that's your case here.

12 PROFESSOR ANAYA: Is it that no  
13 one -- there was complete ignorance  
14 about the escrow provision?

15 MR. VIOLI: The escrow  
16 provision didn't come into law  
17 until -- as far as I know personally,  
18 June of 1999, the MSA.

19 PROFESSOR ANAYA: No, I  
20 understand. I'm talking about the  
21 escrow provision.

22 MR. VIOLI: The escrow  
23 provision, when it came into law, was  
24 it possible?

25 PROFESSOR ANAYA: Yes, that

0522

1 Grand River Arbitration  
2 they knew about it, that your clients  
3 knew about it.

4 MR. VIOLI: Was it possible?

5 PRESIDENT NARIMAN: Not  
6 possible -- that is your case, that  
7 you know it really didn't apply to

8 you.

9 MR. VIOLI: Was it or should  
10 they have known about it is the  
11 question.

12 PROFESSOR ANAYA: No, I am  
13 wondering -- if the argument is that  
14 they knew about it and thought there  
15 was ambiguity and it didn't apply, or  
16 they just didn't know about it -- what  
17 is the argument?

18 MR. VIOLI: They didn't know  
19 about it, March 2001.

20 PROFESSOR ANAYA: You are  
21 representing to us that they didn't  
22 know what the terms of the escrow  
23 statutes were.

24 MR. VIOLI: That's correct.  
25 Before March 2001.

0523

1 Grand River Arbitration

2 MR. CROOK: Mr. Violi -- sorry  
3 to beat up on you.

4 MR. VIOLI: I am used to it.

5 MR. CROOK: You said something  
6 a minute ago, and I wanted to make  
7 sure it actually reflects your  
8 position because it was a little  
9 garbled on the transcript which is why  
10 I am asking you.

11 I understood you to say that  
12 there was no loss or damage before the  
13 allocable share amendments. Is that,  
14 in fact, your position?

15 MR. VIOLI: On the  
16 discrimination claim, that's correct.

17 MR. CROOK: Just on the  
18 discrimination claim.

19 MR. VIOLI: That's correct,  
20 because the discrimination claim talks  
21 about the exemptions. They gave an  
22 exemption to a select few companies,  
23 right, but the escrow statute in its  
24 original form allowed Grand River and  
25 others who concentrated their sales in

0524

1 Grand River Arbitration

2 a few states -- they allowed them to  
3 lower their escrow burden to a point  
4 even lower than the exemptions for  
5 some companies.

6 MR. CROOK: So you are not  
7 asserting a denial of just inequitable  
8 treatment or expropriation or anything  
9 of that character with respect to the  
10 allocable share amendments? You are  
11 asserting only that there was breach  
12 of national treatment.

13 MR. VIOLI: We are denying --  
14 it's the other way around. The  
15 allocable share would be inclusive.

16 MR. CROOK: Okay. So the  
17 allocable share amendment,  
18 notwithstanding what you just said,  
19 applies to whole range of your NAFTA  
20 claims?

21 MR. VIOLI: Sure, it is  
22 expropriation. It's the escrow  
23 statutes. Now, what the allocable  
24 share causes is a discrimination under  
25 most favored nation and --

0525

1 Grand River Arbitration

2 MR. CROOK: I am just trying to  
3 kind of clarify what you were saying  
4 on the record. Okay.

5 MR. VIOLI: Right. That is  
6 correct. There is no discrimination,  
7 and just -- there is no discrimination  
8 until the allocable share comes into  
9 effect.

10 PRESIDENT NARIMAN: There is no  
11 discrimination.

12 MR. VIOLI: Until the allocable  
13 share amendments.

14 PRESIDENT NARIMAN: Then you  
15 are -- but you may make a claim on  
16 that. That's not your claim.

17 MR. VIOLI: It is our claim.  
18 We have it in here. We talk about the  
19 statute -- we talk about the statute  
20 in its present form.

21 And, yesterday, we say what it

22 now requires at paragraph 63:  
23 "Deposit and maintains what you  
24 would pay as an SPM."

25 You only deposit in what you

0526

1 Grand River Arbitration  
2 pay as an SPM under the allocable  
3 share amendment. Before that you  
4 deposit what you pay as an NPM, but  
5 you get a refund of a significant  
6 amount. You know, it's -- you have to  
7 pay \$4, but you get \$3.50 back.

8 So we say that, deposit and  
9 maintain. We talked about  
10 implementing measures now present when  
11 this notice of claim was filed.

12 MR. CROOK: Again, Mr. Violi, I  
13 have one question, and I will shut up.

14 So that is your response to  
15 their contention that this is a late  
16 filed claim, that it only crept in  
17 very late in the proceedings. Your  
18 position is that they were on notice  
19 of this from what was in the PSOC?

20 MR. VIOLI: Yes, in their  
21 objections to jurisdiction, they set  
22 out the allocable share provision,  
23 causing us to respond and said:

24 "Wait a minute. That allocable  
25 share provision you are talking about

0527

1 Grand River Arbitration  
2 is for the old version of the  
3 statute."

4 And in our reply we did that.  
5 We mentioned it. They responded, and  
6 we rejoined it.

7 MR. CROOK: But you are now  
8 making a claim with respect to a state  
9 of facts that did not exist what the  
10 claim was originally filed?

11 MR. VIOLI: No, no, no. We  
12 started doing that in 2002. We will  
13 see from the slides they were planning  
14 it in 2001, started it in 2002, and  
15 they started to pass the laws in 2003.

16 MR. CROOK: That's fine. You  
17 will explain that to us.

18 MR. VIOLI: That's what set up  
19 the red flags.

20 PRESIDENT NARIMAN: If there  
21 were no allocable -- this -- the  
22 amendments didn't come into force, if  
23 there were no such amendments, you  
24 would ignore the escrow statutes, no  
25 difficulty.

0528

1 Grand River Arbitration

2 MR. VIOLI: Actually, that's a  
3 good point. I can't say for certain.  
4 But if there was no allocable share  
5 amendments, we might not be here  
6 today, Mr. President.

7 PRESIDENT NARIMAN: When did  
8 those allocable share amendments --

9 MR. VIOLI: 2003, to the extent  
10 we were able to research it.

11 PROFESSOR ANAYA: The  
12 Respondents contend that you sustained  
13 losses the moment that the escrow  
14 statutes became applicable, because  
15 there was a liability incurred at that  
16 moment as I understand their argument,  
17 right, that you were liable for  
18 payments into escrow.

19 So that was the loss -- the  
20 moment of the loss -- the moment you  
21 sold cigarettes in a state that had  
22 one of these escrow statutes.

23 MR. VIOLI: Someone sold our  
24 cigarettes, actually.

25 PROFESSOR ANAYA: The moment

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1 Grand River Arbitration

2 someone sold your cigarettes. Now,  
3 what do you say to that?

4 MR. VIOLI: On  
5 discrimination --

6 PROFESSOR ANAYA: No, no, no,  
7 is it a loss?

8 MR. VIOLI: No, absolutely not.

9 PRESIDENT NARIMAN: Why?

10 MR. VIOLI: Absolutely not.  
11 PROFESSOR ANAYA: Why?  
12 MR. VIOLI: Because the statute  
13 says -- the statute says you can --  
14 first of all, the statute says -- and  
15 it's a knowledge of loss. But let's  
16 go to the loss first.

17 MR. CROOK: Loss or damage,  
18 correct.

19 MR. VIOLI: Loss or damage,  
20 correct, but knowledge, also.

21 MR. CROOK: Right.

22 PROFESSOR ANAYA: I just want  
23 to know if there is a loss. And then  
24 we will talk about knowledge.

25 MR. VIOLI: The statute says

0530

1 Grand River Arbitration  
2 that the requirement to pay escrow of  
3 whoever a tobacco product manufacturer  
4 is, right, can only be mandated by  
5 court order. It says, if you do not  
6 pay, attorney general may -- doesn't  
7 say shall -- may bring a lawsuit,  
8 civil action.

9 And then after there is an  
10 order, you get 15 days -- if there is  
11 an order to that effect, and a  
12 determination you are a tobacco  
13 manufacturer, and there is a  
14 violation -- then you get 15 days to  
15 deposit the escrow that is ordered.  
16 On a demonstration of a violation,  
17 there can be a penalty.

18 PROFESSOR ANAYA: You just said  
19 a violation. A violation is at the  
20 moment you don't do what the statute  
21 mandated.

22 MR. VIOLI: According to --  
23 according to whom? That's the key.

24 PROFESSOR ANAYA: According to  
25 the statute itself. You are saying

0531

1 Grand River Arbitration  
2 the statute is not self-executing?

3 MR. VIOLI: It is not



4 self-executing.  
5 PROFESSOR ANAYA: So it  
6 doesn't -- so before people pay into  
7 it, they have to pay until they are  
8 ordered to do so before -- if they're  
9 a tobacco manufacturer.

10 MR. VIOLI: If there is -- if  
11 they believe it has application to  
12 them.

13 PROFESSOR ANAYA: They have to  
14 wait until they are ordered by a  
15 court.

16 MR. VIOLI: If they don't  
17 believe it has application to them,  
18 no.

19 PRESIDENT NARIMAN: What is the  
20 reason for your believing it is not  
21 applicable to you? That is what we  
22 are asking you.

23 MR. VIOLI: There are a number  
24 of them.

25 First is that, when Grand River

0532

1 Grand River Arbitration  
2 made products, for example, Capital  
3 brand product, Grand River did not own  
4 the trademark to that brand, didn't  
5 import it into the United States,  
6 merely had a production arrangement  
7 with the trademark owner and importer.  
8 Under the MSA and under the escrow  
9 statutes, as we will see, the states  
10 held the importer to be the  
11 manufacturer of those brands.

12 But when it comes to Grand  
13 River they say:

14 No, we don't care if your  
15 product is -- if a product that came  
16 out of your factory is sold in Utah,  
17 in Oklahoma, you are liable for it."

18 Well, there are importers, who  
19 have joined as manufacturers under the  
20 MSA, and they have been deemed  
21 manufacturers. We have the only case  
22 based on the merits, and it wasn't  
23 based on hearsay -- where a Wisconsin

24 court held -- and this wasn't a sparse  
25 record. The documents are as much as  
0533

1 Grand River Arbitration  
2 what is on this table submitted in  
3 this case.

4 Grand River came in and said:  
5 "We are not subject to this  
6 escrow statute. We don't do business  
7 in the State of Wisconsin. It can't  
8 be applied and enforced against us."

9 Wisconsin disputed that. They  
10 brought in the NAFTA -- the NAFTA  
11 claim -- the NAFTA statement of claim  
12 that was brought in this -- they  
13 brought it in the Wisconsin action,  
14 gave it to the judge.

15 Among everything, they scanned  
16 web sites -- you would not believe the  
17 amount of evidence that they put in --  
18 purported to put in on that case.

19 And on the merits, the judge  
20 held that, based on all the  
21 information before her, Grand River  
22 could -- that that escrow statute  
23 could not be enforced against Grand  
24 River for lack of personal  
25 jurisdiction.

0534  
1 Grand River Arbitration  
2 So the only case in this  
3 country --

4 PROFESSOR ANAYA: But that's  
5 not on the merits. Is it?

6 MR. VIOLI: Personal  
7 jurisdiction is on the merits. If you  
8 have no regulatory or personal  
9 jurisdiction over a company, you can't  
10 enforce the law. Sir?

11 PROFESSOR ANAYA: Go ahead.

12 MR. VIOLI: Not on the  
13 definition of what a tobacco product,  
14 you are right.

15 But on the point that, who is  
16 the tobacco product manufacturer,  
17 essentially? Who can the statute be

18 enforced against?

19 Not only did Grand River have a  
20 good faith belief, right, after  
21 March 2001 that it didn't apply it,  
22 they were ultimately vindicated in a  
23 court.

24 MR. CROOK: Mr. Violi, I'm a  
25 little uncomfortable here because we  
0535

1 Grand River Arbitration  
2 have got a lot of dualing  
3 representations with testimony by  
4 counsel with respect to a matter that  
5 really is not in the record here  
6 beyond the sort of naked documents  
7 dismissing the case.

8 MR. VIOLI: It says first --  
9 they brought it up yesterday as  
10 hearsay. I telephoned Wisconsin  
11 counsel. He's available if you would  
12 like on a conference call. He has the  
13 transcript. We have the transcript.  
14 I can submit the transcript into the  
15 record, and we will see what went on.  
16 And if you would like I can get all  
17 the documents.

18 MR. CROOK: As I said,  
19 Mr. Violi, I don't think very much of  
20 kind of late hour submissions, because  
21 I wonder if we could just move on to  
22 the rest --

23 MR. VIOLI: They raised it as  
24 hearsay. That is why I brought it up.

25 MR. CLODFELTER: There is  
0536

1 Grand River Arbitration  
2 nothing in the record about the case.  
3 They have the burden of proof. They  
4 want to put these document in. They  
5 have plenty of time to put them in.

6 MR. CROOK: So why don't you  
7 proceed, Mr. Violi.

8 PRESIDENT NARIMAN: I think we  
9 are doing you an injustice. Please  
10 proceed in your own way, and we will  
11 attempt not to ask you any questions

12 until an appropriate -- more  
13 appropriate time, because -- no, it's  
14 better because we want to understand  
15 what you want us to know.

16 MR. VIOLI: I'm used to it.  
17 That's okay.

18 PRESIDENT NARIMAN: You feel  
19 upset about it.

20 MR. VIOLI: Well, the  
21 amendment --

22 PRESIDENT NARIMAN: Please go  
23 ahead in your own way, and we will try  
24 to see whether we can restrain  
25 ourselves.

0537

1 Grand River Arbitration

2 MR. VIOLI: The amendment is  
3 key.

4 PRESIDENT NARIMAN: Please  
5 carry on. Thanks.

6 MR. VIOLI: The next overriding  
7 point that we think needs mention at  
8 the outset is that, as you said, 1116  
9 requires knowledge of a loss or  
10 damage, constructive or otherwise, and  
11 knowledge of a breach, constructive or  
12 otherwise.

13 If we search the record, the  
14 pleadings, we will see that the  
15 Respondent does not acknowledge a  
16 measure that relates to the Claimants.  
17 They refuse to accept that there is  
18 even a measure. They do not accept  
19 that there has been a breach of the  
20 NAFTA, and they not accept that the  
21 Claimants experienced an expropriation  
22 or suffered loss of damage.

23 Yet, they come before the  
24 Tribunal and say that:

25 "Despite that Claimants have

0538

1 Grand River Arbitration

2 not sustained or demonstrated any of  
3 these" -- and we do not agree that any  
4 of these points are proven -- "they  
5 should have known that there was a

6 measure that related to them, breached  
7 the NAFTA, and caused them loss before  
8 March 12th of 2001."

9 It's almost slipping the  
10 jurisdictional argument into a merits  
11 argument and putting the cart before  
12 the horse.

13 How can you say or not admit  
14 that there is a breach or measure, and  
15 damage, but then say that you have  
16 should known that there was a breach,  
17 a measure, and damage before March 12,  
18 2001?

19 And I refer to the Respondent's  
20 reply page four, note four and note  
21 six, where they -- where they feel  
22 that it's not necessary to determine  
23 whether or not there is a measure that  
24 relates or that -- and they deny  
25 emphatically that Claimants suffer a  
0539

1 Grand River Arbitration  
2 loss.

3 So I ask, Mr. President, how,  
4 if they deny we suffer loss, how could  
5 we have knowledge of loss prior to  
6 March 12th of 2001?

7 It's almost as if -- sort of a  
8 parallel question -- I tried to break  
9 it down into simplest terms.

10 Could Claimants or should  
11 Claimants have filed a NAFTA claim  
12 before March 12, 2001? The attorney  
13 general of Missouri purportedly sends  
14 a letter. The attorney general of  
15 Iowa purportedly sends a letter in  
16 2000. Does that constitute knowledge  
17 of a measure, knowledge of a breach,  
18 and damage?

19 PROFESSOR ANAYA: Why not? I  
20 am having trouble -- you keep asking  
21 questions -- why doesn't it? You tell  
22 us, please.

23 MR. VIOLI: Because they would  
24 say --

25 PROFESSOR ANAYA: No, what do

0540

1 Grand River Arbitration

2 you say?

3 MR. VIOLI: We didn't pay any  
4 escrow. The statute did not apply to  
5 us, as the Wisconsin court found it  
6 could not be enforced against us.

7 And the terms of the statute  
8 are ambiguous at best, and the  
9 documents show that they didn't even  
10 know what the words "tobacco product  
11 manufacturer" -- how that was  
12 defined -- "they" being the states.

13 PROFESSOR ANAYA: Iowa and  
14 Missouri and the other -- Nebraska --  
15 they didn't think it was ambiguous.

16 MR. VIOLI: No, just Iowa and  
17 Missouri, right, before March 12th.

18 PROFESSOR ANAYA: Right.

19 MR. VIOLI: Well, actually, if  
20 you read the letters, it says: "If  
21 you are," and, "if you don't respond  
22 to this letter, we will assume you  
23 are" -- against the importer.

24 PRESIDENT NARIMAN: You didn't  
25 respond?

0541

1 Grand River Arbitration

2 MR. VIOLI: We didn't receive  
3 it.

4 PRESIDENT NARIMAN: You are  
5 saying -- I am saying that you have to  
6 -- assume that you did get it.

7 MR. VIOLI: No, we did not get  
8 it.

9 PROFESSOR ANAYA: You are  
10 saying you didn't get it, not just  
11 that it's not in the record -- I mean,  
12 in the documents, in the corporate  
13 documents, in the corporate files.

14 PRESIDENT NARIMAN: See, if you  
15 had received this, you would have  
16 responded and told them exactly what  
17 you are telling us. That is your  
18 case.

19 MR. VIOLI: When the Missouri

20 attorney general, Mr. President, when  
21 we were aware of a lawsuit that the  
22 Missouri attorney general brought  
23 against us, we went in -- it's a third  
24 lawsuit -- we went in, defended it.  
25 We have -- in fact, we have a stay in

0542

1 Grand River Arbitration  
2 that case.

3 We went in. We appeared. When  
4 we found out about the default  
5 judgment in Wisconsin, we went in and  
6 had it vacated on a decision by a  
7 respected judge who said that the  
8 statute couldn't be enforced against  
9 us.

10 Where we were given and knew  
11 about a case, we have gone in and  
12 defended it on the merits in the  
13 state. Now, should they have had to  
14 faced 46 potential lawsuits?

15 They brought a federal lawsuit  
16 against 31 attorneys general in July  
17 of 2002 to resolve this issue among  
18 others. What did the 31 attorney  
19 general do?

20 "You can't use sue us in  
21 New York, even though we came here for  
22 six months to negotiate the MSA. You  
23 have to sue us 46 or 31 times."

24 Now, this is a fledgling  
25 company who -- you know, it's not GM

0543

1 Grand River Arbitration  
2 or Philip Morris. They can't defend  
3 31 lawsuits. So they said:

4 "Okay. We will resolve this  
5 once and for all. We will bring one  
6 lawsuit. Everybody come to New York,  
7 and we will decide the issue."

8 What did they do? Scorched  
9 earth, divide and conquer, bring a  
10 lawsuit.

11 And, now, just this few months  
12 ago, the Second Circuit Court of  
13 Appeals affirmed:

14 "No, they have to come to  
15 New York to decide this issue. They  
16 didn't divide up and try to put you  
17 out of business by litigating in 31  
18 separate forums."

19 Where we did receive notice and  
20 knew about it, we went in and  
21 defended.

22 We settled with nine states  
23 after March 12, 2001. We settled with  
24 nine states, without prejudice to this  
25 claim.

0544

1 Grand River Arbitration

2 We went in there, and we said:

3 "You know what? We are going  
4 to operate under the allocable share.  
5 We are going to settle our differences  
6 without prejudice, and reserve for a  
7 later time other issues of damage and  
8 potential application. But, for now,  
9 we can continue to do business and do  
10 fairly well."

11 But we have -- we have indeed  
12 come in and -- where we received  
13 notice -- but we did not -- and I will  
14 get to it in a moment.

15 That April -- that October 11th  
16 letter to Native Tobacco Direct, like  
17 the others, it says: "We attach a  
18 copy of the statute." Right.

19 If you look at the attachment  
20 in the record, October 11, 2000, is  
21 the letter, purportedly to Native  
22 Tobacco Direct, at its -- to the  
23 address of its -- one of its owners,  
24 prior owner.

25 If you look at the attachment,

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1 Grand River Arbitration

2 the attachment is dated no sooner than  
3 January 2001. How could the Iowa  
4 attorney general send a letter to  
5 Native Tobacco Direct dated  
6 October 2000, with an attachment that  
7 is dated in 2001, copyrighted in 2001?



8           There are some serious  
9 questions about what the attorneys  
10 general did to give notice to this  
11 company and to these Claimants. And  
12 we think that renders everything  
13 suspect.

14           Dale Feedy's letter dated  
15 April 7, 2000 purports to contain an  
16 attachment -- purports to contain an  
17 attachment. The attachment is not in  
18 here, and the letter says --

19           PROFESSOR ANAYA: But isn't the  
20 attachment the statute?

21           MR. VIOLI: It says copy  
22 enclosed, right.

23           PROFESSOR ANAYA: And can't we  
24 assume that, well, they just didn't  
25 put the attachment in -- the statute

0546

1           Grand River Arbitration  
2 in the record because it's readily  
3 available when they sent it this time  
4 around. They just got a later copy of  
5 the same statute that they did send  
6 earlier.

7           MR. VIOLI: It says, copy  
8 enclosed. I think it renders the  
9 whole -- in our view the whole process  
10 suspect.

11           MS. MENAKER: Mr. Chairman, if  
12 I may respond to this -- if I may  
13 respond to this, because you made an  
14 allegation in your rejoinder that is  
15 essentially accusing us of  
16 manipulating the evidence -- or the  
17 attorney general of -- since I am  
18 representing the United States --

19           MR. VIOLI: I didn't say  
20 manipulate anywhere.

21           MS. MENAKER: I think that  
22 was -- at least that was my  
23 recollection, and I would just like to  
24 offer in -- or have Ms. Guymon offer  
25 the explanation for the reason why the

0547

1           Grand River Arbitration

2 attachment was postdated. There is a  
3 simple explanation.

4 MR. VIOLI: Can we get through  
5 it? We're not -- it's in my proofs.  
6 It's in my presentation. I'd rather  
7 not interfere or interrupt my opening,  
8 but I have it. It's coming up on a  
9 slide, and we can deal with it then.

10 MS. MENAKER: It's just,  
11 Mr. Violi, that you did this to us  
12 several times yesterday.

13 MR. VIOLI: I did it not during  
14 your opening. May I proceed.

15 MS. MENAKER: You interrupted  
16 me yesterday.

17 MR. VIOLI: No, I didn't  
18 interrupt. Mr. Clodfelter --

19 PRESIDENT NARIMAN: You had an  
20 opening and closing. You have an  
21 opening and a closing.

22 MS. MENAKER: Well, when it  
23 comes to that, we would like to offer  
24 an explanation because it does not --

25 PRESIDENT NARIMAN: Right,  
0548

1 Grand River Arbitration  
2 right --

3 MS. GUYMON: It does directly  
4 respond to what Professor Anaya just  
5 said. So it seems an opportune time.

6 MR. VIOLI: Yes, but, you  
7 known, then we have the Missouri  
8 attorney general -- and it was a good  
9 faith mistake; let's point to that.

10 The Missouri attorney general  
11 in that first lawsuit, apparently that  
12 was brought against Grand River and  
13 the other company -- he said:

14 "You can" -- to the judge -- or  
15 in the -- to the Court: "You can find  
16 a knowing violation of the statute  
17 because John Quinlan in North Dakota  
18 wrote a letter to Grand River and  
19 advised Grand River of these  
20 obligations."

21 We found out that that wasn't

22 true. John Quinlan never wrote a  
23 letter.

24 PRESIDENT NARIMAN: That is --  
25 that is -- that is not vacated?

0549

1 Grand River Arbitration

2 MR. VIOLI: What is that?

3 PRESIDENT NARIMAN: That  
4 judgment is not vacated, the Missouri  
5 default judgment?

6 MR. VIOLI: The injunction --

7 PRESIDENT NARIMAN: I'm asking  
8 you if it's not vacated.

9 MR. VIOLI: It's not vacated,  
10 but the ban -- but the injunction in  
11 it expired. The injunction only  
12 lasted two years. It expired in 2004.

13 So the Missouri attorney  
14 general -- the point there is -- they  
15 have an explanation for that, too. It  
16 was a good faith.

17 The Missouri attorney general  
18 thought the Iowa attorney general who  
19 thought the North Dakota attorney  
20 general -- so why did the attorneys  
21 general get so much good faith  
22 explanations and accorded so much  
23 politeness, respect, or deference or  
24 even excuse?

25 But when this company says

0550

1 Grand River Arbitration

2 three letters we did not receive out  
3 of -- from 46 states over the course  
4 of five years, three letters we did  
5 not receive, and when we received the  
6 letter in March of 2001, we, in good  
7 faith, didn't believe it applied to  
8 us, because it says:

9 "If you sell to consumers in  
10 Oregon through an intermediary or any  
11 intermediary" -- well, what does that  
12 mean?

13 When they in good faith believe  
14 it doesn't apply to them, why are they  
15 not accorded the same type of

16 deference or excuse when the three  
17 notices -- every one of these three  
18 letters -- and that's all they have --  
19 every one of them has a problem with  
20 it -- not to the right address.

21 It says attaches a copy of the  
22 statute. It doesn't.

23 And, thirdly, the last one  
24 attaches a copy, at least in the  
25 record that I have been given, a

0551

1 Grand River Arbitration  
2 document that is dated in the next  
3 year. So they have an excuse.

4 MR. CLODFELTER: So are we back  
5 to that document now? Can we offer  
6 our comment?

7 MR. VIOLI: My point is that we  
8 have a good faith reason why we didn't  
9 believe in March of 2001 it didn't  
10 apply to us. That was ultimately  
11 vindicated by a court in Wisconsin.

12 PROFESSOR ANAYA: You are going  
13 to get to that because I at least  
14 think that is the key here to what  
15 your argument is.

16 MR. VIOLI: Good faith, right.

17 PROFESSOR ANAYA: I know you  
18 say it's good faith, but what is the  
19 basis for the good faith belief? I am  
20 really interested. You don't have to  
21 do it now, but at some point, I  
22 mean --

23 MR. VIOLI: No --

24 PROFESSOR ANAYA: -- you keep  
25 alluding to that.

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1 Grand River Arbitration

2 MR. VIOLI: It's a good point.  
3 It also touches upon the President --

4 PROFESSOR ANAYA: Before you  
5 said you had four reasons for  
6 considering it -- that it didn't apply  
7 to you.

8 MR. VIOLI: No, I actually had  
9 four points at the beginning.

10 MR. CROOK: Mr. Violi, so you  
11 can answer both of us at the same  
12 time --

13 MR. VIOLI: Yes.

14 MR. CROOK: I mean, my quandary  
15 is, how can you assert that, "A,"  
16 Claimants didn't know about these  
17 things, and, "B," they believe they  
18 didn't apply to them because they are  
19 ambiguous?

20 Are those not inconsistent  
21 propositions?

22 MR. VIOLI: No, in March 2001  
23 when they became aware through a  
24 letter from the Oregon attorney  
25 general, they did not believe in good

0553

1 Grand River Arbitration  
2 faith that it applied to them.

3 MR. CROOK: So you are not  
4 representing that ambiguity had  
5 anything to do with the failure to act  
6 prior to March of 2001?

7 MR. VIOLI: That's correct.  
8 Prior to 2001 -- and that's where I  
9 was going to go -- there is a good  
10 faith belief that the MSA -- I mean,  
11 it's not a good faith -- absolutely,  
12 the MSA didn't apply to them. Right?  
13 It wasn't a law. It doesn't on its  
14 face say that --

15 MR. CROOK: Is that in the  
16 record any place, the state of mind of  
17 your clients prior to March 2001?

18 MR. VIOLI: We say that the MSA  
19 is not a measure -- absolutely.

20 MR. CROOK: Is that a legal  
21 argument? Is that a statement --  
22 okay -- go ahead.

23 MR. VIOLI: We never --

24 PRESIDENT NARIMAN: This  
25 letter -- sorry to bother you -- this

0554

1 Grand River Arbitration  
2 letter is of 12 March 2001.

3 MR. VIOLI: March 14th.

4           PRESIDENT NARIMAN: That is tab  
5 number. Just give me that.  
6           MR. VIOLI: That is the  
7 Williams affidavit.  
8           PRESIDENT NARIMAN: The  
9 Williams affidavit.  
10          MR. VIOLI: The Williams  
11 affidavit.  
12          PRESIDENT NARIMAN: My question  
13 is, did you respond to this letter?  
14          MR. VIOLI: No.  
15          PRESIDENT NARIMAN: I am just  
16 asking you.  
17          MR. VIOLI: Right, there is --  
18 no.  
19          PRESIDENT NARIMAN: Exactly  
20 what you are stating just now. Did  
21 you respond to this letter? Of  
22 course, this is 14 March. Therefore,  
23 it's within the limitations and so  
24 on --  
25          MR. VIOLI: Right, right.

0555

1           Grand River Arbitration  
2           PRESIDENT NARIMAN: And you  
3 said that:  
4           "In good faith we believed that  
5 better that we were -- that this was  
6 not applicable to us."  
7           Now, why was that not stated in  
8 a letter written in the response?  
9 Give me the tab number, if you don't  
10 mind. Thank you.  
11          MR. VIOLI: Sure.  
12          PRESIDENT NARIMAN: Can you --  
13 can you assist -- it's 14th  
14 March 2001.  
15          MS. GUYMON: Yes, tab A to  
16 the -- to the Williams affidavit -- A  
17 as in "apple" -- to the Williams  
18 affidavit, which I believe is tab 14  
19 to their appendix.  
20          PRESIDENT NARIMAN: 14A.  
21          MS. GUYMON: 14A.  
22          MS. MENAKER: Tab A to the  
23 Williams affidavit.

24 MR. VIOLI: It's reply to the  
25 objections to jurisdiction, volume two

0556

1 Grand River Arbitration  
2 of two, 14A.

3 PRESIDENT NARIMAN: This letter  
4 admittedly was received -- no  
5 difficulty.

6 MR. VIOLI: Yes, that was the  
7 first letter that Claimants received.

8 PRESIDENT NARIMAN: Yes, first  
9 letter. Yes.

10 MR. CROOK: Two days after the  
11 date.

12 PRESIDENT NARIMAN: Yes, yes,  
13 two days, we know that.

14 Now, this gives you an  
15 opportunity to say that: "This  
16 statute doesn't apply to me at all,"  
17 because this states that this is a  
18 reminder to some previous letter which  
19 you have not received, apparently.

20 MR. VIOLI: Yes.

21 PRESIDENT NARIMAN: That's what  
22 it says, a reminder.

23 MR. VIOLI: No, there was no  
24 previous letter. It doesn't say there  
25 was a previous letter.

0557

1 Grand River Arbitration

2 PRESIDENT NARIMAN: It says  
3 reminder.

4 MR. VIOLI: That is just the  
5 reminder. They sent these letters out  
6 to all manufacturers reminding them  
7 that is a law in existence apparently.

8 PRESIDENT NARIMAN: No, but  
9 this law purports to apply to you. It  
10 says:

11 "Look here. If you have any  
12 questions, don't hesitate. Statutory  
13 deadline is April 15th. Can't be  
14 waived. For God's sake, do  
15 something."

16 This is received by you, by all  
17 nonparticipating tobacco

18 manufacturers.  
19 To the first thing that you  
20 could have done or should have done is  
21 to say that:

22 "Sorry. We have come to know  
23 of it. Thank you for informing us,  
24 but please notice that the statute  
25 does not apply to us for the following

0558

1 Grand River Arbitration  
2 reasons, one, two, three, four, five."

3 Correct?

4 MR. VIOLI: They retained a  
5 lawyer, Mr. President, in response.

6 PRESIDENT NARIMAN: I am asking  
7 about the Claimants now.

8 MR. VIOLI: Yes, they retained  
9 a lawyer.

10 PRESIDENT NARIMAN: Whether  
11 they retained or they didn't retain or  
12 retained a lawyer, we are not going  
13 into, because that we can't ask you  
14 about when you retained him or how  
15 much fee you paid him and so on. That  
16 is a matter between you --

17 MR. CROOK: I think Mr. Violi  
18 is saying that they did, in fact, take  
19 action.

20 PRESIDENT NARIMAN: But there  
21 was no response.

22 MR. VIOLI: Because it says,  
23 "if you are subject." If you are not  
24 subject to it, you don't have to --  
25 there is nothing you need to do.

0559

1 Grand River Arbitration

2 PRESIDENT NARIMAN: But you  
3 said it's quite clear -- when you  
4 received this letter, you were quite  
5 clear in your mind that the statute  
6 never applied to you.

7 MR. VIOLI: No, it was their  
8 good faith belief it didn't apply to  
9 them and -- with counsel after  
10 conferring with counsel, they're  
11 advised that it should not apply to



12 them. And the Wisconsin court where  
13 it was found -- Oregon did never  
14 enforce --

15 PRESIDENT NARIMAN: I am not on  
16 enforce. Did you reply to this  
17 letter?

18 MR. VIOLI: It doesn't require  
19 it. It says, if you were subject.

20 PRESIDENT NARIMAN: We know it  
21 doesn't require.

22 MR. VIOLI: Okay. It doesn't  
23 require, Mr. President.

24 PROFESSOR ANAYA: And you will  
25 get to at some point to why -- why you

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1 Grand River Arbitration  
2 thought it didn't apply?

3 MR. VIOLI: Yes, it's in  
4 Mr. Williams' affirmation where he  
5 says --

6 PROFESSOR ANAYA: No, I've read  
7 the document. We are having hearings  
8 so you can illuminate us further on  
9 what is in the documentation.

10 MR. VIOLI: It says, the first  
11 letter that they received is this one.  
12 It states, in bold capital letters:

13 If you are subject to the  
14 statutory requirements as a result of  
15 having sold cigarettes to consumers in  
16 the state of Oregon, as defined in the  
17 statute, then you must comply."

18 PRESIDENT NARIMAN: But you  
19 said selling cigarettes in Oregon.

20 MR. VIOLI: No. Do we sell  
21 cigarettes in Oregon?

22 PRESIDENT NARIMAN: No. Having  
23 sold cigarettes to consumers in the  
24 State of Oregon.

25 MR. VIOLI: Grand River never

0561

1 Grand River Arbitration  
2 sold cigarettes to consumers in --  
3 through an intermediary -- I don't  
4 even know what that means. That was  
5 one of the issues in the Wisconsin

6 court.

7 But Mr. Williams's response to  
8 this letter is:

9 "Grand River has never sold  
10 cigarettes to consumers, and certainly  
11 never sold cigarettes to consumers in  
12 Oregon."

13 In addition, the letter does  
14 not provide a copy of the statute to  
15 which it refers. The letter also  
16 fails to give notice that certain  
17 companies were allowed to join the MSA  
18 with payment exemptions, so on and so  
19 forth.

20 This point is that this letter  
21 comes in and it says: "If you are."  
22 It doesn't say -- it didn't have a  
23 copy of the statute. It didn't. It  
24 didn't.

25 PROFESSOR ANAYA: Answer what  
0562

1 Grand River Arbitration  
2 it is -- why you think the statute  
3 didn't apply. You keep saying:  
4 "If it applies, we don't think  
5 it applies, and we have a good faith  
6 belief it doesn't apply."

7 What is that argument?

8 MR. VIOLI: They are not a  
9 tobacco product manufacturer. At  
10 least, there was no certainty that  
11 they were a tobacco product  
12 manufacturer. Within the meaning of  
13 the statute, they were not a tobacco  
14 product manufacturer.

15 It could not apply to a company  
16 who has no jurisdictional contact with  
17 the State of Oregon. And, I mean,  
18 those are the two basic reasons. They  
19 didn't sell to consumers. The statute  
20 requires you to be a tobacco product  
21 manufacturer and sell to consumers.  
22 And we will go through that, but that  
23 is --

24 PROFESSOR ANAYA: We will go  
25 through all of this.

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1 Grand River Arbitration

2 MR. VIOLI: Yes.

3 PROFESSOR ANAYA: I am really  
4 interested in more generally, not just  
5 as to Oregon. But why didn't the  
6 escrow statutes where your products  
7 were being sold apply?

8 MR. VIOLI: And we will get to  
9 that. It's tobacco product  
10 manufacturer. It has to do with that.  
11 It has to do with reservation,  
12 on-reservation sales.

13 PROFESSOR ANAYA: Okay. In my  
14 mind that is the crux of your defense  
15 I am interested in. So get to that.

16 MR. VIOLI: Well, it is, but  
17 what we maintain is that, until they  
18 actually enforce the law and get a  
19 mandate from the court, there is no  
20 loss or damage.

21 What I would like to start with  
22 is a background of the Claimants and  
23 brief history.

24 Claimants are Canadian  
25 investors, who are members of the Six

0564

1 Grand River Arbitration

2 Nations otherwise known as Hood and  
3 the Shoshone or the Iroquois  
4 Confederacy. Since 1992, Claimants  
5 have engaged in tobacco trade  
6 throughout North America, initially  
7 and principally on Native American  
8 land throughout North America.

9 They formed a partnership in  
10 1994 called Grand River Enterprises  
11 and then incorporated that in  
12 association in 1996. We have  
13 resolutions from the Assembly of  
14 Nations, which is in the record  
15 speaking to the promotion of trade  
16 among first nations in North America,  
17 and the manufacturing facility that  
18 was on the Oshweken -- on the Grand  
19 River Reserve, in fact, as early as

20 1994.

21 Initially, the Claimants were  
22 involved in the distribution of  
23 premium and private label brands in  
24 North America. They sold the  
25 Marlboros. They sold the RJ Reynolds

0565

1 Grand River Arbitration  
2 products. Then they started to  
3 private label DKs and Putters. They  
4 had Star Tobacco making that product  
5 for them. I think Sego may have been  
6 the brand.

7 So they were having product  
8 made for them at that time. There  
9 came a point in time in '96 or so, or  
10 actually even before '96, where they  
11 invested in what is called the Racket  
12 Point facility at the Akwesasne  
13 Reserve in northern New York for the  
14 production of these private label  
15 brands.

16 In '97 -- in or about '97 and  
17 '98, the Claimants also entered into a  
18 venture with the Omaha Nation for the  
19 production of these private label  
20 brands and the Omaha Nation's own  
21 brand in return for a share of the  
22 profits -- the relationship with  
23 the -- well, Larry Skidders passed  
24 away -- the Racket Point facility  
25 co-venturer, and the relationship with

0566

1 Grand River Arbitration  
2 Mr. Skidders deteriorated.

3 And, instead of proceeding with  
4 the Racket Point, the -- and the Omaha  
5 Nation, the Claimants decided that the  
6 most efficient way to run their  
7 operation was to centralize production  
8 out of Oshweken and distribution out  
9 of northern New York.

10 So at the time or as of June of  
11 1999 -- and I put June 1999 because  
12 that is the first foreknowledge or  
13 first enactment of an escrow statute;

14 it may have been months earlier, but  
15 that is our first research -- but as  
16 of June of 1999, they had invested  
17 tens of millions of dollars in the US  
18 and Canadian market, formalized their  
19 manufacturing and distribution plans,  
20 and anticipated the continued success  
21 that they had experienced.

22 As I said, they formalized the  
23 plan, consolidated the manufacturing  
24 operation on the Grand River Reserve,  
25 and the distribution out of northern

0567

1 Grand River Arbitration  
2 New York, Seneca Nation territory of  
3 northern New York.

4 They sold their products  
5 without incident until 2002 when  
6 unbeknownst to them an injunction was  
7 entered against them arising out of  
8 the escrow statutes in July of 2002.

9 The first notice that they  
10 received that there was any sort of  
11 adverse enforcement action being taken  
12 against them was in the context of two  
13 letters received in late 2002 saying:

14 "Your product are banned from  
15 sale."

16 One letter says:  
17 "You're banned from sale under  
18 contraband law or complementary  
19 legislation," which was passed months  
20 after March 12, 2001.

21 And the other letter  
22 referenced, I believe, a judgment.

23 MR. CROOK: Both Missouri?

24 MR. VIOLI: No. The  
25 Missouri -- ironically enough, the

0568

1 Grand River Arbitration  
2 Missouri letter doesn't reference the  
3 judgment at all.

4 MR. CROOK: I am just -- you  
5 say they received two letters. And in  
6 what states were those?

7 MR. VIOLI: Arizona and

8 Missouri.

9 MR. CROOK: Thank you.

10 MR. VIOLI: The Missouri letter  
11 said:

12 "Your product is banned from  
13 sale under the contraband law."

14 It doesn't say:

15 "Your product is banned because  
16 we have got an injunction against you  
17 a couple of months earlier."

18 MR. CROOK: No, that's fine.

19 MR. VIOLI: What happened was,  
20 in or about 2002, and 2003, the  
21 Claimants began to sit down with the  
22 states and became fully conversant,  
23 for lack of a better word, and  
24 knowledgeable of the escrow statutes,  
25 how the states thought they applied,

0569

1 Grand River Arbitration  
2 and what was required under them.

3 Grand River entered into  
4 settlements with a number of states:  
5 North Carolina, South Carolina,  
6 Tennessee, Oklahoma, Nebraska,  
7 Louisiana, and Kansas. As part of  
8 those settlements, Grand River was  
9 required to make escrow deposits  
10 without prejudice.

11 The Nebraska settlement  
12 acknowledged that they were not  
13 charging escrow for on-Reserve sales  
14 in Nebraska.

15 Oklahoma, unfortunately, the  
16 attorney general would not agree, and  
17 Grand River deposited millions of  
18 dollars in escrow for on-Reserve sales  
19 in Oklahoma.

20 The settlements essentially  
21 were made without prejudice, and Grand  
22 River to this day has been compliant  
23 without prejudice in those states.  
24 And they have deposited close to 16 --  
25 they or their importer or the importer

0570

1 Grand River Arbitration

2 of the products has deposited close to  
3 \$6 million into escrow as of today.

4 I should mention that two of  
5 those states, North Carolina and  
6 South Carolina, do not recognize that  
7 Grand River is the manufacturer. They  
8 recognize that the importer, the  
9 off-Reserve importer, Tobaccoville is  
10 the manufacturer.

11 MR. CLODFELTER: Well, that's  
12 not correct; and, when we have an  
13 opportunity to explain why that's not  
14 correct, Tobaccoville is paying there  
15 the judgment -- default judgment  
16 against Grand River, who is the  
17 manufacturer.

18 MR. VIOLI: Actually, the  
19 escrow statutes -- and if we need to  
20 supplement the record, if they are  
21 going to bring in something that  
22 wasn't mentioned earlier, that's  
23 fine -- but the -- excuse me -- the  
24 escrow agreement.

25 MR. CROOK: Why don't we ask

0571

1 Grand River Arbitration  
2 Respondents to deal with that in their  
3 rebuttal.

4 MR. VIOLI: Fine, if we have  
5 time. The escrow agreement -- the  
6 escrow agreements, which I may mention  
7 now, are for North Carolina and  
8 South Carolina, does not have Grand  
9 River's name on it at all. It is  
10 Tobaccoville because the escrow  
11 statute requires you to obtain and  
12 enter into an escrow agreement.

13 Tobaccoville is the escrowee or  
14 escrower, whatever you want to call  
15 it.

16 So that is sort of the events.  
17 We have investments -- 1992 investors,  
18 Claimants, right through June of 1999  
19 and thereafter involved in the US  
20 market, principally on Reserve,  
21 through June of 1999.

22           And what we would like to do is  
23 the parallel sequel to the events that  
24 gave rise to the MSA and subsequently  
25 to the measures that are at issue.

0572

1           Grand River Arbitration

2           In 1993, unbeknownst to anyone,  
3 there was a paralegal at a law firm of  
4 one of the -- at the law firm that  
5 represented Brown & Williamson; and I  
6 believe he was done in Kentucky. The  
7 paralegal was purloining documents,  
8 Brown & Williamson documents -- it has  
9 been the subject of the movie, The  
10 Insider -- it was called.

11           The documents were subsequently  
12 given to attorneys, Senator Waxman,  
13 the US. He posed questions to the  
14 presidents of RJ Reynolds, Lorillard,  
15 Philip Morris, and said -- you know,  
16 asked certain questions about whether  
17 or not tobacco was addictive, nicotine  
18 was addictive.

19           They all denied it, but the law  
20 firm who was counseling with Senator  
21 Waxman had these documents that were  
22 purloined from these manufacturers'  
23 files showing that they were lying to  
24 consumers, targeting youth, and  
25 conspiring not to come out with a safe

0573

1           Grand River Arbitration

2 product. That launched litigation,  
3 massive litigation in 46 states  
4 against the four major manufacturers,  
5 who were accused of these sorts of  
6 atrocities.

7           PRESIDENT NARIMAN: This is  
8 prior to 98?

9           MR. VIOLI: This is between '94  
10 and '96.

11           PRESIDENT NARIMAN: Before the  
12 MSA?

13           MR. VIOLI: This is what gave  
14 rise to the MSA.

15           Over 30 lawsuits were brought



16 using a coordinated litigation  
17 strategy and scheme that was  
18 coordinated by the National  
19 Association of Attorneys General. By  
20 1997 it was evident that the tobacco  
21 companies would rather settle than  
22 continue to litigate.

23 And there were settlements  
24 reached in '97 between Minnesota,  
25 Florida, Mississippi, and Texas, which

0574

1 Grand River Arbitration  
2 left 46 other states out there.

3 In 1998, the negotiations were  
4 undertaken in earnest, and the  
5 remaining cases were settled and  
6 claims -- not every state brought a  
7 lawsuit -- they were settled under the  
8 MSA.

9 The litigation ends in or about  
10 1999 when consent decrees are entered  
11 right after the MSA, and pursuant to  
12 the MSA, and the MSA is entered into.

13 In mid 1999, we see that the  
14 states start to adopt escrow statutes.  
15 The escrow statutes -- get to in a  
16 moment -- are not mandatory. But if a  
17 state doesn't adopt an escrow  
18 statutes, it loses money under the  
19 MSA. So there is an incentive to pass  
20 the escrow statutes.

21 MR. CROOK: Mr. Violi, I notice  
22 you don't talk about the first  
23 comprehensive settlement and the  
24 failure of Congress to enact it. Is  
25 it that you are just trying to keep

0575

1 Grand River Arbitration  
2 things simple for us?

3 MR. VIOLI: I am, because if I  
4 were I would have to mention that  
5 there was an antitrust exemption  
6 because they wanted to do certain  
7 thing. But Senator McCain did not  
8 agree with it.

9 MR. CROOK: Okay. It's just

10 for purposes of simplicity then.  
11 There is no underlying reason other  
12 than that.

13 MR. VIOLI: No.

14 PROFESSOR ANAYA: Have any  
15 states not adopted escrow statutes?

16 MR. VIOLI: No, the states  
17 began in mid 1999 -- the last state  
18 was in 2000. There was eight of them  
19 that adopted it in 2000. We talked  
20 about this yesterday.

21 And then in 2001 there were  
22 some amendments, even post March 12,  
23 2001. What happened was the escrow  
24 statutes of some states did not  
25 conform to what the manufacturers had

0576

1 Grand River Arbitration  
2 negotiated the MSA wanted.

3 So those states had to change  
4 their escrow statutes in order to be  
5 considered a qualifying statute under  
6 the MSA, and we have a slide on that  
7 later.

8 I'll talk briefly about the  
9 structure of the MSA. It's a private  
10 settlement agreement among four major  
11 tobacco companies called OPMs. They  
12 were the ones who negotiated the deal.  
13 They were the ones who were sued, and  
14 they were the ones who originally  
15 executed them.

16 The MSA states agreed in  
17 return, in consideration for among  
18 other things executing the settlement  
19 and ending the litigation, to release  
20 all of their claims against the  
21 OPMs -- and, again, OPMs are RJR,  
22 Philip Morris, Lorillard, and B&W.

23 In return the OPMs had to make  
24 or agreed to make annual settlement  
25 payments ranging from 4 to \$9 billion.

0577

1 Grand River Arbitration  
2 Those payments are subject to  
3 adjustments for market share. If the

4 OPM's market share is reduced, there  
5 is a possibility of reduction. If  
6 their volume is reduced, there is a  
7 definite reduction under the MSA.

8 So anytime OPM sales decrease,  
9 MSA payments decrease as well.

10 The OPM also agreed to  
11 discontinue certain advertising and  
12 marketing.

13 A problem arose, apparently,  
14 during the negotiations, because we  
15 have an article attached to our  
16 particularized statement of claim  
17 where the major tobacco companies  
18 complained that:

19 "After the MSA, we are going to  
20 raise our price to pay for this" --  
21 excuse me -- "this MSA burden of 4 to  
22 \$9 billion a year. And it's probably  
23 going to cost \$0.35 a pack" or --  
24 \$0.35 a pack over the course of  
25 25 years or \$3.50 a carton, up to \$4 a

0578

1 Grand River Arbitration  
2 carton over the course of 25 years.

3 So they said:

4 "When we raise our price, we  
5 don't want to lose market share and  
6 volume, because we don't want to lose  
7 profit, and you MSA states -- you  
8 don't want to lose MSA payments. So  
9 what do we do about smaller companies  
10 that were never sued or accused of any  
11 wrongdoing and who wouldn't have to  
12 raise their price to pay for a  
13 settlement that they didn't negotiate,  
14 that they didn't enter into?"

15 The answer was to make the  
16 settlement's payment terms applicable  
17 to these small companies. And then  
18 the question came again about how.

19 And that's where we come to  
20 what's called the renegade clause in  
21 the escrow statute. The answer to  
22 that question how was simply open up  
23 the MSA to all tobacco product

24 manufacturers who might wish to join.

25 That sounds great. We'll just

0579

1 Grand River Arbitration  
2 approach all tobacco product  
3 manufacturers in the United States,  
4 and say:

5 "Guess what? Here is a  
6 settlement that your competitors  
7 reached. They have to pay, and you'll  
8 have to pay as much as they do on a  
9 pro rata basis, and, again,  
10 advertising and so forth. But we are  
11 not accusing you of any wrongdoing.  
12 You didn't do any wrongdoing. Please  
13 join."

14 Well, that wasn't going to fly.  
15 So how do you get them to join. What  
16 they crafted into the MSA was  
17 something called the renegade clause,  
18 which basically says -- there is no  
19 actual invitation in the MSA that  
20 says, "you shall join" or "you can  
21 join"; it just says: "Subsequent  
22 participating manufacturers are" --  
23 and it defines them -- and "subsequent  
24 participating manufacturers shall  
25 pay."

0580

1 Grand River Arbitration  
2 So the idea is, well, how do  
3 you become a subsequent participating  
4 manufacturer.

5 Well, you have to get notice of  
6 the settlement, that it's open to  
7 everyone. And, by the way, here is an  
8 inducement because, obviously, you  
9 wouldn't join in this kind of  
10 agreement unless there was some  
11 incentive. You would never pay dollar  
12 for dollar what Philip Morris pays,  
13 never agree not to advertise in a way  
14 that Philip Morris agreed not to  
15 advertise, because your profit level  
16 as a generic or small Native American  
17 Enterprise is just pennies, or

18 whatever, on a carton.

19 You couldn't pay 3 or \$4 a  
20 carton.

21 So what they did was they gave  
22 an inducement or incentive to these  
23 small manufacturers. Now, the record  
24 also shows that there was actually  
25 private invitations. An attorney -- I

0581

1 Grand River Arbitration  
2 should have mentioned it.

3 The attorneys that represented  
4 the MSA states -- the MSA states  
5 were -- obviously, they brought these  
6 civil lawsuits -- by the attorney  
7 general. But they were represented  
8 principally presently by an asbestos  
9 law firm down in South Carolina and  
10 Mississippi. A fellow -- one of the  
11 attorneys -- and they are receiving  
12 \$500 million a year, by the way, as  
13 their attorneys' fees for concluding  
14 and reaching the settlement.

15 One of the lawyers, Joseph Rice  
16 from Ness, Motley, was charged with  
17 the responsibility of going to small  
18 manufacturers, physically took his  
19 private jet and he went to meet the  
20 fellow at Baileys.

21 So he would -- he flew around  
22 the country, apparently, after the MSA  
23 was executed, and said:

24 "Here is the deal. Here is  
25 this massive settlement."

0582

1 Grand River Arbitration

2 As one of the -- one company  
3 said:

4 "I was given this massive  
5 statement and said I have a week to  
6 decide whether I should join it,  
7 whether I could join it."

8 And the reason why he only had  
9 a little bit of time was because that  
10 window to get an exemption expired in  
11 60 days -- it actually didn't expire

12 in 90 days -- and I will get to that.  
13 There was actually concession  
14 made, so they gave these companies 60  
15 days to join with an incentive by  
16 personal invitation. And this  
17 incentive says:

18 "You can continue to make the  
19 pro rata market share you had for  
20 1997, 125 percent of what you did in  
21 1997, or 100 percent of what you did  
22 in 1998. And you can do that in  
23 perpetuity without making any payments  
24 under the escrow statutes."

25 A significant inducement for

0583

1 Grand River Arbitration  
2 some to join, and they get -- and I  
3 think eight others immediately said:

4 "We are going to sign onto this  
5 sort of concession."

6 Now, one of the questions that  
7 we raise is -- he makes a good point  
8 here -- under the NAFTA -- we believe  
9 the NAFTA is a free trade -- it's a  
10 charter for free trade, United States,  
11 Canada, and Mexico.

12 Okay. How can 46 states or  
13 even the United States -- and I am not  
14 blaming the United States -- but how  
15 can 46 states draw a border around the  
16 United States, and say:

17 "From this date forward, if you  
18 sold so much between '97 and '98 or  
19 manufactured so much in '97 and '98,  
20 in the United States, you get a  
21 perpetual exemption. Your production,  
22 your sales anywhere else in the free  
23 trade area, irrelevant. We are  
24 putting a border around the United  
25 States, saying, if you had this much

0584

1 Grand River Arbitration  
2 market share in '97 and '98, you can  
3 get a grandfathered exemption in  
4 perpetuity. Your fellow or your  
5 competitors in Canada and Mexico, they

6 don't get it. If they didn't have or  
7 were only to the extent that they had  
8 market share in the US, they can  
9 continue with that market share.

10 And in fact, there was "In Ram"  
11 [phonetic] embargo, by way of the  
12 contraband laws going forward -- "If  
13 you don't agree to be bound by that  
14 limitation, we are going to embargo  
15 your product. It can't even come into  
16 the state. It's contraband. It's  
17 subject to seizure."

18 PRESIDENT NARIMAN: If Grand  
19 River had manufactured cigarettes --

20 MR. VIOLI: Yes, or  
21 Claimants --

22 PRESIDENT NARIMAN: The  
23 Claimants.

24 If the Claimants had  
25 manufactured cigarette and sold them

0585

1 Grand River Arbitration  
2 in the United States prior to 1999,  
3 that it was there in '97, '98, this  
4 would have been an ideal bargain, and  
5 they would have opted.

6 Do I understand you?

7 MR. VIOLI: Not necessarily,  
8 Mr. President, and I will tell you  
9 why.

10 If you had a million carton  
11 exemption, or a million carton  
12 exemption -- let's say you made a  
13 million cartons in the United States  
14 in '97 and '98 -- I forget numbers; it  
15 may be a billion, with all the  
16 ventures they had, selling private  
17 labels, manufacturing -- but let's say  
18 you have a million cartons because I  
19 want to make it easy.

20 And that is all you had for  
21 '97, '98. Okay. Under the MSA, you  
22 have to pay \$4 million -- \$4 a  
23 carton -- okay -- so you get you get a  
24 \$4 million exemption.

25 But as soon you sell 1 million

0586

1 Grand River Arbitration  
2 and one carton, on that one carton  
3 after a million, you have to pay \$4 a  
4 carton. So what happens if you sell  
5 two million cartons? Right.

6 If you sell two million -- if  
7 you sell one million, zero under the  
8 MSA with this exemption. If you sell  
9 2 million, with the exemption, you are  
10 \$2 a carton. If you sell four, \$1 a  
11 carton.

12 So as you expand production  
13 with this exemption, you actually  
14 raise your MSA payment. So you are  
15 asking me: Wouldn't it be a good  
16 deal? No.

17 If you didn't have the market  
18 share that Liggett has or some of your  
19 other competitors, it might not -- it  
20 might not be a good deal. That is why  
21 Bailey's, which we will get to in a  
22 moment, entered into the settlement.

23 Under the escrow statutes as  
24 they were originally enacted, if you  
25 took that one millionth cigarette

0587

1 Grand River Arbitration  
2 carton and you sold it only in  
3 Oklahoma, you would have to pay \$4 --  
4 \$4 million; but you would get back all  
5 but \$.04, right.

6 If you decided to go to Kansas,  
7 then you would go to \$.08, correct.

8 The point is, under the  
9 original escrow statutes, you would  
10 effectively lower your net escrow  
11 burden, to where Grand River did, to  
12 \$.50 a carton. So Grand River --

13 MR. CLODFELTER: Now, the  
14 exemption, therefore, was a bad deal;  
15 and, therefore, they didn't suffer any  
16 loss because of that.

17 MR. VIOLI: No, the argument is  
18 that discrimination is experienced,  
19 that the plan was hatched -- we will



20 get to it because we will see that  
21 they scurried, when the MSA states --  
22 PRESIDENT NARIMAN: But you  
23 were not a manufacturer --  
24 MR. VIOLI: Yes, we were.  
25 PRESIDENT NARIMAN: -- of

0588

1 Grand River Arbitration  
2 cigarettes. You just told us that  
3 after 1999 you became a manufacturer.  
4 MR. VIOLI: No, we were a  
5 manufacturer since '94. In '92 we  
6 private labeled. The manufacturing  
7 facility was moved exclusively to --  
8 production was moved in December or  
9 January of -- December of '98, January  
10 of '99 to Canada.

11 PRESIDENT NARIMAN: So you  
12 never manufactured cigarettes for the  
13 US market until 1999?

14 MR. VIOLI: Grand River, Grand  
15 River, just that one company.

16 MR. CLODFELTER: But is there  
17 any allegations that any of the other  
18 Claimants were manufacturers of  
19 cigarettes?

20 MR. VIOLI: Absolutely.  
21 Claimants, we said Racket Point --

22 MR. CLODFELTER: At the time of  
23 the MSA?

24 MR. VIOLI: Yes, Omaha.

25 MR. CLODFELTER: At the time of

0589

1 Grand River Arbitration  
2 the MSA, where are they? They are not  
3 Claimants. Omaha is not a Claimant.

4 MR. VIOLI: They're  
5 co-venturers in the Omaha enterprise.  
6 The Racket Point --

7 MR. CLODFELTER: There is no  
8 claim for that production.

9 MR. VIOLI: What are you  
10 talking about?

11 MR. CROOK: I'm sorry. You're  
12 saying you can claim with respect to  
13 their production, but their knowledge

14 is not imputable --

15 MR. VIOLI: I'm sorry.

16 MR. CROOK: You can claim with  
17 respect to their production, but their  
18 knowledge is not imputable to you.

19 MR. VIOLI: I don't understand  
20 what that means.

21 MR. CROOK: You were saying  
22 that -- yesterday, that communications  
23 received by Omaha Tobacco were not --  
24 you were not --

25 MR. VIOLI: The communication  
0590

1 Grand River Arbitration  
2 that Omaha received was in October of  
3 2000. By then Grand River -- the  
4 Claimants, not Grand River -- the  
5 Claimants had severed their  
6 relationship with Omaha.

7 MR. CROOK: When precisely did  
8 that relationship sever?

9 MR. VIOLI: Was it '98? 1998,  
10 right. I can get that.

11 MR. CROOK: If you could, the  
12 representation was --

13 MR. VIOLI: I believe it's '98.

14 MR. CROOK: I believe  
15 Mr. Williams lived there until late  
16 '98.

17 MR. VIOLI: Yes, it was '98.

18 MR. CLODFELTER: So before the  
19 MSA -- so no production at the time of  
20 the MSA by any of the Claimants is my  
21 point, except Grand River.

22 MR. VIOLI: No, no, no.

23 MR. CLODFELTER: This is an  
24 easy thing.

25 MR. VIOLI: The Claimants have  
0591

1 Grand River Arbitration  
2 a volume market share exemption based  
3 on their production, not through Grand  
4 River, but through their other  
5 enterprises.

6 MS. MENAKER: And I am just  
7 trying to understand.

8 MR. VIOLI: You can get to it  
9 on rebuttal if you like, but I would  
10 like to get through this at some point  
11 today.

12 So the renegade clause gave  
13 this exemption to small companies. It  
14 may or may not be beneficial. One  
15 company says -- it said wasn't  
16 beneficial who was invited. That was  
17 S&M brands.

18 PRESIDENT NARIMAN: Any other  
19 Canadian company joining?

20 MR. VIOLI: The subsidiaries of  
21 the big OPMs, the affiliates of RJ  
22 Reynolds, I think, and Philip Morris  
23 have joined. They knew about it.  
24 They joined. And they have an  
25 exemption actually, because they knew

0592

1 Grand River Arbitration  
2 about it already.

3 Now, the renegade clause --  
4 even then the MSA doesn't apply to  
5 small companies. If you choose not to  
6 join, then that's fine. You don't  
7 have to join.

8 But if you say no, there's a  
9 possibility that you will be subject  
10 to an escrow statute, the escrow  
11 statutes --

12 PRESIDENT NARIMAN:  
13 Possibility, why possibility?

14 MR. VIOLI: Because it wasn't  
15 passed -- it wasn't a certainty.

16 The states took the position  
17 that we were not required to pass the  
18 escrow statutes; and, in fact, they  
19 are not. They weren't required under  
20 the MSA. The MSA just said:

21 "If you don't pass an escrow  
22 statute, your payments could go down  
23 if we lose market share."

24 If the OPMs lose market share,  
25 and you, one state -- and this is

0593

1 Grand River Arbitration

2 where it gets Draconian.

3 PRESIDENT NARIMAN: Is there  
4 any evidence here that the states  
5 refuse to pass escrow statutes?

6 MR. VIOLI: Well, they didn't  
7 in 1999.

8 PRESIDENT NARIMAN: No, I'm  
9 asking you:

10 Is there anything on the record  
11 to show that any state refused to pass  
12 the escrow statute?

13 MR. VIOLI: No, they all passed  
14 them.

15 PRESIDENT NARIMAN: They all  
16 passed it.

17 MR. VIOLI: They all passed  
18 them. They did. But they didn't pass  
19 it -- they passed it later, not at the  
20 time of the MSA, a year or two.

21 PRESIDENT NARIMAN: No, no,  
22 they passed it in due course. Each  
23 state was required --

24 MR. VIOLI: No, not required.  
25 Not required. It was optional. If

0594

1 Grand River Arbitration  
2 they didn't pass it, their money would  
3 go down under the MSA.

4 So the inducement to these  
5 small companies was, if you don't join  
6 the MSA, there is a possibility in the  
7 future that the state is going to that  
8 is sort of an amendment.

9 PROFESSOR ANAYA: You say  
10 possibility in the future. Was it  
11 contemplated that some states might  
12 not pass it? Wasn't it an essential  
13 feature of the MSA, that they would  
14 pass it?

15 MR. VIOLI: It wasn't --

16 PRESIDENT NARIMAN: Make it  
17 beneficial to pass it for the state.

18 MR. VIOLI: It was economically  
19 beneficial.

20 PRESIDENT NARIMAN: Yes.

21 MR. VIOLI: But it wasn't a

22 certainty, and I don't know the  
23 legislative history. But I know some  
24 states delayed passing it a year. I  
25 guess they must have questioned, well,

0595

1 Grand River Arbitration

2 do "we" --

3 PRESIDENT NARIMAN: There is  
4 nothing on the record about all of  
5 this, that they "questioned" and they  
6 said.

7 MR. VIOLI: Yes.

8 PRESIDENT NARIMAN: And there  
9 is nothing at the moment in the  
10 record.

11 MR. VIOLI: There is a slide  
12 that talks about how the language was  
13 not satisfactory as of 2001 for a  
14 handful of states, and then they had  
15 to change. They had to change their  
16 model escrow statutes to conform to  
17 the one that is attached to the MSA.

18 So I think there was some  
19 debate when eight states got docked --  
20 you know, they received less payment  
21 for '99 because, if they didn't have  
22 this statute in place, then they --  
23 then they, you know, succumbed so to  
24 speak.

25 Now, I would like to go to the

0596

1 Grand River Arbitration

2 purpose of the escrow statute,  
3 because, I think, as I said, it was  
4 hanging over the head.

5 But before that, if you look at  
6 the MSA, you read it -- it says  
7 that -- it doesn't say there is an  
8 exemption, per se. What it says is:

9 "A manufacturer who joins later  
10 shall have payment obligations only to  
11 the extent its market share exceeds  
12 its '97 or '98 market share. And if  
13 you join after 60 days, your market  
14 share is zero. So even if you did  
15 have market share in '97, '98, if you

16 don't join within 60 days, your market  
17 share is zero, no matter what."

18 Now, that 60 days expired. It  
19 expired. November '98, you got  
20 December -- you have got January.  
21 What happens? Eight companies say:

22 "Well, we might want to join  
23 the MSA."

24 We have a slide that will show  
25 it. We have -- not a slide.

0597

1 Grand River Arbitration

2 So what do the MSA states do?

3 They amend the MSA to extend the  
4 deadline another 30 days, another 30  
5 days.

6 PRESIDENT NARIMAN: I just --  
7 all of this argument is very useful  
8 and interesting. I find it quite  
9 fascinating. But I just want to know:

10 Why did the Claimants not join  
11 the bandwagon? I mean, I have heard  
12 all this --

13 MR. VIOLI: They weren't  
14 invited within 90 days. They weren't  
15 invited within 60 days. The MSA said  
16 you had 60 days to join.

17 PRESIDENT NARIMAN: Not on  
18 invited or not invited. I'm just  
19 saying, there was -- MSA was  
20 concluded. You had knowledge that it  
21 was concluded. You were not invited.  
22 Why didn't you barge into the party  
23 and join the party?

24 MR. VIOLI: Mr. Nariman -- --  
25 Mr. President, when --

0598

1 Grand River Arbitration

2 PRESIDENT NARIMAN: No, I am  
3 asking you.

4 MR. VIOLI: It's a good point  
5 but, if GM, Chrysler, and Ford enter  
6 into a settlement agreement --

7 PRESIDENT NARIMAN: I'm asking  
8 you. It was economically advantageous  
9 for you.

10 MR. VIOLI: But we don't know.

11 PRESIDENT NARIMAN: I

12 thought --

13 MR. VIOLI: But we didn't know  
14 it was or wasn't.

15 PRESIDENT NARIMAN: That means  
16 you were not aware of the MSA at all.

17 MR. VIOLI: We were not aware  
18 of the exemptions. We were not aware  
19 that it was open to other companies.

20 PRESIDENT NARIMAN: You told us  
21 earlier that "we" were aware that MSA  
22 was concluded.

23 I then asked you, did you then  
24 find out through your advocates or  
25 anybody that what does this contain,

0599

1 Grand River Arbitration  
2 this MSA, so that "we know whether we  
3 have to join; we don't have to join."

4 But then you said that: "Why,  
5 we have no obligation to read it."  
6 This is what confuses me. I am  
7 totally confused on this.

8 MR. VIOLI: What is reasonable  
9 is, why would some company if three --

10 PRESIDENT NARIMAN: You are  
11 asking me questions. I am asking you.

12 MR. VIOLI: Because it's not  
13 reasonable. It's not reasonable to  
14 think that four companies who have  
15 been sued because they have targeted  
16 youth, spiked nicotine in their  
17 product, and conspired not to come out  
18 with a safe product -- that's what  
19 they were sued for -- it's not  
20 reasonable to assume that a settlement  
21 that they enter into for cases that  
22 alleged those facts would also bring  
23 in other companies who had never been  
24 accused of that kind of conduct.

25 PRESIDENT NARIMAN: You were

0600

1 Grand River Arbitration  
2 never -- you were not aware that you  
3 had an option to join.

4 MR. VIOLI: Absolutely,  
5 absolutely -- certainly not in the  
6 first three months.

7 PRESIDENT NARIMAN: But if you  
8 read the MSA, you would have. Why  
9 should you read it, you say.

10 MR. VIOLI: There is no  
11 occasion to read the MSA if it applies  
12 to four companies.

13 PRESIDENT NARIMAN: You never  
14 took legal advice before July 2002.

15 That is your statement of claim.

16 MR. VIOLI: No.

17 PRESIDENT NARIMAN: Yes. July,  
18 first time.

19 MR. VIOLI: That's the first  
20 time they retained us. That is  
21 correct. They actually -- they have  
22 legal counsel before July 2002.

23 PRESIDENT NARIMAN: You have  
24 not said that. I don't know whether  
25 you have or you have not. Your

0601

1 Grand River Arbitration  
2 statement of claim -- no, your  
3 statement of claim is July of 2002.

4 MR. VIOLI: Is when they first  
5 became fully apprised of the measure.  
6 That's correct.

7 PRESIDENT NARIMAN: When you  
8 engaged counsel. Therefore, when you  
9 came to know it was concluded, you  
10 didn't go to counsel and say:

11 "For God's sake, tell us is  
12 this -- should we join, or shall we  
13 jump into this bandwagon? Or shall we  
14 remain outside?"

15 MR. VIOLI: But the question  
16 is, to get an exemption, you had to do  
17 that within 60 days, and they did not.  
18 They did not have reason to believe it  
19 was for them during those 60 days.  
20 There was nothing that put them on  
21 notice that they could join in 60  
22 days, and there is certainly nothing  
23 that said anything about exemptions in



24 60 days.  
25 PROFESSOR ANAYA: And you are  
0602  
1 Grand River Arbitration  
2 saying these other companies that did  
3 join they were invited -- they were  
4 apparently invited by --  
5 MR. VIOLI: Yes, right. What  
6 we think happened -- what we think  
7 happened -- I don't know of any Native  
8 American Enterprise, because the MSA  
9 has a provision that says:  
10 "This doesn't apply to tribal  
11 territory, conduct on tribal  
12 territory."  
13 We believe -- there is an --  
14 the attorney general --  
15 PRESIDENT NARIMAN: The MSA  
16 says it doesn't apply to tribal  
17 reservations?  
18 MR. VIOLI: It says that  
19 vaguely, yes. It has a --  
20 PRESIDENT NARIMAN: Which  
21 clause? I want to see that.  
22 MR. VIOLI: It has to do with  
23 releases. Where is that -- on FF, at  
24 one of the last provisions.  
25 PRESIDENT NARIMAN: What page?  
0603  
1 Grand River Arbitration  
2 MR. VIOLI: I'm sorry. It's  
3 page 118.  
4 PRESIDENT NARIMAN: Thank you.  
5 MR. VIOLI: Of Exhibits, volume  
6 two.  
7 PRESIDENT NARIMAN: Yes, 118.  
8 MR. VIOLI: Right.  
9 MR. LIEBLICH: What is the  
10 provision?  
11 MR. VIOLI: FF.  
12 MS. MENAKER: Of what section?  
13 MR. VIOLI: Page 118 of  
14 Exhibit 13.  
15 MS. GUYMON: Your pagination is  
16 different from the official copy of  
17 the MSA. There is --

18 MR. VIOLI: There is no  
19 official copy.  
20 MR. LIEBLICH: FF is  
21 subsection.  
22 PRESIDENT NARIMAN: Page 118,  
23 page 118, you said.  
24 MR. VIOLI: It's the very  
25 last -- it's right before the "In  
0604

1 Grand River Arbitration  
2 witness whereof."  
3 PRESIDENT NARIMAN: In  
4 connection with geographic  
5 boundaries --  
6 MR. VIOLI: Yes.  
7 PRESIDENT NARIMAN: -- with  
8 settling states -- and you got it --  
9 actions within -- just before the "in  
10 witness whereof" -- the very last page  
11 of the document. Now, read it.  
12 MR. VIOLI: "To the extent that  
13 any provision of this agreement  
14 expressly prohibits, restricts, or  
15 requires any action to be taken within  
16 any settling state or the settling  
17 states, the relevant prohibition  
18 restriction or requirement applies  
19 within the geographic boundaries of  
20 the applicable settling state or  
21 settling states, including but not  
22 limited to Indian country or Indian  
23 Trust Land, within such geographic  
24 boundaries."

25 PRESIDENT NARIMAN: But it  
0605

1 Grand River Arbitration  
2 includes it.  
3 MR. VIOLI: It includes it.  
4 But MSA --  
5 PRESIDENT NARIMAN: It's the  
6 other way around.  
7 MR. VIOLI: No, yeah -- I'm  
8 going to say it's the other way  
9 around. It purports to apply, but the  
10 escrow statutes don't apply.  
11 PRESIDENT NARIMAN: No, no, I

12 am saying, this purports to apply to  
13 Indian reservations as well.

14 MR. VIOLI: It does. And  
15 that's my point. It purports to apply  
16 to the Indian reservation, but the  
17 Seneca Nation -- no Native American  
18 Enterprise that we are aware of in the  
19 United States was invited to join this  
20 agreement, but it purported to apply  
21 to that.

22 PRESIDENT NARIMAN: No, please  
23 just listen to this because this I was  
24 not aware of nor did the Respondents  
25 point it out -- that this purports to

0606

1 Grand River Arbitration  
2 say that -- this agreement, this MSA,  
3 that it applies also to the Indian  
4 country or Indian trust land within  
5 each settling state, so it expressly  
6 applies to Indian reservations.

7 MR. VIOLI: Correct.

8 PRESIDENT NARIMAN: That is --  
9 the impression I had was that it does  
10 not apply to Indian reservations.

11 MR. VIOLI: On escrow statutes,  
12 you are right. Yes, that's debatable.

13 MR. CLODFELTER: What -- the  
14 MSA or the escrow statute, what's the  
15 expectation -- this is all new  
16 argument that we have never seen any  
17 of this before.

18 MR. VIOLI: The escrow  
19 statutes -- the escrow statutes, some  
20 states apply the escrow statutes on  
21 Reserves. Some don't.

22 MR. CLODFELTER: It's not in  
23 the statutes anymore.

24 MR. CROOK: I'm sorry. Excuse  
25 me. I've sort of lost the track.

0607

1 Grand River Arbitration  
2 What is the argument you are making  
3 right now? Maybe we can -- you can  
4 clarify that and we can get back on  
5 track.

6 MR. VIOLI: No, the president  
7 asked about whether or not this  
8 applied to reservations.  
9 MR. CROOK: I understand that.  
10 MR. VIOLI: And it does apply.  
11 The Seneca Nation, none of the --  
12 PRESIDENT NARIMAN: No, no, I  
13 asked you and you said your impression  
14 was that it -- in fact, the MSA did  
15 not apply to Indian reservations.  
16 That's why I said, let's have a look  
17 at the provision.  
18 MR. CROOK: Mr. Violi, you  
19 raised the provision; and, quite  
20 frankly, I'm sorry, I've lost -- my  
21 mental train has derailed, and I have  
22 lost the context in which you raised  
23 that. Perhaps you can remind us what  
24 your argument was.  
25 PROFESSOR ANAYA: I believe you  
0608  
1 Grand River Arbitration  
2 were talking about how no Indian  
3 tribe --  
4 MR. VIOLI: Yes, they were not  
5 invited to join -- to my knowledge  
6 they were not invited to join the MSA.  
7 We have a letter from the  
8 attorney general of the Seneca Nation  
9 saying that they were not invited.  
10 MR. CROOK: That's a statement  
11 you are providing for our factual  
12 context. You are -- do you now have  
13 as part of your claim the assertion  
14 there was a discrimination in this  
15 period in 1998, 1999, when your  
16 clients were not invited? Is that  
17 part of your case now or not?  
18 MR. VIOLI: No. We suffered --  
19 we were discriminated against, but we  
20 didn't suffer loss or damage until the  
21 allocable share amendment by reason of  
22 the discrimination. See, you get an  
23 exemption --  
24 MR. CROOK: Okay. So if we get  
25 to a merits stage, you would continue

0609

1 Grand River Arbitration  
2 to assert that there was a breach of  
3 NAFTA in 1998, 1999, but you were not  
4 damaged until some much later time.  
5 So is that -- does that remain -- does  
6 that claim of NAFTA breach remain part  
7 of your case or not?

8 MR. WEILER: It's the measures  
9 that impose the MSA, the MSA's  
10 negotiation.

11 MR. CROOK: You are not  
12 asserting that the MSA is the measure.

13 MR. VIOLI: Right that's  
14 correct.

15 MR. CROOK: So that what you  
16 are saying to us is really historical  
17 background, not your legal claim.

18 MR. VIOLI: Right, it's  
19 background that, because the escrow  
20 statutes refer and incorporate the  
21 MSA, some of the MSA --

22 MR. CROOK: Okay. I just want  
23 to be clear on what you're saying.

24 MR. VIOLI: We are not  
25 complaining about the MSA per se, only

0610

1 Grand River Arbitration  
2 by the discrimination results, because  
3 the MSA gave certain favorable  
4 treatment to certain individuals in  
5 Claimants -- certain investors, and  
6 this was not offered to these  
7 investors.

8 But the actual harm from that  
9 discrimination does not -- is not  
10 experienced until the allocable -- the  
11 escrow statute is amended, lowering --  
12 or increasing the escrow burden to a  
13 point beyond the exempt MSA burden.

14 PRESIDENT NARIMAN: Did any  
15 escrow statute in any state exclude  
16 Indian country or Indian trust land?

17 MR. VIOLI: On its terms, no,  
18 Mr. President, only in its  
19 application. Only in its application.

20 PROFESSOR ANAYA: How is that?

21 MR. VIOLI: Because we know  
22 that in Nebraska we have entered into  
23 a settlement agreement with the  
24 attorney general of Nebraska, and they  
25 have told us that they are not

0611

1 Grand River Arbitration  
2 charging -- in the settlement  
3 agreement they have told us they are  
4 not charging us for on-Reserve sales.

5 In New York, there has been no  
6 charge for escrow for on-Reserve  
7 sales.

8 Unfortunately, it's not  
9 uniform. In Oklahoma we are being  
10 charged for on-Reserve sales where a  
11 tribal stamp is affixed to the  
12 product.

13 PRESIDENT NARIMAN: Thank you.  
14 Yes.

15 MR. VIOLI: What I would like  
16 to do is talk about the purposes of  
17 the escrow statutes. And, apparently,  
18 they serve two purposes. Under the  
19 MSA, under the MSA --

20 PRESIDENT NARIMAN: Would you  
21 like to take a break? Let's take a  
22 10-minute break.

23 (Whereupon a short break is  
24 taken.)

25 PRESIDENT NARIMAN: Let's

0612

1 Grand River Arbitration  
2 start.

3 MR. VIOLI: Before I move on, I  
4 would like to bring a point that I  
5 sort of lost track of during the  
6 discussion and questions, regarding  
7 when the MSA was publicly available.

8 Mr. President, we have asked --  
9 the response by Respondent is that it  
10 was on the National Association of  
11 Attorneys General network, or web  
12 site.

13 And you say, well, maybe you

14 could have asked for it anywhere. And  
15 I am not speaking to that. I'm  
16 speaking to when it was publicly  
17 available and you could actually get  
18 it off of the web.

19 We asked when that was posted.  
20 And we didn't get a response, when the  
21 exact date it was posted. And I'll  
22 tell you the reason why I have some  
23 difficulty with that.

24 When I first obtained a copy of  
25 the MSA off of the NAAG web site in  
0613

1 Grand River Arbitration  
2 March of 1999, it did not have all of  
3 the amendments, including the  
4 amendments that gave an extension for  
5 the deadline for an exemption on those  
6 eight other companies.

7 When the New York attorney  
8 general -- and we have the record of  
9 the federal proceedings -- when he  
10 submitted the MSA into the record in  
11 that case, it -- pages and pagination  
12 conflicted, as I heard the "official"  
13 MSA version. I have never seen a  
14 signed -- to this day, no one has a  
15 completed, executed with everyone's  
16 signature -- I mean, no one publicly.  
17 I don't have it.

18 PRESIDENT NARIMAN: Which is  
19 the one you have annexed?

20 MR. VIOLI: I have one that we  
21 got off of a web site, from an  
22 attorney general's web site which is  
23 long after March 12th.

24 PRESIDENT NARIMAN: I am not  
25 asking where did you get it. But when  
0614

1 Grand River Arbitration  
2 did you get it?

3 MR. VIOLI: Probably last year.  
4 We printed it off the web site last  
5 year.

6 But what I'm telling you is  
7 that, when amendments were made to the

8 MSA, either at the time for additional  
9 exemptions, they weren't publicly  
10 broadcasted or noticed or told  
11 everybody:  
12 "Well, we are extending the  
13 deadline 30 days. Everybody come in."  
14 Or they post something on a web  
15 site:  
16 "We're proposing the amendment,  
17 an amendment that gives someone  
18 30 days."  
19 So just from my own personal  
20 troubles, I know that I have had  
21 difficulty even to this day -- and  
22 there is a conflict between what even  
23 the New York attorney general has as  
24 the final MSA -- I recall that it  
25 was -- it was agreed to in principle

0615

1 Grand River Arbitration  
2 on or about November 16th, and the MSA  
3 states were given one week to decide  
4 whether or not they were going to join  
5 it.

6 They had a week to look it  
7 over, and sort of review it. I  
8 haven't seen what they looked over or  
9 reviewed. It has never been made  
10 available to me.

11 The first time that I ever saw  
12 the MSA was, as I said, was March 1999  
13 on the NAAG web site. But it was an  
14 incomplete version.

15 So I did ask that question of  
16 Respondents in our papers. And it  
17 wasn't -- it wasn't responded to. So  
18 I don't know when a true and accurate  
19 version or copy of the MSA was  
20 available, even if it's available  
21 today, fully executed with all of its  
22 amendments, contemporaneously with the  
23 time that they were --

24 PRESIDENT NARIMAN: Before you  
25 begin, may I just ask you to look at

0616

1 Grand River Arbitration



2 your footnote 12 of paragraph -- of  
3 your statement of claim, paragraph 43,  
4 when you deal with the renegade  
5 clause. Paragraph 43 -- using  
6 manufacturers and competitors -- have  
7 you read that?

8 MR. VIOLI: Yes.

9 PRESIDENT NARIMAN: Read it to  
10 yourself.

11 MR. VIOLI: Yes.

12 PRESIDENT NARIMAN: And then  
13 read the footnote.

14 MR. VIOLI: Yes.

15 PRESIDENT NARIMAN: My question  
16 to you is that -- you're quoting from  
17 Federal News Service, November 16th,  
18 1998, which you have annexed as  
19 Exhibit 15.

20 There is no mention anywhere,  
21 as far as I can see in the  
22 particularized statement of claim or  
23 in any subsequent document, that this  
24 Federal News Service of November 16,  
25 1998 was not available to you at the

0617

1 Grand River Arbitration  
2 time when it is supposed to have been  
3 publicized.

4 MR. VIOLI: There is, actually.  
5 I first received this --

6 PRESIDENT NARIMAN: No, on the  
7 record, not what you --

8 MR. VIOLI: Yes, there is.

9 PRESIDENT NARIMAN: Where?

10 MR. VIOLI: There is an  
11 affidavit from me which talks about  
12 the first time -- I am the one who  
13 found this document, and I found by  
14 going -- you can't find it even on  
15 Westlaw or the web.

16 PRESIDENT NARIMAN: Which  
17 affidavit, if you don't mind? I want  
18 to know. You have made an affidavit.

19 MR. VIOLI: Yes. I found it on  
20 Lexis Nexis in June of -- I believe it  
21 was sometime prior -- it was in 2002.

22 My rejoinder -- it's Exhibit 15 to  
23 volume two of Claimants' factual  
24 materials. I think that is it.

25 PRESIDENT NARIMAN: Volume --  
0618

1 Grand River Arbitration

2 MR. VIOLI: No, sorry. This is  
3 the wrong one. This is the reply.

4 MS. GUYMON: It is right after  
5 Mr. Williams's affidavit.

6 PRESIDENT NARIMAN: What is  
7 that?

8 MS. GUYMON: It's tab 15,  
9 volume two, the appendix to the reply.

10 MR. VIOLI: Yes, volume two.  
11 Sorry. Would like me to read it into  
12 the record.

13 PRESIDENT NARIMAN: No, only in  
14 connection with this.

15 MR. VIOLI: Yes.

16 "Respondent suggests that Grand  
17 River should have had knowledge of the  
18 MSA and the opportunity to join the  
19 MSA when the exemption within 90 days  
20 of its execution date. And in support  
21 of that argument, Respondent  
22 specifically points to two  
23 publications, a Federal News Service  
24 wire, announcing the MSA dated  
25 November 16, 1998, paragraph two on

0619

1 Grand River Arbitration

2 the next page. I discovered the  
3 Federal News Service article in July  
4 of 2002 while conducting legal  
5 research on the Lexis Nexis legal  
6 database. That database is a  
7 proprietary source available solely to  
8 subscribers, typically lawyers and law  
9 firms. The article was available  
10 nowhere else other than through the  
11 Federal News Service web site, which  
12 is also a proprietary source that  
13 requires subscription. In short, the  
14 article was not public knowledge and  
15 not readily available to the general

16 public."  
17 PRESIDENT NARIMAN: Thank you.  
18 That answers my question. Thank you.

19 MR. VIOLI: Perhaps there are  
20 more resourceful people who could have  
21 gotten it, but I have scoured --

22 MR. CLODFELTER: Just to be  
23 correct, you are not talking about the  
24 article. You are talking about the  
25 press conference.

0620

1 Grand River Arbitration

2 MR. VIOLI: The news -- well  
3 the article that you cited had  
4 excerpts. The press conference is not  
5 that full transcript.

6 MR. CLODFELTER: It was the  
7 transcript of the press conference.

8 MR. VIOLI: Right.

9 MR. CLODFELTER: A conference  
10 for the press.

11 MR. VIOLI: I don't know if it  
12 was at the Press Club or where. I  
13 don't know the particulars of it. It  
14 was Federal News Service.

15 PRESIDENT NARIMAN: Okay.  
16 Please continue.

17 MR. VIOLI: So I want to get  
18 into the escrow statutes. I think  
19 that is the heart of the matter.

20 We have essentially two  
21 purposes that the escrow statutes are  
22 supposed to serve.

23 Under the MSA, we see that the  
24 escrow statute is supposed to  
25 effectively and fully neutralize the

0621

1 Grand River Arbitration  
2 cost disadvantages that the  
3 participating manufacturers  
4 experienced vis-a-vis nonparticipating  
5 manufacturers within such settling  
6 states as a result of the provisions  
7 of this agreement.

8 So the MSA -- and there are  
9 cases on this -- speaks to sort of an

10 attempt to neutralize the playing  
11 field between people who don't join  
12 the MSA and people who do join, the  
13 companies who do join the MSA and  
14 companies that don't join the MSA.

15 That is what the MSA states.

16 That particular purpose of the  
17 escrow statute is not in the preamble.  
18 When the states went to enact it, they  
19 didn't put that in there. What they  
20 did was say, more generally, it's to  
21 create a fund, a 25-year fund, that a  
22 company must maintain in the event  
23 that a state sues the company for  
24 what's called a released claim under  
25 the MSA, which is, basically, if the

0622

1 Grand River Arbitration  
2 company is found culpable by a court  
3 of law, that fund -- and a state sues  
4 the MSA, that fund is supposed to be  
5 able to secure the payments of any  
6 judgment or claims that a state might  
7 bring in the future if the  
8 manufacturer is sued and he's  
9 determined to -- or it's determined to  
10 have acted culpably.

11 So that is the purpose that the  
12 states espouse in the escrow statutes  
13 for the escrow statutes.

14 The other -- the other thing  
15 that is noted in the preamble is that  
16 it prevents NPMs from competing  
17 unfairly and deriving short-term  
18 profits and avoiding -- going out of  
19 business and avoiding potential  
20 liability years after the liability is  
21 established.

22 So that is sort of the  
23 background. And I don't think anybody  
24 disputes that it was supposed to have  
25 some competition-neutralizing facet to

0623

1 Grand River Arbitration  
2 it for characteristic.

3 Now, what does the escrow

4 statutes require? Right there. Just  
5 click on that.

6 The escrow statute says:  
7 "Any tobacco product  
8 manufacturer selling cigarettes to  
9 consumers within an MSA state, whether  
10 directly or through a distributor or  
11 retailer or similar intermediary or  
12 intermediaries, shall do one of the  
13 following: One, join the MSA; or,  
14 two, get an escrow statute. But if  
15 you join the MSA past the 60 or 90  
16 days, you don't get an exemption."

17 So we go -- we go to the next  
18 slide.

19 PRESIDENT NARIMAN: No, but do  
20 you fall in that description?

21 MR. VIOLI: That is the next  
22 slide, to whom did the escrow statute  
23 apply?

24 Well, we know that it applies  
25 to tobacco product manufacturer,

0624

1 Grand River Arbitration  
2 whatever that means, who sells to  
3 consumers within a state, directly or  
4 through an intermediary. And that is  
5 sort of a shorthand way of saying it.

6 PROFESSOR ANAYA: This is  
7 language --

8 MR. VIOLI: This is the  
9 language. Tobacco product  
10 manufacturer, and then the quote above  
11 is the language.

12 PROFESSOR ANAYA: Right.

13 MR. VIOLI: I just paraphrased  
14 to make it easier.

15 It's sort of a two-step  
16 process. First, you have to be a  
17 tobacco product manufacturer. Second,  
18 you have to sell to the consumers in  
19 the state.

20 We begin with who is a tobacco  
21 product manufacturer. Well, the  
22 tobacco product manufacturer is  
23 defined identically in the MSA and in

24 the escrow statutes.

25 And it means an entity that,

0625

1 Grand River Arbitration  
2 after the date of the effective -- the  
3 effective date of the act -- that  
4 directly and not specifically through  
5 affiliate, manufacturer's  
6 cigarettes -- that such manufacturer  
7 intends to be sold in the US.

8 And I highlighted that because  
9 it's in comparison to what follows.

10 It intends to be sold in the  
11 US, and you see that language that  
12 says, "includes cigarettes intended to  
13 be sold in the US through an  
14 importer," or it's the "first  
15 purchaser anywhere for resale in the  
16 US of cigarettes that the manufacturer  
17 does not intend to be sold in the US."

18 So --

19 PROFESSOR ANAYA: Is it "or,"  
20 or is it "and"?

21 MR. VIOLI: No, it's "or."

22 The third thing is, "or a  
23 successor of either of the above."

24 So we see that, if you're a  
25 manufacturer that intends -- and

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1 Grand River Arbitration  
2 Respondent yesterday kept saying Grand  
3 River. They didn't say Claimants.  
4 They kept saying:  
5 "Grand River is the  
6 manufacturer. Grand River knew.  
7 Grand River should have paid."

8 And I have it marked. It's  
9 replete -- the record is replete. The  
10 record is filled with it. It's "Grand  
11 River" they say should have known,  
12 should have paid, and is the  
13 manufacturer.

14 Okay. Well, if that were the  
15 case, then you would have to say that  
16 Grand River is a manufacturer who  
17 intends -- who manufactures cigarettes

18 that the manufacturer intends to be  
19 sold in the US.

20 Merely intending that your  
21 cigarette is being sold in the US  
22 purportedly under the statute is  
23 enough for a state to require you to  
24 establish an escrow fund or join the  
25 MSA. So there is no definition of

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1 Grand River Arbitration  
2 what "intends to be sold" means.

3 PROFESSOR ANAYA: You say that  
4 Grand River manufactures cigarettes  
5 with the intent to sell them in the  
6 US.

7 MR. VIOLI: With -- the key is,  
8 with the intent to sell them, no.  
9 With the knowledge that they are sold  
10 in the US, yes. Grand River doesn't  
11 intend itself to sell in the US, and I  
12 tell you where this becomes --

13 PROFESSOR ANAYA: No, that's  
14 not what it says.

15 MR. VIOLI: Right, I know. But  
16 that's why the Wisconsin case said you  
17 can't do that. You can't just say  
18 someone in China who is making a  
19 product that knows and intended its  
20 product to be sold in the US suddenly,  
21 if the product ends up in the US --  
22 let's say toasters --

23 PROFESSOR ANAYA: Is that your  
24 case? You are not a toaster. You are  
25 cigarettes, and you are making

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1 Grand River Arbitration  
2 cigarettes --

3 MR. VIOLI: Yes --

4 PROFESSOR ANAYA: Excuse me.  
5 With an importer in mind, as I  
6 understand it, right?

7 MR. VIOLI: For the Seneca  
8 brands, that's correct, and I will get  
9 to that.

10 PROFESSOR ANAYA: With specific  
11 deals that have been developed, that

12 are concocted. These deal are  
13 established specifically to sell the  
14 tobacco products in the US; is that  
15 right?

16 MR. VIOLI: Yes, I would say  
17 that's correct for the Seneca brand.  
18 And I will tell you why this sort of  
19 -- and this is where things start to  
20 get confusing.

21 Trademark owners and importers  
22 in the US approached Grand River in  
23 1999 and 2000 and said -- in fact, we  
24 even had a distributor -- and it's in  
25 the record -- who entered into an

0629

1 Grand River Arbitration  
2 agreement that said:

3 "We want to distribute Seneca  
4 brand in the US, and we will be  
5 responsible for all the US laws."

6 But even aside from the Seneca  
7 brand that was sold off-Reservation by  
8 this distributor who assumed all this  
9 responsibility --

10 MR. CROOK: Is that  
11 Tobaccoville?

12 MR. VIOLI: No, White River.  
13 Also, Tobaccoville. I say  
14 Tobaccoville. I always speak about  
15 White River.

16 But we have these brands  
17 Capital, Scenic 101 -- I think was the  
18 one that may have been sold in Oregon,  
19 based on my independent review -- I am  
20 not certain.

21 But what happens is these are  
22 trademark owners or importers. In  
23 fact, some are manufacturers. The  
24 trademark owner for Scenic 101 brand  
25 is a manufacturer itself in Arizona,

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1 Grand River Arbitration  
2 called Single Stick USA, and they have  
3 another company.

4 But the point is they asked  
5 Grand River to make a product for



6 them, to private label a product for  
7 them, that they would purchase FOB  
8 Oshweken -- "they" meaning the US  
9 company -- they own the trademark, own  
10 the packaging, directed what formula  
11 for the ingredients.

12 And they said to Grand River:

13 You make it for us. We will  
14 import it. We will pay the federal  
15 excise tax. We own the trademark.  
16 That's all we want you to do for us."

17 Okay. So Grand River does  
18 that, charges \$2 carton for that,  
19 whatever it is.

20 Fast forward a couple of years,  
21 and the states start knocking on the  
22 door and say:

23 "Grand River, you are the  
24 manufacturer for these millions of  
25 carton. You owe us million of

0631

1 Grand River Arbitration  
2 dollars."

3 And Grand River says:

4 "Well, wait a minute. These  
5 are importers, independent importers."

6 MR. CROOK: Excuse me,  
7 Mr. Violi. You deliver the stuff FOB  
8 Oswego, New York.

9 MR. VIOLI: Oshweken, Canada.

10 MR. CROOK: Oshweken, Canada.  
11 Okay.

12 MR. VIOLI: We will see under  
13 the MSA that the MSA participants  
14 under the identical language who are  
15 importers are deemed manufacturers.  
16 Why is there a different standard when  
17 it's Grand River than an American  
18 Enterprise operating --

19 PRESIDENT NARIMAN: What is  
20 your case? What do you say or you  
21 don't intend to say?

22 MR. VIOLI: We did not intend  
23 for the Seneca brand -- we had --

24 PRESIDENT NARIMAN: We are not  
25 on brand. Did you intend to sell any

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1 Grand River Arbitration

2 cigarettes of any brand?

3 MR. VIOLI: Seneca brands, yes.

4 PRESIDENT NARIMAN: That's

5 right.

6 MR. VIOLI: We had no intent

7 whatsoever -- but, Mr. President, we

8 wanted to -- it's important because

9 importers are manufacturers for other

10 brands.

11 PRESIDENT NARIMAN: Insofar as

12 Seneca brand is concerned, the statute

13 would apply.

14 MR. VIOLI: Yes, I'm sorry.

15 That's correct -- I wouldn't say it

16 would apply -- but the intent -- yes,

17 here the intent is to sell in the US.

18 Yes, right.

19 PRESIDENT NARIMAN: So that

20 what is the quantity of those

21 cigarettes in '97, '98, '99.

22 MR. VIOLI: The Seneca brand in

23 the US, '99 -- '99 Seneca brands.

24 1999, 400 million sticks, half a

25 billion sticks.

0633

1 Grand River Arbitration

2 PRESIDENT NARIMAN: As compared

3 to the others? That's what I mean

4 MR. VIOLI: Half a billion --

5 PRESIDENT NARIMAN: 50 percent.

6 MR. VIOLI: It was probably

7 80 percent. It was -- in 1999 -- it

8 was probably 70 -- anywhere from 50 to

9 80 -- I'm sorry. I apologize. I

10 don't have that exact figure. But now

11 Grand River only produces Seneca

12 today.

13 PRESIDENT NARIMAN: I am saying

14 in '97, '98, 1999 which we are

15 concerned.

16 MR. VIOLI: Well --

17 PRESIDENT NARIMAN: '98, sorry,

18 1999, not '97.

19 MR. VIOLI: '98, they were

20 making Segó at the Omaha Nation in  
21 '98, right. They were making another  
22 brand, not Seneca. They were making a  
23 different brand in '98, not Seneca.  
24 '97, '98, a couple of other brands,  
25 DK, Putters, Segó -- Omaha -- through

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1 Grand River Arbitration

2 Omaha, yes.

3 PRESIDENT NARIMAN: Then which  
4 particular brand you intended to sell  
5 in the US, that's all I am asking.

6 MR. VIOLI: I would say Seneca.  
7 We would go on the record and say that  
8 Grand River -- I don't know how you --  
9 intended to be sold -- but knew and  
10 facilitated.

11 PRESIDENT NARIMAN: No, I am  
12 asking you the statute word -- you  
13 want to --

14 MR. VIOLI: Yes, you could say  
15 that. I would say that "intends to be  
16 sold in the US," although I don't know  
17 what "intends" means.

18 MR. CROOK: That is today,  
19 Mr. Violi, or at the earlier time?

20 MR. VIOLI: No, at the earlier  
21 times. You know, I think you could  
22 fairly say that that is Grand River's  
23 brand. It has a trademark interest in  
24 it through a cross-licensing joint  
25 venture relationship.

0635

1 Grand River Arbitration

2 PRESIDENT NARIMAN: To that  
3 extent, the escrow statutes would be  
4 applicable to Grand River.

5 MR. VIOLI: I would have to say  
6 yes, but I would really -- my view is  
7 that it's really, "B." It should be  
8 the importer because we will see that  
9 the default that they adopted was who  
10 pays the federal excise tax. And  
11 that's the importer.

12 So we have the, who is the  
13 tobacco product manufacturer. It's

14 either the actual fabricator, or it's  
15 the importer. So let's turn to an  
16 application of what that means.

17 Since the -- it's simple to say  
18 it, right, intends to be sold in the  
19 US, you know, tobacco product  
20 manufacturer. But it's much more  
21 difficult and complex in its  
22 application, because, since the MSA  
23 was executed, the application has  
24 not -- has not been uniform.

25 PRESIDENT NARIMAN: That is  
0636

1 Grand River Arbitration  
2 application in various states.

3 MR. VIOLI: Yes, correct.  
4 Sorry for the confusion.

5 If we go to the first draft of  
6 the MSA, which is the first exhibit  
7 slide, the states have them -- I mean,  
8 the Respondent has them.

9 (There was a discussion off the  
10 record.)

11 MR. VIOLI: If we look at the  
12 draft MSA, draft back in June of '98  
13 this is roughly three months or --  
14 excuse me -- five months before it was  
15 executed. We see definition here.  
16 The first -- the origin or the first  
17 permutation of this definition of what  
18 a "tobacco product manufacturer" is,  
19 and specifically a nonparticipating  
20 manufacturer -- it means:

21 "A tobacco product manufacturer  
22 or importer of manufactured tobacco  
23 products sold in the domestic market  
24 that is not a signatory to this  
25 agreement."

0637

1 Grand River Arbitration

2 So you would say here -- I  
3 mean, the fair interpretation, the  
4 best I could come up with, one, is  
5 that, if it's a product produced  
6 domestically, it's the manufacturer;  
7 if it's a product that is imported,

8 it's the importer who is the tobacco  
9 product manufacturer.

10 We know that -- can we go back  
11 to the other slide? We know that  
12 there is a company now called Premiere  
13 International Holdings Limited. It  
14 was called Premiere Marketing, and  
15 then it was Premiere Manufacturing.

16 It was one of the companies who  
17 joined and received an exemption under  
18 the MSA, got in under that sort of  
19 special arrangement of 60 to 90 days.

20 Premiere is based in  
21 Chesterfield, Missouri. It's located  
22 in a building maybe several times  
23 bigger than this office. And it is  
24 not a manufacturer. It is an  
25 importer. It has certain brands,

0638

1 Grand River Arbitration  
2 called Ultra Shield, something like  
3 that.

4 Over the years it has had its  
5 product manufactured at a number of  
6 locations. Currently, I think it's  
7 china. At one point it was Europe.  
8 And it's in the MSA; you know, they  
9 are -- joined in the MSA, so there is  
10 an amendment to join the MSA.

11 MR. CLODFELTER: Is any of this  
12 in the record?

13 MR. VIOLI: Yes, they're in the  
14 MSA.

15 MR. CLODFELTER: I know the MSA  
16 is in the record, but the companies in  
17 the MSA -- what are you talking about?

18 MR. VIOLI: This company  
19 Premiere is an SPM with an exemption.

20 MR. CLODFELTER: These other  
21 facts you are talking about, is any of  
22 that in the record?

23 MR. VIOLI: That it's an  
24 importer, yes, actually, that's in  
25 Mr. Williams' affidavit. Would you

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1 Grand River Arbitration

2 like to see -- it's in there. You can  
3 trust me on that.

4 MR. CLODFELTER: All right.

5 MR. VIOLI: Mr. Williams  
6 testifies based on his knowledge and  
7 review that, based on what I went over  
8 with him, but Premiere is an importer.  
9 That is all it is, but it was allowed  
10 to join the MSA within 60 days as a  
11 manufacturer.

12 So we see this is the first  
13 signs of, who was a manufacturer, sort  
14 of the -- it's not entirely clear,  
15 because, when a company in China makes  
16 a product for Premiere, clearly it's  
17 intended for sale in the US, right.

18 Premiere imports it. They say  
19 this is the packaging. They own the  
20 trademark. But the company in China  
21 is not responsible for the MSA  
22 payment. Premiere is under the MSA.

23 We then go to February 2000,  
24 and in February -- it's the second  
25 slide. That's Claimants Exhibit 17B

0640

1 Grand River Arbitration  
2 at page seven. It's the next -- the  
3 second slide.

4 PRESIDENT NARIMAN: Yes.

5 MR. VIOLI: Now, we see that in  
6 February of 2000 there was still  
7 confusion among even the drafters of  
8 the MSA, the people who drafted the  
9 words "tobacco products" -- the term  
10 "tobacco product manufacturer"; not  
11 even they could be uniform and  
12 consistent as to what is -- how do we  
13 apply this definition with absolute  
14 certainty? Who does this apply to?

15 At paragraph five on page  
16 seven, it says:

17 "Participating manufacturers  
18 definition and problems. Who is PM?"

19 "Participating manufacturer" is  
20 just a tobacco product manufacturer  
21 who joins the MSA.

22           And we see that they go over  
23           the general terms that the "tobacco  
24           product manufacturer" is defined in  
25           part as:

0641

1           Grand River Arbitration  
2           "One who manufactures  
3           cigarettes anywhere that such  
4           manufacturer intends to be sold in the  
5           states, including cigarettes intending  
6           to be sold in the states through an  
7           importer."

8           We go down to the third full  
9           paragraph there. The question  
10          remains, however -- the question is  
11          what factors should be considered for  
12          purposes of determining who is the  
13          manufacturer and whether any of the  
14          factors are dispositive.

15          See, so we have these problems.  
16          You know, who is -- definition and  
17          problems -- who is the PM?

18          Okay. So they come up with  
19          this sort of nine-factor test. Now,  
20          mind you, Mr. President and Members of  
21          the Tribunal, this was not shared with  
22          any OPM, and, ironically,  
23          February 2000, a couple of months  
24          later, they are sending letters  
25          apparently or allegedly to my client,

0642

1           Grand River Arbitration  
2           to the Claimants saying:  
3           "If you're a manufacturer."  
4           Well, why didn't you send me  
5           this memo that said how I figure out  
6           and determine whether I'm a  
7           manufacturer.

8           MR. CROOK: Mr. Violi, I am  
9           looking at this document here which  
10          says it's not intended to be an  
11          official record or an exhaustive  
12          recitation. It is intended to  
13          summarize the discussion based on the  
14          recollection of somebody named Sue  
15          Ellen Woodbridge and Laura Loveland.

16 Now, who are those good people?  
17 MR. VIOLI: Laura Loveland  
18 worked for, I believe, the National  
19 Association of Attorneys General. She  
20 was an attorney -- assistant attorney  
21 general for North Dakota who took on a  
22 position with one of those private  
23 attorneys that I mentioned.

24 MR. CROOK: So this is  
25 essentially notes of a meeting by a

0643

1 Grand River Arbitration  
2 staff member of the NAAG.

3 MR. VIOLI: And the attorneys  
4 general. The meeting was attended by  
5 the tobacco working group of the  
6 attorneys general through their trade  
7 association. We have this --

8 MR. CROOK: That is -- I  
9 believe that's consistent with what I  
10 said. So we have a staff member of  
11 the -- of this organization --  
12 employed by this organization.

13 MR. VIOLI: Let's go to 17B,  
14 and we see it's Ness, Motley is the  
15 firm that represented the MSA states  
16 in negotiating and executing. They  
17 were also a member of what is called  
18 the tobacco -- technical working  
19 group.

20 MR. CROOK: It's from someone  
21 named Laura Loveland.

22 MR. VIOLI: Yes, she left the  
23 North Dakota attorney general's office  
24 to work with Ness, Motley. It says:  
25 "Cc all SPMs" --

0644

1 Grand River Arbitration

2 MR. CROOK: Right, I can read  
3 it.

4 MR. VIOLI: And Joe Rice, who  
5 was the attorney -- remember, I said  
6 that he was out inviting people to  
7 join the exemption.

8 MR. CROOK: Right, so this was  
9 not a -- this was the recitation of a



10 conversation at a meeting.

11 MR. VIOLI: It's a meeting  
12 concerning the master settlement  
13 agreement. And I should read that.

14 "Two meetings were held last  
15 week at the request of the settling  
16 states with a variety of parties" to  
17 the MSA -- it doesn't say to the  
18 MSA -- "to discuss some of the  
19 outstanding issues relative to the  
20 financial provisions of the Master  
21 Settlement Agreement."

22 So January 27, 2000, meeting  
23 with OPMs, SPMs, PWC, which means  
24 PriceWaterhouseCoopers, and Management  
25 Science Associates.

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1 Grand River Arbitration

2 MR. CROOK: The full context is  
3 they are basically looking for a way  
4 to assure there is not double  
5 payments.

6 MR. VIOLI: Who is responsible  
7 actually.

8 MR. CROOK: Well, the party's  
9 concern is to ensure that everybody is  
10 counted, but the question is to make  
11 sure that the obligations attached is  
12 counted once but not twice. So it's  
13 the context of a conversation aimed at  
14 avoiding double counting, double  
15 billing.

16 MR. VIOLI: Actually, if you  
17 look at the next page, it talks about  
18 that the manipulation -- so I hope  
19 people are worried about manipulation  
20 and double billing. You wouldn't  
21 manipulate the system to pay more.

22 You might manipulate the system  
23 to pay less, because some SPMs, in  
24 fact, divided themselves into SPM and  
25 NPM; and they would make a product and

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1 Grand River Arbitration

2 not pay escrow and make another  
3 product and pay, you know, MSA

4 payments.

5 So I think that is what the  
6 second page refers to. But maybe  
7 double billing may have been a  
8 concern. There is also manipulation  
9 as shown on the next page.

10 So we have these -- may I  
11 proceed.

12 MR. CROOK: Okay.

13 MR. VIOLI: Okay. We have  
14 these nine factors of who is a  
15 manufacturer. First, one --

16 MR. CROOK: Factors that might  
17 be considered.

18 MR. VIOLI: Right, who is a  
19 manufacturer. First one, owner of the  
20 brand or the trademark. Who does the  
21 physical processing? Who pays the  
22 FET, the federal excise tax? Who  
23 makes the actual shipment to  
24 wholesalers? Who own the product  
25 formula? Who determines the amount of

0647

1 Grand River Arbitration  
2 the product to be produced? Who  
3 controls and pays for advertising?  
4 Who controls marketing? Who has title  
5 to the raw materials? And whose name  
6 is on the package.

7 The second page --

8 PRESIDENT NARIMAN: Does all of  
9 this discussion in the NAAG suspend  
10 the operation of any of these  
11 statutes?

12 MR. VIOLI: It doesn't suspend  
13 it. But what it does is it points  
14 out -- and as I've said, they never  
15 told the people who were supposed to  
16 be bound by the statute that this was  
17 going on or this is what you should  
18 look to to determine if you are,  
19 because, remember they wrote letters  
20 that say, "if you are a tobacco  
21 manufacturer."

22 But what it shows is that there  
23 was no certainty at the time, as of

24 February of 2000, who was the  
25 manufacturer, and how to determine who

0648

1 Grand River Arbitration  
2 was a manufacturer within the  
3 definition of the MSA and the escrow  
4 statutes.

5 Now, on the second page, it  
6 says the OPM -- remember, the four who  
7 originally signed the agreement -- and  
8 as one respected member of the  
9 business community said, "turned  
10 lemons into lemonade."

11 This deal worked out. It was  
12 negotiated by the OPMs. We know that  
13 they benefited from it to some extent.

14 It says:

15 "The OPMs suggested that when  
16 it comes to report cigarette volumes  
17 the default factor should be the  
18 federal excise tax."

19 Right. So whoever pays federal  
20 excise tax should be by default the  
21 manufacturer within this definition.  
22 We know now that -- and we knew then  
23 that this federal excise tax is paid  
24 by an importer. It's not paid by a  
25 company in Canada or China or whoever

0649

1 Grand River Arbitration  
2 it is that manufacturing the product,  
3 FOB; you know, so it talks about then  
4 the downside of this problem.

5 It's manipulated. And I think  
6 it was manipulated for the reasons  
7 that I explained to you earlier by  
8 SPMs.

9 And then there is a proposed  
10 solution, just a proposed solution, to  
11 say that:

12 "We will leave it -- we will  
13 ask PriceWaterhouseCoopers to ask a  
14 series of questions that would reveal  
15 any discrepancy so that any party that  
16 wished to challenge the default,"  
17 meaning who pays the federal excise

18 tax, "can do so."  
19 MR. CROOK: Mr. Violi, go back  
20 to the paragraph with the multiple you  
21 were looking at. As I read through  
22 those, it strikes me that Grand River  
23 would have satisfied most of those  
24 tests.

25 MR. VIOLI: For the Seneca

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1 Grand River Arbitration  
2 brands, let's go to one.

3 MR. CROOK: You own the brand.

4 MR. VIOLI: No, actually,  
5 Native Wholesale Supply owns the  
6 brand.

7 MR. CROOK: One of the  
8 Claimants, but not Grand River.

9 MR. VIOLI: Grand River --  
10 actually, one of the investments.  
11 Native Wholesale Supply is an  
12 investment. They are not a Claimant.  
13 It's a US company. They couldn't be a  
14 Claimant.

15 MR. CROOK: You did the  
16 physical process.

17 MR. VIOLI: Grand River did the  
18 physical processing. Native Wholesale  
19 Supply pays the FET, which, again, is  
20 the default factor, we see on the next  
21 page, the importer.

22 MR. CROOK: Grand River made  
23 the actual shipment.

24 MR. VIOLI: No, Native  
25 Wholesale Supply makes the --

0651

1 Grand River Arbitration  
2 actually, no --

3 MR. CROOK: How does it move  
4 from the Grand River plant?

5 MR. VIOLI: It says  
6 wholesale -- actual shipment to  
7 wholesaler.

8 MR. CROOK: Okay.

9 MR. VIOLI: It goes to an  
10 importer FOB Oshweken. The importer  
11 takes title of risk of loss of the

12 goods in Canada, brings them to the  
13 native reservation or Indian free  
14 trade or Native free trade zone in  
15 New York, and then brings them onto  
16 the reservation in New York. The  
17 actual shipment to the wholesaler, the  
18 way Native Wholesale Supply works --  
19 MR. CROOK: So Native Wholesale  
20 Supply is not a wholesaler?  
21 MR. VIOLI: It is not. It is  
22 an importer.  
23 MR. CROOK: It has the word in  
24 the title, but it is not actually a  
25 wholesaler.

0652

1 Grand River Arbitration  
2 MR. VIOLI: Right, it's not a  
3 wholesaler. What they do is,  
4 wholesalers buy from them. And they  
5 don't ship to the wholesalers.  
6 MR. CROOK: Okay. Let's move  
7 on. Who owns the product formula?  
8 MR. VIOLI: That would be  
9 Native Wholesale Supply -- or is  
10 that -- the formula -- yes, NWS --  
11 actually, Native Wholesale Supply owns  
12 the formula. Yes, the importer.  
13 MR. CROOK: Who determines the  
14 amount of product to be produced?  
15 MR. VIOLI: Native Wholesale  
16 Supply.  
17 MR. CROOK: Advertising?  
18 MR. VIOLI: Advertising, Native  
19 Wholesale Supply, marketing, wholesale  
20 supply.  
21 MR. CROOK: So there was -- you  
22 were suggesting there was a material  
23 ambiguity here whether in these  
24 particular material facts, it was  
25 Grand River or Native Wholesale Supply

0653

1 Grand River Arbitration  
2 who had these obligations.  
3 MR. VIOLI: For Seneca.  
4 MR. CROOK: Which you said was  
5 80 percent of the product.

6 MR. VIOLI: In 1999, correct.  
7 MR. CROOK: Correct.  
8 MR. VIOLI: 50 to 80. There  
9 was Capital. There might have been  
10 one other brand. But that's correct.  
11 So I think Native Wholesale  
12 Supply would fit within most of these  
13 definitions.

14 The resolution was the  
15 technical working group agreed to  
16 think about this proposal further,  
17 discuss it with their principals, and  
18 distribute the idea to the entire  
19 group of participating manufacturers.

20 So even in February of 2000  
21 they don't have an absolute or certain  
22 answer. They are going to think about  
23 it, I guess, circulate it. But they  
24 didn't circulate it to the other half  
25 of the world that apparently is bound  
0654

1 Grand River Arbitration  
2 by this definition. So --

3 MR. CROOK: Mr. Violi, is that  
4 an accurate characterization? I am  
5 looking at the bottom of the next page  
6 to which you referred my attention.

7 MR. VIOLI: Yes.

8 MR. CROOK: You are saying  
9 basically they were talking about a  
10 default, and the default would be in  
11 case of any ultimate uncertainty who  
12 paid the federal excise tax; and if  
13 they floated this is as a concept,  
14 does that bear upon what you were  
15 saying to us?

16 MR. VIOLI: Well, they say "we"  
17 are going to think about the proposal  
18 further, that it would be a default.

19 MR. CROOK: Not as the -- as  
20 default, simply as default.

21 MR. VIOLI: Yes, as the  
22 default, when you are trying to define  
23 manufacturer.

24 MS. MENAKER: Mr. Chairman, if  
25 I may interject something as a

0655

1 Grand River Arbitration  
2 clarification.

3 MR. VIOLI: Can you tell me  
4 first? Normally, you tell your  
5 adversary what you are going to do.  
6 Go ahead.

7 MS. MENAKER: Well, you can  
8 listen, also.

9 Just in this paragraph when we  
10 are talking about the default factor,  
11 if you just look at that, they are  
12 talking about the default factor to  
13 determine market share, which is a  
14 defined term in the MSA.

15 It's referred to on the prior  
16 page. When you are determining the  
17 market share of the SPM, the default  
18 factors to look at are the number of  
19 cigarettes for which excise taxes have  
20 been paid. So that doesn't -- excise  
21 taxes -- that is not the default  
22 factor for determining the definition  
23 of "manufacturer." It's the default  
24 factor for determining market share.

25 MR. CROOK: I see.

0656

1 Grand River Arbitration

2 MR. VIOLI: I don't -- I  
3 don't -- I don't know if that is the  
4 way to characterize it. The first  
5 page says who is the manufacturer.

6 MR. CROOK: We will read the  
7 document and make our own conclusions.

8 MR. VIOLI: Now, we know that  
9 the most recent company to join the  
10 MSA that we are aware of -- we have  
11 mentioned is a company called General  
12 Tobacco Inc. -- BVO/BVO Corp.  
13 [phonetic].

14 And the way they've joined  
15 it -- you know, I don't know exactly  
16 what the terms were; I wasn't privy to  
17 them.

18 But, essentially, GTI makes a  
19 product or has a trademark for a

20 product called Bronco and GT1. They  
21 are an importer. GTI and BVO are  
22 importers, not manufacturers.

23 But, nonetheless, they are  
24 deemed the manufacturer under the MSA.  
25 I should say that that agreement does

0657

1 Grand River Arbitration  
2 talk about and speak to who the  
3 manufacturer is, but the TPM -- the  
4 tobacco product manufacturer within  
5 the definition of the MSA, my  
6 understanding is that it's GTI and  
7 BVO.

8 Nonetheless, they are the ones  
9 who have joined the MSA. These are  
10 importers. And that is the most  
11 recent application of the definition,  
12 at least for purposes of joining the  
13 MSA.

14 The last thing I want to point  
15 out on this is a Wisconsin web site.  
16 Under the contraband laws, which we  
17 have mentioned -- I will get to them  
18 in a little bit -- these contraband  
19 laws require the attorney general to  
20 post a web site or a directory that  
21 says which manufacturers and brands  
22 can be sold in the state because they  
23 are compliant with the escrow statute  
24 or the MSA and which are not and  
25 therefore deemed contraband and

0658

1 Grand River Arbitration  
2 subject to seizure.

3 And is pulled right off the web  
4 site, the Wisconsin Tobacco Directory  
5 of the Department of Revenue for  
6 Wisconsin.

7 If you look at the bottom  
8 highlighted -- the top just recaps  
9 what I just said, as of March 1st the  
10 product can't be sold or listed --  
11 essentially, the products are -- that  
12 are sold or listed are the ones that  
13 are compliance with the state.



14           The bottom highlight says -- I  
15 will go slow:  
16           "Companies marked with an  
17 asterisk are considered participating  
18 manufacturers under the MSA for all  
19 cigarettes they make or import. Where  
20 the product is manufactured abroad,  
21 see country of origin for each brand.  
22 The PM, participating manufacturer, is  
23 not the manufacturer of the product,  
24 but instead the importer."

25           So we see this equivocation  
0659

1           Grand River Arbitration  
2 even to this day or a different  
3 standard of treatment with an  
4 identical definition, who was the  
5 tobacco product manufacturer.

6           It seems to be defined  
7 differently, applied differently,  
8 depending upon states, depending upon  
9 whether you join the MSA,  
10 notwithstanding the definition is  
11 identical in both.

12           We see that this confusion also  
13 exists under the escrow statutes.  
14 Right. We have the same definition  
15 under both. We just went over what  
16 went -- about how the definition of  
17 the MSA was applied.

18           We would like to turn to the  
19 definition under the escrow statutes,  
20 and, you know, how there may have been  
21 some confusion or some uncertainty.

22           The first lawsuit that appears  
23 in the record that we came to know  
24 about through this litigation was one  
25 that was apparently filed against a

0660

1           Grand River Arbitration  
2 host of companies; and Ms. Guymon or  
3 Ms. Menaker made mention yesterday,  
4 they sued a lot of them because there  
5 was some uncertainty.

6           So they sued the Seneca Nations  
7 of Indian Inc., which by the way is

8 not the Seneca Nation -- I don't even  
9 think it's an existing corporation.  
10 And we have an affidavit from the  
11 president of the Seneca Nation who  
12 will attest to that, when a sheriff  
13 appeared at his door and said: I am  
14 going to serve you with process." No  
15 Seneca Nation of Indian Inc.  
16 corporation exists, he told the  
17 process server.

18 MR. CLODFELTER: Is any of this  
19 on the record?

20 MS. GUYMON: Is this in the  
21 record?

22 MR. VIOLI: You mentioned it  
23 yesterday, so I am bringing it up.

24 MR. CLODFELTER: Okay.

25 MR. VIOLI: Anyway. So we have

0661

1 Grand River Arbitration  
2 all of these companies being sued and  
3 this sort of confusion. But let's go  
4 right to that lawsuit.

5 The lawsuit was brought against  
6 we know now Grand River, Grand River  
7 Enterprises Six Nations Limited, which  
8 is actually the corporation. And then  
9 they changed the caption by  
10 interlineation when they entered the  
11 default judgment to Grand River  
12 Enterprises, Inc., a non-existing  
13 company.

14 Why they went from the right  
15 company to the wrong company I can't  
16 figure that out.

17 They also sued the importer,  
18 Native Tobacco Direct. They also sued  
19 the Seneca Nations Inc. And a fellow  
20 by the name of Ross John.

21 That first lawsuit was brought  
22 against Native Tobacco Direct,  
23 arguably, an importer, maybe someone  
24 who is within this definition.

25 We see from the Claimants

0662

1 Grand River Arbitration

2 rejoinder tab A that that case was  
3 dismissed against the importer,  
4 voluntarily by he Missouri attorney  
5 general. Defendant Native Tobacco  
6 Direct, Ross L. John, Iroquois Tobacco  
7 Direct, Seneca Smoke, Native American  
8 Wholesale, voluntarily dismissed  
9 without prejudice by the plaintiff,  
10 Missouri attorney general.

11 So after two years of, I  
12 guess -- of litigation, three years --  
13 two years of litigation, he lets them  
14 go.

15 PRESIDENT NARIMAN: Do I take  
16 it that your principal point is that  
17 the escrow statutes themselves did not  
18 establish liability, because, when  
19 they chose to enforce it against a  
20 particular identified group of persons  
21 or manufacturers and so on, that you  
22 actually suffered or knew that you had  
23 suffered some loss.

24 MR. VIOLI: Suffered the loss  
25 and even the lesser default

0663

1 Grand River Arbitration  
2 consideration, knew of the loss  
3 because there was confusion.

4 Now, okay, so we have the first  
5 lawsuit brought against an importer or  
6 someone who they think can be a  
7 manufacturer. And if you look at the  
8 allegations, they say that they are a  
9 manufacturer within the terms of the  
10 statute. But they are dismissed.

11 Fast forward five years. Go to  
12 the most recent case. Fast forward  
13 five years. And yesterday we heard  
14 Respondent say Grand River is the  
15 manufacturer; Grand River is the  
16 manufacturer. They are the ones  
17 liable.

18 Okay. Five years later if you  
19 go two pages forward, that is the  
20 complaint, December 2005, several  
21 months ago, which I received last --

22 two weeks ago from a seller of  
23 products in new Mexico.

24 PRESIDENT NARIMAN: Which is  
25 it?

0664

1 Grand River Arbitration

2 MR. VIOLI: This is the  
3 complaint, two pages later.

4 Five years later, after they  
5 let the importer out of the case in  
6 Missouri, and after they had five  
7 years of history of Grand River and  
8 five years of -- Grand River is the  
9 one responsible -- who does new Mexico  
10 sue three months ago, not Grand River,  
11 but the importer, Native Wholesale  
12 Supply company, not Grand River,  
13 because Native Wholesale Supply  
14 company is at all relevant times, was  
15 the manufacturer, a manufacturer of  
16 tobacco products in the industry.

17 PROFESSOR ANAYA: MSA, section  
18 four, or 6412.1.

19 MR. VIOLI: That is the escrow  
20 statute. I have a lawsuit. I will  
21 just give the cite in the record, but  
22 I have copies of it. The state of  
23 Pennsylvania went so far as to sue to  
24 judgment. They lost. The judgment  
25 was for the importer.

0665

1 Grand River Arbitration

2 MR. CLODFELTER: Excuse me. Is  
3 any of this in the record?

4 MR. VIOLI: This is a case.

5 MR. CLODFELTER: Where is it in  
6 the record?

7 MR. VIOLI: It's cited at 847,  
8 Atlantic Second, 125.

9 MR. CLODFELTER: You are citing  
10 law now.

11 MR. VIOLI: Yes.

12 MR. CLODFELTER: Had you cited  
13 this before? I am trying to figure  
14 out what is going on here so you let  
15 us know what you're talking about.

16 MR. VIOLI: It's a case we  
17 haven't cited before, but research  
18 will pull it up. But it's just a  
19 case.

20 But the point is that it's a  
21 case where the Missouri -- I mean, the  
22 Pennsylvania attorney general sued the  
23 importer and went so far as to sue the  
24 importer, not the manufacturer in  
25 India, because I represented this

0666

1 Grand River Arbitration  
2 company.

3 The company in India  
4 manufactured this product for Jash  
5 [phonetic, according to the facts of  
6 the case. Jash imported it, paid the  
7 federal excise tax, whatever the case  
8 may be. But they went so far as to  
9 say:

10 "You importer, US importer, are  
11 the manufacturer, not the foreign  
12 manufacturer."

13 Judgment held, and the  
14 Pennsylvania Court of Common Pleas,  
15 this importer is not a manufacturer.

16 So then we see this sort of,  
17 okay, first, they sue the importer.  
18 Now, they say that it's the  
19 manufacturer because we know that  
20 there are enforcement actions in the  
21 record against the manufacturer.

22 And then they go back to suing  
23 the importer, NWS.

24 And I think it really gets  
25 almost absurd if we look at the slide

0667

1 Grand River Arbitration  
2 right before that, the Arkansas  
3 settlement. Would you go to that.

4 Arkansas settlement. As I told  
5 you, when Grand River started to  
6 retain counsel and understood what was  
7 going on, they said, okay, we will  
8 settle with a few states and come into  
9 compliance without prejudice, our

10 NAFTA rights and our federal  
11 constitutional rights, Indian commerce  
12 clause claims, right, what have you.  
13 We will settle with a number of states  
14 under the allocable share part of the  
15 amendment which is on the floor. We  
16 will survive, do well, and go on.

17 In or about September of  
18 2003 -- and we mention the Arkansas  
19 settlement in the PSOC -- Grand River  
20 enters into a settlement with  
21 Arkansas.

22 Why? Because Arkansas says  
23 Capital brand cigarettes were  
24 manufactured by Grand River and sold  
25 in Arkansas. Grand River says -- and

0668

1 Grand River Arbitration

2 I know because I said it:

3 "We don't own the trademark.  
4 We didn't pay the FET. We don't  
5 wholesale, import. We don't do  
6 anything for this brand. We don't  
7 even own the copyright to the  
8 packaging. It's a company, an  
9 importer out of California."

10 "We don't care. You will be  
11 banned from this state because we have  
12 a contraband law unless you pay for  
13 the Capital cigarettes that enter in  
14 this state."

15 I said: "No, you have to sue."

16 "No, that's it, end of story."

17 Okay. We enter into a  
18 settlement. We pay for it without  
19 prejudice. Two weeks later, this goes  
20 on the Arkansas web site.

21 PRESIDENT NARIMAN: Where is  
22 that settlement?

23 MR. VIOLI: We have -- we have  
24 the reference to the settlement here.

25 I can get the actual settlement

0669

1 Grand River Arbitration

2 papers, but Mr. Williams attested to

3 it, that there was a settlement with

4 Arkansas and a number of states.  
5 PRESIDENT NARIMAN: But here it  
6 says Royal Tobacco.

7 MR. VIOLI: That's my point,  
8 Mr. President. Two weeks before, in  
9 September, October, they make us pay  
10 for cigarettes. Two weeks later, they  
11 list the importer as the manufacturer  
12 after we were forced to pay.

13 PRESIDENT NARIMAN: Where is  
14 this forced to pay? Where is that?

15 MR. VIOLI: I can get the -- we  
16 say that we settled with Arkansas.  
17 And we gave the sort of general terms  
18 of the settlements with a number of  
19 states:

20 "Pay or else. We are going to  
21 impose an embargo under the contraband  
22 laws."

23 So we pay. And we said, we are  
24 not the manufacturer for Capital.  
25 They said too bad. We pay it. What

0670

1 Grand River Arbitration  
2 do they do? They list this importer  
3 as the manufacturer for Capital.

4 MS. GUYMON: Mr. Violi, is  
5 Capital your brand that was subject to  
6 the settlement? Is that what you are  
7 saying?

8 MR. VIOLI: No.

9 MR. CLODFELTER: So Royal  
10 existed as a manufacturer, but not for  
11 your brand.

12 MR. VIOLI: I'm sorry.

13 MR. CLODFELTER: So it's not  
14 listed for your brand.

15 MR. VIOLI: No, but they told  
16 us we were the manufacturer of  
17 Capital. They demanded escrow payment  
18 from us in September and October.

19 PRESIDENT NARIMAN: On the  
20 theory that you were the importer or  
21 the manufacturer?

22 MR. VIOLI: No, that we were  
23 the manufacturer under the statute.

24 MS. MENAKER: There is just  
25 nothing in the record on Capital, so

0671

1 Grand River Arbitration  
2 we are just asking you what your  
3 relationship is with Capital.

4 MR. VIOLI: We produced it -- I  
5 said that we produced it like  
6 Tobaccoville. We produced brands for  
7 companies or importers; and that is  
8 the record also in the complaint in  
9 the federal action that you've  
10 attached.

11 We have produced private label  
12 brands for companies, including  
13 Capital.

14 MR. CLODFELTER: You  
15 manufactured Capital --

16 MR. VIOLI: Produced Capital.

17 MR. CLODFELTER: Well, sold --  
18 manufactured, produced -- is there a  
19 difference between "manufactured" and  
20 "produced"?

21 MR. VIOLI: Well,  
22 "manufactured" is a defined term.  
23 That is why I said that.

24 MR. CLODFELTER: You made the  
25 cigarettes.

0672

1 Grand River Arbitration

2 MR. VIOLI: Right.

3 MR. CLODFELTER: With the  
4 intent to be sold in the  
5 United States?

6 MR. VIOLI: Not with the  
7 intent -- see, this is when you think  
8 about it -- intent to be sold, what  
9 does that mean? If we were the  
10 manufacturer who intended the  
11 cigarette to be sold in the  
12 United States, why wasn't our name put  
13 on here as the manufacturer?

14 MR. CROOK: Did you make the  
15 cigarettes in response to an order  
16 from a US party?

17 MR. VIOLI: Yes.



18 MR. CROOK: Okay.  
19 MR. VIOLI: But why then is  
20 Capital the manufacturer?  
21 MR. CROOK: That's fine.  
22 MR. VIOLI: And then Capital  
23 gets another manufacturer to make it  
24 for them.  
25 PROFESSOR ANAYA: Well, do you  
0673

1 Grand River Arbitration  
2 have an answer to that question you  
3 keep asking as to why.  
4 MR. VIOLI: Yes, I will tell  
5 you, because there is confusion, and  
6 it's the importer. It's not --  
7 PROFESSOR ANAYA: Maybe it  
8 could be the clerk that wrote this up  
9 who was confused.  
10 MR. VIOLI: This is written up  
11 by the attorney general.  
12 PROFESSOR ANAYA: Maybe it's a  
13 summer intern for the attorney  
14 general. I don't know.  
15 MR. VIOLI: Okay. I can tell  
16 you from personal knowledge it wasn't.  
17 I spoke to the assistant attorney  
18 general who did it. That is their  
19 position, that Capital -- even though  
20 we were the manufacturer, they would  
21 list Capital because Capital owned the  
22 trademark. I can't explain it.  
23 MS. GUYMON: Rather than  
24 confusion, isn't it the distinction  
25 that you just stated, that as to

0674  
1 Grand River Arbitration  
2 Seneca you produced them intending  
3 them to be sold; but as to these other  
4 products, you don't produce them  
5 intending to be the manufacturer?  
6 So as to one, you are the  
7 manufacturer. As to the other you are  
8 not.  
9 MR. VIOLI: I don't like to  
10 take questions. But the point is that  
11 no, it actually shows the confusion

12 even among the enforcers of this law.

13 MR. CROOK: I wonder if that's  
14 fair --

15 MR. VIOLI: Why didn't Royal  
16 pay the escrow, is my point.

17 MR. CROOK: Well, I read the  
18 document here. You gave it to me last  
19 night, for which I am grateful.

20 And the first paragraph says  
21 this is a listing of the things that  
22 are lawful to be approved to be stamp  
23 sold offered for sale. So this is a  
24 document that exists for defining what  
25 is lawful to import or have --

0675

1 Grand River Arbitration

2 MR. VIOLI: Sold into Arkansas.

3 MR. CROOK: Sold in markets.

4 MR. VIOLI: Sold in markets in  
5 Arkansas.

6 MR. CROOK: Okay. Well, I  
7 don't want to take more of your time.  
8 Please go on.

9 PRESIDENT NARIMAN: I think  
10 that your point that you are making  
11 with all of this, is that in each  
12 state, although there may be identical  
13 statutes in accordance with the MSA,  
14 the enforcing agencies in each state  
15 were not quite sure who was the  
16 manufacturer, under what circumstances  
17 he was the manufacturer, whether an  
18 importer should also be the  
19 manufacturer, in order to establish  
20 liability.

21 MR. VIOLI: Okay.

22 PRESIDENT NARIMAN: So,  
23 therefore, and your point is that it  
24 is only when the enforcing authority,  
25 whoever it is, comes forward and asks

0676

1 Grand River Arbitration  
2 you to pay up, at that point of time  
3 your liability gets crystallized.

4 MR. VIOLI: I couldn't have  
5 said it better. I am glad you said it

6 for me, but that's right,  
7 Mr. President.

8 PRESIDENT NARIMAN: That's your  
9 case.

10 MR. VIOLI: I may be confusing  
11 it in trying to get it out. But  
12 that's what they show. I don't think  
13 they -- this slide talks about that  
14 March 14th letter which was after the  
15 cutoff date from Oregon which says "if  
16 you're a tobacco product  
17 manufacturer."

18 PRESIDENT NARIMAN: But I  
19 thought one of your group was Oregon,  
20 in Oregon you were selling cigarette.

21 MR. VIOLI: No, we weren't.  
22 What happened was we made cigarettes  
23 like -- this type of Capital -- it  
24 wasn't Capital; I think it was  
25 Scenic -- for someone who brought it

0677

1 Grand River Arbitration  
2 into, I think, Arizona, then sold it  
3 into Oregon, or as best as my  
4 independent research could follow.

5 So that is what I think  
6 engendered the Oregon letter of  
7 March 14th. And when Mr. Williams or  
8 Grand River received this letter for  
9 the first time, it says, "if you are a  
10 tobacco product manufacturer," well,  
11 that question of "tobacco product  
12 manufacturer" was at best ambiguous.

13 And to have knowledge that  
14 there was a measure related to these  
15 investors breached the NAFTA and  
16 caused loss of damage as of the time  
17 or prior to March 14, 2001, we think  
18 is just out of town.

19 And the Wisconsin court  
20 decision, which we went over, the  
21 Wisconsin court decision is the first  
22 time where we have notice of a  
23 lawsuit, the default judgment. We  
24 went in and said for all of the  
25 reasons that I just explained to you,

0678

1 Grand River Arbitration  
2 Mr. President and Members of the  
3 Tribunal, we should not be the  
4 manufacturer, and that was the Seneca  
5 brand in Wisconsin.

6 What happened was the  
7 cigarettes were sold to NWS in  
8 New York. They were shipped or taken  
9 into Nebraska by Hochunk Inc. of the  
10 Winnebago Tribe, a fellow by the name  
11 of Lance Morgan. He takes it into the  
12 tribe in Nebraska. He then, I think,  
13 sold to Iowa or whatever -- or sold to  
14 a tribe in Wisconsin, and then either  
15 on or off reservation -- Wisconsin --  
16 we never got it -- but Wisconsin says:

17 "Those Seneca brand cigarettes  
18 you must pay for and pay escrow."

19 They get a default judgment  
20 because we never get the complaint.  
21 We find out, and they had an  
22 injunction against us. The tribe --  
23 the tribe sent it to the Hochunk. The  
24 Hochunk -- the notice of injunction.  
25 The Hochunk send it to us.

0679

1 Grand River Arbitration  
2 We immediately acted. We went  
3 to court and we said all of these  
4 arguments I just presented, and saying  
5 for the reasons I presented, in  
6 addition to personal jurisdiction, you  
7 could not enforce this law against  
8 Grand River. It doesn't apply to  
9 them.

10 And the court found, I can't  
11 tell you if it applies to them  
12 essentially because I need an answer  
13 to get there -- but it can't apply to  
14 them because of personal jurisdiction.

15 They had no connection with  
16 Wisconsin. It's not like someone  
17 makes a valve stem and a tire in Japan  
18 or China. And then it's defective,  
19 and then it comes into Oklahoma and it

20 blows up on a bicycle and someone gets  
21 hurt or in a car and someone gets  
22 hurt.

23 So someone commits a tort in  
24 Japan. This is the Asaihi [phonetic]  
25 case in the Supreme Court of the

0680

1 Grand River Arbitration  
2 United States. You put a product in  
3 the stream of commerce that causes  
4 injury, and it creates a tort, right.  
5 And, therefore, you can be held in  
6 that remote jurisdiction for  
7 committing that tort or wherever you  
8 commit it. We argued that is not the  
9 case here.

10 We are making cigarette  
11 products. It's perfectly legal to  
12 sell these products, and you cannot  
13 hold a company just for selling  
14 cigarettes liable if someone gets sick  
15 under the Simpolone [phonetic] case in  
16 the Supreme Court of the United  
17 States. It's not permissible.

18 So there is no tort. The  
19 Wisconsin attorney general, like all  
20 the other Wisconsin attorney generals  
21 say -- it doesn't matter. Personal  
22 jurisdiction is assumed under the  
23 intention that your cigarettes be sold  
24 in the United States.

25 See, it doesn't say in

0681

1 Grand River Arbitration  
2 Wisconsin. It doesn't say in Oregon,  
3 in Iowa, Missouri. If you intend your  
4 cigarettes to be sold anywhere in the  
5 United States, then you have -- you  
6 are subject to the escrow laws of "our  
7 state, if your product subsequently  
8 gets into our stream."

9 And that went into the  
10 definition of -- I told you what  
11 tobacco product manufacturer -- there  
12 was confusion as to the tobacco  
13 product.

14           There was also confusion as  
15 selling to consumers. What does that  
16 mean? The MSA states say that means  
17 if your product ends up being sold  
18 here, no matter how it gets here or by  
19 whom, remotely in Oregon, whatever the  
20 case, you are responsible for escrow.

21           So that is the way that they  
22 came to apply that statute, and that  
23 is where we objected in Wisconsin and  
24 ultimately were vindicated.

25           We can't do that in 46 states.

0682

1           Grand River Arbitration

2 We would go broke. We would go  
3 bankrupt. This company, you know,  
4 supplies for 200 families, Native  
5 American families in New York and  
6 Canada. I mean, this is going to  
7 bankrupt this company on a measure  
8 that essentially has no application  
9 and breaches the NAFTA, as we said.

10           But I want to cut through this  
11 because I want to get to the allocable  
12 share and the contraband law.

13           So the next slide is problems  
14 with the escrow statutes. After these  
15 escrow statutes were passed in 1999,  
16 and 2000, there emerged problems. You  
17 couldn't ban -- if you -- if you -- if  
18 I'm a manufacturer or a producer or an  
19 importer and for some reason or  
20 another, I don't think this statute  
21 applies here, I am entitled to due  
22 process.

23           The attorney general has to sue  
24 me, get a court order mandating I  
25 comply. And if I don't comply, then

0683

1           Grand River Arbitration

2 there are penalties and injunctions  
3 against my sales. So it had due  
4 process. It had everything it should  
5 have. That was the original escrow  
6 statute.

7           The attorneys general didn't

8 like that. They didn't want to have  
9 to bring lawsuits and see the myriad  
10 of lawsuits that they would have to  
11 litigate. So what they did was -- the  
12 other point is the allocable share.

13 PRESIDENT NARIMAN: Which is  
14 this clause in the statute, which it  
15 says requires the attorney general to  
16 bring a lawsuit if he or she believes  
17 the statute applies.

18 MR. VIOLI: That is in the  
19 model statute. We can get the model  
20 statute, the model statute, please.

21 PRESIDENT NARIMAN: You are  
22 saying the source is the Oklahoma  
23 statute.

24 MR. VIOLI: Yes, that is in  
25 my --

0684

1 Grand River Arbitration

2 PRESIDENT NARIMAN: That's in  
3 your statement.

4 MR. VIOLI: Yes, but I was  
5 going to make it easier for you.

6 (There was a discussion off  
7 the record.)

8 PRESIDENT NARIMAN: No, the  
9 requirement that it should bring a  
10 lawsuit, where is that?

11 MR. VIOLI: Well, it says --

12 PRESIDENT NARIMAN: May bring a  
13 civil suit on behalf of the state that  
14 fails to place -- that is entirely  
15 different.

16 My point was, that --

17 MR. VIOLI: You can't --

18 PRESIDENT NARIMAN: No, no, no.  
19 You see the obligation is on the TPMs  
20 to place into escrow the funds  
21 required, whatever your impression may  
22 be. And the attorney general is also  
23 entitled to bring a civil action, not  
24 that he -- that your liability only  
25 arises when the attorney general sues

0685

1 Grand River Arbitration

2 you. I mean, that doesn't seem to be  
3 correct. Just have a look at the  
4 statute.

5 MR. VIOLI: You are correct.  
6 What I said was mandated. If you want  
7 a mandate or an absolute certainty on  
8 it, if this law applies to you --  
9 right, if you have a question that  
10 this law does not apply to you, or you  
11 feel it does not apply to you, the  
12 only way that it can apply to you is  
13 by court order, and a mandate. That  
14 was my point, Mr. President.

15 PRESIDENT NARIMAN: Which part  
16 of the statute is this taken from?

17 MR. VIOLI: It says here in  
18 that paragraph three, right.

19 PRESIDENT NARIMAN: No, no, I  
20 just want to know which is that -- the  
21 model statute, Exhibit T -- which part  
22 of Exhibit T says that?

23 MR. VIOLI: It's paragraph --  
24 it's the section requirements.

25 MR. CROOK: Why don't we ask

0686

1 Grand River Arbitration  
2 Mr. Violi to perhaps supply that after  
3 lunch --

4 MR. VIOLI: It's right.

5 MR. CROOK: The precise cite --  
6 I am trying to save you time.

7 MR. VIOLI: It's just called  
8 section requirements, subparagraph 3.  
9 And our point was not that alleged  
10 liability -- alleged liability doesn't  
11 attach under the mandate talking about  
12 certainty and injunctions for not  
13 paying.

14 The statute doesn't say that  
15 they can -- your product can be  
16 banned. It doesn't say that there can  
17 be penalties brought against you.

18 PROFESSOR ANAYA: There are no  
19 penalties for failure to pay?

20 MR. VIOLI: No, unless there is  
21 a court order, unless there is a court



22 order, it had --  
23 PROFESSOR ANAYA: But the court  
24 order can be imposing penalties for  
25 the prior failure to pay.

0687

1 Grand River Arbitration

2 PRESIDENT NARIMAN: That's what  
3 we saw in that Missouri order three  
4 times.

5 MR. VIOLI: That's correct.

6 PROFESSOR ANAYA: But the  
7 penalty suggests that you were  
8 obligated.

9 MR. VIOLI: That's right, if  
10 you were determined, if you are  
11 determined.

12 PROFESSOR ANAYA: There is the  
13 question about whether or not it  
14 applies to you, then. I understand  
15 that.

16 MR. VIOLI: Yeah.

17 PROFESSOR ANAYA: But if it's  
18 determined that it applies to you,  
19 it's not past it. That is at that  
20 point of the determination you incur  
21 liability. The liability actually is  
22 deemed to have attached when you  
23 failed to comply to the statute.

24 MR. VIOLI: Actually, under --  
25 our position is that it doesn't apply.

0688

1 Grand River Arbitration

2 We have been vindicated in one court,  
3 and our attorneys' fees --

4 PROFESSOR ANAYA: I understand  
5 that. But assuming it does apply --

6 MR. VIOLI: We will  
7 absolutely --

8 PROFESSOR ANAYA: That is the  
9 argument, that you keep saying it  
10 doesn't apply. But assuming it does  
11 apply, the obligation attaches --  
12 doesn't attach only when there is a  
13 court order.

14 PRESIDENT NARIMAN: This is  
15 only a method of enforcement.

16 MR. VIOLI: It's the only  
17 method of enforcement.  
18 PRESIDENT NARIMAN: It doesn't  
19 say that. It says may bring, not that  
20 he must bring a lawsuit.  
21 PROFESSOR ANAYA: If you don't  
22 pay taxes, personal income taxes, I  
23 mean, because you don't think you  
24 should because you think the  
25 Constitution of the United States

0689

1 Grand River Arbitration  
2 protects you against paying income tax  
3 to the federal government -- and some  
4 people think that, right -- so you  
5 don't have to pay taxes? Is that --  
6 until you get a court order?

7 MR. VIOLI: An expert in our  
8 case, a fellow by the Robert Venable  
9 [phonetic] out of Cornell University,  
10 and I read all of his pieces; and I  
11 think he is absolutely right. So what  
12 does that mean? Are the Six  
13 Nations -- is, if you have a good  
14 faith belief -- I still believe  
15 everything he says, and his writings  
16 are sound beyond a fault, especially  
17 Indians not taxed. So tell me --

18 PROFESSOR ANAYA: No, you tell  
19 me. Please, don't ask me any  
20 questions.

21 MR. VIOLI: Professor Anaya, I  
22 think that is --

23 PROFESSOR ANAYA: This is the  
24 one time I get to --

25 MR. VIOLI: You are a

0690

1 Grand River Arbitration  
2 professor. You ask questions all the  
3 time. This is my chance to ask a  
4 professor a question.

5 PROFESSOR ANAYA: No, it's not.

6 MR. VIOLI: I am only kidding.

7 My point is that I think that  
8 in this some situation as well as in  
9 others the liability doesn't attach

10 unless there is a determination of a  
11 violation. And an injunction can't be  
12 imposed, and the loss is not incurred.  
13 That's really the key. But then we're  
14 talking about  
15 PROFESSOR ANAYA: How is that  
16 different from a hypothetical when  
17 someone says, "I don't want to pay  
18 taxes, federal income tax, and so I am  
19 not liable"? And is it the case that  
20 they are not liable for taxes until  
21 they --

22 MR. VIOLI: If it's a good  
23 faith belief on that, it's knowledge.  
24 You should have known.

25 PROFESSOR ANAYA: Okay. You  
0691

1 Grand River Arbitration  
2 have to have a good faith belief.

3 MR. VIOLI: On knowledge you  
4 should have known, I would think so.

5 MR. CROOK: That's not the  
6 issue. The issue is, when is there  
7 injury or damage?

8 MR. VIOLI: Actually, it's  
9 breach. I think we are confusing  
10 breach --

11 PROFESSOR ANAYA: No I am  
12 talking about injury. I am talking  
13 about loss. And the government's  
14 position is that there is a loss at  
15 the time liability is incurred. And  
16 there is liability once the statute  
17 becomes enforced, and someone is  
18 subject to the statute by selling  
19 cigarettes. At that moment there is a  
20 loss.

21 MR. VIOLI: But how do we  
22 explain --

23 PRESIDENT NARIMAN: And that is  
24 all taxing statutes. There is -- so  
25 you say: "For various reasons, I may

0692

1 Grand River Arbitration  
2 say I am not subject to a particular  
3 taxing statute."

4 MR. VIOLI: But we won that  
5 argument in Wisconsin.

6 PRESIDENT NARIMAN: You may  
7 have won it in a given case because of  
8 this. That doesn't -- that doesn't  
9 throw much light on the outcome of  
10 this escrow statutes.

11 Does the escrow statutes impose  
12 a liability on a manufacturer? That  
13 is the question, with all of that  
14 definition, et cetera. You may fall  
15 within that definition. You may not.  
16 That is just too bad if you do. If  
17 you do, you do. If you don't, you  
18 don't.

19 When we are coming to this  
20 limitation clause, there is no  
21 question of limitation, because then  
22 this limitation provision cannot  
23 possibly attached to anything, until  
24 and unless something is foisted on  
25 you, you say: "I refuse to pay."

0693

1 Grand River Arbitration  
2 Where do you get this good faith  
3 business? Because God has told me I  
4 should not pay. Good enough excuse.

5 MR. VIOLI: A Wisconsin judge,  
6 Mr. President, has told us that.

7 PRESIDENT NARIMAN: In that  
8 particular case, he may have told you  
9 that. But do we have to go into the  
10 facts of each case?

11 MR. VIOLI: The fact of each  
12 case is we could not suffer loss  
13 before we were mandated to comply  
14 where our product was banned. That's  
15 the only time we could actually suffer  
16 a physical loss or injury under the  
17 statute.

18 PRESIDENT NARIMAN: No, no, you  
19 are right, but this is why your title  
20 is a little defective. That's why I  
21 looked at -- requires attorney general  
22 to bring a lawsuit and obtain a court  
23 order. If it did, then you are right.

24 That's why I looked at it.  
25 MR. VIOLI: To enforce the

0694

1 Grand River Arbitration  
2 requirements of the escrow statutes,  
3 that's correct.

4 For us to get a loss -- this  
5 is -- this is written with the idea of  
6 a loss, when we sustain an actual  
7 physical loss.

8 If we had brought a lawsuit --  
9 let's say -- let's assume that we did  
10 receive a letter from the Missouri  
11 attorney general, and that is  
12 absolutely untrue.

13 But if we did, could we have  
14 brought a NAFTA claim at that time in  
15 April of 2000? That is a measure we  
16 should have known, a breach of the  
17 NAFTA, and loss, all on April 7th when  
18 we receive a letter like that?

19 MR. CROOK: Mr. Violi.

20 MR. VIOLI: The answer is no.  
21 I shouldn't pose it as a question.  
22 But the answer is -- our position is  
23 no.

24 MR. CROOK: I have the sense  
25 that all the panel have sort of

0695

1 Grand River Arbitration  
2 expressed their views, and you I think  
3 have laid out your position. You have  
4 been speaking in terms of loss, if you  
5 think there is any material  
6 difference, because the language in  
7 116 -- 1116, of course, is loss or  
8 damage.

9 Do you think there is any  
10 difference? Is all loss equal to  
11 damage? Does the fact they use two  
12 words, does that have any legal  
13 significance?

14 MR. VIOLI: I will let  
15 Mr. Weiler speak to that when we get  
16 to that.

17 MR. CROOK: All right. I think

18 you have laid out your position. We  
19 understand it, and we will consider  
20 it.

21 MR. VIOLI: Okay. Thank you.

22 PROFESSOR ANAYA: I'm not sure  
23 how you are saying, if you say there  
24 is a good faith argument that doesn't  
25 apply, then that is where the crux of

0696

1 Grand River Arbitration  
2 your argument is.

3 MR. VIOLI: On the knowledge  
4 part.

5 PROFESSOR ANAYA: Okay.

6 MR. VIOLI: Whether you knew or  
7 should have known.

8 PROFESSOR ANAYA: You are  
9 saying there is a good faith argument  
10 that this doesn't apply because of all  
11 of the ambiguity --

12 MR. VIOLI: All of the  
13 ambiguity, correct.

14 PROFESSOR ANAYA: And you made  
15 reference to Venable's position about  
16 the tax in the Six Nations. Are you  
17 arguing at all --

18 MR. VIOLI: That was in  
19 response to -- if you tell someone  
20 that they are subject to tax, and not  
21 only -- and they have a good faith  
22 belief -- and, in fact, I will put it  
23 in our circumstances.

24 You have a good faith belief  
25 that you are not subject to tax. And

0697

1 Grand River Arbitration  
2 you make that position. You maintain  
3 it, and then you subsequently win on  
4 it, like we did in Wisconsin.

5 Does that mean we suffered loss  
6 when someone said it applied to us?

7 No. I'm sorry. I keep posing these  
8 questions, but it's really a  
9 rhetorical question. The answer is  
10 no.

11 PROFESSOR ANAYA: But you are

12 not arguing that because the Six  
13 Nations -- they are not subject --  
14 this company is not subject to it.

15 MR. VIOLI: I am. Actually, we  
16 are. That's part of the expropriation  
17 claim. That is the international  
18 treaties. The treaty --

19 PRESIDENT NARIMAN: That is  
20 your separate suit.

21 MR. VIOLI: No, no, no, that's  
22 here -- international law. Mr. Weiler  
23 can speak to that.

24 But the Six Nations treaties --  
25 the two Rowampan treaty -- and perhaps

0698

1 Grand River Arbitration  
2 chief -- former chief can speak to  
3 it -- more than that, there is a  
4 treaty between the United States and  
5 the Six Nations members that they  
6 shall -- they can trade in commerce  
7 freely across the border unmolested  
8 and undisturbed.

9 So our position is that the  
10 imposition of this escrow statute,  
11 state measures, essentially a state  
12 measure on these groups of investors,  
13 violates that treaty. And that's an  
14 international law. It has to be  
15 respected as international law as any  
16 other international law would, and  
17 which is incorporated into the NAFTA.

18 And it's important because,  
19 remember, Grand River and NWS only do  
20 business on a Reserve. Grand River  
21 makes Seneca cigarettes on a Reserve,  
22 sells them to a reservation in  
23 northern New York. The Indians -- the  
24 Native Americans in northern New York  
25 who sell it throughout the country

0699

1 Grand River Arbitration  
2 only do so on Reserve and only to  
3 Native American Enterprises, wholly  
4 owned, and not some --

5 PROFESSOR ANAYA: But the

6 cigarettes end up -- many of them --  
7 MR. VIOLI: Because someone  
8 else, Professor Anaya, takes them off  
9 of the Reservation, but not our  
10 Claimants.  
11 MR. CROOK: For present  
12 purposes, that someone else is  
13 generally Tobaccoville.  
14 MR. VIOLI: Tobaccoville in  
15 one, but not in the case of Wisconsin.  
16 Apparently, Oregon, Nebraska, Iowa --  
17 perhaps -- that's correct.  
18 None of these Claimants took  
19 these products off reservation. It  
20 was total inter -- or intra-nation  
21 commerce.  
22 And, you know, the judge in  
23 New York -- I tried to explain it to  
24 him, and you've seen the decision in  
25 the Grand River case in New York -- he  
0700  
1 Grand River Arbitration  
2 said:  
3 "Well, of course, the escrow  
4 statutes don't apply on reservation."  
5 And I would have said:  
6 "Judge, thanks very much, but  
7 that's not the way the attorney  
8 generals are applying it. If that was  
9 true, I would be happy."  
10 But they don't seem to get it.  
11 They don't seem to get it. And they  
12 say:  
13 "If someone takes the product  
14 off of a Reserve in California,  
15 Arizona, New Mexico, it doesn't  
16 matter. We go all the way back to  
17 Canada, and the person who  
18 manufactured it is responsible."  
19 It's an anomaly unprecedented  
20 in international law, and we feel  
21 violates -- and Professor Venable  
22 submitted affidavits on this -- we  
23 retained him -- that it violates --  
24 PROFESSOR ANAYA: Doesn't this  
25 go to the limitations issue as well?



0701

1 Grand River Arbitration  
2 I mean, it's not just about the  
3 merits. Doesn't it go to the  
4 ambiguity of the applicability of the  
5 statute?

6 MR. VIOLI: Right, that's  
7 what we believe and why it doesn't  
8 apply to us --

9 PROFESSOR ANAYA: I am  
10 wondering why -- why just now we are  
11 hearing this.

12 MR. VIOLI: It's in the PSOC.  
13 It talks about the --

14 PROFESSOR ANAYA: It's not in  
15 your rejoinder. It's not in your  
16 answer.

17 MR. VIOLI: Because they never  
18 really raised it.

19 PROFESSOR ANAYA: Yes, but you  
20 are arguing that the statute -- there  
21 is ambiguity in its application, and  
22 that seems to be the crux of your  
23 argument as to why liability doesn't  
24 attach until the government agency,  
25 the state government agency takes the

0702

1 Grand River Arbitration  
2 position that it does apply and  
3 enforces that. Right? It's the  
4 ambiguity in the applicability of the  
5 statute --

6 MR. VIOLI: It's the  
7 ambiguity --

8 PROFESSOR ANAYA: -- that gives  
9 you the good faith argument.

10 MR. VIOLI: It does. And it  
11 has to do with the whole March --  
12 really the March --

13 PROFESSOR ANAYA: Right.

14 MR. CROOK: I'm sorry, "really  
15 the March" what?

16 MR. VIOLI: The March 14, 2001  
17 letter. It's the first time there was  
18 a notice to them in writing saying --

19 PROFESSOR ANAYA: I understand

20 that. The reason I have -- just so I  
21 get this clear.

22 The reason -- I am trying to  
23 understand your argument -- the reason  
24 they have -- they think that it  
25 doesn't apply to them, right, the

0703

1 Grand River Arbitration  
2 reason Grand River and the other  
3 defendants think it doesn't apply to  
4 them is because of what you have been  
5 showing us here this morning, the  
6 confusion in the definition of  
7 "manufacturer."

8 And am I now to believe,  
9 because of this argument, that based  
10 on the two Rowampan belts and the  
11 treaty --

12 MR. VIOLI: Yeah --

13 PROFESSOR ANAYA: -- that  
14 it's --

15 MR. VIOLI: It's in our PSOC,  
16 absolutely.

17 PROFESSOR ANAYA: No, I -- it  
18 seems to be a material part of your  
19 argument with regard to the ambiguity  
20 created in the applicability of the  
21 statute which is central, I think, if  
22 I understand your argument correctly,  
23 to your argument that damage doesn't  
24 attach until that ambiguity is eroded  
25 by an effort to apply the statute.

0704

1 Grand River Arbitration

2 MR. VIOLI: Under the good  
3 faith standard, that is correct.  
4 Under good faith belief and on whether  
5 or not it could apply, should apply,  
6 breaches international law if it does  
7 apply -- yes.

8 PROFESSOR ANAYA: You say  
9 international law. You mean the  
10 treaty.

11 MR. VIOLI: Yeah, because I  
12 don't know of any NAFTA case that  
13 deals with this, but NAFTA speaks to

14 international.

15 PROFESSOR ANAYA: Yes.

16 MR. VIOLI: And it's our  
17 position that a treaty, US treaty is  
18 deemed, you know, international law or  
19 international law --

20 PROFESSOR ANAYA: Treaty with a  
21 tribe.

22 MR. VIOLI: With a tribe, or  
23 treaty with the Six Nations. The  
24 treaty with the -- the Six Nations  
25 treaty -- the Jay treaty is actually

0705

1 Grand River Arbitration  
2 very broad. It doesn't just say the  
3 tribe. It says members of the Six  
4 Nations.

5 I am not that versed in -- I  
6 mean, I have read those treaties and  
7 sort of the history, but I don't know  
8 if it's consistent with all of the  
9 other, you know, many other treaties.

10 MR. CLODFELTER: May I just  
11 ask, is this in connection with the  
12 1105 claim?

13 MR. VIOLI: Yeah, Mr. Weiler  
14 will turn to it, but, yes, this is  
15 1105.

16 MR. CLODFELTER: Because there  
17 is a binding interpretation that  
18 applies to this case which said that  
19 1105 only applies to customary  
20 international law, not other treaties,  
21 so this interpretation is already  
22 precluded.

23 MR. VIOLI: I don't -- I think  
24 it is customary international law.

25 MR. WEILER: We will get to

0706

1 Grand River Arbitration  
2 that.

3 MR. CROOK: I think perhaps we  
4 can turn to this when Mr. Weiler is  
5 on.

6 MR. VIOLI: I thought it was  
7 the merit. I mean, look, the way I

8 look at this is --

9 MR. CLODFELTER: We thought it  
10 was the merits, too. That's why we  
11 were surprised. We haven't heard that  
12 as a reason for confusion on  
13 timeliness. That's all.

14 PROFESSOR ANAYA: It could just  
15 be the merit, but I am surprised that  
16 you are just treating it as the merit.  
17 I would think that would go to your  
18 argument about the ambiguity in the  
19 applicability of the escrow statutes.

20 MR. VIOLI: It's not the  
21 ambiguity that it doesn't apply.  
22 That's correct, that it would not  
23 apply, right.

24 We feel there is no ambiguity.  
25 It does not apply on Reserve. We have

0707

1 Grand River Arbitration  
2 made that case in our particularized  
3 statement of claim.

4 But, really, the whole -- I  
5 think we only get to these issues if  
6 there is a belief that the Claimants  
7 should have had knowledge and did, in  
8 fact, sustain loss of damage before  
9 March of 2001, if -- and that there  
10 was a breach of the NAFTA before they  
11 received that knowledge. And --

12 PRESIDENT NARIMAN: So you say  
13 that, even if you had knowledge of the  
14 MSA, you had knowledge of all of the  
15 escrow statutes, assuming that you had  
16 full knowledge of the escrow statutes,  
17 you would still be able to -- you  
18 would still be contending that,  
19 despite all of that knowledge, the  
20 question of the automatic  
21 applicability of that escrow statute  
22 to Grand River is not to be assumed at  
23 all until and in the peculiar  
24 circumstances or circumstances of the  
25 present case where you happen to be on

0708

1 Grand River Arbitration

2 an Indian reservation having --  
3 subject to a treaty, et cetera.

4 MR. VIOLI: In that context,  
5 yes.

6 PRESIDENT NARIMAN: That's  
7 all -- I'd like it in the statement of  
8 claim. Now, you put it.

9 MR. VIOLI: We have so much  
10 confusion as to who the tobacco  
11 product manufacturer is.

12 Essentially, what this is -- as  
13 I see this -- members of the panel, we  
14 have scoured the files. We have had  
15 the Claimants scour their files. The  
16 first thing they found was March 14,  
17 2001.

18 What this really is, is an  
19 attack on counsel saying:

20 "You didn't bring the case  
21 timely, Counsel, because you should  
22 have known that the MSA breached the  
23 NAFTA" and all of this.

24 That's really what's going on  
25 because who is the one that is hurt

0709

1 Grand River Arbitration  
2 here? It is the Claimants.

3 Because the Claimants get a  
4 letter, in good faith, it says, "if  
5 you are a participating manufacturer,"  
6 there is ambiguity that is rampant in  
7 the document. They didn't even know  
8 what that -- the drafters didn't even  
9 know what that meant -- who was -- "if  
10 you're a tobacco product  
11 manufacturer."

12 PRESIDENT NARIMAN: This is not  
13 your statement of claim as I have read  
14 it. I'm sorry. With the assistance  
15 of your argument today, perhaps you  
16 have expounded on it. But your  
17 statement of claim expressly says that  
18 your cause of action is the MSA, the  
19 statute -- escrow statutes and their  
20 enforcement. You have lumped them all  
21 together.

22 MR. VIOLI: No, they have.  
23 PRESIDENT NARIMAN: Please, in  
24 your paragraph 10 -- in your statement  
25 of claim, you have expressly said so.

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1 Grand River Arbitration

2 MR. VIOLI: We have never said  
3 the MSA was a measure.

4 (There was a discussion off  
5 the record.)

6 PRESIDENT NARIMAN: Page 24.

7 It's your argument. It's in the  
8 argument section. E. E, E. Just  
9 read "para" ten.

10 "The measures in this case  
11 include the existence and enforcement  
12 of three types of legislation, which  
13 have been and continue to be imposed:  
14 Escrow statutes, contraband law, and  
15 equity assessment laws."

16 Now, I am emphasizing the word  
17 "existence."

18 See, the existence of the  
19 statute imposes liability. Now, the  
20 differentiation, which you are now  
21 making -- please follow my  
22 difficulty --

23 MR. VIOLI: Yes, yes.

24 PRESIDENT NARIMAN: Namely,  
25 that the statute by itself, Grand

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1 Grand River Arbitration

2 River, does not impose any liability  
3 at all unless and until it is  
4 established against you, because of  
5 various circumstances which go to show  
6 that there is ambiguity into to  
7 whether you are a manufacturer in --  
8 under this statute.

9 And then you go on to cite the  
10 different states here treating you  
11 differently at different times.

12 That is the way I -- your  
13 argument has developed. Now, you see,  
14 I just want to know that, if MSA and  
15 the escrow statutes are also part of

16 your cause of action.

17 MR. VIOLI: MSA, no.

18 PRESIDENT NARIMAN: The escrow  
19 statute is definitely part of your  
20 cause of action.

21 MR. VIOLI: Right.

22 PRESIDENT NARIMAN: How -- this  
23 is my problem -- how do you dissect  
24 the limitation point by saying escrow  
25 statutes, yes, the enforcement of it

0712

1 Grand River Arbitration  
2 in each individual case. And you lump  
3 them both together.

4 Now, where does the limitation  
5 begin? Where does it start, from the  
6 time the escrow statutes is there, or  
7 from the time when each state chooses  
8 or not chooses to enforce this statute  
9 against you?

10 MR. VIOLI: We do not sustain  
11 loss or damage until they choose, and  
12 I will tell you and just --

13 (There was a discussion off the  
14 record.)

15 MR. VIOLI: All of this is  
16 irrelevant to the escrow statutes as  
17 it currently exists. But you asked me  
18 a question about how. And we don't  
19 sustain loss or damage or know of a  
20 breach when they send letters in March  
21 or April of 2000 because it doesn't  
22 say: "You are a manufacturer who is  
23 liable." It says: "If you are."

24 And at that point, we did not  
25 know -- maintain we were not, and in

0713

1 Grand River Arbitration  
2 Wisconsin we were ultimately proven  
3 that we shouldn't be.

4 So that is really my point,  
5 Mr. President. No one knows for  
6 certain. But they didn't make a  
7 demand and say absolutely, with  
8 certainty: "You are a manufacturer.  
9 You must pay." It says "if." The

10 letters say "if"; and we will assume  
11 this and all of that.

12 PROFESSOR ANAYA: Just so I  
13 understand, you maintain that you  
14 weren't a manufacturer because of  
15 these things you showed us, right,  
16 because of the different definitions  
17 of manufacturer that were floating  
18 around.

19 MR. VIOLI: Except for the  
20 Seneca.

21 PROFESSOR ANAYA: Is that the  
22 only reason you weren't a  
23 manufacturer?

24 MR. VIOLI: Under the  
25 definition of the statute --

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1 Grand River Arbitration

2 PROFESSOR ANAYA: Or that you  
3 weren't subject to the statute.

4 MR. VIOLI: Right, well, no, we  
5 weren't subject to the statute for a  
6 number of reasons. We have the  
7 international -- you know, the treaty  
8 rights issue. We have the ambiguity  
9 in the statute, and that is -- the  
10 subdivision of that is sort of what  
11 happened in Wisconsin.

12 But, you know, if I received  
13 that letter -- let's say I received  
14 one of those letters, March or April,  
15 could I have sued at that time the US  
16 government and said: "Here is a  
17 breach of the NAFTA and I have  
18 suffered loss"?

19 It doesn't ever say I am the  
20 manufacturer. It says, "if you are" a  
21 manufacturer. It doesn't say, you  
22 know, with certainty, you are.

23 PRESIDENT NARIMAN: Are you  
24 drawing a distinction between the  
25 breach and the loss? Is it your case

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1 Grand River Arbitration

2 that, although there may have been a  
3 breach, the loss would not be suffered



4 for various -- for a variety of  
5 reasons until and unless it was -- the  
6 escrow statute was attempted to be  
7 enforced against you?

8 MR. VIOLI: Right, right, but  
9 Mr. Weiler will explain that when we  
10 get to that.

11 With that, I wanted to just go  
12 on -- and we touched the allocable  
13 share. There were essentially  
14 problems with the original  
15 legislation.

16 PRESIDENT NARIMAN: That's  
17 problem -- that's a point on which I  
18 will require some elucidation from you  
19 on this point.

20 MR. CROOK: Which -- Mr.  
21 Chairman, which point is that?

22 PRESIDENT NARIMAN: Which point  
23 I just mentioned to him, that is it  
24 possible -- because their contention  
25 today may be that, although there may

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1 Grand River Arbitration  
2 be a breach, the requirement being  
3 that your requirement, namely, breach  
4 and loss, the breach may have taken  
5 place -- I'll start with the MSA, the  
6 statutes, et cetera -- but the loss  
7 could only be suffered after there was  
8 an attempt to enforce it against them.  
9 And there was no attempt to enforce it  
10 against them prior to March 2001. I  
11 mean, that is the point on which I  
12 would require a little assistance from  
13 both of you.

14 MR. VIOLI: What I would like  
15 to go on to -- we see that there were  
16 problems with the -- with the escrow  
17 statutes' enforcement rather than  
18 existence, the required. But the only  
19 way that they could actually get a ban  
20 against someone who allegedly didn't  
21 comply or actually force them to  
22 comply was by a court order.

23 And there was a second problem,

24 the allocable share allowed NPMs like  
25 Grand River, who they claim is an NPM,

0717

1 Grand River Arbitration  
2 sales of their product to be  
3 concentrated in a few states, and that  
4 lowered the escrow burden to a point  
5 where they could compete with the --  
6 with the exempt SPMs.

7 So I would like to go to the  
8 slide that talks about how the  
9 original law worked, when it was  
10 enacted in 1999 and 2000. A TPM -- a  
11 tobacco product manufacturer has MSA  
12 payments -- has MSA payments based on  
13 its aggregate amount sold in the  
14 United States. And that is determined  
15 by federal excise tax, as Ms. Menaker  
16 mentioned before.

17 So if a million cartons of  
18 cigarettes, for example, that you  
19 manufactured -- and you are in the MSA  
20 and you signed on -- you make a  
21 million cartons, 4 million --  
22 whatever -- the federal excise tax is  
23 paid.

24 The MSA is \$4 per carton. You  
25 will pay \$4 million under the MSA, if

0718

1 Grand River Arbitration  
2 you join it, a million cartons, \$4 per  
3 carton, \$4 million. The money goes  
4 into a big fund, and then it's divvied  
5 up among the states. California gets  
6 12.45 percent. New York get 12.45  
7 Oklahoma gets 1.03. Kansas gets  
8 something equivalent, and so that is  
9 what we see happens.

10 You have an apportionment of  
11 your -- of your MSA liability among  
12 the states.

13 Under the original escrow  
14 statute, Oklahoma, for example, could  
15 not -- you did not have to pay into  
16 escrow or keep in escrow. You had to  
17 put the \$4 in, but you got a refund

18 immediately. You didn't have to pay  
19 or hold more than what Oklahoma would  
20 have received from you under the MSA,  
21 which is 1 percent of your MSA  
22 payments.

23 So let's say you sell your  
24 virtual MSA payments. So you don't  
25 want to be in the MSA. You sell 10  
0719

1 Grand River Arbitration  
2 million cartons. Your MSA liability  
3 would be \$40 million. Oklahoma gets  
4 1 percent of \$40 million. Oklahoma  
5 gets \$400,000 under the escrow  
6 statute, because that is the max they  
7 would have gotten -- or it would have  
8 gotten from you under the MSA.

9 So let's say you sold 3 million  
10 cartons in Oklahoma. Well, 3 million  
11 cartons at \$4 a carton is \$12 million.  
12 You would have to deposit \$12 million  
13 in Oklahoma. And you would get a  
14 refund of all but about \$400,000. So  
15 you would get \$11,600,000 back.

16 That allowed Grand River to  
17 effectively lower its national escrow  
18 burden to \$0.50 per carton. Exempt  
19 SPMs who were invited to that  
20 sweetheart deal at the beginning of  
21 the MSA, see, they got zero on the  
22 first million cartons, let's say. But  
23 they would have to pay \$4 for every  
24 carton thereafter.

25 So if they sold 10 million  
0720

1 Grand River Arbitration  
2 cartons, they would get -- they would  
3 get, okay, a ride on one million.  
4 They get a free ride on one million.  
5 That is \$4 million. But they have to  
6 pay \$4 on 9 million cartons. That's  
7 \$36 million.

8 So that is how, under the  
9 original escrow statute, when -- Grand  
10 River continued to do business,  
11 settled with the states without

12 prejudice and worked within the  
13 confines of this law as it existed and  
14 as it was adopted in order to stay in  
15 business and keep selling.

16 And I will just review these  
17 quickly. That created a problem, see,  
18 because now the exempt SPMs are  
19 complaining. They are saying:

20 "Wait a minute. We thought we  
21 were the ones who got the sweetheart  
22 deal. You know, but now, it turns out  
23 we didn't get the sweetheart deal. We  
24 only got an exemption for 100 percent  
25 of what we sold back in '97 and '98.

0721

1 Grand River Arbitration  
2 These guys now can sell, and they can  
3 dollar cost average or whatever you  
4 want to call it and effectively lower  
5 their payments so that they can  
6 compete with us effectively."

7 PRESIDENT NARIMAN: Is the  
8 allocable share amendment reflected in  
9 the MSA?

10 MR. VIOLI: No, never. They  
11 say it was a loophole. It was -- it  
12 was a mistake. They never -- it's an  
13 unintended consequence. The two  
14 largest law firms in New York City,  
15 perhaps in the country, 46 attorneys  
16 general, and some prized plaintiff  
17 attorneys, drafted this statute. But  
18 they then said: "This was a loophole.  
19 We never intended it."

20 So this amendment didn't come  
21 on until much after March 2001.

22 MR. CROOK: Next slide.

23 MR. VIOLI: They effectively --  
24 they effectively changed the rules in  
25 the middle of the game, Mr. President

0722

1 Grand River Arbitration  
2 and Members of the Tribunal. And as  
3 Mr. Weiler will explain, that's how we  
4 get the discrimination.

5 Now, in March of 2001, click

6 that, if you would -- in March of  
7 2001, we see a letter from the  
8 National Association of Attorneys  
9 General -- that is the next slide in  
10 the presentation, after -- not in the  
11 exhibits -- that is after the -- after  
12 the order -- Wisconsin order of  
13 dismissal -- NAAG letter 3/12/01.

14 PRESIDENT NARIMAN: Yes.

15 MR. VIOLI: So March 12th,  
16 2001, which is, ironically, the same  
17 day we -- that they are claiming they  
18 say we should have known before -- on  
19 that day, the attorneys general, the  
20 NAAG rights to the attorney, the head  
21 attorney for Philip Morris, Wachtel  
22 Lipton, and says --

23 PRESIDENT NARIMAN: Who is  
24 Winter?

25 MR. VIOLI: Jeffrey Winter is a

0723

1 Grand River Arbitration  
2 partner at Wachtel Lipton Rosen &  
3 Katz. That is the law firm that  
4 represents Philip Morris, one of the  
5 OPMs, the original four.

6 And he writes them, and he  
7 says:

8 "As you have been advised" -- I  
9 will paraphrase -- "As you have been  
10 advised, some NPMs are asking for  
11 refunds."

12 On the next page he says:

13 "The foregoing letter  
14 demonstrates that the NPM request is  
15 not frivolous, meaning NPMs are  
16 entitled to it, and we are going to  
17 give the information that is going to  
18 allow them to get their refunds under  
19 this allocable share provision."

20 They were also advised in  
21 February of 2001 by RJ Reynolds. To  
22 date -- well, it talks about:

23 "As you recall, for almost a  
24 year and perhaps longer, participating  
25 manufacturers have been attempting to

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1 Grand River Arbitration  
2 learn when and how the attorneys  
3 general of the various states have  
4 been proceeding to enforce the version  
5 of the model statute."

6 I will go to the next  
7 paragraph.

8 "To date, we are aware only --  
9 of only one enforcement action brought  
10 by any state against any of the  
11 nonparticipating manufacturers."

12 And then it says that the --  
13 PRESIDENT NARIMAN: Which is  
14 this --

15 MR. VIOLI: This is the  
16 paragraph --

17 PRESIDENT NARIMAN: No, no, who  
18 is this?

19 MR. VIOLI: This is RJ  
20 Reynolds.

21 PRESIDENT NARIMAN: No, but do  
22 you know happen to know this  
23 enforcement action, one?

24 MR. VIOLI: No, I don't know  
25 it. I know it's not us. I know that.

0725

1 Grand River Arbitration  
2 Nevada didn't sue us until 2004. So  
3 this is definitely not us.

4 Now, Mr. President, Members of  
5 the Tribunal, on February 19 of 2001,  
6 one of -- the second largest tobacco  
7 producer in the United States didn't  
8 even know about the enforcement. In  
9 fact, he says:

10 "It's deficient. Something is  
11 wrong. We only know about one case."

12 But a month later, this  
13 company, operating out of Oshweken,  
14 Canada, by Native Americans, is  
15 supposed to know about all of the  
16 enforcement and how these statutes are  
17 being enforced and who it applies  
18 to -- the industry standard, which we  
19 will get to later -- there is no proof

20 of an industry standard. They said  
21 that the industry should have known.

22 Here is the second largest  
23 company in the world dealing in  
24 cigarettes -- didn't even know about  
25 the enforcement. And they are going

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1 Grand River Arbitration  
2 to brand us with knowledge prior to  
3 this date.

4 I think the concept of that  
5 industry standard, which we should  
6 have known, has no basis. And,  
7 certainly, in a court of law, to prove  
8 an industry standard, you must get an  
9 expert on the stand, normally, expert  
10 testimony, what it is and how long its  
11 common practice in the US.

12 The only thing we have heard is  
13 the attorneys for the federal  
14 government saying what tobacco  
15 companies should have known:

16 "They should have read Smoke  
17 Shop."

18 Did one tobacco company come  
19 here and give probative evidence as to  
20 what these people should have known?  
21 Not one.

22 Their evidence on industry  
23 standard and what someone should have  
24 known in the industry is completely  
25 lacking.

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1 Grand River Arbitration

2 That is February 2001. Four  
3 months later, in June of 2001, the  
4 same sentiment is echoed by the  
5 subsequent participating manufacturers  
6 who got the exemptions.

7 "SPMs do not believe that the  
8 current efforts of the settling states  
9 are sufficient to capture the activity  
10 levels of NPMs. The primary issue for  
11 SPMs is the real and perceived lack of  
12 adequate enforcement of the model act  
13 by the settling states."

14 Even they agree that the  
15 enforcement that the escrow statutes  
16 as originally enacted were not doing  
17 apparently what they were intended to  
18 do, or the purpose, one of the  
19 purposes that I put up earlier.

20 We go further in that letter to  
21 page three, and we see -- and all of  
22 this is happening beyond the purview  
23 of the public. This happens by  
24 allegedly confidential memoranda of  
25 state officials, to a trade

0728

1 Grand River Arbitration  
2 association of state officials.  
3 Right.

4 Don't call the NPMs and say,  
5 look, you know, we are thinking about  
6 doing something.

7 They say: "Houston, we have a  
8 problem. We have a problem. The NPMs  
9 are growing. And we need to correct  
10 it."

11 The letter, page three of the  
12 same letter -- this June 18th  
13 letter -- go ahead one more. It  
14 should link to the next one.

15 (There was a discussion off the  
16 record.)

17 MR. VIOLI: That's it. It's in  
18 the slide. What does it say. It  
19 shows that on June 18 of 2001 -- we  
20 believe that -- it had a meeting:

21 "During our joint meeting with  
22 the OPMs, we suggested several changes  
23 to the model act," to the escrow  
24 statutes, "the original escrow  
25 statutes. We suggested changes to the

0729

1 Grand River Arbitration  
2 escrow statutes. We have previously  
3 provided this list to the attorneys  
4 general, chief tobacco counsel,  
5 Mark Greenwall. We will continue to  
6 work on a proposed draft of the  
7 changes," meaning the amendment that



8 they were going to pass or trying to  
9 get passed -- "these changes include  
10 first importers to be treated as  
11 tobacco product manufacturers."

12 In June of 2001 we have a  
13 private company, a competitor of these  
14 Claimants, who has joined the MSA with  
15 an exemption, telling the attorneys  
16 general: "Impose this law on first  
17 importers."

18 I don't care what the  
19 definition -- it doesn't talk about  
20 the definition. It says: "First  
21 importers be treated as tobacco  
22 product manufacturers."

23 PRESIDENT NARIMAN: And they  
24 were.

25 MR. VIOLI: They were and they

0730

1 Grand River Arbitration  
2 weren't -- they were and they weren't.  
3 And that's exactly it.

4 Then number three:  
5 "Strengthen sanctions by  
6 providing criminal penalties making  
7 none PM product contraband."

8 This is the origin of the  
9 contraband law, which is a measure in  
10 that paragraph ten we talked about.

11 "Finally, elimination or  
12 modification of the requirement that  
13 NPM escrow liability be limited to the  
14 payments such NPM would make as a  
15 participating manufacturer."

16 What does that mean? That is  
17 the allocable share:

18 "We want the allocable share  
19 out. We want an amendment that  
20 changes the way they are treated under  
21 this regulation."

22 So that is where we see the  
23 plan is hatched where it starts to  
24 change the law. And it doesn't change  
25 the law differently or the amount of

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1 Grand River Arbitration

2 damages. It changes it fundamentally,  
3 and it does it in a way that allows  
4 the experience -- them to experience  
5 the discrimination. And it does it in  
6 a way that imposes an "In Ram" embargo  
7 on these plaintiffs. If we look at  
8 the slide --

9 PRESIDENT NARIMAN: And this is  
10 part of your notice of arbitration?

11 MR. VIOLI: Right, yes -- well,  
12 we say the escrow statutes, which --

13 PRESIDENT NARIMAN: Include the  
14 amendment.

15 MR. VIOLI: Yeah, it says on  
16 paragraph three, now required. It  
17 talks about what is required to be  
18 paid, equivalent multi million dollar  
19 payments. Equivalent is only  
20 equivalent to SPMs who don't have an  
21 exemption -- implement the measures  
22 now present.

23 PRESIDENT NARIMAN: And all of  
24 these amendments came in when?

25 MR. VIOLI: After March 2001.

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: All of  
3 them.

4 MR. VIOLI: All, every single  
5 one.

6 MR. CLODFELTER: Just a  
7 correction, these amendments are not  
8 mentioned at all in any of your  
9 pleadings to the reply.

10 MR. VIOLI: When you attack a  
11 statute, you don't attack the 1965  
12 version.

13 MR. CLODFELTER: You say it's  
14 so crucial to your case, but you never  
15 mentioned it.

16 MR. VIOLI: We say now  
17 required, paragraph 63 of the PSOC --  
18 says now required.

19 MR. CROOK: I think I  
20 understand, at least, your position,  
21 Mr. Violi.

22 MR. VIOLI: Okay. I can go  
23 through the other paragraphs -- 44,  
24 50, 51, 56, 57, 65 -- talks about the  
25 profits, the per carton payments now

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1 Grand River Arbitration  
2 being rated in the profits. That is  
3 only after the allocable share  
4 management.

5 Respondent raised it in their  
6 objections. They explained the  
7 allocable share amendment. We  
8 responded and said it showed the harm.  
9 They replied at page 12: No, it only  
10 affect the amount.

11 In our rejoinder, we say it  
12 doesn't affect the amount. It  
13 materially changes the whole  
14 perspective because, now, you are  
15 imposing \$4 a carton on us when these  
16 exemptions allow these people who  
17 joined early to pay, 30, 50 cents, a  
18 dollar a carton.

19 That's where we experience the  
20 discrimination.

21 All right. I wanted to go --  
22 we can go -- how does the amendment,  
23 proposed amendment remedy the problem?

24 PRESIDENT NARIMAN: Your point  
25 is that the first acquired knowledge

0734

1 Grand River Arbitration  
2 would go to the escrow statutes as  
3 amended after March 2001.

4 MR. VIOLI: Under  
5 discrimination and most favored  
6 nation -- under the discrimination  
7 statute, that's correct.

8 The proposed amendment to the  
9 model escrow statute eliminates the  
10 unintended consequences of the  
11 original language that has compromised  
12 the law's effectiveness. See, the  
13 original law could not do what it  
14 was -- what they wanted it to do; that  
15 is, stop NPM sales.

16 Now, we have the pursuit of the  
17 amendment. See, we can follow the  
18 chronology of the pursuit of the  
19 amendment -- just hit on the NAAG.

20 We see that, three slides down  
21 in the exhibits, legislative counsel  
22 from RJR -- again, that's Reynolds --  
23 the second largest tobacco company in  
24 the world -- the National  
25 Association -- and this is March 18,

0735

1 Grand River Arbitration  
2 2003, Mr. President, Members of the  
3 Tribunal:

4 "NAAG has developed legislation  
5 that corrects the flaw in the model  
6 statute."

7 NAAG briefed its members:

8 "We have enclosed it for your  
9 review" as well as the propaganda that  
10 accompanied it.

11 PRESIDENT NARIMAN: I must tell  
12 you one thing that has been pointed  
13 out on the other side occurs to me  
14 also.

15 I at least thought that the  
16 escrow statute meant the statutes  
17 which were originally enacted. And  
18 that is why we ask you for dates, et  
19 cetera.

20 MR. VIOLI: It is --

21 PRESIDENT NARIMAN: One minute.

22 But you are pointing out just  
23 now in reference to this that there  
24 have been subsequent changes which  
25 have materially altered the scope of

0736

1 Grand River Arbitration  
2 the escrow beyond what was  
3 contemplated in the MSA.

4 MR. VIOLI: Exactly.

5 PRESIDENT NARIMAN: And,  
6 therefore, that -- your point is that  
7 the three have to be taken together.  
8 And the question of any loss, damage,  
9 et cetera, has to be construed with

10 reference to the statute as amended  
11 because, you see, this is not really  
12 brought out in the statement of claim  
13 so effectively.

14 MR. VIOLI: We say --

15 PRESIDENT NARIMAN: Excuse me.

16 I know you mentioned all the  
17 paragraphs just now. You are right,  
18 that it now provides, now provides.  
19 But it didn't occur to me as to what  
20 does "now" mean. I wasn't aware that  
21 there were -- there were these  
22 amendments which themselves came after  
23 March of 2001.

24 MR. VIOLI: Right, the  
25 Respondent has sort of clumped them

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1 Grand River Arbitration  
2 altogether.

3 PRESIDENT NARIMAN: You also  
4 have clumped them together.

5 MR. VIOLI: I want to go to the  
6 approval of the NPMs. Can you go back  
7 to the slide. We see that in April of  
8 2003 --

9 (There was a discussion off the  
10 record.)

11 MR. VIOLI: Here and it was  
12 apparently a NAAG confidential  
13 document that was produced in Kansas,  
14 dated April 17, 2003. And this is an  
15 update; the whole document is an  
16 update.

17 PRESIDENT NARIMAN: What is  
18 this confidential.

19 MR. VIOLI: I guess it was NAAG  
20 confidential. It says it was produced  
21 in the Kansas case.

22 PRESIDENT NARIMAN: It was  
23 produced in some case.

24 MR. VIOLI: I think. This is  
25 what we got from the attorney in

0738

1 Grand River Arbitration  
2 Kansas, who was litigating Kansas.  
3 Okay. It says -- it's dated April 17,

4 2003. We saw the progression.  
5 PRESIDENT NARIMAN: Two months  
6 registration is already in the works  
7 for this state, only by one  
8 legislator.

9 MR. VIOLI: This is in Oregon.

10 MS. MENAKER: We have a  
11 question from NAAG about the  
12 provenance of the document, since it  
13 does say confidential. Can you tell  
14 us if it was certainly produced in the  
15 Kansas lawsuit?

16 MR. VIOLI: It was produced --  
17 it was represented to me that it was  
18 produced in response to a Freedom of  
19 Information Act request, and in  
20 connection with a -- the attorney  
21 general -- we could keep it  
22 confidential for the purposes of this.

23 MS. MENAKER: That's not really  
24 the point. The point is, where did  
25 you get the document? You are just

0739

1 Grand River Arbitration  
2 saying from hearsay.

3 MR. VIOLI: I have said that I  
4 got it from an attorney who litigated  
5 the Kansas case, who said that this  
6 was produced in the Kansas case.

7 MR. CLODFELTER: But you said  
8 Freedom of Information Act or a Kansas  
9 case. There are two different stories  
10 right there where the document comes  
11 from.

12 MR. VIOLI: He had a Kansas  
13 case. I don't know if he produced  
14 it -- if he asked for this in the  
15 context of discovery in that case or  
16 in the Freedom of Information.

17 MR. CLODFELTER: You don't  
18 really know where it came from?

19 MR. VIOLI: But the bottom line  
20 is there was no confidentiality order.  
21 There is no confidentiality order that  
22 is attached.

23 PRESIDENT NARIMAN: Okay. May

24 we adjourn for lunch on this happy  
25 note.

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1 Grand River Arbitration

2 MR. CROOK: Before we adjourn,  
3 can we have a sense of how long  
4 Claimants think they require and what  
5 the scheduling might be for the  
6 afternoon, this on the assumption the  
7 Tribunal will behave itself.

8 MR. VIOLI: I would say  
9 two hours max.

10 MR. CROOK: So you have two got  
11 two hours max. That gets us to  
12 4 o'clock. What does that do in terms  
13 of rebuttal?

14 PRESIDENT NARIMAN: 45, 45.

15 MR. CLODFELTER: Well, we have  
16 to prepare.

17 MS. MENAKER: If we hear  
18 another two hours and we have already  
19 heard another three hours this  
20 morning, we need time to prepare for  
21 our rebuttal.

22 MR. VIOLI: I am ready to do  
23 rebuttal.

24 PRESIDENT NARIMAN: I agree.  
25 You are entitled to as much time as

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1 Grand River Arbitration

2 you like.

3 MS. MENAKER: Thank you.

4 PRESIDENT NARIMAN: We are not  
5 rushing you or anything. We all come  
6 from different parts of the world. We  
7 try to see whether -- it's not as if  
8 we can sit here again on Monday or  
9 Tuesday or anything.

10 PROFESSOR ANAYA: How long do  
11 you require?

12 MS. MENAKER: I guess it also  
13 depend on how much longer he goes. I  
14 know these are all new documents.

15 PRESIDENT NARIMAN: They are.  
16 They are definitely new document.  
17 They have to be dealt with by you.

18 Please note that they should be dealt  
19 with by you. Take your time.

20 (There was a discussion off the  
21 record.)

22 MR. CLODFELTER: It's the first  
23 time we heard the explanation for  
24 these documents.

25 PRESIDENT NARIMAN: I also  
0742

1 Grand River Arbitration  
2 didn't realize it.

3 MR. CLODFELTER: The entire  
4 case is the case they put in late two  
5 weeks ago. We need some time. I  
6 think we need at least an hour and a  
7 half to prepare.

8 PRESIDENT NARIMAN: That takes  
9 us over the weekend. So that doesn't  
10 help very much, whether you take an  
11 hour and a half or a day and a half or  
12 month and a half.

13 MR. CROOK: As much as I loathe  
14 the notion, does this mean we finish  
15 up with the Claimants' presentation  
16 and then we have a final written  
17 submission or perhaps give each party  
18 15 minutes for highlights?

19 PRESIDENT NARIMAN: I don't  
20 suggest -- I don't think a written  
21 submission on this sort of thing -- I  
22 would like to hear you.

23 MR. CROOK: How mechanically  
24 can we do it?

25 PRESIDENT NARIMAN: I know.  
0743

1 Grand River Arbitration  
2 That is separate.

3 MR. VIOLI: I will try to  
4 streamline it. I won't spend as much  
5 time on the three letters as they did.  
6 I will cut it in half. I will cut it  
7 to the -- in half or 25 percent of the  
8 three letters that they spent  
9 yesterday. But I have some other --

10 (There was a discussion off the  
11 record.)



12 PRESIDENT NARIMAN: Okay.  
13 Let's adjourn for lunch.

14 MR. CLODFELTER: We have to  
15 check -- we can come back tomorrow  
16 morning, or we are prepared to work  
17 late tonight and see if we can  
18 accommodate this.

19 PRESIDENT NARIMAN: This  
20 evening is difficult for me, at least  
21 beyond 5:30. But, tomorrow, yes.

22 MR UHWE: They are closed  
23 tomorrow. It's part of the business.  
24 They are closed.

25 PRESIDENT NARIMAN: Where else  
0744

1 Grand River Arbitration  
2 would you suggest?

3 MR. CLODFELTER: I can make  
4 inquiries.

5 (There was a discussion off  
6 the record.)

7 (A lunch recess was taken.)

8 MR. VIOLI: Where we left off  
9 was a discussion of how the states and  
10 the manufacturers who settled and  
11 negotiated the MSA embarked on a trail  
12 to change the allocable share or to  
13 change the escrow statutes and also to  
14 adopt a contraband law, which -- as I  
15 mentioned before, under the escrow  
16 statutes, in order to ban or have a  
17 violation of the escrow statute, in  
18 order for there to be deemed a  
19 violation of the escrow statute and a  
20 ban of a tobacco product  
21 manufacturer's product -- based on the  
22 allegation -- or based on the alleged  
23 failure to comply, the attorney  
24 general would have to go to court and  
25 get a determination of a violation and

0745

1 Grand River Arbitration  
2 an injunction.

3 The contraband law, the parties  
4 submitted, would allow the attorney  
5 general to make that decision without

6 due process, essentially, unilaterally  
7 remove the judicial function and  
8 element from the escrow statute; and  
9 if the attorney general deemed to  
10 himself or herself that someone was  
11 non-compliant with the escrow statute  
12 or alleged to be non-compliant, he  
13 could simply not include that  
14 manufacturer on this list.

15 So the parties and the states  
16 embarked on this episode to adopt  
17 these laws. And one of the things we  
18 had mentioned was that it required OPM  
19 approval, and you see the quote there  
20 from the Claimants Exhibit 18K. This  
21 was the status of the allocable shares  
22 in the various states as of April of  
23 2003.

24 And the full exhibit is in 18K,  
25 and it notes the states where it has

0746

1 Grand River Arbitration  
2 passed the house and passed the senate  
3 and things were moving apace.

4 But in Oklahoma, at least at  
5 that time, the Oklahoma attorney  
6 general reported that:

7 "It's too late for this year.  
8 We will try next year, but anticipate  
9 much opposition from tribes and NPMs.  
10 Update, March 27, 2003. Oklahoma now  
11 has a bill or a bill in a form that  
12 has been approved by the OPMs.  
13 Oklahoma will introduce it as an  
14 amendment to an existing shell tobacco  
15 bill. Bill passed out of committee,  
16 but must go through another" -- it  
17 gets kind of -- "review."

18 The point here is that here we  
19 have the four companies who negotiated  
20 the MSA actually taking part in the  
21 drafting, having to be -- usually,  
22 when you normally want approval for a  
23 statute, you take it to your  
24 legislature.

25 And they are the ones who are

0747

1 Grand River Arbitration  
2 going to take it up in the first  
3 instance, but that is not the case  
4 here where apparently we have a  
5 process, again, which is not public.  
6 We certainly weren't advised of any of  
7 sort of OPM requirement, that they  
8 must approve.

9 But, nonetheless, they approved  
10 apparently Oklahoma's allocable share  
11 amendment version of the statute, at  
12 that time, April of 2003.

13 And it's not up on the slides,  
14 but in the large exhibit that is 18R,  
15 there is a -- a seminar handout. It  
16 says: "Estimate of MSA payments." It  
17 was September 28th through 30th of  
18 2004. And it attaches another handout  
19 dated October of 2003.

20 And you will recall that our  
21 notice of claim is March of 2004.

22 But in October of 2003, in a  
23 presentation that was apparently given  
24 by -- the presentation was apparently  
25 given by NAAG, Mr. Tony Ogden, who is

0748

1 Grand River Arbitration  
2 an attorney for NAAG, says -- Q and A  
3 at least in the series that we have --  
4 Tony Ogden, NAAG, October 2003.

5 He says at that point,  
6 allocable share laws in 29 states. He  
7 lists the states. The point here is  
8 that we have seen this sort of  
9 progression, and then ultimately  
10 Oklahoma passed it.

11 I forgot the exact date, early  
12 2004 or late -- actually, no, 2003.  
13 It didn't take effect until January --  
14 or it didn't take effect until January  
15 of 2005.

16 Now, so we see -- and the  
17 particularized statement of claim  
18 talks about the escrow statute in its  
19 current form. Some states didn't have

20 the allocable share. Some states did.  
21 All of the states were moving  
22 towards that, and we see behind the  
23 scenes where we never saw before that  
24 they are pushing and how this was  
25 going on.

0749

1 Grand River Arbitration

2 And one of the questions is:

3 Okay. "What if we don't -- what" --  
4 one of the points was the filing  
5 notice of claim.

6 They said:

7 "If we filed a notice of claim  
8 now, it would be untimely because --  
9 for the amendment, even though it's  
10 included in the PSOC. If we did a  
11 separate notice of claim, it would  
12 relate back to the MSA and therefore  
13 be untimely."

14 Perhaps they would say it would  
15 relate back to the first allocable  
16 share law that was passed, which I  
17 think was in West Virginia, early in  
18 2003.

19 And so they would say something  
20 to the effect:

21 "Oh, well, it's 2006, so you  
22 can't do it."

23 And that's why, when we drafted  
24 the PSOC, we said the allocable shares  
25 in their current form. And if we are

0750

1 Grand River Arbitration

2 going to take the position that they  
3 take, that:

4 "Oh, you need to -- you can't  
5 look at the escrow statutes state by  
6 state. You have to go back to the  
7 first date that an escrow statute was  
8 passed, and that all of the escrow  
9 statutes in every other state, they  
10 must relate back in time for the  
11 purposes of the statute of limitations  
12 to that time."

13 If you were to do that under

14 the allocable share, you would have to  
15 go back to early 2003; and obviously  
16 they would try to make some  
17 argument -- I would think or  
18 anticipate -- that a claim filed  
19 anytime in late 2006 would be  
20 untimely.

21 But as I said, because of that  
22 and our concern with that kind of  
23 argument, we have, in the notice of  
24 claim, the escrow statutes as of then  
25 in form, and certainly on the drawing

0751

1 Grand River Arbitration  
2 board according to the MSA  
3 participants, who we know were working  
4 towards that end.

5 The next thing we see -- I  
6 mean, the language is close the  
7 loophole. I won't go to that slide,  
8 that linking slide, close the  
9 loophole. It's more of the same where  
10 they say as an unintended consequence  
11 the escrow statute was never meant to  
12 be this way. It allows NPMs to  
13 actually rearrange the business plan  
14 or operate very efficiently,  
15 effectively, and compete, and so  
16 forth.

17 So I'll go to the next slide  
18 where we see, in January of 2004, the  
19 actual purpose of the amendment  
20 becomes blatant. And you see in a  
21 letter from that Mark Greenwall, who  
22 is the tobacco counsel from NAAG --  
23 and I have excerpted the list that is  
24 in the record, the list of the  
25 addressees. It's every state attorney

0752

1 Grand River Arbitration  
2 general.

3 And that's dated January 2004.  
4 Again, that's a couple of months  
5 before our notice of claim.

6 "Legislative conference call  
7 update. Please be advised that we

8 will have a conference call" -- and it  
9 says -- there is some language  
10 there -- "regarding state legislation  
11 to protect MSA states" -- and relevant  
12 here is -- "to protect MSA states  
13 against increasing NPM sales."

14 Claimants under the MSA states'  
15 application of the law are NPMs,  
16 nonparticipating manufacturers,  
17 because they have not joined the MSA.

18 So, now, we have it clear what  
19 they are looking for, and they are  
20 talking about legislation at that time  
21 that was basically stopping increasing  
22 NPM sales.

23 PRESIDENT NARIMAN: If there  
24 was no amendment to the statute, you  
25 wouldn't have made any claim.

0753

1 Grand River Arbitration

2 MR. VIOLI: Probably not,  
3 Mr. President. We think that there  
4 are -- we think that there are  
5 violations of international law.  
6 These people take very serious the  
7 Indian law claims. And that is why we  
8 fought it tooth and nail in  
9 Federal Court, and that's why we are  
10 fighting it here.

11 It's very sensitive. Some of  
12 the Claimants -- they write in  
13 their -- I mean, this is -- this is  
14 more -- the Indian law claim is more  
15 interesting than other parts to some.  
16 So I can't say for certain, but I can  
17 tell you that I would probably see  
18 something from the other side, and  
19 this is what I anticipated.

20 If there was no allocable share  
21 amendment, they would come in and say:

22 "You have not been harmed.

23 There is no discrimination. You are  
24 selling your products for 50 cents a  
25 carton under the escrow statute. You

0754

1 Grand River Arbitration

2 would have to pay more if you got an  
3 exemption, so you are actually on  
4 equal terms or a little better or a  
5 little worse than some. So you have  
6 no claim."

7 I would have anticipated that  
8 if there was no allocable share  
9 amendment, so we may not have brought  
10 the claim. That's correct. And, in  
11 fact -- well, that is the case.

12 We see this in January of 2004.  
13 We go to April of 2004. The next  
14 slide is the need to fix the problem.  
15 It's now apparent. Now, this E-Mail  
16 was sent by Michael Herron, another  
17 NAAG attorney. And it talks about a  
18 number of bills that are out there at  
19 the time.

20 And out there at the time was  
21 this equity assessment bill, that is  
22 in our particularized statement of  
23 claim. Michigan passed a law that  
24 said:

25 "Not only do you have to pay \$3

0755

1 Grand River Arbitration  
2 or \$4 a carton after the allocable  
3 share amendment, but you have to pay  
4 another \$3.50 assessment."

5 So while exempt SPMs pay zero  
6 and non-exempt SPMs pay \$4, in  
7 Michigan a manufacturer has to pay  
8 \$7.50 a carton -- a manufacturer's  
9 product, it's \$7.50 a carton, for  
10 their products to be sold in Michigan.  
11 And there have been challenges as  
12 well.

13 I don't know where the  
14 challenges are, but they haven't been  
15 so favorable. You would think, how  
16 could you -- two manufacturers, one  
17 decide to join the MSA. One doesn't.  
18 Why does one pay \$4 and one pay \$7.50?

19 In any event, we think it's  
20 discriminatory. We know it's  
21 discriminatory. And that was --

22 that's in our claim. It's called  
23 the -- it's here. It says there are  
24 at least three bills out there.

25 And number one is the one I  
0756

1 Grand River Arbitration  
2 have excerpted here. It says:  
3 The Minnesota bill called an  
4 equity assessment bill. This bill has  
5 been passed in Michigan and Utah so  
6 far. We do not recommend the bill,  
7 and it will be difficult to defend  
8 when it is challenged."

9 Here, the attorneys who are  
10 drafting this bill for -- with the  
11 OPMs for proposing it for legislation,  
12 and they are saying it's going to be  
13 difficult if challenged. But  
14 nonetheless they put it in the  
15 legislature. It gets passed, and we  
16 have this issue.

17 Now, what is most important is  
18 the last paragraph --

19 MR. CLODFELTER: Excuse me for  
20 the interruption.

21 You are confusing the allocable  
22 share amendments and these bills.  
23 NAAG did not prepare those drafts.  
24 NAAG did not prepare those drafts or  
25 work with the states on those drafts.

0757

1 Grand River Arbitration

2 MR. VIOLI: It worked with the  
3 states on these drafts.

4 MR. CLODFELTER: It did not.

5 MS. MENAKER: They did not.

6 MR. VIOLI: Okay.

7 MR. CLODFELTER: It says they  
8 opposed it.

9 MR. VIOLI: Yeah.

10 MR. LIEBLICH: Number one, NAAG  
11 did not draft that bill.

12 MR. VIOLI: I wouldn't say -- I  
13 wouldn't -- I wouldn't -- my point is  
14 that --

15 MR. LIEBLICH: It was



16 clarified.

17 MR. VIOLI: Yes, I agree with  
18 that. I have no dispute with that.

19 But the point here is that here  
20 is an assessment that states have  
21 passed an assessment bill, equity  
22 assessment.

23 Do you know if the OPMs were  
24 involved in it?

25 MS. MENAKER: We are just

0758

1 Grand River Arbitration  
2 commenting.

3 MR. VIOLI: Do you know?

4 MR. LIEBLICH: I am not here to  
5 give evidence.

6 MR. VIOLI: That's fine.

7 MR. LIEBLICH: But I would like  
8 to correct your misstatement.

9 MR. CROOK: Okay.

10 MR. VIOLI: NAAG knows  
11 something I don't.

12 MR. CLODFELTER: If you don't  
13 know, don't say it then. And it  
14 wouldn't be a misstatement then.

15 MR. CROOK: Well, the Tribunal  
16 noted that NAAG was not involved.

17 MR. VIOLI: Nonetheless, the  
18 NAAG attorney says it's difficult to  
19 challenge -- the bottom line -- really  
20 what the bottom line is, as the  
21 attorney writes:

22 "The bottom line, none of these  
23 bills are appropriate at this time.  
24 To protect star star" -- now, I guess  
25 they have a code or something. They

0759

1 Grand River Arbitration  
2 don't put what the word is, what it's  
3 supposed to protect, but -- "To  
4 protect star star we need to pass the  
5 allocable share and complementary  
6 legislation this year. We need to fix  
7 the problem we have with the model  
8 escrow statute. Then we can work on a  
9 replacement or substitute for the

10 escrow statute for a future year."

11 Now, I will explain to you  
12 briefly -- this really goes with what  
13 the -- how the language changed from  
14 the old statute. As I said, under the  
15 old statute, you wouldn't pay in  
16 Oklahoma more than the state's  
17 allocable share of what it would have  
18 received from you if you had joined  
19 the MSA. Under the amendment you pay  
20 in Oklahoma based on what you would  
21 have paid to every other state under  
22 the MSA for your cigarettes sold in  
23 Oklahoma.

24 So if you sell a million  
25 cigarettes -- a million cartons in

0760

1 Grand River Arbitration  
2 Oklahoma under the MSA, you pay  
3 \$4 million. Oklahoma gets some, and  
4 the rest of the states divvy it up,  
5 even though you only sold cigarettes  
6 in Oklahoma. That is under the MSA.

7 Under the allocable share, now,  
8 they equate or they cap or actually  
9 becomes a minimum -- the amount that  
10 you must pay in Oklahoma is no more  
11 capped by the amount Oklahoma would  
12 have received from you if you were an  
13 NPM.

14 It effectively raises the -- we  
15 can go to the next slide -- the new  
16 law effectively forecloses Claimants  
17 from competing in the US market. It  
18 raise their average escrow obligation  
19 from \$0.50 a carton to approximately  
20 \$4 per carton for this year.

21 And the primary competitors,  
22 these exempt SPMs who received the  
23 favorable treatment, they are the ones  
24 who are now able to price their  
25 products and have priced their

0761

1 Grand River Arbitration  
2 products below the Claimants' costs.  
3 In Arkansas and Oklahoma we

4 have advised that the Claimants can't  
5 compete with these products.

6 If you're looking at the  
7 federal excise tax, it's \$3.90. There  
8 is no duty from Canada so the NAFTA is  
9 preserved there, so there is no duty  
10 for Canada. Its \$3.90. Products from  
11 some other countries is \$.30 duty; so  
12 if you add 3.90 to 4.20, you are up to  
13 8.10 per carton.

14 The exempt SPMs, at least one  
15 of them, is pricing product at \$8.50 a  
16 carton, 40 cents higher than our cost  
17 without even -- or Native Wholesale  
18 Supply's and Grand River's cost,  
19 without even manufacturing  
20 distribution. And they certainly do  
21 not make the product for \$0.40 a  
22 carton.

23 They are effectively out of  
24 business with this allocable share  
25 amendment. There is no way they can

0762

1 Grand River Arbitration  
2 compete with these exempt SPMs who are  
3 really in the market niche where they  
4 are.

5 I mean, to some extent, I guess  
6 you could say they are competing with  
7 Marlboro, but not really. The people  
8 who buy Seneca are, you know, the  
9 generic discount kind of brands, where  
10 these exempt SPMs operate, that part  
11 of the market.

12 At present all but two states  
13 have passed the ASR to our knowledge.  
14 Then we go to the next slide. We have  
15 that NAAG seminar in September of  
16 2004, and it talks about significant  
17 trends.

18 "Passage of allocable share  
19 legislation in 38 states, significant.  
20 NPM sales in most states that have  
21 enacted the allocable share  
22 legislation have generally fallen  
23 dramatically."

24           It also says non-compliant NPM  
25           sales have fallen even more

0763

1           Grand River Arbitration  
2           dramatically. It lends credence, it's  
3           not just me who is saying that they  
4           can't compete.

5           Now, we are talking about, you  
6           know, stopping -- do we want to stop  
7           NPM sales, or the previous slide  
8           said -- the previous slide said from  
9           Mr. Greenwall talked about how they  
10          needed to enact legislation against  
11          increasing -- protect states against  
12          increasing NPM sales.

13          Here we are talking about  
14          fixing the problem. And, ultimately,  
15          we have a statute whose effect would  
16          be to put us -- and has already  
17          dropped our market share considerably.  
18          And this is acknowledgment of that  
19          fact.

20          Go to the next slide. I want  
21          to talk to the contraband law. As I  
22          said before, the contraband -- under  
23          the old law in order to -- under the  
24          contraband law, the escrow statute --  
25          in order to ban someone's product, we

0764

1           Grand River Arbitration  
2           get a definitive answer who is the  
3           tobacco product manufacturer -- either  
4           you are liable or you are not  
5           liable -- had to go to court and it  
6           had to be decided by the judiciary.

7           And to ban it you needed a  
8           court order.

9           The contraband law removed that  
10          due process element, because Grand  
11          River -- and like I said, where they  
12          learned about it, they went into the  
13          states, a few states, and were  
14          successful in Wisconsin, which is --  
15          they received a stay in Missouri,  
16          because we found out about a third  
17          lawsuit that was brought. That was

18 formally served.

19 We acknowledged the service,  
20 went in, and that case is stayed.

21 But the contraband law removed  
22 that element of judicial process, and  
23 now, as I said, the attorney general,  
24 if he deems that a company is  
25 non-compliant, he doesn't -- he can

0765

1 Grand River Arbitration  
2 deem it in contraband but by not  
3 putting it on the list or putting it  
4 on a contraband list. Some states  
5 have a white list. Some states have a  
6 black list.

7 PRESIDENT NARIMAN: When were  
8 these contraband laws enacted?

9 MR. VIOLI: All after March of  
10 2001.

11 It imposes Draconian penalties,  
12 including criminal penalties. So it's  
13 just a civil matter anymore. Now,  
14 they are going for the jugular,  
15 because, now, it's not only effective  
16 against the manufacturer. But it's  
17 effective against the sellers in the  
18 state.

19 So if you're caught, it's like  
20 having drugs. If you are caught with  
21 cigarettes of Grand River in Missouri,  
22 or Maine, that is a criminal offense,  
23 right. And as I said, it removes the  
24 judicial component.

25 Let's go to the main escrow

0766

1 Grand River Arbitration  
2 statute, if you will, the main escrow  
3 statute.

4 (There was a discussion off the  
5 record.)

6 PRESIDENT NARIMAN: How many  
7 states have passed the contraband law?

8 MR. VIOLI: I believe all of  
9 them. Mr. Lieblich has a better -- I  
10 believe all of them.

11 MR. LIEBLICH: I think just two

12 have not.

13 MR. VIOLI: That's allocable  
14 share, the complementary legislation.

15 MR. LIEBLICH: We discussed  
16 this yesterday.

17 MR. VIOLI: 45.

18 MR. LIEBLICH: In the mid 40s.  
19 Some of those that have not passed it  
20 have other different types of statutes  
21 that are designed to accomplish the  
22 same purpose.

23 PRESIDENT NARIMAN: Almost all.

24 MR. VIOLI: They started  
25 passing them all after March of 2001.

0767

1 Grand River Arbitration

2 Let's go to the effect with the  
3 link.

4 The effect of the contraband  
5 law as it's stated there in our  
6 particularized statement of claim. It  
7 imposes an "In Ram" embargo on the  
8 product of an NPM that the attorney  
9 general deems not to be compliant.

10 It removes the escrow statute's  
11 requirement of a court order to find a  
12 violation and the mandate of  
13 compliance. And the ban is immediate.  
14 It deprives Grand River of the  
15 opportunity to be heard in a judicial  
16 determination before its property is  
17 taken.

18 With that, I would like to --  
19 the next slide goes into the  
20 requirements for a NAFTA claim, and  
21 really, essentially, the law. And I  
22 will come back, but Mr. Weiler will  
23 speak to the legal definitions and the  
24 law part of the NAFTA claim.

25

0768

1 Grand River Arbitration

2 PRESENTATION BY MR. WEILER

3

4 MR. WEILER: Thank you.

5 Because I am not just speaking as an

6 academic, but I am actually astounded  
7 as to how long it has taken both sides  
8 to actually get to the question of the  
9 law and the legal test. You seem to  
10 be talking about the facts for two  
11 days, and we actually -- I don't  
12 think -- have really nailed down the  
13 test for the Tribunal. And so I hope  
14 that I can do that for you.

15 Articles 1116 and 1117, I have  
16 them up there. But I am sure you have  
17 them also -- very, very similar -- so  
18 I can -- I will just speak to them as  
19 one provision in the sense. They both  
20 do the same thing, one with respect to  
21 Claimants, the other with respect to  
22 an investment or enterprise.

23 They require two things, actual  
24 or constructive knowledge of a breach  
25 and actual or constructive knowledge

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1 Grand River Arbitration  
2 of a loss. Those are the two things  
3 that we are looking for, the two-part  
4 test in this hearing.

5 Breach, for breaches of  
6 provision of articles 1102, sorry -- I  
7 went to the wrong place -- for  
8 breaches of provisions such as 1102 or  
9 1105, loss of damage may occur as of  
10 the time of the breach, but it doesn't  
11 necessarily occur at that same time.

12 (There was a discussion off the  
13 record.)

14 MR. WEILER: So for breaches of  
15 articles 1102, 1105, loss or damage  
16 occurs as of the time of the breach,  
17 or it may occur after that time. It  
18 doesn't necessarily have to occur at  
19 that time.

20 For a breach of article 1110,  
21 the expropriation obligation, loss and  
22 breach are at the same time because  
23 part of the obligation of  
24 expropriation, the nature of the  
25 breach is a take-down, a loss.

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1 Grand River Arbitration

2 So, therefore, the breach and  
3 the loss are simultaneous; but for  
4 provisions such as the minimum  
5 standard or national treatment, you  
6 may have breach before the loss. You  
7 may have loss, and then later you may  
8 have no breach.

9 And we have lots of examples of  
10 that in our brief. For example, the  
11 Czech cases where you have one  
12 Tribunal. Both Tribunals find a  
13 certain fact pattern. One of them  
14 says there is no proximate cause  
15 connection. The other one says there  
16 is.

17 So, effectively, you have two  
18 breaches, but only one finding of  
19 loss. And the breach took place way  
20 before the loss.

21 So breach -- in our case, I  
22 think it would be useful just to sort  
23 of go over, even though this is not a  
24 merits hearing -- just to go over what  
25 our general arguments are likely to be

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1 Grand River Arbitration

2 if we proceed to merits with regard to  
3 the three breaches.

4 With regard to article 1105,  
5 our position is that the breach is  
6 triggered when the escrow statutes  
7 were enforced against us, allegedly,  
8 for a future contingent liability and  
9 what we say is in violation of  
10 principles of transparency, fair and  
11 equitable treatment, and also the  
12 rights that are found in the treaty  
13 such as the Jay Treaty.

14 For the time being, though, and  
15 for the rest of my part of the  
16 presentation, I think what we can do  
17 so that we don't have to go back over  
18 it again with the Tribunal, so that we  
19 can adopt an alternative -- an



20 alternative position and assume that  
21 those provisions -- those escrow  
22 statutes actually apply to us and  
23 create -- generate a liability as of  
24 the moment they were passed as opposed  
25 to enforced.

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1 Grand River Arbitration

2 So just in the alternative, we  
3 will say that for now and move on so  
4 that we don't have to get stuck on  
5 that issue. I will clarify, briefly,  
6 our article 1105 position.  
7 Mr. Clodfelter started to talk about,  
8 and, of course, we don't need to go  
9 into much detail about it now because  
10 that is what a merits hearing is for.

11 Essentially, the position of  
12 the Claimant is that the minimum  
13 standard is a customary international  
14 minimum standard. It is the standard  
15 required as a matter of customary  
16 international law. It is the same  
17 standard that is required in the  
18 NAFTA.

19 Tribunals such as Mondeff,  
20 Tribunals such as the ADF Tribunal,  
21 have both agreed that indeed article  
22 1105 essentially now, as a result of  
23 the statement made by the three NAFTA  
24 parties, is customary international  
25 law.

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1 Grand River Arbitration

2 But as the ADF Tribunal stated,  
3 and as the Mondeff Tribunal stated,  
4 and no another Tribunal since then has  
5 disagreed, how you find what the  
6 content of that minimum standard is,  
7 is not necessarily a matter of only  
8 going back to the tried and true test  
9 of customary international law, as  
10 some doctrinalists would believe you  
11 have to go.

12 What it means is you go to  
13 treaties. You go to principles. You

14 go to jurisprudence. You go to the  
15 learned writings of authors. You go  
16 to wherever you want to go to figure  
17 out what -- in the context of the  
18 exact case, the standard should be,  
19 knowing that the existence of the  
20 standard itself is a matter of  
21 customary international law.

22 So our position will be, if we  
23 are permitted to go forward to the  
24 merits phase, that, indeed, the Native  
25 treaties are very relevant with regard  
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1 Grand River Arbitration  
2 to the legitimate expectation, with  
3 the standards of reasonableness, the  
4 standard of fairness, the standard of  
5 transparency, that would apply in this  
6 case.

7 Now, obviously, the Respondents  
8 have a different view on that, and  
9 that's fine. And if they would like  
10 to elaborate on that, I'm sure we can.  
11 I am sure if we prevail we will have a  
12 whole big hearing, and we can talk  
13 about that at length.

14 PRESIDENT NARIMAN: Is the  
15 Native treaty relevant on the  
16 limitations question, according to  
17 you?

18 MR. WEILER: The treaties  
19 themselves connect to a question of  
20 the kind of legitimate expectation  
21 that a Native person would have  
22 transacting business, would expect to  
23 have.

24 And I think that, perhaps while  
25 we were not particularly clear in our  
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1 Grand River Arbitration  
2 memorials in explaining what that  
3 legitimate expectation was, or, as  
4 Mr. Violi says, the expectation of  
5 good faith, what that was, perhaps, we  
6 will be able to do a little bit better  
7 with the remainder of the hearing.

8 I am going to stick to the law;  
9 but if you have further questions on  
10 that, we can perhaps try to clarify  
11 that for you. If there are  
12 submissions after the fact, perhaps,  
13 also, we can clarify it in that sense.  
14 So that is the minimum standard.

15 PROFESSOR ANAYA: I'm sorry. I  
16 didn't quite get the answer to the  
17 specific question.

18 Is it relevant to limitations?

19 MR. WEILER: I think it is  
20 relevant.

21 PROFESSOR ANAYA: In what way,  
22 though?

23 MR. WEILER: It's relevant in  
24 the sense that -- well, it goes  
25 into -- I already said assume the

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1 Grand River Arbitration  
2 alternative -- so, therefore, I'm sort  
3 of bypassing that issue.

4 But if I don't bypass the issue  
5 and I go into it, my argument would be  
6 very similar to Mr. Violi. It would  
7 be essentially that there is a  
8 legitimate expectation on the part of  
9 these Claimants, that, as Native  
10 peoples, that -- especially who are  
11 entitled to the treaty rights that  
12 they have, that they wouldn't expect  
13 to be subjected to these escrow  
14 statutes, because they are connected  
15 to the mechanism -- the mechanism is  
16 connected to an excise tax.

17 And their expectations have  
18 been validated in New York state, for  
19 example. But they have not been  
20 validated in other states.

21 PROFESSOR ANAYA: That goes to  
22 the ambiguity.

23 MR. WEILER: Yes, it does.

24 PROFESSOR ANAYA: I understand.  
25 I understand. I am trying to get to

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1 Grand River Arbitration

2 his question, which is the most  
3 primary in the mind now.

4 MR. WEILER: Certainly, and  
5 that covers it then.

6 PROFESSOR ANAYA: Well, I guess  
7 I would want to know more at some  
8 point what the argument is that these  
9 treaties provide --

10 PRESIDENT NARIMAN: You only  
11 put it on legitimate expectation. You  
12 don't put it on federal law or  
13 anything?

14 MR. VIOLI: No, I think -- no.

15 MR. WEILER: The legitimate  
16 expectation is not -- I am not using  
17 it in the expression of a substantive  
18 obligation, the minimum standard. I  
19 am using it in the broader sense to  
20 describe the kind of expectation that  
21 these Native peoples as --

22 PRESIDENT NARIMAN: No, but you  
23 don't say it as a matter of law that  
24 they are not entitled.

25 MR. WEILER: No, it's

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1 Grand River Arbitration  
2 not really -- it's not as a matter of  
3 law. It's more a matter of, once  
4 again, the standard of reasonableness  
5 about what we would expect  
6 constructive knowledge to be in this  
7 case. So I'll go back --

8 PROFESSOR ANAYA: That -- so  
9 it's not as a matter of law they would  
10 expect not to have this applied to  
11 them.

12 MR. WEILER: No, they enjoy  
13 treaty rights as a matter of  
14 international law. And those treaty  
15 rights inform the reasonableness of  
16 their expectations, and the  
17 reasonableness of their conduct with  
18 regard to --

19 PROFESSOR ANAYA: It may or may  
20 not depending upon what the law is.

21 MR. WEILER: It may or may not.

22 It may or may not.  
23 PROFESSOR ANAYA: I mean, is  
24 there some claim that the Jay Treaty  
25 or some other source of international

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1 Grand River Arbitration  
2 law or federal law is an effective bar  
3 to the application of the escrow  
4 statutes?

5 MR. VIOLI: Yes, we would argue  
6 yes. And I think -- I tell you why  
7 that is the case.

8 This is not a situation where  
9 you have Native American buying Philip  
10 Morris cigarettes from South Carolina  
11 or wherever they come from.

12 PROFESSOR ANAYA: I understand  
13 that.

14 MR. VIOLI: This is a value  
15 added 100 percent on reservation.

16 PROFESSOR ANAYA: I understand  
17 that, but that doesn't help us.

18 PRESIDENT NARIMAN: That's not  
19 in your statement of claim.

20 MR. WEILER: The statement of  
21 claim does mention the Jay Treaty.

22 PRESIDENT NARIMAN: Not in this  
23 context.

24 MR. WEILER: No, but if we are  
25 given the opportunity in

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1 Grand River Arbitration  
2 post-submission hearing --

3 PROFESSOR ANAYA: I am really  
4 curious whether or not there is a  
5 legal argument and how strong that  
6 legal argument is that the escrow  
7 statutes don't apply.

8 MR. VIOLI: I have an affidavit  
9 in the federal case from Robert  
10 Venable that says it doesn't apply.  
11 And if you like us to submit it post  
12 hearing, okay, but we think it does  
13 not apply because it's a state. It's  
14 not a federal regulation, measure.  
15 It's a state trying to regulate

16 on-reservation activities.  
17 PROFESSOR ANAYA: Look, I  
18 understand that; but I also understand  
19 how complex this area of the law is.  
20 And we can't -- it's not just a matter  
21 of you sitting there saying that,  
22 telling me Robert Venable says it.

23 MR. VIOLI: That's why he said  
24 it and not me.

25 PROFESSOR ANAYA: Yeah, but it

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1 Grand River Arbitration  
2 seems to be very central to your  
3 argument with regard to the  
4 limitations. And, you know, I can  
5 just speculate what that argument -- I  
6 can do a little more than speculate  
7 because I happen to know the area of  
8 the law generally. I haven't looked  
9 specifically at this particular  
10 question.

11 MR. WEILER: Could we -- I  
12 understand the Respondent's interest  
13 in post-hearing submissions. Could we  
14 take you up on that?

15 MR. CLODFELTER: We have not  
16 determined that at all. That is an  
17 overstatement. We have yet to see the  
18 case.

19 MR. VIOLI: I think the PSOC  
20 says we have the rights and the  
21 expectations --

22 MR. WEILER: It doesn't say it  
23 in detail. I would agree with that.

24 PROFESSOR ANAYA: See, that's  
25 my point. I know that is what you

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1 Grand River Arbitration  
2 said. I know it's sort of like very  
3 tantalizing.

4 MR. WEILER: We will leave it  
5 with you for the moment and move on,  
6 keeping in mind I would contest,  
7 Professor Anaya, that it's central to  
8 the case.

9 I am arguing that, even in the

10 alternative that the escrow statutes  
11 applied as of the day they were  
12 enforced, that the time limitation  
13 problem is still not there. So to be  
14 clear --

15 PROFESSOR ANAYA: I didn't mean  
16 to say it turns on that, but it seems  
17 that it would be --

18 MR. WEILER: It would be very  
19 important.

20 PROFESSOR ANAYA: It would be a  
21 very important pillar in --

22 MR. WEILER: Thank you.

23 MS. MENAKER: May I make a  
24 comment purely on proper. I am a  
25 little concerned that, if this is an

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1 Grand River Arbitration  
2 argument and they are raising it for  
3 the first time, I am not prepared to  
4 elaborate on it here.

5 And I have heard a few times  
6 your reference to your post-hearing  
7 submission. We can't be faced with a  
8 post-hearing submission, especially if  
9 they are simultaneous submissions,  
10 which is what I think you were  
11 anticipating we should have them,  
12 where we are faced with a brand new  
13 argument for the first time. It's  
14 just --

15 MR. WEILER: Well, it wouldn't  
16 be a brand new argument. It would be  
17 an elaboration thereof.

18 MS. MENAKER: It would be -- if  
19 you are going to elaborate, I mean,  
20 please elaborate. Even now would be  
21 late, but do it now. If you're not  
22 prepared to elaborate now, then I  
23 think it is a brand new argument, if  
24 you have to wait to make it at post  
25 hearing.

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1 Grand River Arbitration

2 MR. WEILER: I will leave it to  
3 the Tribunal.

4 MR. CLODFELTER: They raise the  
5 treaty as a substantive violation.  
6 They never made the argument because  
7 of their treaty rights inform their  
8 view of the applicability of the  
9 statute.

10 MR. VIOLI: Actually,  
11 Mr. Williams's affidavit raised that.

12 PRESIDENT NARIMAN: We are  
13 asking about your claim. Leave the  
14 affidavit. Only that's --

15 MR. WEILER: He's not referring  
16 to the claim, if I'm not mistaken.

17 MR. VIOLI: No, I'm --

18 (There was a discussion off the  
19 record.)

20 MR. WEILER: Mr. Clodfelter is  
21 referring to the argument in this  
22 case, not the claim, if I understand  
23 you correctly.

24 MR. CLODFELTER: Yes, same  
25 thing -- what is your claim? What

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1 Grand River Arbitration  
2 have you made in support of your  
3 claim? This is a new one.

4 MR. VIOLI: Well, that's not  
5 new. Mr. Williams did raise that,  
6 when he was called by an author, he  
7 would have expected the sovereign  
8 rights of any Native American  
9 enterprise, who -- or member.

10 PROFESSOR ANAYA: Native  
11 American Enterprises don't have  
12 sovereign right. The nation has  
13 sovereign rights. The benefit -- you  
14 know, that kind of statement is not  
15 very helpful.

16 MR. VIOLI: But in California  
17 we have some case law that says -- and  
18 in New York we have some case law that  
19 says that Native Americans do -- when  
20 they go off reservation, they do carry  
21 with them -- there's a -- I think  
22 the -- one of the cases in  
23 California -- I don't have it with



24 me -- I apologize -- where that  
25 sovereignty actually does extend a  
0786

1 Grand River Arbitration  
2 little more than just what you do on  
3 the reservation. That's the first  
4 thing. The second thing is that this  
5 is 100 percent on-reservation  
6 activity.

7 PROFESSOR ANAYA: Now, we are  
8 getting into the complexity.

9 MR. WEILER: The procedural  
10 issue aside for the moment, let me  
11 carry on with the argument, if I could  
12 suggest, and then, if we would like to  
13 discuss how we might handle in a  
14 post-hearing submission, if the  
15 Tribunal feel it's necessary to  
16 receive those, then we can discuss the  
17 modalities at that time.

18 Would that be sufficient?

19 PRESIDENT NARIMAN: I don't  
20 know. Proceed, please.

21 MR. WEILER: Thank you.

22 So actual breaches, I just  
23 mentioned the first one, article 1105.  
24 The second one, article 1110, in this  
25 case, the essential argument is in a  
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1 Grand River Arbitration  
2 nutshell, whether -- article 1110, the  
3 expropriation obligation, is breached  
4 when either escrow statute enforcement  
5 results in a judgment having the  
6 effect of banning commerce of the  
7 Claimants' product, or with the  
8 enactment of a contraband law.

9 And this article 1110  
10 obligation would be delineated by the  
11 measure and the territory for which  
12 that measure is responsible. So the  
13 main contraband statute bans the  
14 product. That is the expropriation  
15 with respect to Maine, because of the  
16 way the obligation works.

17 It's only as far as the

18 territory involved. Nobody  
19 purports -- none of these statutes  
20 purports to legislate for broader or  
21 shorter than their territorial area,  
22 the integrity of that state.

23 Therefore, Maine contraband  
24 statutes, that is the breach. Then  
25 that is the expropriation.

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1 Grand River Arbitration  
2 Escrow statutes enforced in  
3 Missouri, injunction obtained, then  
4 for the entire Missouri market that  
5 would be the expropriation. So that  
6 is the essential flavor of that  
7 argument.

8 And then with respect to  
9 national treatment, article 1102, that  
10 would be breached when the escrow  
11 statute. As enforced with the  
12 allocable share mechanism removed,  
13 would result in those benefitting from  
14 an exemption, either under the MSA or  
15 through some sort of later enforcement  
16 discretion, having to pay less into  
17 escrow than the claims.

18 The point is -- with respect to  
19 MSA exemptions, the point is that,  
20 while people behind the MSA actually  
21 thought their measures would give a  
22 better deal to the exempted SPMs,  
23 right away it just turned out that it  
24 actually didn't happen until they  
25 amended their measures such that they

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1 Grand River Arbitration  
2 would be able to ensure that the  
3 benefits did kick in.

4 And that's what we call the  
5 allocable share amendment.

6 The point is that the allocable  
7 share mechanism was already there,  
8 that it had to be amended to remove  
9 that mechanism. And that is when the  
10 harm actually kicked in. It just  
11 turned out they didn't draft them very

12 well. They were very surprised that,  
13 as Mr. Violi has shown -- they thought  
14 they had basically crafted this right  
15 the first time and had to go back and  
16 amend them, so that they would indeed  
17 give these exempt people, these exempt  
18 SPMs, the benefit that they had  
19 thought they had given them in the  
20 first place.

21 So in order for the Respondent  
22 to succeed on this objection, it must  
23 not only demonstrate that the  
24 Claimants had actual or constructive  
25 knowledge that one statute is -- one

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1 Grand River Arbitration  
2 escrow statute as amended breached the  
3 NAFTA prior to March 14th; it they  
4 must prove that for each NAFTA -- I'm  
5 sorry -- each escrow statute and each  
6 contraband law, because article 1101  
7 refers to measures that breach -- I'm  
8 sorry -- that the chapter applies to  
9 measures.

10 "Measures" is defined in  
11 article 201 as any law, regulation,  
12 practice, what have you. It doesn't  
13 say anything about an agreement  
14 between two, for private parties and a  
15 bunch of states. It doesn't cover  
16 that kind of thing. That is not a  
17 measure.

18 So the measures at issue in  
19 this claim are the escrow statutes in  
20 each of the 46 states, the contraband  
21 statutes in the 40 some odd states, as  
22 well as in addition, if the claims are  
23 allowed, are proved as of the time,  
24 the equity assessment statutes.

25 PRESIDENT NARIMAN: Were these

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1 Grand River Arbitration  
2 amendments to the escrow statutes  
3 retrospective as from the date of the  
4 statute?

5 MR. VIOLI: Some were,

6 Mr. President.

7 MR. WEILER: Some were. Some  
8 weren't. But the point is that, by  
9 the time the claim came around, by the  
10 time the claim was made by these  
11 Claimants, the vast majority of these  
12 amendments had already taken place,  
13 which is why they said: "Oh, my gosh,  
14 we are not doing as well as we thought  
15 we were going to do under this  
16 system."

17 PRESIDENT NARIMAN: I must say  
18 your statement of claim doesn't  
19 explain this at all. Very  
20 difficult -- you say, now, you relied  
21 on -- now, it's escrow statutes  
22 provide and in that sort of way,  
23 because at least I never understood it  
24 by reason of the amendment.

25 MR. WEILER: I do understand  
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1 Grand River Arbitration  
2 that we were not particularly -- we  
3 were not sufficient -- we were not  
4 particularly clear with respect to the  
5 allocable share amendments and their  
6 significance.

7 PRESIDENT NARIMAN: That's a  
8 fair way of putting it. That's  
9 correct. You were not aware either  
10 because it's very difficult to suggest  
11 that you were aware and this is all  
12 very clear. It's not at all clear.

13 MR. WEILER: However, I would  
14 say that, with the paragraphs that  
15 Mr. Violi has mentioned, they refer to  
16 the operation of the escrow statutes.

17 PRESIDENT NARIMAN: Only in  
18 hindsight, go back.

19 MR. WEILER: No, sir. The  
20 point is --

21 PRESIDENT NARIMAN: Look, the  
22 amendment is not mentioned  
23 specifically at all.

24 MR. WEILER: I agree with you,  
25 yes.

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: Yes.

3 MR. WEILER: Not specifically.

4 But the point is --

5 PRESIDENT NARIMAN: We expected  
6 it to be mentioned specifically

7 because then that would have removed a  
8 large part of the argument.

9 MR. WEILER: A large part of  
10 the argument, that's true. I cannot  
11 disagree with that.

12 MR. CROOK: Mr. Weiler, let me  
13 see if I just understand what you just  
14 said. Is the import of what you just  
15 said that there is not one time bar  
16 under 1116 or 1117? There are 46 for  
17 purposes of the escrow statutes.

18 There are 40, however many there may  
19 be, for the allocable share  
20 amendments. And there is a separate  
21 time bar for each of the other  
22 individual measures you are talking  
23 about.

24 MR. WEILER: There is actually  
25 one time bar and a whole bunch of

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1 Grand River Arbitration

2 measures. The time bar applies to  
3 measures, sir.

4 MR. CROOK: I misspoke. We  
5 apply -- you are saying then we have  
6 to apply the time bar to 92 separate  
7 measures, give or take.

8 MR. WEILER: That's correct.  
9 And the reason for that is --

10 MR. CROOK: Let me just ask  
11 you:

12 If that is so, wouldn't it  
13 incumbent upon Claimants to specify  
14 which measures were at issue, rather  
15 than to give this sort of generic  
16 indication?

17 MR. WEILER: Well, the  
18 Claimants actually did take the time  
19 to cite all the escrow statutes in the

20 particularized statement of claim.  
21 They do list all the statutes that  
22 they could find at the time and put  
23 them in. So they are all listed.  
24 They are all there.  
25 MR. CROOK: So you are not -- I

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1 Grand River Arbitration  
2 just want to be clear that I  
3 understand. Your position is that the  
4 time bar is applied to 92 or 108 or  
5 however many separate measures there  
6 would be?

7 MR. WEILER: Yes, and the  
8 reason for that is -- and the reason  
9 for that is, without a measure, you  
10 can't have a breach. You can't just  
11 speak in the -- "you" meaning one --  
12 one cannot speak in the abstract of a  
13 breach without having a measure.

14 The chapter applies to measures  
15 adopted or maintained by a party with  
16 respect to investors or their  
17 investments. You need a measure. The  
18 breach in the abstract means nothing.  
19 It is completely unspecific. We need  
20 to know what the measure is.

21 MR. CROOK: I understand your  
22 position.

23 MR. WEILER: Thank you.  
24 So moreover -- and this is the  
25 next part -- not only must they

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1 Grand River Arbitration  
2 demonstrate how a breach -- indeed  
3 should have -- show that there was  
4 actual or constructive knowledge of a  
5 breach with regard to each specific  
6 measure before the cut-off date; they  
7 must also do the same for loss.

8 PRESIDENT NARIMAN: I don't  
9 know about this. Please look at the  
10 wording of the article.

11 MR. WEILER: Sure.

12 PRESIDENT NARIMAN: The article  
13 says an investor may not make a claim.

14 It wasn't on you. You cannot make a  
15 claim if more than three years have  
16 elapsed.

17 So you have sought to take that  
18 burden by putting in your statement of  
19 claim by explaining why your claim is  
20 in time. That is how you put it. You  
21 say your claim is in time because you  
22 had lawyers briefed only in July of  
23 2002, and, therefore, your claim is in  
24 time.

25 Nothing else was mentioned,  
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1 Grand River Arbitration  
2 nothing else mentioned that there was  
3 an amendment to the escrow statute,  
4 that the amendment all took place  
5 after March 2001.

6 All that is not there, not  
7 there.

8 Please, Mr. Violi, it's not  
9 there. And I am surprised that we are  
10 pleading this. I can't understand it  
11 because you see your statement of  
12 claim. You see your limitation  
13 provision where you have dealt with  
14 it. And you have only said -- and  
15 therefore you are not, because of the  
16 escrow statutes.

17 You don't say that, "Our claim  
18 is that there is a breach also" with  
19 regard to and by reason of, but  
20 because of the amendment to the escrow  
21 statutes. If there was no amendment,  
22 "we" probably would not have made this  
23 claim; but because of this amendment,  
24 this claim is not heightened.

25 And all of this took place  
0798

1 Grand River Arbitration  
2 after March of 2001. That is not  
3 foreshadowed at all. It's only in  
4 this argument that we are all evolving  
5 all of this.

6 MR. WEILER: With respect,  
7 though, to the provision itself, it

8 says may not make a claim if more than  
9 three years have elapsed from the date  
10 upon which the investor first acquired  
11 or should have first acquired, one,  
12 knowledge of the alleged breach, two,  
13 knowledge that the investor has  
14 incurred loss or damage.

15 PRESIDENT NARIMAN: And you  
16 have taken that burden and said:

17 "We first acquired knowledge on  
18 such and such a date of the breach.  
19 We first discovered loss on such and  
20 such a date."

21 MR. WEILER: No, sure -- no, I  
22 am suggesting that, as an alternative  
23 argument, if the escrow statutes as of  
24 the day they were put in force, caused  
25 a breach because they imposed

0799

1 Grand River Arbitration  
2 liability, the question still remains  
3 when did loss occur. And loss -- loss  
4 is a physical actual thing. Loss is  
5 not some theoretical or theological  
6 thing. You can't --

7 PRESIDENT NARIMAN: Loss  
8 occurred after the amendment.

9 MR. WEILER: Loss can occur --  
10 well, no, our case under 1105, and  
11 under the minimum standard, is  
12 actually -- it's the national  
13 treatment case that connects to the  
14 escrow statutes as amended.

15 The expropriation claim refers  
16 to the contraband laws, whenever they  
17 came in, or any escrow statutes as in  
18 force and judgment obtained.

19 So the -- and the minimum  
20 standard, we say, originally, it  
21 applies the moment they enforce it;  
22 but, for the sake of the alternative  
23 argument, the breach came the moment  
24 that the escrow statute came in play.

25 So we are talking about those

0800

1 Grand River Arbitration



2 measures. All we have done thus far  
3 is simply elaborate upon the nature of  
4 the discrimination claim. It just so  
5 happens that the discrimination claim  
6 would not necessarily have been here  
7 if not for the fact that they amended  
8 these statutes.

9 But as Mr. Violi said earlier,  
10 we still might well have brought the  
11 claim. It would have been a matter of  
12 figuring out what the damages are.  
13 But not being obsequious though by  
14 saying we may or may not have brought  
15 the claim --

16 PRESIDENT NARIMAN: No, not  
17 like that. You made a specific case.  
18 The first date upon which of the  
19 Claimants suffered loss or damage  
20 within the meaning of these articles  
21 was in March 2002, the day on which  
22 counsel was retained to advise and  
23 defend.

24 What has counsel got to do with  
25 it?

0801

1 Grand River Arbitration

2 MR. WEILER: Well, the reason,  
3 sir, is that we make --

4 PRESIDENT NARIMAN: Your  
5 statement just now was that you  
6 suffered loss, not like that. You  
7 suffered loss as a result of the  
8 enforcement of these claims.

9 MR. WEILER: But my point is  
10 that we didn't find out about the  
11 enforcement actions, and I would have  
12 actually gotten to it through here. I  
13 will say it now.

14 The first time -- the first  
15 measures that they kick in, in terms  
16 of enforcement, we had not even been  
17 aware of the Missouri one. But we now  
18 know from -- what was the tab for the  
19 Respondent.

20 MR. VIOLI: 48.

21 MR. WEILER: With regard to the

22 very first Missouri injunction, that  
23 is June of 2002, that is an escrow  
24 statute being enforced, judgment  
25 obtained, June 2002. We didn't know

0802

1 Grand River Arbitration  
2 about it -- please let me finish,  
3 Mr. Chairman.

4 The contraband laws, the very  
5 first contraband laws that kick in are  
6 later in 2002, Arizona, and what was  
7 the other one -- it will be here  
8 anyway -- Arizona and Missouri -- no,  
9 it's not.

10 MR. VIOLI: Missouri, December  
11 31.

12 MR. WEILER: Arizona and  
13 Missouri.

14 So Missouri actually has an  
15 injunction under its escrow statute,  
16 we understand now, as of June of 2002,  
17 but they don't apparently enforce it  
18 until December when they actually use  
19 the contraband law to do that.

20 The bottom line is, as soon  
21 as -- and Mr. Violi has made the  
22 statement numerous times -- as soon as  
23 the Claimants found out about an  
24 enforcement activity, they did make a  
25 choice.

0803

1 Grand River Arbitration  
2 Because there are 46 states  
3 possibly all doing their action, their  
4 choice was not always to go fight.  
5 Sometimes it was to settle. Sometimes  
6 it was to say forget it.

7 But the moment they found out  
8 about an actual enforcement action,  
9 they did something; and none of those  
10 things took place before the date of  
11 this claim, three years prior to it.

12 PRESIDENT NARIMAN: See, I just  
13 want to ask you one thing.

14 In paragraph 15, if you just  
15 read it, it's you have phrased it.

16 You have never amended or asked for  
17 leave to amend it.

18 You have said that you became  
19 aware of any individual state intended  
20 was in March of 2002.

21 MR. WEILER: Correct.

22 PRESIDENT NARIMAN: That is  
23 apparently with reference to that  
24 letter.

25 MR. VIOLI: That's March 2001.

0804

1 Grand River Arbitration

2 That's a typographical error.

3 PRESIDENT NARIMAN: Thank you.  
4 March 2001.

5 MR. VIOLI: Sorry about that.

6 PRESIDENT NARIMAN: And the  
7 first date when loss occurred was in  
8 May of 2002, the day on which counsel  
9 was retained for advice and to defend.

10 I am asking you a question.

11 If we do not accept either of  
12 this because of all of the material  
13 which is on record, then what happens?  
14 Are we still to probe and find out  
15 everything with regard to all of the  
16 argument?

17 MR. WEILER: Well, you would --  
18 I mean,

19 PRESIDENT NARIMAN: I am asking  
20 you, your response.

21 MR. WEILER: For example, let's  
22 say that you decide that the  
23 Missouri -- that the Missouri -- that  
24 we are found to have known or should  
25 have known about the Missouri case

0805

1 Grand River Arbitration

2 before that date. Well, then you  
3 still have to ask yourself, when did  
4 loss occur, when -- if we didn't know  
5 about it, even if we should have known  
6 about it, if we didn't know about it,  
7 what did it cost us?

8 What did it -- I mean, it may  
9 be that in Estonia right now somebody

10 really doesn't like me, and they're  
11 going to pass a law against me. If I  
12 don't go to Estonia, I'm never going  
13 to hear about it.

14 The point is it's the moment  
15 that you find out, you know -- so  
16 let's say Mr. Montour has, you know,  
17 one of his distributors come back to  
18 him and say:

19 "Oh, my gosh, we were told we  
20 can't do any business in Missouri:

21 Well, then he's going to say --  
22 that's -- there is the loss. You now  
23 know about the loss. Before that date  
24 you didn't know about the loss.

25 Now, the only reason that I

0806

1 Grand River Arbitration  
2 stick to the choice of the hiring --  
3 the retaining of Mr. Violi's law firm  
4 as the earliest date is because we do  
5 claim in our statement of claim for  
6 the out-of-pocket cost of defending  
7 against the actions.

8 Therefore, that is definitely a  
9 cost that is spent. Hopefully, it's  
10 money well spent. We don't know yet,  
11 but that is the point. That is the  
12 earliest day upon which we spent --

13 PRESIDENT NARIMAN: But the  
14 crucial question is whether the date  
15 starts from the enforcement of the  
16 measure or the statutes.

17 MR. WEILER: The date, well,  
18 the date of liability I am accepting  
19 arguendo is that the breach is the day  
20 of the escrow statute coming into  
21 force.

22 PRESIDENT NARIMAN: Which  
23 escrow statutes?

24 MR. WEILER: Any escrow  
25 statute.

0807

1 Grand River Arbitration

2 PRESIDENT NARIMAN: The first  
3 one or the amended one?

4 MR. WEILER: Well, it depends  
5 on each statute. We claim for the  
6 statutes already as amended, so it's  
7 not --

8 PRESIDENT NARIMAN: That is  
9 what is not clear here.

10 MR. WEILER: It may not be.  
11 When I go to the local court and I say  
12 I have save a problem with the fish  
13 recoveries act --

14 PRESIDENT NARIMAN: I don't  
15 know about the fish recoveries act. I  
16 am saying it's not at all clear in the  
17 statement of claim.

18 MR. WEILER: I have agreed with  
19 you, Mr. Chairman, that it's not clear  
20 in the --

21 PRESIDENT NARIMAN: That  
22 doesn't help at all. That is not your  
23 claim.

24 MR. CROOK: Mr. Weiler was  
25 laying out their NAFTA theory on the

0808

1 Grand River Arbitration  
2 basis of some hypothetical assumptions  
3 about how the consequence of the  
4 escrow act. Are you sort of about  
5 where you need to be, Mr. Weiler? Or  
6 do you have more points to make for  
7 us?

8 MR. WEILER: Let's just go back  
9 to loss or damage. You had asked a  
10 question, Mr. Crook, about loss or  
11 damage: Is there a difference between  
12 loss or damage?

13 I did some research on this not  
14 recently, but in preparation of the  
15 memorial. And my conclusion is that  
16 it was actually a generic term, "loss  
17 or damage." And that it essentially  
18 means moneys paid or revenues  
19 foregone, and that it can't -- it  
20 simply cannot be equated with the  
21 legal question of whether one has  
22 incurred liability to be sued under a  
23 local statute. And the reason for

24 that is to adopt an interpretation  
25 that breach equals loss, that breach

0809

1 Grand River Arbitration

2 is synonymous with loss --

3 PRESIDENT NARIMAN: What -- is  
4 what is not suffered, incurred, not  
5 suffered.

6 MR. WEILER: Incurred.

7 PRESIDENT NARIMAN: No, it  
8 makes all the difference.

9 MR. WEILER: Loss --

10 PRESIDENT NARIMAN: Incurred --

11 loss can be incurred by reason of a  
12 statute or not. Suffered means when  
13 somebody goes against you.

14 MR. WEILER: If loss is  
15 incurred -- if loss --

16 PRESIDENT NARIMAN: Suffered  
17 has a different connotation.

18 MR. WEILER: If loss and breach  
19 meant the same thing, there would be  
20 no point in writing breach and loss.  
21 They would simply have said "breach."  
22 The treat cannot be interpreted to  
23 create an inutility. It must mean  
24 something. They say loss or damage  
25 and breach. There are two concepts.

0810

1 Grand River Arbitration

2 It must mean --

3 MR. CROOK: Mr. Weiler, my  
4 question really was: Are loss and  
5 damage the same thing? And I take it  
6 your view is that they are.

7 MR. WEILER: I think it's a  
8 generic term, loss or damage. I don't  
9 think you separate loss from damage,  
10 loss or damage. It's one concept.

11 Now, the Respondent though --  
12 no, I won't go into that. There is  
13 just no point. We have already  
14 discussed it. I would say that, if  
15 breach and loss were interpreted to  
16 mean the same event, there would be an  
17 inutility in the text.

18           And I would remind the Tribunal  
19           that that is not Professor Paulson's  
20           opinion; and that is not the opinion  
21           in the Quiller case. That is not the  
22           opinion in the Techman case. And that  
23           is not the opinion in the Feldman  
24           case.

25           The Quiller case yesterday was

0811

1           Grand River Arbitration  
2           attempted to be distinguished on the  
3           grounds that the European Union has a  
4           particular tolling mechanism, and that  
5           may be true; that is true as a matter  
6           of fact.

7           But if one reads that case  
8           carefully, the extension period is a  
9           whole separate issue from the question  
10          of loss and when loss took place. In  
11          that case, they were trying to  
12          basically -- it was an argument about  
13          trying to figure out when do you --  
14          when do you toll the limitation period  
15          because the whole point was how much  
16          money do you get from, you know, not  
17          getting your milk brought in time.

18          So one person wanted to put it  
19          there. One person wanted to put it  
20          there. And in that case -- it just so  
21          happened that the Claimant was arguing  
22          breach -- they were saying, "No, no,  
23          it's not about loss. It's about  
24          breach," because that would have given  
25          them the better -- more money.

0812

1           Grand River Arbitration

2           But the Tribunal said no -- I'm  
3           sorry -- the court said no. It's  
4           about loss.

5           Feldman case -- I'm sorry --  
6           Techman case, we will do first. The  
7           Techman case involved a landfill  
8           operator who experiences various sorts  
9           of regulatory skirmishes over a number  
10          of years, which culminates in a  
11          declaration that denies the

12 operational permit.

13 The Tribunal is presented with  
14 an argument by Mexico based on a  
15 three-year limitation period, and I  
16 will quote the text:

17 "The investor may not submit a  
18 claim under this agreement if more  
19 than three years have elapsed since  
20 the date on which the investor had or  
21 should have had knowledge" -- I'm  
22 sorry -- "notice of the alleged  
23 violation as well as -- as well of the  
24 loss or damage sustained."

25 It sounds eerily familiar. And

0813

1 Grand River Arbitration  
2 in that case, the Tribunal, despite  
3 given that argument that, essentially,  
4 the case should be thrown out because,  
5 indeed, in Mexico's opinion, it was  
6 too late, it went on to make a finding  
7 of expropriation.

8 And one of the cases that it  
9 cited in doing so is a European Court  
10 of Human Rights case in which they  
11 said:

12 "Non-nationals are more  
13 vulnerable to domestic regulation.  
14 Unlike nationals, they will generally  
15 have played no part in the election or  
16 designation of its authors, nor have  
17 been consulted on its adoption.  
18 Secondly, although a taking of  
19 property must always be effected in  
20 the public interest, different  
21 considerations may apply to nationals  
22 than non-nationals, and there may will  
23 be legitimate reason for requiring  
24 nationals to bear a greater burden in  
25 the public interest than

0814

1 Grand River Arbitration  
2 non-nationals."

3 And it went on to find that an  
4 expropriation did take place in that  
5 case with respect to the operation of



6 a landfill, despite the fact that the  
7 three-year rule was attempted to be  
8 thrown out.

9 And the Feldman Tribunal  
10 similarly had a fact pattern that  
11 extended beyond the three-year period  
12 and nonetheless found liability. The  
13 facts of that case, albeit  
14 complicated, start with the tax law  
15 enacted in 1992 that permitted rebates  
16 for cigarette importer retailers.

17 From 1990 to 1995 Mexico  
18 refused to pay the rebates for the  
19 investment enterprise citing a  
20 technical breach, even though the  
21 court had told it to do otherwise.

22 From June '96 to September '97,  
23 Mexico actually paid the rebates.  
24 During the last three months in '97,  
25 Mexico refused to pay the rebates.

0815

1 Grand River Arbitration  
2 During the same period of time, other  
3 local competitors in the same business  
4 were not given exactly the same  
5 treatment.

6 They were given rebates when  
7 the other one was not given rebates.  
8 They were not audited as much as the  
9 foreigner was audited.

10 As of January '98 they changed  
11 the measure. So you have got this  
12 block period between '92 and '98. You  
13 have got, sometimes you get the  
14 rebates, sometimes you don't.

15 The claim cut-off date in that  
16 case was May '96, because it was a  
17 three-year NAFTA rule. It's the exact  
18 same rule we have here, that the  
19 Feldman Tribunal was dealing with, the  
20 same three-year rule. They said in  
21 that case, three years back from the  
22 note of arbitration, May 1996 -- they  
23 threw away everything before May 1996;  
24 and they only gave them money back on  
25 the rebate for the three months that

0816

1 Grand River Arbitration  
2 were after that cut-off date.

3 But the point is these rebates  
4 were under a tax law that had been in  
5 place since 1992. It's the same tax  
6 law. And if we were to follow,  
7 obviously, the Respondent's argument  
8 in this case, the Feldman Tribunal  
9 must apparently be wrong.

10 And I would submit that  
11 Professors Gantz and Karimaos, are not  
12 wrong, that they were right. I say  
13 the two of them because it was a  
14 majority decision on national  
15 treatment.

16 But it turns out, if you  
17 closely read the very first paragraph  
18 of the dissent, the dissenting  
19 Arbitrator says he agrees with regard  
20 to all questions of procedure and  
21 jurisdiction, which would include the  
22 three-year rule.

23 So we do actually have case law  
24 on this. The fact pattern of Feldman  
25 is very relevant. The fact pattern of

0817

1 Grand River Arbitration  
2 Techman is very relevant.

3 PRESIDENT NARIMAN: Sorry to  
4 interrupt you again. I request you to  
5 please read paragraph 15. I have a  
6 question, two questions to ask you.

7 The first time that any of the  
8 claimants became aware that any  
9 individual state intended to enforce  
10 its MSA laws against them -- and we  
11 have corrected this now -- March 2001.  
12 Therefore, this was before the  
13 amendment. This was before the  
14 amendment of the.

15 MR. WEILER: Before they  
16 changed.

17 PRESIDENT NARIMAN: Before they  
18 changed.

19 MR. WEILER: Right, yes.

20 PRESIDENT NARIMAN: Right, on  
21 the original statute that gave you a  
22 cause of action --

23 MR. WEILER: Yes.

24 PRESIDENT NARIMAN: That is  
25 your case. Please follow this.

0818

1 Grand River Arbitration

2 MR. WEILER: Yes, that's  
3 correct.

4 PRESIDENT NARIMAN: It's not  
5 your case that you would have to  
6 make -- that limitation would start,  
7 as you told my colleague, for each  
8 state enforcing it.

9 You say for the first time that  
10 it was enforced, that is knowledge to  
11 you, because you say that for the  
12 intended to enforce when investor  
13 first became aware of the institution  
14 to enforce these measures against you.

15 MR. WEILER: By any individual  
16 state. We are very clear that we  
17 meant by any state.

18 PRESIDENT NARIMAN: No, no, no.  
19 You are saying it is now within time,  
20 therefore. You say -- you don't say  
21 that it's not within --

22 MR. WEILER: With regard to  
23 that particular state, Oregon, we said  
24 an individual state, Mr. Chairman.

25 PRESIDENT NARIMAN: No, no, you

0819

1 Grand River Arbitration  
2 say investor launched this claim with  
3 the delivery of its notice less than  
4 three years after it was made aware of  
5 the first enforcement action against  
6 it.

7 MR. WEILER: Yes.

8 PRESIDENT NARIMAN: Therefore,  
9 the first enforcement action against  
10 you was -- according to you, at least,  
11 an intention that others may or may  
12 not enforce, but this was the first  
13 time you became aware of it. I mean,

14 this is how you have phrased it.

15 MR. WEILER: And with respect  
16 to articles 1105 and 1110, that would  
17 be accurate. This is the first time  
18 that -- but with regard to 1102, the  
19 discrimination claim.

20 PRESIDENT NARIMAN: It's not a  
21 repetitive thing. It is one -- it  
22 starts, and it doesn't suspend at all.

23 MR. WEILER: To be clear the  
24 claim is for three obligation breaches  
25 with regard to --

0820

1 Grand River Arbitration

2 PRESIDENT NARIMAN: This is  
3 your claim, your plea in the paragraph  
4 15 and 16. You haven't made any  
5 further plea. This is your plea. You  
6 are saying that -- that since the --  
7 less than three years after it was  
8 first made aware of the first  
9 enforcement action against it. So  
10 your case is not the statute,  
11 enforcement. First enforcement by any  
12 state is good enough.

13 MR. WEILER: I agree, but keep  
14 in mind, Mr. Chairman, I was speaking  
15 in the alternative if we used the date  
16 of the statute itself.

17 Certainly, our claim is  
18 enforcement. But I am saying, even if  
19 in the alternative, if it's the escrow  
20 statutes, the day it was an obligation  
21 under domestic law under that statute  
22 came into place, we still do not have  
23 a three-year rule problem because we  
24 didn't suffer damages as of the date  
25 the statute came into force. We

0821

1 Grand River Arbitration

2 suffered damages after it was enforced  
3 upon us, and we found about it.

4 PRESIDENT NARIMAN: This  
5 March 2001 is which exhibit if you  
6 don't mind, when the first institution  
7 of an action against you?

8 MR. VIOLI: The Oregon letter.  
9 PRESIDENT NARIMAN: Exhibit A  
10 to the Williams 14.

11 MR. VIOLI: 14A, right.

12 PRESIDENT NARIMAN: Tab 14.

13 MR. WEILER: Professor Anaya,  
14 is there a question you had there?  
15 Your eyes kind of went up there a  
16 second.

17 PROFESSOR ANAYA: I didn't  
18 understand that last statement. Yes.  
19 You are assuming for the purposes of  
20 argument that you suffered loss.

21 MR. WEILER: No, that the  
22 breach would have taken place. The  
23 loss still takes place when either the  
24 judgment is obtained or, in the state  
25 seeking the judgment, you start

0822

1 Grand River Arbitration  
2 fighting the state in local court and  
3 pay people like Lynn to do so.

4 MR. VIOLI: The point is, if I  
5 may clarify it -- if the state says  
6 the law applies to us -- let's take  
7 it, Wisconsin, for example -- let's  
8 say we break it up into each state.  
9 So the state of Wisconsin says this  
10 law applies to you. We say no, and we  
11 litigate it --

12 PRESIDENT NARIMAN: No, is that  
13 really the point? If you don't mind,  
14 sorry to interrupt you. Please,  
15 before lunch, I had an apprehension of  
16 your argument was in my opinion a good  
17 argument, that you said that all of  
18 these laws which are enacted, which  
19 were amendments, came in after March  
20 of 2001.

21 MR. VIOLI: That's correct.

22 PRESIDENT NARIMAN: Right.  
23 Now, your cause of action, as you have  
24 pleaded it in your statement of claim,  
25 has nothing whatever to do with the

0823

1 Grand River Arbitration

2 amended statute -- please -- if you  
3 don't mind.

4 It has only something to do  
5 with the original statute. That  
6 original statute gave you a cause of  
7 action, for which you have claimed all  
8 of these damages. And you said this  
9 is the first time this arose, and that  
10 is why I asked you, all of these  
11 statutes came after the amendments.  
12 The amendments came after March 2001.

13 MR. VIOLI: If you look at the  
14 economist report, the economic  
15 report --

16 PRESIDENT NARIMAN: I can't  
17 look at -- your case --

18 MR. VIOLI: I know, but we  
19 submitted that with the claim. And  
20 you will see at page nine, paragraph  
21 C, that the economist gives a range of  
22 millions of dollars based on -- and he  
23 says:

24 "I am not taking into account  
25 the refunds that are due."

0824

1 Grand River Arbitration

2 The statute, in effect at the  
3 time we filed our claim, is the  
4 statute we are complaining of. If you  
5 look at how the payment --

6 PRESIDENT NARIMAN: Therefore,  
7 your real loss was with the original  
8 statute, not with the amendment.

9 MR. VIOLI: No, on the  
10 discrimination, no. On the  
11 discrimination, no. On the other  
12 claims, yes. Discrimination is with  
13 the amendment. But with the other  
14 claims, expropriation --

15 PRESIDENT NARIMAN: There is no  
16 amendment to the statement of claim.

17 MR. WEILER: Mr. Chairman.

18 MR. VIOLI: Let me just -- this  
19 is very important.

20 The State of Wisconsin  
21 threatened us, or actually they

22 brought a lawsuit against us.  
23 PRESIDENT NARIMAN: There is  
24 no -- it's not in your statement of  
25 claim with regard to limitation and

0825

1 Grand River Arbitration  
2 objection to.

3 MR. VIOLI: It's true, true,  
4 but when they object, I don't -- I  
5 don't have to plead an opposition to  
6 an affirmative defense. If they raise  
7 it, I get a chance to respond. I  
8 can't anticipate everything they would  
9 say.

10 PRESIDENT NARIMAN: Okay.

11 MR. VIOLI: But my point was  
12 this. Wisconsin says this law applies  
13 to us. Right. We litigate it; we  
14 win. What loss did we sustain under  
15 the Wisconsin escrow statutes? What?  
16 To this day the only loss is the  
17 attorney fees, correct, because we  
18 proved Wisconsin wrong. They couldn't  
19 enforce that escrow statutes against  
20 us.

21 So we can't say just the mere  
22 enactment of the law or when your  
23 cigarette ended up being sold in  
24 Wisconsin. We won in Wisconsin. How  
25 can we sustain a loss under the escrow

0826

1 Grand River Arbitration  
2 statutes by mere fact of the  
3 enactment? We won. The court said  
4 this law cannot be applied to you.

5 How can there be a loss under  
6 the escrow statute? It's only when  
7 they get a judgment, cause us loss,  
8 and we have to get an attorney, or do  
9 something like that that causes  
10 physical loss or harm or monetary  
11 damage.

12 That's what happened.

13 And, furthermore, the problem  
14 with -- for example, under the  
15 contraband law, the Missouri judgment

16 said there is a ban under the escrow  
17 statute for two years. It was entered  
18 on July 26, 2002. I am talking about  
19 the second Missouri judgment. That  
20 expired in 2004.

21 The Missouri attorney general  
22 has still banned our product, banned  
23 our product because we did not pay for  
24 escrow that was -- that the court said  
25 we had to pay and imposed a ban in

0827

1 Grand River Arbitration  
2 2002.

3 That -- and we have it as an  
4 exhibit -- that expired, that  
5 injunction. But the Missouri attorney  
6 general still calls our product  
7 contraband.

8 In Wisconsin -- in Wisconsin,  
9 we won, flat out won. We have a judge  
10 entering a decision and says: "You  
11 win. The escrow statutes doesn't  
12 apply."

13 You look at the list that I  
14 gave you, the list that I gave you,  
15 the Wisconsin list, and it shows that  
16 we are contraband in that state,  
17 Mr. President. And we won the case.  
18 The statute cannot be applied to us.  
19 But our product is contraband.

20 How is that the case? How does  
21 loss start when someone says a law  
22 applies to you? It cannot.

23 We went in there, had a good  
24 faith dispute and won, and still they  
25 said the law still applies to you --

0828

1 Grand River Arbitration  
2 attorney general unilaterally. This  
3 is loss and damage, not because  
4 someone says a law may apply to you or  
5 if you are --

6 PRESIDENT NARIMAN: You are  
7 only drawing attention to your  
8 pleading. You can get as angry as you  
9 like.



10 MR. VIOLI: No, I am not  
11 angry --

12 PRESIDENT NARIMAN: I am  
13 referring you to paragraph 15. You  
14 have not pleaded any of this.

15 MR. WEILER: With respect,  
16 Mr. Chairman, to paragraph 15, with  
17 respect to paragraph 15, we are  
18 referring -- the point of the -- the  
19 point of the notice provision, the  
20 three-year rule is that the moment --  
21 essentially, the moment that you know  
22 that you are in trouble, the NAFTA  
23 drafters essentially assumed that,  
24 within about three years of the time  
25 you found out that you in trouble --

0829

1 Grand River Arbitration  
2 by "trouble" I mean breach and loss --  
3 that you will have -- you will have  
4 come -- you will have brought your  
5 claim or not.

6 As it turns out, if you look at  
7 the Techman case, if you look at the  
8 Feldman case, if you look at many of  
9 these investment cases -- I am sure  
10 that the three of you have -- you have  
11 worked on -- it's very common that the  
12 bad stuff starts happening before  
13 three years. It may start at five  
14 years. It may start at ten years.  
15 The point is that you have to try to  
16 ascertain what the measure is and make  
17 sure that you stay on the right side  
18 of that date.

19 PRESIDENT NARIMAN: No, the  
20 plea should have -- your plea should  
21 have been that the limitation laws do  
22 not apply at all until and unless  
23 everyone enforces it. Therefore, the  
24 question of limitation is irrelevant  
25 in this proceeding. That should have

0830

1 Grand River Arbitration  
2 been your case. That's not your case.  
3 Your case is when you first came to

4 know the first enforcement action is  
5 sufficient to start the period of  
6 limitation. It doesn't matter who --

7 MR. WEILER: Actually,  
8 Mr. Chairman, our case is not that.  
9 Our case is with respect to that  
10 individual state measure, with that  
11 individual state measure, the Oregon  
12 measure, that is the earliest date.

13 We were simply pointing out the  
14 earliest dates that you could possibly  
15 choose. That doesn't mean that we  
16 were saying -- otherwise, you would  
17 take us to be accepting the  
18 Respondent's argument that the MSA is  
19 one large kind of amorphous thing and  
20 all of the measures underneath it are  
21 all just one. And that is not our  
22 position. That has never been our  
23 position;

24 We have been very clear all the  
25 way through saying that, no, they are

0831

1 Grand River Arbitration  
2 different measures.

3 And so the Oregon measure is  
4 the first one, the earliest one, the  
5 first one -- I mean, it's not  
6 coincidental that it was the 12th that  
7 they submitted their claim, two  
8 years -- two days less from three --  
9 when, I mean, they searched their  
10 records.

11 The very first earliest letter  
12 they found said March 14th. So they  
13 made darn sure that they brought their  
14 claim at least a couple of days before  
15 that. I mean, why otherwise would  
16 they have done so? They searched  
17 their records thoroughly. That is the  
18 earliest letter they found.

19 They just, to be safe, we will  
20 put it in now. We don't want to miss.  
21 We don't want to be late. We will put  
22 it in, you know, based on the first.

23 As the lawyers got involved and

24 they learn about the NAFTA, and they  
25 realize it turns out loss and -- you

0832

1 Grand River Arbitration  
2 know, loss and breach are much more  
3 determined than of course the  
4 Claimants would have known at the  
5 time.

6 But just to be safe, at the  
7 three-year point, they started the  
8 claim with respect to all of the  
9 measures.

10 Now, I should mention -- I  
11 haven't yet mentioned the loss part.  
12 My point is that, if the Tribunal  
13 concludes that the Claimants should  
14 have known about how the law is being  
15 enacted in several states, to  
16 implement policies found in the MSA  
17 breached the NAFTA, the Tribunal still  
18 needs to look to the occasion upon  
19 which they suffered losses for each  
20 measure.

21 In this case -- in this case,  
22 for breaches of article 1110, the loss  
23 is not incurred until the taking  
24 occurs in any given state. The taking  
25 cannot occur until there has been

0833

1 Grand River Arbitration  
2 substantial interference with the  
3 investor's business in that state.

4 So that is the earliest -- that  
5 is when the breach occurs, and that is  
6 when the loss occurs.

7 For breaches of article 1102,  
8 it just turns out that the loss is not  
9 incurred until the unfair payments are  
10 actually required. And as that turns  
11 out, because of the allocable share  
12 amendment -- I'm sorry -- because of  
13 the allocable share mechanism, it was  
14 a while before the non-discrimination  
15 claim. I don't think the Claimants  
16 should be punished for throwing in the  
17 article 1102 claim.

18           It turns out it was actually a  
19           very useful claim to though in,  
20           perhaps, at the beginning -- and when  
21           you bring these claims, you don't have  
22           full specificity of knowledge of every  
23           little aspect of how the claim is  
24           going to go.

25           That's why we have 20 people on  
0834

1           Grand River Arbitration  
2           either side, and all sorts of, you  
3           know, discoveries, and what have you.  
4           It turns out that article 1102, the  
5           loss would be incurred in the cases  
6           where the unfair payments are required  
7           by any given state.

8           And finally with respect to  
9           article 1105, the loss does not first  
10          start to be incurred until the  
11          Claimants' product are interdicted or  
12          they are forced to bear compliance  
13          costs including the hiring of counsel  
14          to defend themselves because these --  
15          it turns out in this case, these  
16          out-of-pocket costs are the earliest  
17          upon which a claim could be based  
18          here.

19          And now I can go back to  
20          Mr. Violi to continue on with the  
21          evidence, unless there are any other  
22          questions. Mr. Crook?

23          MR. CROOK: That's fine.

24          MR. VIOLI: No questions?

25          PROFESSOR ANAYA: I am a little

0835

1           Grand River Arbitration  
2           unclear what your theory of the loss  
3           is. I mean, there are different  
4           losses with regard to the different  
5           NAFTA provisions.

6           MR. WEILER: Different  
7           breaches.

8           PROFESSOR ANAYA: Different  
9           breaches, can you summarize those real  
10          quickly?

11          MR. WEILER: Certainly.

12 Article 1110 the expropriation  
13 provision requires a taking which  
14 tribunals have generally found --

15 PROFESSOR ANAYA: Right, don't  
16 summarize the whole thing -- just with  
17 regard to the taking, what it is.

18 MR. WEILER: The taking -- a  
19 breach of the taking provision  
20 requires a taking. A taking is a  
21 loss. So, therefore, for that case, a  
22 taking is whenever the ban is put in  
23 place under an escrow statute,  
24 through --

25 PROFESSOR ANAYA: With regard

0836

1 Grand River Arbitration  
2 to you guys, specifically, what is  
3 your loss?

4 MR. WEILER: Our earliest loss  
5 on that -- it turns out that there is  
6 an unenforced judgment by the Missouri  
7 attorney general, which is June 2002;  
8 so that would be the first escrow  
9 statute judgment.

10 What was the first time you  
11 actually fought a case under the  
12 escrow statutes?

13 MR. VIOLI: We brought a case  
14 in Federal Court in July of 2002.

15 MR. WEILER: No, but what was  
16 the first time you actually defended  
17 against an escrow statute case?

18 MR. VIOLI: I would say -- I  
19 would have to say it was the Missouri  
20 case, the third Missouri case, when we  
21 got knowledge of that.

22 MR. WEILER: So then that would  
23 be 2004?

24 MR. VIOLI: No, 2002, sometime  
25 2002 -- late 2002.

0837

1 Grand River Arbitration

2 MR. WEILER: So for the  
3 expropriation provision, and the  
4 minimum standard on the -- unless  
5 you -- on the expropriation provision,

6 it's going to be when the taking  
7 happened. So it's going to be when  
8 the judgment was obtained or when the  
9 contraband statute comes in.

10 So that is June 2002, as it  
11 turns out for Missouri. With regard  
12 to the contraband statutes, that is,  
13 again, Missouri, in December of 2002;  
14 and it's Arizona in October of 2002  
15 when the ban kicks in under the  
16 contraband statute.

17 MR. VIOLI: No, no, that is the  
18 injunction.

19 MR. WEILER: Okay. It was  
20 another injunction -- okay, fine. But  
21 the Missouri, December --

22 MR. VIOLI: The first knowledge  
23 or actual physical taking is June of  
24 2002 under the Missouri law. If you  
25 look at each law, we would have to go

0838

1 Grand River Arbitration  
2 in and say when there was an actual --  
3 like Nevada never enforced their  
4 escrow statute until last year. So if  
5 we don't break it up -- no, if we  
6 don't break it up as to when -- the  
7 first expropriation occurred in June  
8 of 2002.

9 MR. WEILER: As it turns out,  
10 we didn't find out until really -- we  
11 did find out about the December 31,  
12 2002 Missouri contraband law, which  
13 would have the exact same effect.  
14 That is when we heard about it. That  
15 is expropriation.

16 With regard to minimum  
17 standard, it would be the very  
18 first -- so the very first breach  
19 would be, under the one theory, would  
20 be whatever the earliest escrow  
21 statute was that came into force; and  
22 then whenever that first statute came  
23 to our attention, either by way of  
24 notice or by way of NPM, you know,  
25 starting a case, and that would be --

0839

1 Grand River Arbitration  
2 that would be our notice of it. And  
3 you could -- the question would be  
4 whether or not we should have known  
5 earlier, fair. So that's between  
6 knowledge and constructive knowledge  
7 of the breach.

8 With regard to loss, it would  
9 be when that escrow statute was  
10 enforced against us. So that could be  
11 either because we defended ourselves  
12 against it or because the court case  
13 was brought. So that is the escrow  
14 statute.

15 Contraband statute, it would be  
16 right away, when it comes in, because  
17 the contraband statute imposes an  
18 immediate breach.

19 So with regard to national  
20 treatment, the earliest breach for  
21 us --

22 MR. VIOLI: Discrimination.

23 MR. WEILER: It would be the  
24 first allocable -- the first time you  
25 had to make a payment under an

0840

1 Grand River Arbitration  
2 allocable share removed --

3 MR. VIOLI: No, not a payment.

4 PRESIDENT NARIMAN: I  
5 thought --

6 MR. CROOK: Sorry. Mr. Weiler,  
7 the contraband statute, there is a  
8 breach when it's enacted.

9 MR. WEILER: The breach is  
10 when -- no, the contraband law, it  
11 breaches when it starts, when it's  
12 enacted, because it starts an  
13 immediate ban with a list that you are  
14 on.

15 MR. CROOK: There doesn't have  
16 to be implementing action by the  
17 attorney general.

18 MR. WEILER: No. That's the  
19 escrow statute.

20 MR. VIOLI: Actually, no, that  
21 is true. The attorney general has  
22 like 30 days to make a list.

23 MR. WEILER: The --

24 MR. CROOK: The statute  
25 authorizes the attorney general to do

0841

1 Grand River Arbitration  
2 something. It's presumably when the  
3 attorney general makes that list.

4 MR. VIOLI: It's short, like  
5 30 days.

6 MR. WEILER: Breach would  
7 actually be the day the statute came  
8 into place, and loss would be the day  
9 the attorney general does something.

10 MR. CROOK: How is that  
11 different from escrow again?

12 MR. WEILER: An escrow  
13 breach -- well, under my theory.

14 MR. CROOK: Why is enactment in  
15 one case a breach and not in the  
16 other?

17 MR. WEILER: Under my theory,  
18 the escrow statute doesn't have the --  
19 it doesn't authorize -- it's not -- it  
20 doesn't have the same kind of  
21 mechanism. Its mechanism for  
22 enforcement is to go to court, civil  
23 action. So my first argument is you  
24 go to court.

25 MR. CROOK: Your position is

0842

1 Grand River Arbitration  
2 the only thing that counts is going to  
3 court, whereas the other, it's the  
4 attorney general's office --

5 MR. WEILER: And my alternative  
6 theory -- which still brings me to  
7 today -- is fine, it was the day it  
8 came into force. It doesn't change  
9 the fact that the law took place until  
10 later.

11 PROFESSOR ANAYA: For the  
12 breach.

13 MR. WEILER: Yeah, that the



14 breach would have taken place. So I  
15 don't really care if the breach takes  
16 place the day the escrow statute comes  
17 into force.

18 PROFESSOR ANAYA: But here we  
19 are talking about the loss.

20 MR. WEILER: Yes, the loss  
21 doesn't happen until it's enforced  
22 against you. It's until either they  
23 obtain a judgment, or you start  
24 fighting them to prevent them from  
25 obtaining a judgment.

0843

1 Grand River Arbitration

2 PRESIDENT NARIMAN: But  
3 wouldn't it be said that you have  
4 incurred this loss, not suffered --  
5 you may suffer it later -- but you  
6 have incurred this loss. There is  
7 no -- the language is incurred.

8 MR. WEILER: Otherwise, if that  
9 were true, there would no point in  
10 putting loss and breach. It would  
11 mean the same thing.

12 PROFESSOR ANAYA: Not  
13 necessarily. You could have different  
14 regimes.

15 MR. VIOLI: My only point to  
16 that on loss is that, what do you do  
17 in a situation with an ambiguous  
18 statute -- and you talk about good  
19 faith -- or when you have a statute  
20 that doesn't apply to you?

21 PROFESSOR ANAYA: I don't know.

22 MR. VIOLI: It means that we  
23 didn't suffer loss in Wisconsin.

24 PROFESSOR ANAYA: But  
25 Mr. Weiler doesn't seem to be arguing

0844

1 Grand River Arbitration

2 that it depends on there being an  
3 ambiguous statute. He seems to be  
4 stating a flat rule that loss does not  
5 occur until a statute is in force.

6 MR. WEILER: Right.

7 PROFESSOR ANAYA: Is that

8 right?

9 MR. WEILER: Right. Yes, that  
10 is what Professor Paulson says. And  
11 that is what the Tribunal said. That  
12 is what they said.

13 PROFESSOR ANAYA: So if there  
14 is a taxing law that goes against  
15 NAFTA, and you are flagrantly -- one  
16 is flagrantly avoiding compliance with  
17 that tax situation -- let me finish --  
18 then you are -- there is no loss until  
19 the IRS, Internal Revenue Service,  
20 say, the federal law comes after you;  
21 is that right?

22 MR. WEILER: I would say the  
23 avoidance cost might have been the  
24 loss. You are trying to evade the law  
25 that you know applies to you -- the

0845

1 Grand River Arbitration  
2 efforts expended would be -- we didn't  
3 know the law -- we didn't know the law  
4 was applied to us. That is the  
5 difference. This is not --

6 PROFESSOR ANAYA: This is back  
7 to what Mr. Violi was saying. You  
8 don't know the law applies because of  
9 the ambiguity.

10 MR. VIOLI: Ambiguity and our  
11 good faith, we believe, because the  
12 treats, whatever the case may be, our  
13 position is it doesn't -- it doesn't  
14 apply to us. We have a good faith  
15 belief it doesn't apply.

16 PROFESSOR ANAYA: Okay. So we  
17 need to find this sort of good faith  
18 belief based on ambiguity, based on  
19 the treaty or something like that.

20 MR. WEILER: We have an  
21 example.

22 PROFESSOR ANAYA: I just want  
23 to get it clear. I just want to get  
24 clear the argument.

25 MR. WEILER: There are examples

0846

1 Grand River Arbitration

2 of them enforcing against one kind  
3 of -- the other kind not enforcing.

4 So I think given this -- it is  
5 a contextual thing. You have to look  
6 at the measure that you are dealing  
7 with.

8 And as you said earlier, maybe  
9 there is some explanation. Well, the  
10 question is -- you look at the  
11 measure. Is the measure like a  
12 contraband law which is pretty right  
13 away, or is it, you know, or criminal  
14 law, you know, murder?

15 PROFESSOR ANAYA: How is the  
16 contraband law right away, and this  
17 right away? I have a sense, but, if  
18 you could explain that, the contraband  
19 law --

20 MR. VIOLI: The contraband law,  
21 the escrow statutes -- the way it  
22 works under the escrow statute, in  
23 order for there to be an actual  
24 physical taking, a ban, or imposition  
25 or a mandate of compliance or a

0847

1 Grand River Arbitration  
2 penalty or anything, there has to be a  
3 judicial determination, that, "A," you  
4 are a tobacco product manufacturer;  
5 "B," you sell to consumers; "C," you  
6 violated the statute.

7 So all of those would be  
8 required, it is our view.

9 Now, under the contraband law,  
10 that whole element of judicial process  
11 and review is out. The attorney  
12 general says: I think you are a  
13 manufacturer. I don't see that you  
14 paid escrow."

15 PRESIDENT NARIMAN: No, first  
16 he draws up a list.

17 MR. VIOLI: He draws up the  
18 list. He says:

19 "I think you are a  
20 manufacturer. I haven't seen any  
21 certification from you, and you

22 haven't paid. And I believe that  
23 these cigarettes are your cigarettes.  
24 Therefore, I am deeming your product  
25 contraband."

0848

1 Grand River Arbitration  
2 It removes that whole  
3 judicial -- that whole element that  
4 the Claimants had and we thought we  
5 had as of July -- that's why we went  
6 to Federal Court in July of 2002,  
7 because we weren't going -- we didn't  
8 have to -- and the court said you  
9 don't have to go in 31 separate  
10 jurisdictions to prove this point.

11 PROFESSOR ANAYA: I understand  
12 that. But how is it that the  
13 contraband law is --

14 MR. VIOLI: Because it removes  
15 that -- it removes that -- there is  
16 no -- there is no judicial review.  
17 There is no sort of due process. It's  
18 the attorney general unilaterally  
19 making the decision and writing the  
20 list.

21 MR. WEILER: He doesn't have to  
22 go to court and fight it out. He just  
23 decides.

24 PROFESSOR ANAYA: You could get  
25 to judicial review certainly in the

0849

1 Grand River Arbitration  
2 application of the contraband law?  
3 How could you not?

4 MR. WEILER: You could. But  
5 that's after the fact.

6 MR. VIOLI: Under contraband --  
7 well, you could --

8 PROFESSOR ANAYA: That's what I  
9 am trying to figure out. What --  
10 after what fact?

11 MR. VIOLI: After they ban your  
12 product.

13 PROFESSOR ANAYA: The product  
14 is banned. Then what?

15 MR. WEILER: You are out of

16 business until the judicial review  
17 comes up, whereas under the escrow  
18 statute law option, you are in  
19 business.

20 MR. VIOLI: It's guilty until  
21 proven innocent versus the other  
22 concept.

23 PROFESSOR ANAYA: I am trying  
24 to get the specifics straight in my  
25 head. It would help if you articulate

0850

1 Grand River Arbitration  
2 them. I mean, not generalities about  
3 shooting first and dying later,  
4 whatever.

5 But what is it that happens  
6 specifically in the contraband law  
7 that is of a nature that we don't have  
8 in the escrow statutes? I think I  
9 understand it.

10 MR. WEILER: You go to the -- I  
11 will try because I am not an expert.

12 In the escrow statute, the  
13 attorney general has to go to court to  
14 get the goal. In the contraband law,  
15 he just has to make a decision and put  
16 you on the list.

17 The difference to the Claimants  
18 in terms of loss is, if he is under  
19 the escrow statute and there is no  
20 contraband law, he has however long it  
21 takes to hear the case to continue  
22 making money.

23 MR. VIOLI: To prove his point.

24 MR. WEILER: Under the  
25 contraband law, he's out. He can't

0851

1 Grand River Arbitration  
2 make any money. He is out of  
3 business. He can -- sure, he can make  
4 a judicial review application.

5 PROFESSOR ANAYA: Because he  
6 can't sell.

7 MR. WEILER: No, because he is  
8 enjoined. The enjoinder is at the  
9 discretion of the AG as opposed to the

10 court.  
11 PROFESSOR ANAYA: Okay. That's  
12 what I thought. That's the  
13 distinction.  
14 MR. WEILER: That is the  
15 distinction.  
16 PROFESSOR ANAYA: Yes.  
17 MR. CROOK: As I recall,  
18 Mr. Violi was about to move to this  
19 slide. Is that about where we were?  
20 (There was a discussion off the  
21 record.)  
22  
23  
24  
25

0852

1 Grand River Arbitration  
2 PRESENTATION BY MR. VIOLI  
3  
4 MR. VIOLI: Yes.  
5 This is sort of just to recap,  
6 but I wanted to go to the specific  
7 exhibits.  
8 When did Claimants sustain loss  
9 or damage? The Respondent, as I said  
10 in the opening many hours ago, they  
11 never concede the fact in their  
12 brief -- and in their statement of  
13 defense, they say you never sustained  
14 loss or damage by reason of a breach.  
15 PRESIDENT NARIMAN: Incurred.  
16 MR. VIOLI: Incurred. You  
17 never incurred a loss or damage by  
18 reason of a breach. But nonetheless  
19 you incurred -- you should have known  
20 you incurred loss or damage before  
21 March 12, 2001.  
22 So even though they never  
23 answer the question and they don't  
24 wish to accept what we view as when we  
25 incurred loss or damage -- I just

0853

1 Grand River Arbitration  
2 wanted to review some of the exhibits  
3 which show this.

4           The first Missouri injunction,  
5 the first loss or damage that  
6 Mr. Weiler referred today is this  
7 order and judgment that, other than  
8 the June 10th, judgment. And there is  
9 a reason why I have gotten the June  
10 26, 2002 judgment.

11           This is the first time there is  
12 a ban imposed to our knowledge on the  
13 products of Grand River. And we  
14 didn't have knowledge of this ban  
15 until much later. But before they  
16 came up with the June 10th -- or  
17 before they came up with that first  
18 Missouri proceeding and then we found  
19 the June 10th, this is the relevant  
20 one that bans the product. And it  
21 says: "The court finds that Grand  
22 River" -- this is excerpted -- it  
23 says:

24           "You must pay. You're ordered  
25 to comply with the escrow statutes.

0854

1           Grand River Arbitration  
2 But you defaulted. You didn't answer  
3 the complaint. So you have certain  
4 penalties being assessed against you.  
5 And then pursuant to the escrow  
6 statute, your product is banned,  
7 prohibited from -- actually, that you  
8 are prohibited from selling cigarettes  
9 to consumers within the state."

10           And so that's the first ban.  
11 But the reason why I put this language  
12 in red here, the Missouri attorney  
13 general -- at that time, there was a  
14 recent enactment. On July 12 of 2002,  
15 when the contraband law came into  
16 effect -- do you see that there? And  
17 it's red, so I don't know how good you  
18 can see it. It's kind of subdued.

19           But the Missouri attorney  
20 general asked the Judge: "Please have  
21 this product deemed contraband under  
22 the new contraband law."

23           And the Missouri -- and the

24 judge in Missouri didn't agree. He  
25 crossed out -- Jim Edwards crossed out

0855

1 Grand River Arbitration  
2 this whole bit about how this product  
3 should be deemed contraband under the  
4 new law and, instead, keeps in his  
5 injunction, his two-year injunction.

6 Now, the reason -- let's fast  
7 forward two, please -- one, two.

8 MS. MENAKER: I would note for  
9 the record that this exhibit --

10 MR. VIOLI: It is excerpted.  
11 That's correct.

12 MS. MENAKER: No, but it's  
13 also -- we submitted this with our  
14 objection, tab 50.

15 MR. VIOLI: Okay. Yes. It's  
16 also 16B. Thank you.

17 MS. GUYMON: But 16B submits  
18 evidence that Claimants came -- only  
19 came into their possession recently.  
20 It was provided by the United States  
21 as exhibit to its objection.

22 MR. VIOLI: No, no, this is  
23 being proffered because it's compared  
24 to the seizure receipt, which I'll --  
25 was what we just got, and I will show

0856

1 Grand River Arbitration  
2 you how this came into us. I am not  
3 saying this was only recent.

4 The Missouri -- on December 31,  
5 2002, the Missouri attorney general  
6 writes to all of the distributors in  
7 Missouri, and says: "Grand River's  
8 product as well as others" -- hit the  
9 click; maybe it goes to the second  
10 page, yes -- it's a contraband list,  
11 Grand River, not because of this  
12 judgment, not because of this  
13 judgment, but because of this law. So  
14 a judge says:

15 "I am going give you an  
16 injunction. I'm not going to deem it  
17 contraband under the new law."



18           The Missouri attorney general  
19 writes a letter three or four,  
20 five months later and says:  
21           "You can't sell Grand River's  
22 product because it's contraband under  
23 the new law."

24           We have no record of the  
25 Missouri attorney -- nor is there any

0857

1           Grand River Arbitration  
2 in the record that the Missouri  
3 attorney general enforced this  
4 injunction. That's why we didn't know  
5 about it. No -- no distributor,  
6 anything, he received an injunction,  
7 spent all that time.

8           PRESIDENT NARIMAN: Merely when  
9 this judgment came, did it furnish you  
10 a cause of action to file a claim as  
11 you have filed here on -- if this was  
12 the very first claim, it would not  
13 have been barred?

14           MR. VIOLI: No, it wouldn't.  
15 It's July 2002.

16           PRESIDENT NARIMAN: No, no, you  
17 are not following what I am saying.  
18 If this was the very first claim  
19 that -- this was the very first  
20 judgment that was against you, not the  
21 previous judgment against you, your  
22 case is -- it must be your case --  
23 that you were entitled to file your  
24 claim, notwithstanding the fact that  
25 the MSA was in 1998, the statute was

0858

1           Grand River Arbitration  
2 in 1999, and so on?

3           Am I right?

4           MR. VIOLI: That's correct.

5           PRESIDENT NARIMAN: Therefore,  
6 the remediation, really, according to  
7 you, it must remain like this, that  
8 there is no limitation for these sort  
9 of claims at all -- not that there is  
10 this first time that action is taken;  
11 therefore, limitations start.

12 That is your statement of  
13 claim.

14 MR. VIOLI: The first time  
15 action --

16 PRESIDENT NARIMAN: That is  
17 your paragraph 15 and 16. This is the  
18 problem that I face, and nobody has  
19 answered me at all.

20 MR. VIOLI: Yeah, but --

21 MR. WEILER: I'm sorry.

22 PRESIDENT NARIMAN: It's quite  
23 all right. Paragraph 15 and 16 says  
24 that the limitation commences for the  
25 purposes of this article according to

0859

1 Grand River Arbitration  
2 the Claimants was when the first  
3 enforcement action against it took  
4 place.

5 MR. WEILER: Actually, it's not  
6 a statement of the law. It's simply a  
7 statement of fact, saying that this is  
8 the first time we heard about  
9 something. It doesn't say --

10 PRESIDENT NARIMAN: You are  
11 pleading that it is not barred by the  
12 limitation.

13 MR. WEILER: Correct.

14 PRESIDENT NARIMAN: Please  
15 follow this.

16 MR. WEILER: Correct.

17 PRESIDENT NARIMAN: You have  
18 not pleaded, and you have said -- this  
19 is the -- this breach, this loss took  
20 place.

21 Now, you have not distinguished  
22 between the three separate articles  
23 which you are supposed to have been  
24 breached -- one later, another still  
25 later, et cetera.

0860

1 Grand River Arbitration

2 MR. WEILER: No, because you  
3 would have to go by the earliest  
4 breach.

5 PRESIDENT NARIMAN: That's

6 right, the earliest breach.  
7 MR. WEILER: The  
8 earliest breach --  
9 PRESIDENT NARIMAN: Of  
10 whichever article of NAFTA.  
11 MR. WEILER: In this case, it  
12 would probably be article 1105.  
13 PRESIDENT NARIMAN: That fixes  
14 you. Therefore, within that  
15 three-year period, you have to bring  
16 your claim.  
17 MR. WEILER: Correct, which we  
18 did.  
19 PRESIDENT NARIMAN: I am not  
20 saying you didn't. That is your  
21 claim. Therefore, it is not as, if  
22 every time somebody enforces it, it  
23 gives you rise to a new cause of  
24 action against you.  
25 MR. WEILER: Correct, but it is  
0861  
1 Grand River Arbitration  
2 every time -- I mean, each measure is  
3 different. Each measure breaches.  
4 PRESIDENT NARIMAN: That gives  
5 you a right to claim every time.  
6 MR. WEILER: In respect of that  
7 measure.  
8 PRESIDENT NARIMAN: That is not  
9 how you have pleaded it.  
10 MR. WEILER: With respect,  
11 Mr. Chairman, it is.  
12 PRESIDENT NARIMAN: This is a  
13 very difficult way of reading this  
14 article. Otherwise, it could make  
15 a --  
16 MR. WEILER: Article 1101  
17 refers to measure.  
18 PRESIDENT NARIMAN: No, I know.  
19 I am saying investor may not make a  
20 claim if more than three years have  
21 elapsed from the date on which the  
22 investor first acquired -- investor  
23 should have first acquired knowledge  
24 of the breach.  
25 MR. WEILER: Yes, so the

0862

1 Grand River Arbitration  
2 alleged breach would be with  
3 respect --

4 PRESIDENT NARIMAN: Not --

5 MR. WEILER: No, it would be --  
6 so to have a breach, one would need a  
7 measure. And so -- because you can't  
8 have a breach without a measure. A  
9 measure is what breach is.

10 Therefore, by definition -- I  
11 have to look for a measure. Okay.  
12 When did I know about this measure?  
13 When did I know that this measure  
14 could be a breach, and when did it  
15 hurt me? When did I incur loss? And  
16 I would have to do that for each  
17 measure because a measure is what a  
18 breach is.

19 PRESIDENT NARIMAN: You have  
20 put in your claim the breach is of all  
21 of these articles, this article, and  
22 so on, and so forth and treated it  
23 this -- the way -- the first starting  
24 point for all three. That is your --  
25 that is your claim.

0863

1 Grand River Arbitration

2 MR. WEILER: I think -- I think  
3 I -- if I understand you correctly, we  
4 are in agreement.

5 PRESIDENT NARIMAN: Yes.

6 MR. VIOLI: Well, if I --

7 MR. WEILER: If I do understand  
8 correctly.

9 MR. VIOLI: My point is that  
10 this is a statement of fact saying the  
11 first time we had knowledge of  
12 anything that could be interpreted as  
13 a measure or an intended  
14 enforcement --

15 PRESIDENT NARIMAN: Breach.

16 MR. WEILER: No, of a measure  
17 that would result in a breach.

18 PRESIDENT NARIMAN: The breach,  
19 so it may be a breach of any of the

20 three articles that constitutes the  
21 first time when you are entitled to  
22 put in a claim.

23 MR. WEILER: This fixes the  
24 date with respect to that measure that  
25 we first learned about or could have

0864

1 Grand River Arbitration  
2 known, you know, could be said to  
3 know, because, of course, this isn't  
4 the Oregon letter, which, is -- as you  
5 know, Mr. Williams has said was not  
6 exactly the most clear thing. But,  
7 anyway, even assuming the worst case  
8 scenario, that letter triggers the  
9 date.

10 PRESIDENT NARIMAN: That is  
11 your case. That is not an assumption.  
12 That is what you have said.

13 MR. VIOLI: Now, if you go --  
14 let's go back. As I said the Missouri  
15 attorney general did this. If you go  
16 back -- no, no, go back to the  
17 presentation.

18 Go to the seizure receipt.

19 We see that on March -- that's  
20 two exhibits away.

21 We see that on March 1, 2006,  
22 three weeks ago, the Department of  
23 Revenue in Missouri seized products  
24 that were made by Grand River and  
25 being held by an Oklahoma distributor

0865

1 Grand River Arbitration  
2 in its Missouri warehouse.

3 So we see the seizure. The  
4 problem is that the injunction expired  
5 in 2004. What gave the attorney  
6 general grounds to seize Grand River's  
7 products in 2006? The injunction only  
8 lasts two years. It's the contraband  
9 law.

10 That's why the contraband law  
11 has a separate arm, injury loss,  
12 separate breach from the escrow  
13 statutes. So we see that in play, and

14 that was the purpose of that -- of  
15 that memo.

16 The other item is the Arizona  
17 letter, which marks that -- click on  
18 that. This is actually the first  
19 time -- the first time that they  
20 received any piece of paper that said  
21 you may -- that this law may apply to  
22 you is March of 2001.

23 It didn't say it does apply.  
24 It didn't say we are going to sue you.  
25 I didn't say we are going to enforce

0866

1 Grand River Arbitration  
2 it.

3 It says "if you are a  
4 manufacturer." The first time was  
5 March 12, 2001. I am not saying that  
6 there was a breach at that time, there  
7 was a loss at that time. That was the  
8 first piece of paper in their files.  
9 We scoured their files, questioned  
10 their -- the Claimants. This was the  
11 first time anything gave them notice  
12 that there was something that has  
13 potential application to them,  
14 March 2001.

15 The first time that they got  
16 notice of actual harm was in October  
17 of 2002, when the attorney general of  
18 Arizona wrote to -- who was -- I  
19 believe -- a former partner of  
20 Mr. Evans -- a former partner of the  
21 investors, and said:

22 "You know, we have an  
23 injunction against you, so you must --  
24 you are prohibited from selling Grand  
25 River's products."

0867

1 Grand River Arbitration  
2 Right, the July 2002  
3 injunction, the default judgment,  
4 Grand River never received this. And  
5 it was never enforced, as I said. To  
6 this day it has not been enforced.

7 But this is the first notice of

8 an actual physical taking from the  
9 Claimants. And we say -- go back to  
10 the presentation, if you would.

11 The point is that -- the point  
12 is that the test under the NAFTA, as  
13 we see it, is not when they should  
14 have anticipated a possibility of  
15 future loss or damage. You should  
16 have known when you got that letter in  
17 March of 2001 that you were going to  
18 get -- you were going to sustain  
19 damage or that you might sustain  
20 damage.

21 No. The test under NAFTA is,  
22 when you actually sustain loss or  
23 damage and had knowledge of that fact  
24 as well as knowledge of a breach.

25 MR. CROOK: Is that right,

0868

1 Grand River Arbitration  
2 Mr. Violi? Did you have actually have  
3 actual knowledge or knew or should  
4 have known?

5 MR. VIOLI: It's knew or should  
6 have known loss -- of loss or damage.  
7 It's not worded the best in the  
8 statute. It says, "knowledge or  
9 should have known"; and then the  
10 immediately -- the subordinating  
11 clause is "deals with breach"; then  
12 knowledge, then it says "knowledge or  
13 loss of damage."

14 So depending upon how you want  
15 to situate or read that subordinate  
16 clause and what it modifies, it would  
17 be -- one could say it's knowledge of  
18 the damage or loss. I am advised by  
19 NAFTA counsel that, no, it's  
20 constructive knowledge of the loss or  
21 damage, but either way, constructive  
22 knowledge --

23 PROFESSOR ANAYA: Is there --  
24 do you have clear authority somewhere  
25 that says it's not knowledge?

0869

1 Grand River Arbitration

2 MR. VIOLI: That it is  
3 actual -- that it requires actual  
4 knowledge?

5 PROFESSOR ANAYA: No, that it's  
6 not knowledge of a potential loss.

7 MR. VIOLI: Well, yes, well,  
8 I'll -- that is where I was going to  
9 go next.

10 In 1105 under the expropriation  
11 provision, it's actually the first  
12 time we see a time limitation in -- or  
13 anything that deals with time under  
14 NAFTA -- 1110 -- sorry. It's 1110.  
15 Excuse me.

16 And it says:  
17 "Compensation is to be paid for  
18 expropriation based on value of  
19 investment, quote, immediately before  
20 the expropriation took place."

21 So we know that there is a  
22 concept of expropriation actually  
23 taking place, which suggests that is  
24 what you need, an expropriation taking  
25 place. And then you must value it

0870

1 Grand River Arbitration  
2 immediately before for purposes of  
3 awarding damages.

4 The next subparagraph in 1110  
5 says:

6 "Compensation may not reflect  
7 change in value occurring because,  
8 quote, the intended expropriation had  
9 become known earlier."

10 What that means to me is that  
11 an intended expropriation, an  
12 anticipation of expropriation,  
13 knowledge that you might have your  
14 assets expropriated cannot affect the  
15 value and sort of this whole concept  
16 of actually having, you know,  
17 knowledge of --

18 PRESIDENT NARIMAN: What is the  
19 meaning of "incurred"? Does incurred  
20 postulate something different from  
21 "actually suffered"? I just want to



22 know from you.  
23 "Incurred," does it mean that,  
24 if a statute imposes some liability on  
25 you, you incurred that liability, or

0871

1 Grand River Arbitration  
2 have you not until someone enforces  
3 that statute against you?

4 MR. WEILER: Well, you have  
5 incurred liability. You have not  
6 incurred a loss, though. Loss is  
7 different from liability.

8 MR. VIOLI: The way I explained  
9 it, Mr. President, when I thought  
10 about it -- when we bought our NAFTA  
11 claim in 2000, would the federal  
12 government have said:

13 "Wait a minute. You haven't  
14 paid any escrow. How do you know this  
15 statute has applied to you? Where is  
16 your escrow account?"

17 This is the nature of an  
18 indemnity claim, this sort of  
19 expropriation.

20 PROFESSOR ANAYA: According to  
21 them, they wouldn't have said that.  
22 So let's not get into that. They seem  
23 to indicate they wouldn't have said  
24 that. They would have said whatever.

25 MR. VIOLI: I think that's

0872

1 Grand River Arbitration  
2 valid -- you would suffer loss or  
3 damage. That's right.

4 PROFESSOR ANAYA: Anyway, I  
5 just heard something that struck me,  
6 Mr. Weiler. There can be a liability  
7 without a loss. Now, wouldn't general  
8 accounting principles suggest that, if  
9 there is a liability, that shows up in  
10 an accounting statement as a loss?

11 MR. VIOLI: A contingent  
12 liability, a contingent liability? I  
13 don't know.

14 PROFESSOR ANAYA: I am asking.

15 MR. WEILER: No, if you knew

16 about it.  
17 PROFESSOR ANAYA: In your view.  
18 MR. WEILER: If you knew about  
19 it, of course, general accounting  
20 principles are not quite the same  
21 thing.  
22 PROFESSOR ANAYA: Why aren't  
23 they? That's what we are trying to  
24 learn, what is a loss.  
25 MR. VIOLI: A contingent

0873

1 Grand River Arbitration  
2 liability -- a contingent liability is  
3 not a loss under general accounting  
4 practices. It's not. It's not  
5 recorded as a loss on the books. It's  
6 not -- it's just that. It's a  
7 contingent liability.  
8 MR. CROOK: With that  
9 observation --  
10 PROFESSOR ANAYA: So he didn't  
11 say contingent liability. You are  
12 saying there is possibility of  
13 liability, not a liability. You meant  
14 a possibility of liability, not  
15 liability.  
16 MR. WEILER: I think he said  
17 that part.  
18 PROFESSOR ANAYA: Well, I am  
19 asking you because you said that -- do  
20 you guys have different arguments? I  
21 am trying to figure it out. You said  
22 there can be a liability, not a  
23 contingent liability, a liability, but  
24 not a loss. Is that right? Is that  
25 what you said? Did I understand that

0874

1 Grand River Arbitration  
2 correctly?  
3 MR. WEILER: You can have -- it  
4 is possible for -- under local law  
5 for -- I should say a possible -- this  
6 is in our alternative. Our primary  
7 argument is not, so keep in mind the  
8 alternative.  
9 PROFESSOR ANAYA: I understand.

10 MR. WEILER: In our own  
11 alternative, if you find that domestic  
12 liability accrued as of the date the  
13 measure was put in place, that would  
14 pretty much go to the breach. That  
15 would go to the breach. You say,  
16 okay. Well, then they are subjecting  
17 these investors do something, and that  
18 breach would take place at that time.

19 With regard to loss, they -- as  
20 is it turns out in this case, the  
21 loss -- in my submission, loss or  
22 damage is an actual honest to gosh  
23 loss. It's a physical, actual loss.  
24 Either you have incurred a liability  
25 or you have --

0875

1 Grand River Arbitration  
2 PROFESSOR ANAYA: You just  
3 said --

4 MR. WEILER: No, no, let me  
5 take -- it's not the right way to say  
6 it, because I don't mean a legal  
7 liability. You have incurred --

8 MR. VIOLI: You have paid.

9 MR. WEILER: You have paid  
10 something. Either you have paid  
11 something, or your ability to make  
12 something has been taken away. That  
13 is the best way to put it.

14 So in this case it would be  
15 either you have paid into escrow or  
16 you have paid a lawyer to defend you  
17 or you have been prohibited from  
18 making money in that state. So you  
19 have suffered a loss. You have either  
20 suffered a loss because you couldn't  
21 make money or because you had to pay  
22 money. That is what I mean.

23 So with regard to these  
24 statutes, they say that they came into  
25 place as of this date. These

0876

1 Grand River Arbitration  
2 Claimants were still doing business.  
3 Life was --

4 PROFESSOR ANAYA: I understand  
5 that. You don't have to go over that,  
6 again, Counsel.

7 MR. CROOK: Mr. Chairman, it  
8 occurs to me -- it's 4 o'clock. I  
9 wonder if it's time for us to sort of  
10 take stock of where the Claimants are,  
11 and if it is indeed the case we meet  
12 tomorrow, we may be -- people may need  
13 to make arrangements to tell their  
14 families they're not coming home and  
15 things like that. I wonder if it's  
16 perhaps time to take stock and then  
17 take a break.

18 MR. VIOLI: I think so. I have  
19 to -- let's see. We're going to go  
20 through what they presented, the three  
21 letters that they presented, the  
22 industry standard that they alleged.

23 PRESIDENT NARIMAN: Go through  
24 it.

25 MR. CROOK: Just to drive

0877

1 Grand River Arbitration  
2 through right now, Mr. Chairman.

3 PRESIDENT NARIMAN: I think so.  
4 (There was a discussion and  
5 break off the record.)

6 MR. VIOLI: As we have alleged,  
7 the first knowledge, not notice,  
8 because the NAFTA doesn't speak to  
9 notice -- we know that under legal  
10 standards there is a notice standard  
11 and there is a knowledge standard.

12 The first knowledge of  
13 expropriation, loss, or damage in the  
14 marketplace occurred when the  
15 claimants received that October 31,  
16 2002 letter. They say that damage may  
17 have occurred beforehand, but the  
18 first knowledge that the Claimants had  
19 of any kind of damage or loss --  
20 actual knowledge, I would have to say  
21 that would be October 31st, of 2002.

22 Separate from the marketplace,  
23 we have alleged that, in or about mid

24 2002, the Claimants retained counsel  
25 and were advised of the potential

0878

1 Grand River Arbitration  
2 application of the laws and their  
3 injunctive properties. But the  
4 potentiality doesn't equal breach or  
5 damage, under Claimants theory.

6 The MSA exemptions per se, in  
7 and of themselves, did not damage  
8 Claimants when they were granted. We  
9 have highlighted or sort of emphasized  
10 when they were granted. There were no  
11 escrow statutes in effect at the time  
12 the exemptions were granted nor  
13 certainty that the escrow statutes  
14 would be adopted.

15 When I say it was a fait  
16 accompli, it was going to happen, but  
17 these measures -- the escrow statutes  
18 which the are the measure we complain  
19 of, were not in effect at that time.

20 We know that there were troubles with  
21 adoption of the final wording of the  
22 escrow statutes even in 2001. And  
23 what you see is that a handful of  
24 states had passed an escrow statute.

25 Here is a memo dated

0879

1 Grand River Arbitration  
2 February 7th of 2001, by the National  
3 Association of Attorneys General, and  
4 it talks about "a means for resolving  
5 model statute qualification  
6 questions." "Model statute" is the  
7 escrow statutes.

8 So there were still issues in  
9 February of 2001, a month before -- a  
10 month and three years before the date  
11 that we filed our complaint. Go to  
12 the next one.

13 And then we see on March 21,  
14 2001, which is within the three years,  
15 we see that NAAG is writing, again,  
16 this time to Brown & Williamson; and  
17 it says, for the record:

18 "On February 7, 2001, the  
19 settling states sent to all  
20 participating manufacturers for their  
21 formal execution and agreement signed  
22 by the attorneys general of all  
23 settling states confirming the  
24 parties' mutual understanding that  
25 without any further action the

0880

1 Grand River Arbitration  
2 Nonparticipating Manufacturer  
3 statutes, the escrow statutes, enacted  
4 by 46 states, the District of Columbia  
5 and the Commonwealth of Puerto Rico,  
6 would, except for five states, all be  
7 considered model statutes under the  
8 Master Settlement Agreement."

9 What this means is that the  
10 escrow statutes, although passed, were  
11 not within the model -- the model  
12 agreement terms, and required  
13 amendment even before the allocable  
14 share amendment. They required  
15 amendment after the expiration or  
16 after the three-year bar.

17 With respect to the statutes of  
18 five states, Connecticut, Iowa,  
19 Kansas, Maryland, and Rhode Island,  
20 this agreement required the enactment  
21 of certain specified changes by April  
22 1, 2001.

23 "Three of the five states have  
24 enacted these changes or will do so by  
25 April 1, 2001. Connecticut and

0881

1 Grand River Arbitration  
2 Maryland expect to enact the specified  
3 changes by April 15th of 2001."

4 Next page, in other words:

5 "This agreement would extend  
6 the deadline for Connecticut and  
7 Maryland to enact the agreed upon  
8 changes by two weeks. I will, of  
9 course, be happy to answer any  
10 questions you may have concerning this  
11 matter."

12           So as we have said before, the  
13 Respondent is trying to group all of  
14 the statutes with the MSA and back  
15 date the time when there was a breach,  
16 a measure, a breach and loss or  
17 damage. And they do so in an effort  
18 to bring up the statute of  
19 limitations.

20           But we have here an  
21 acknowledgement a handful of states  
22 hadn't even had their escrow statutes  
23 in final form before we had the  
24 March 12th deadline.

25           And under the original -- go

0882

1           Grand River Arbitration  
2 back -- so under the original escrow  
3 statutes, in addition, Claimants  
4 continued to complete effectively. We  
5 talked about that under the allocable  
6 share amendment. The grant of the  
7 exemptions isn't really realized.  
8 Let's go to the next one.

9           The discrimination is not  
10 experienced until the escrow statute  
11 is amended. Before the amendment, the  
12 Claimants could continue to compete  
13 with the exempt companies. In fact,  
14 the exempt SPMs could pay more than  
15 the statute required as I told. If  
16 they had a small exemption and they  
17 timed it out.

18           Example, S&M brands, which is  
19 Exhibit 1 -- I think, what is it,  
20 P associate -- we have an article  
21 about S&M brands who was offered an  
22 exemption. They were personally  
23 invited by Joe Rice, that attorney,  
24 and said, you can have an exemption,  
25 and they rejected the exemption. And

0883

1           Grand River Arbitration  
2 they didn't say why, but one could  
3 believe that was for that reason.

4           And then, obviously, how could  
5 discrimination that does not cost a

6 disfavored party more cause damage to  
7 Claimants, if you go to the next one.  
8 There was no knowledge of even  
9 potential application of these  
10 measures, the three measures we  
11 allege.

12 Certainly, there was no  
13 knowledge of the contraband law, and  
14 no knowledge of the equity  
15 assessments, because they weren't even  
16 in effect on March 12, 2001.

17 But there wasn't even  
18 potential -- knowledge of even  
19 potential application of the measures  
20 prior to March 12th, 2001. The first  
21 notice -- again, notice being  
22 different than knowledge -- was the  
23 receipt by Grand River of the letter  
24 dated March 12, 2001, from the  
25 attorney general. But, again, we are  
0884

1 Grand River Arbitration  
2 talking about knowledge of a measure,  
3 knowledge of a breach of the NAFTA,  
4 and knowledge of loss or damage, all  
5 of that occurring. That certainly  
6 doesn't occur when someone sends you a  
7 letter on March 12, 2001 saying, "you  
8 may be a tobacco product  
9 manufacturer." You may put someone on  
10 notice, but it can't be knowledge of  
11 all of those things. It's clearly a  
12 distinction.

13 In the record, no mailing,  
14 formal demand, or even telephone call  
15 prior to that date. There was a  
16 mailing. We will get to that. There  
17 are three mailings apparently. Out of  
18 46 states, 38 had passed escrow  
19 statutes in 1999. All of them had  
20 passed it by 2000. They have only  
21 come up with three letters from two  
22 states. But we are essentially going  
23 to allow the tail to wag the dog,  
24 three letters from two state going to  
25 a ban -- is going to ban Claimants'



0885

1 Grand River Arbitration  
2 claim in all 46 states under the  
3 escrow statute, under the  
4 expropriation and the national treaty  
5 standards we have talked about, under  
6 the discrimination, and under the  
7 contraband laws, and the equity  
8 assessment, all because Respondent  
9 takes the position:

10 "Well, they all relate to the  
11 MSA, and we can back date them to the  
12 MSA," which is an absurdity because  
13 statutes that don't come into effect,  
14 obviously, can't be deemed a measure  
15 before the date they come in effect.

16 No certified mail, no return  
17 receipt requested, not even a  
18 telephone call. The letter that you  
19 see from Mr. Montour in November of  
20 1999 dealing with taxes in Missouri --  
21 I think it was; was it Missouri --  
22 leaves his phone number:

23 "Call me if there are any  
24 questions."

25 Is there an affidavit? Is

0886

1 Grand River Arbitration  
2 there anything that says, "we" so much  
3 as picked up the phone and said, you  
4 know, "we have an issue on who is the  
5 product manufacturer; you know, we are  
6 going to sue you if you don't"? No.  
7 And there is a phone call. They have  
8 nothing to hide. They left their  
9 phone number.

10 In response, Respondent argues  
11 that notice of the MSA equals  
12 knowledge of the measures at issue,  
13 that the industry standard presumes  
14 Claimants to have knowledge of the  
15 measure, their application to them,  
16 breach of the NAFTA, and loss or  
17 damage prior to March 2001.

18 They also point to the Missouri  
19 lawsuit filed against Claimants prior

20 to March 2001, and three mailings as I  
21 said before that were sent to the  
22 Claimants in 2000.

23 The notice of the MSA. The MSA  
24 is not a measure. There are three  
25 measures that we allege, in the

0887

1 Grand River Arbitration  
2 statement of claim at paragraph 15,  
3 the president spoke to. They are the  
4 escrow statutes. We didn't say as  
5 amended. We just said escrow  
6 statutes. Normally, when you plead,  
7 you plead the statute as you have it  
8 the day of your pleading. That is  
9 what we did.

10 If we needed to -- I am not  
11 aware of ever pleading a statute in  
12 its prior form, and, certainly, there  
13 would be no discrimination on their  
14 statute in the prior form. But that's  
15 what we have.

16 The MSA is not a measure. It  
17 was reasonable to conclude that it  
18 applied to others. A settlement by  
19 three, four companies, that were  
20 accused of wrongdoing, that were sued,  
21 and then entered into a settlement,  
22 why would I want to settle -- enter  
23 into a settlement that someone  
24 negotiated, which, in fact, freezes  
25 market share and does a number of

0888

1 Grand River Arbitration  
2 other things that have been  
3 recognized, including in the Forbes  
4 article that is in the record?

5 The exemptions were not public  
6 information. To the extent, they were  
7 in the Mealey's reporter, to the  
8 extent they were in the Lexis Nexis  
9 database, that's not public  
10 information; nor would someone have  
11 reason to believe, even if you read  
12 the MSA, it doesn't say an exemption.  
13 It says -- it doesn't even say

14 Subsequent Participating Manufacturers  
15 can join by a certain date or can  
16 join. It just says Subsequent  
17 Participating Manufacturers, no notice  
18 in some kind of Federal Register or  
19 anything.

20 So the exemptions were not  
21 public information. In fact, we know  
22 the process. An attorney went from  
23 company to company -- we are not aware  
24 of any company going a Native American  
25 enterprise in the states -- but went

0889

1 Grand River Arbitration  
2 from company to company and asked  
3 these companies if they wanted to  
4 join. But, certainly, whether they  
5 went to anybody else is somewhat  
6 irrelevant to these Claimants. They  
7 didn't go to the Claimants within  
8 60 days. When it really expired in 60  
9 days, then they added another 30 days  
10 by way of an extension.

11 Then, finally, without the  
12 amendment, the MSA exemptions -- the  
13 MSA and the exemptions could not  
14 discriminate in and of themselves. Go  
15 to the next slide.

16 Industry standard, in every  
17 case that I ever had, industry  
18 standard normally requires not the  
19 layers getting up there and saying:

20 "Oh, you should have read an  
21 article. This is what it required."

22 Industry standard requires  
23 expert factual proof. Even, not even  
24 an expert, they could have come with  
25 some company who said, "Yes, we

0890

1 Grand River Arbitration  
2 believe it was prudent or reasonable."  
3 It's only their claim of what the  
4 industry -- the standard in the  
5 industry required.

6 MR. CLODFELTER: We never made  
7 any argument about industry standard.

8 MR. VIOLI: It's implicit, what  
9 they should have know because they  
10 were the largest or soon to be the  
11 largest NPM, whatever the allegations  
12 were about they were in the market at  
13 the place at the time.

14 Where did the industry standard  
15 come from? I don't know. It's  
16 certainly -- there is no objective  
17 evidence as to what they should have  
18 known at the time. RJR, we saw in  
19 that exhibit, didn't even know about  
20 the enforcement. They thought there  
21 was only one enforcement action  
22 brought by the State of Nevada, which  
23 necessarily excludes "us." And that  
24 was as of February 2001. If RJR is  
25 not aware of enforcement efforts --

0891

1 Grand River Arbitration  
2 and this is a company who monitors to  
3 an extreme, to a fault almost, the  
4 market.

5 No uniform definition of a  
6 tobacco product manufacturer. What is  
7 the industry standard? Nothing. We  
8 have only ambiguity on that. As of  
9 early 2001, changes were being made  
10 even to the original escrow statutes.  
11 Those are the most recent slides which  
12 talk about the five states having to  
13 change their statute by April 15,  
14 2001.

15 In fact, logic and reason would  
16 suggest that the escrow statute did  
17 not apply. We have the Wisconsin  
18 order which said that. We have  
19 New York enforcement, all of the  
20 products -- virtually, all of the  
21 products in 1999 and before were  
22 distributed out of New York; but all  
23 of the products in early 1999, through  
24 1999, and certainly all of the Seneca  
25 products up until 2003, 2002, went

0892

1 Grand River Arbitration

2 through northern New York, Native  
3 Wholesale Supply. And New York never  
4 enforced the escrow statutes through  
5 that -- to either one of these  
6 companies.

7 So they are doing business as  
8 they have done as Native Americans --  
9 probably the first -- not probably --  
10 they were the first to cultivate,  
11 trade, harvest, engage in commerce in  
12 this product in this hemisphere for --  
13 perhaps for thousands of years. They  
14 continue to do so without incident  
15 under treaties that were given to them  
16 and recognized their immemorial  
17 rights.

18 They did that. They had no  
19 reason to expect that activity engaged  
20 solely on Native land -- and that's  
21 the only activity that they engaged  
22 in -- whether someone took their  
23 product and took it off the  
24 reservation, that has nothing to do  
25 with their efforts. That is the

0893

1 Grand River Arbitration  
2 obligations of those who do it.

3 In any event, that immemorial  
4 right seems to have been breached; but  
5 certainly it should not -- given  
6 New York's recognition of that right,  
7 there should be no expectation that  
8 the other states would proceed  
9 otherwise.

10 The Missouri lawsuit -- go to  
11 the next slide -- two of them,  
12 apparently, they were never served on  
13 the Claimants. Excuse me. We can  
14 look at the inconsistencies in the  
15 proof of service.

16 Let's go to the summons and  
17 complaint, and this I find somewhat  
18 odd. We have the Missouri attorney  
19 general apparently writing a letter in  
20 March of 2000 -- March 25th of 2000.  
21 And in any event, the summons and

22 complaint that was served in June --  
23 or not served, but filed in June, it  
24 says, paragraph three:

25 "Native Tobacco Direct is an  
0894

1 Grand River Arbitration  
2 entity whose precise nature is  
3 unknown, whose principal place of  
4 business is in Salamanca, New York,  
5 and may be served at 137 South Main  
6 Street."

7 This is June of 2000. They  
8 acknowledge -- it's their attorney  
9 general -- acknowledges in his  
10 complaint. That's where their  
11 business address is. That's where  
12 they can be served.

13 Why did he serve the complaint  
14 on Holley John, apparently, at 14411  
15 Four Mile Level Road? Why? He has  
16 got a summons and complaint. If you  
17 look at the summons, it says -- let's  
18 turn the page. The summons says it,  
19 137 South Main Street. Why does he go  
20 to the wife of a shareholder and serve  
21 her?

22 Go to the next exhibit.

23 Nothing to hide. We asked  
24 about documents about moving, and so  
25 forth. We have a federal government

0895

1 Grand River Arbitration  
2 document, a monthly report that Native  
3 Tobacco Direct was required to file  
4 every month. What is the address?  
5 It's dated March 1st or 31st. It's  
6 for the 1st and the 31st of the  
7 month -- excuse me -- signed by  
8 Mr. Arthur Montour, Claimant Arthur  
9 Montour.

10 What is the address? Do they  
11 have something to hide? It says 137  
12 South Main Street. This is the same  
13 address that was in the Missouri  
14 attorney general's summons and  
15 complaint. Why did he serve a

16 complaint allegedly on Holley John --  
17 it was defective we know because the  
18 February 19th service -- it had to be  
19 replaced with an April 19th service  
20 which was after the cutoff date.

21 But why does he serve Holley  
22 John at 14411? Because there was a  
23 letter perhaps that Mr. Montour wrote  
24 in November of 1999 that had the  
25 letterhead of 14411? That may be

0896

1 Grand River Arbitration  
2 true, but as of June of 2000 we know  
3 from the record that NTD did business  
4 exclusively with NWS at a total  
5 different address, 137 South Main  
6 Street. Do you want to go to the  
7 next?

8 Then we brought up yesterday,  
9 it was a good faith mistake,  
10 apparently -- I didn't get quite the  
11 explanation -- but the Missouri  
12 attorney general in that complaint  
13 that was filed in June of 2000, that  
14 says that Native Tobacco Direct is  
15 doing business at 137 South Main and  
16 can be served there.

17 Later on in the complaint, we  
18 talked about this John Quinlan matter,  
19 and he asked the judge for default and  
20 penalties and knowing violations  
21 because the North Dakota attorney  
22 general sent a letter the previous  
23 year, or the North Dakota compliance  
24 officer, sent a letter to Grand River  
25 in the previous year.

0897

1 Grand River Arbitration  
2 So to the wrong -- but we know  
3 that that letter was never sent, and  
4 the Respondent admits that. And that  
5 was a good faith mistake. But as I  
6 said before, the attorney general can  
7 give a good faith mistake as to why he  
8 did something or he said something he  
9 shouldn't have or maybe that was

10 incorrect; but when these Claimants  
11 have a good faith basis or even come  
12 to court and say, "We did not, we did  
13 not receive a complaint," suddenly  
14 that's untenable, inexcusable. That  
15 we submit is not permitted or should  
16 not be accepted.

17 Okay. On the Missouri  
18 action -- and this is where I wanted  
19 to talk about some of the -- they  
20 point so many fingers at us, about not  
21 knowing, and you receive letters and  
22 you receive service. In the June --  
23 the June -- the June complaint that  
24 was served sometime in 2001,  
25 apparently, the record indicates that

0898

1 Grand River Arbitration  
2 it was properly served in April of  
3 2001, which by the way would make it  
4 timely. But it was -- it was  
5 allegedly served -- the first  
6 affidavit of service in the file says  
7 February 19, 2001.

8 But we know that the hearing --  
9 the hearing on the -- there was a  
10 hearing held on February 26 in the  
11 Missouri case. And in that hearing,  
12 the Missouri attorney general  
13 represented to the judge, all the  
14 New York defendants haven't been  
15 served yet. That was the  
16 representation to the judge on  
17 February 26th. All of the New York  
18 defendants have not been served yet.

19 But if you look at the docket  
20 sheet and if you look at the affidavit  
21 of ever service, all the New York  
22 defendants were allegedly served on  
23 February 19, 2001. How could the  
24 Missouri attorney general represent to  
25 the court that all of the New York

0899

1 Grand River Arbitration  
2 attorneys general -- all of the  
3 New York defendants had not been



4 served when the fact -- when the  
5 affidavits of service say that all of  
6 the New York defendants were served?  
7 It's completely inconsistent, right?  
8 All New York defendants have not been  
9 served yet, February 26th.

10 February 19th, affidavits of  
11 service, all of the New York  
12 defendants have been served.

13 It raises questions. I am not  
14 saying it's intentional, but again  
15 maybe there is a good faith excuse.  
16 But why are all of the good faith  
17 excuses allowable for the MSA states,  
18 but not the Claimants? I mean, we are  
19 talking about the destruction of these  
20 Claimants' business, their livelihood,  
21 and the families and members of the  
22 Nations that they support.

23 If you look at the summons that  
24 was allegedly served on the Seneca  
25 Nation, it actually says NTD, Native

0900

1 Grand River Arbitration  
2 Tobacco Direct. It doesn't say -- it  
3 doesn't say Seneca Nation. I don't  
4 know why they served the president of  
5 Seneca Nation with a lawsuit that says  
6 it's against Seneca Nations Inc.; and  
7 the summons that was actually served  
8 says Native Tobacco Direct, 137 South  
9 Main Street, Salamanca, New York.  
10 But, nonetheless, that is what we are  
11 faced with.

12 There was an attempted service  
13 on Grand River on April 10, 2001. The  
14 attempted service on Grand River on  
15 April 10th was to an owner, apparently  
16 an owner. It says the owner of Grand  
17 River. There was no owner of Grand  
18 River. There are shareholders of  
19 Grand River who wouldn't be served  
20 anyway. You have to serve an officer  
21 or director.

22 But they served it at the old  
23 address, apparently, on April 10th.

24 But it doesn't matter. Even if they  
25 served the complaint on April 10th,  
0901

1 Grand River Arbitration  
2 it's within the three-year statute of  
3 limitations, so it's of no moment.

4 So the complaint in the  
5 Missouri action that the Respondents  
6 have brought up actually wasn't served  
7 on Grand River, who is the company  
8 that they allege owes the payment. It  
9 wasn't served on them until within the  
10 three years of the statute of  
11 limitations.

12 Recall that, in the Missouri  
13 action, they dismiss the case as to  
14 Native Tobacco Direct and all of the  
15 other Claimants who they allege were  
16 served on February 19th, but then had  
17 to be re-served in April.

18 Now, in the record, we also  
19 mention that. In the federal -- Grand  
20 River's federal lawsuit, I mean, this  
21 is a good point to bring out -- none  
22 of Claimants' argument here --

23 PRESIDENT NARIMAN: Isn't the  
24 suit --

25 MR. VIOLI: Against 31 states.

0902

1 Grand River Arbitration

2 PRESIDENT NARIMAN: What is  
3 referred to in that letter,  
4 Exhibit 17, your Claimants' documents,  
5 that letter, the Seneca attorney  
6 general who gives you advice and tells  
7 you something.

8 MR. VIOLI: No, no.

9 PRESIDENT NARIMAN: What is  
10 that suit mentioned in the first  
11 paragraph?

12 MR. VIOLI: What -- that is the  
13 federal case. Yes. Okay. I'm sorry.

14 PRESIDENT NARIMAN: That is the  
15 federal case.

16 MR. VIOLI: That was submitted  
17 in the Federal case about how none of

18 the Seneca Nation was apprised of the  
19 MSA.

20 PRESIDENT NARIMAN: That is the  
21 case you are referring to.

22 MR. VIOLI: That is the case.  
23 We have some additional materials from  
24 that case in the record.

25 But what happened was, as I

0903

1 Grand River Arbitration  
2 said, Grand River scoured their files.  
3 They see this letter. It's the first  
4 notice they have. We have  
5 communications in May. We say  
6 March 2001 was the first time they  
7 received this notice from the State of  
8 Oregon. We filed lawsuit in July of  
9 2002 to get a declaration to say that  
10 we can't be liable. During the  
11 course --

12 PRESIDENT NARIMAN: July 2002.

13 MR. VIOLI: Yes, filed the  
14 lawsuit against 31 states to say that  
15 we are not liable under these escrow  
16 statutes.

17 PRESIDENT NARIMAN: Is that  
18 complaint on record?

19 MR. VIOLI: Yes, it's in this  
20 record.

21 MR. CROOK: It's in the record.

22 MR. VIOLI: So we did step up.  
23 The states started to press Grand  
24 Jury.

25 PRESIDENT NARIMAN: And what

0904

1 Grand River Arbitration  
2 happened then.

3 MR. VIOLI: We are still  
4 litigating. Under NAFTA you can get  
5 damages. Under US law you cannot get  
6 damages from the states. The only  
7 thing you can get is an injunction to  
8 stop the harm. We did. We went and  
9 we said listen --

10 PRESIDENT NARIMAN: Have they  
11 filed the defense?

12 MR. VIOLI: Yes, they have been  
13 fighting me.  
14 PRESIDENT NARIMAN: By their  
15 defense.  
16 MR. VIOLI: Yes, they have.  
17 They dismissed the case. They want  
18 the case dismissed. They said you  
19 have to challenge us in 46 or 31  
20 states, as that may have been at the  
21 time. They told us:  
22 "We don't want to hear your  
23 claims in one court in New York. Go  
24 to court against us in all 31 states."  
25 Anyway --

0905

1 Grand River Arbitration  
2 PROFESSOR ANAYA: So you were  
3 in Federal Court on claims against all  
4 of the states?  
5 MR. VIOLI: Excuse me.  
6 PROFESSOR ANAYA: You were in  
7 Federal Court against 31 states.  
8 MR. VIOLI: Against 31 states  
9 for injunctive relief.  
10 PRESIDENT NARIMAN: What did  
11 the Court of Appeals say?  
12 MR. VIOLI: The lower court  
13 judge agreed with the states. The  
14 Court of Appeals said:  
15 "No. You have a valid commerce  
16 clause claim and a valid antitrust  
17 claim. And all 31 attorneys general  
18 have to come to New York."  
19 But if we ultimately win, you  
20 only get injunctive relief.  
21 But the point was that, after  
22 four or five years, when we wanted to  
23 resolve this, at the time we were  
24 threatened, we gave the opportunity --  
25 the venue. We stepped up to the

0906

1 Grand River Arbitration  
2 plate.  
3 PRESIDENT NARIMAN: I am just  
4 asking: Suppose you succeed in that  
5 suit?

6 MR. VIOLI: Yes.  
7 MR. WEILER: That will mitigate  
8 the damages.  
9 MR. VIOLI: That will mitigate  
10 damages here because then we cannot  
11 incur damages after the injunction  
12 would issue. But all the damages that  
13 we have sustained until now, we would  
14 have the money we have gotten paid,  
15 because, once you pay a state -- even  
16 though the escrow, it's more like the  
17 penalties. Once you pay a state --  
18 PRESIDENT NARIMAN: They never  
19 pay back.  
20 MR. VIOLI: They don't have to,  
21 I don't think -- it's an 11th  
22 amendment or something. They can't  
23 get the money out of the treasury for  
24 the state.  
25 But the point is, so we did do  
0907

1 Grand River Arbitration  
2 something in July of 2002. We brought  
3 and tell the states: "Come clean.  
4 Let's litigate this issue." They  
5 wanted no part. They wanted no part.  
6 They wanted to divide and conquer.

7 PRESIDENT NARIMAN: What is the  
8 stage of that litigation?

9 MR. VIOLI: Right now, we just  
10 got back from the Court of Appeals.  
11 We are now with 31 states -- against  
12 31 states to get to the merits of the  
13 case.

14 PRESIDENT NARIMAN: In which  
15 court?

16 MR. VIOLI: The New York  
17 Federal Court.

18 PRESIDENT NARIMAN: And you can  
19 agitate all of those -- that entire  
20 thing in that case.

21 MR. VIOLI: We can only  
22 agitate -- we can't agitate NAFTA. We  
23 can't get damages.

24 PRESIDENT NARIMAN: You can  
25 agitate your claim in that suit in the

0908

1 Grand River Arbitration

2 New York court.

3 MR. VIOLI: Constitutional law,  
4 we have two claims that remain,  
5 antitrust and constitutional law. And  
6 as I said, the judge dismissed the  
7 Indian Commerce Clause claim because  
8 he said the escrow statutes don't  
9 apply on reservations. Unfortunately,  
10 the states may read it a different  
11 way.

12 But the point is that we did.  
13 We did do something. And we went in  
14 and tried to get the claim resolved.  
15 But they would have none of it.

16 But the point of the federal  
17 action is that, in that federal  
18 action, we put everything we had  
19 before the federal judge. We said:

20 "Look, Judge, we are getting  
21 threatened. Here is our evidence of  
22 getting threatened."

23 And we put in the Missouri --  
24 the Oregon letter, you know, the  
25 Oregon 2001 letter to show the first

0909

1 Grand River Arbitration

2 date. So back in July of 2002, almost  
3 four years ago, we told the federal  
4 judge:

5 "We are getting threatened.  
6 Here is our first notice of lawsuit, a  
7 threat. They are coming after us,  
8 Judge. We want to get this -- we want  
9 to get this decided, July 2002. Let's  
10 have them all come here and decide the  
11 issue."

12 As I said they would have none  
13 of it, none of it. What they did was  
14 they filed a pleading in that  
15 proceeding, which is in the record;  
16 and they listed several cases that the  
17 states have brought against Grand  
18 River. And they said:

19 "Judge, you could dismiss this

20 case because Grand River should have  
21 to litigate this case and these four  
22 or five cases that are pending against  
23 Grand River in the states."

24 They didn't include the  
25 Missouri action. They are telling us

0910

1 Grand River Arbitration  
2 that these are cases that are pending  
3 for the second Missouri action. They  
4 surely didn't include the first  
5 Missouri action. They didn't include  
6 the second one.

7 At the time of that federal  
8 action, when they made that  
9 submission, not even they told us  
10 about the Missouri action. So we did  
11 not know about it, because of lack of  
12 service; but not only that, they  
13 didn't bring it to the attention when  
14 they were telling the federal judge,  
15 "These are the cases against Grand  
16 River, Federal Judge." Why didn't  
17 they bring them? They listed them  
18 all, but they didn't list Missouri.

19 MR. CROOK: Now, is that  
20 correct? Does that document on its  
21 face purport to be a complete listing?

22 MR. VIOLI: It says these are  
23 the cases pending against the  
24 Claimants.

25 MR. CROOK: We can look at the

0911

1 Grand River Arbitration  
2 document, but I don't remember it  
3 quite being that categorical. We will  
4 have to look at the document.

5 MR. VIOLI: It says, these are  
6 the cases -- I don't know if it says  
7 these are all of the cases. But why  
8 wouldn't they bring -- they certainly  
9 named every one but the Missouri case.

10 MR. CROOK: We will look at the  
11 document in.

12 MR. VIOLI: Yes, if it doesn't,  
13 that's -- if it doesn't purport to say

14 that, that is the only case that is  
15 not listed, that is within -- I went  
16 through their list that they put in  
17 the record of all the cases against  
18 Grand River. And, you know, as of the  
19 time -- and I don't know why they  
20 excluded the Missouri case, but they  
21 did.

22 So we didn't have even  
23 notice -- when the Missouri attorney  
24 general was sued in New York, he had  
25 an opportunity to say:

0912

1 Grand River Arbitration  
2 "You can't; you -- Judge,  
3 dismiss the case because we have got a  
4 Missouri proceeding, an antecedent  
5 Missouri proceeding."

6 He didn't even say that.

7 So the point I guess I am  
8 trying to make on all of this is  
9 that -- and as I said when it was --  
10 the third Missouri action was brought  
11 in, Grand River stepped up to the  
12 plate and we are defending that case  
13 in Missouri, when we heard about it,  
14 knew about it, went in and took care  
15 of it.

16 PRESIDENT NARIMAN: Did you  
17 take any reservation point in that  
18 case? Did you say that, because you  
19 were operating from a tribal  
20 reservation, therefore, you are not  
21 liable at all?

22 MR. VIOLI: In the New York  
23 case.

24 PRESIDENT NARIMAN: Yes.

25 MR. VIOLI: Yes.

0913

1 Grand River Arbitration

2 PRESIDENT NARIMAN: You said  
3 that.

4 MR. VIOLI: The Judge said --  
5 he threw it out, but he said something  
6 to the effect that the escrow statute  
7 doesn't apply on reservations. But



8 the New York attorney general wrote  
9 the brief. And he said the escrow  
10 statute doesn't apply on reservation.  
11 PRESIDENT NARIMAN: What did  
12 the Court of Appeals say?  
13 MR. VIOLI: They did not  
14 reinstate the Indian Commerce Clause.  
15 MR. WEILER: Even though in  
16 other states they do apply it.  
17 MR. VIOLI: What we said --  
18 they do apply it. We tried to say:  
19 "But I know the New York  
20 attorney general is not applying it on  
21 reservations. But the Oklahoma  
22 attorney general is, Judge, You know,  
23 these others."  
24 PROFESSOR ANAYA: That issue is  
25 not alive.

0914

1 Grand River Arbitration  
2 MR. VIOLI: But we didn't sue  
3 Oklahoma.  
4 PRESIDENT NARIMAN: That is not  
5 a live issue.  
6 MR. VIOLI: Not in that case.  
7 PROFESSOR ANAYA: What is live  
8 in that case?  
9 MR. VIOLI: Extra  
10 territoriality of the escrow statutes.  
11 PRESIDENT NARIMAN: That means  
12 it can't apply to Canada.  
13 MR. VIOLI: Can't apply to  
14 Canada, but, more than that, it really  
15 has to do with -- the way the MSA is  
16 structured is that it tries to set up  
17 a uniform system pricing or  
18 allocation, a national regime. One  
19 state, two states 46 states can't do  
20 that. That's why we have a federal  
21 government.  
22 They are the only ones who can  
23 make national policy, set uniform  
24 prices. The failure to do so violates  
25 the commerce clause, and it violates

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1 Grand River Arbitration

2 the antitrust act, the Sherman  
3 federal -- the federal antitrust laws,  
4 the supreme law of the land.

5 The point I'm trying to make is  
6 that none of our arguments are minted  
7 for arbitration. Everything we have  
8 said, since day one, 2002, has been  
9 100 percent consistent in this case.

10 The first notice -- we received  
11 notice -- not knowledge -- was March  
12 of 2001. We are not coming to you  
13 saying we are trying to back date the  
14 dates. No, no.

15 In the Federal Court, we said  
16 this four years ago. The Missouri  
17 attorney general, four years ago,  
18 didn't even bring up the Missouri  
19 case. They didn't even say that they  
20 had enforcement actions against us or  
21 lawsuits against us prior to March 12,  
22 2001, at that time. Nothing that we  
23 are doing with this panel in this  
24 proceeding is minted or crafted for  
25 this case -- it's -- to sort of

0916

1 Grand River Arbitration  
2 construct some kind of defeat of the  
3 statute of limitations. That is not  
4 what we are here -- that's not what we  
5 are all about.

6 Respondent, however, is trying  
7 earnestly to back date, trying so hard  
8 to get everything before March 12,  
9 2001. I have never seen it before.

10 They offered eight -- eight triggering  
11 dates for the statute of limitations.

12 Yesterday, they said one:

13 "When your product goes into  
14 the state, that is when you are  
15 liable. That is when loss occurs, if  
16 at all, if at all."

17 So, originally, they offered  
18 eight: When the MSA was negotiated,  
19 when it was executed, when the  
20 exemptions were given, when the  
21 exemptions expired, when the escrow

22 statutes were passed, when you receive  
23 the letter when the escrow statutes  
24 were passed -- everything, they tried  
25 to get before March 12, 2001.

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1 Grand River Arbitration

2 Never did they say:

3 "Oh, but, you know, you also  
4 suffered loss or damage, or you did  
5 suffer loss or damage. There is a  
6 possibility that you suffered loss or  
7 damage after March 12, 2001."

8 Their whole argument, their  
9 whole case is on a construct to try  
10 back date everything before the  
11 statute of limitations.

12 Our case for the past four  
13 years has been 100 percent consistent.  
14 They have waffled. They have gone:

15 "Oh, it's this. It's this.  
16 It's that."

17 We have never said -- we have  
18 never deviated from our position on  
19 that score. Okay. Let's go to the  
20 next slide. I want to go to the three  
21 letters because we don't have -- it's  
22 5:02.

23 (There was a discussion off the  
24 record.)

25 MR. VIOLI: Mr. Chairman, you

0918

1 Grand River Arbitration

2 asked about some proof of documents  
3 that show change of address. In fact,  
4 I have documents certified by the  
5 Canadian Federal Government which show  
6 addresses at different points in time,  
7 which -- I will do that at the end so  
8 that they can address it; we can  
9 address it tomorrow.

10 The Iowa letter, can we go to  
11 the Iowa letter, please, the next  
12 exhibit.

13 MR. WEILER: Next page like  
14 that.

15 MR. VIOLI: Respondent attaches

16 three letters, brings to the point  
17 three letters. Respondent's  
18 Exhibit 129 is an Iowa letter dated  
19 October 11, 2000. It purports to  
20 attach a copy of the statute, but the  
21 statute that is attached is dated  
22 after January of 2001.

23 How can you write a letter to  
24 Native Tobacco Direct at 14411,  
25 whatever the road is -- how could you

0919

1 Grand River Arbitration  
2 write a letter in October of 2000 and  
3 attach a statute that is printed in  
4 2001?

5 There may be a good faith  
6 explanation, but the point is that was  
7 put into the record without an  
8 affidavit, without any type of good  
9 faith explanation; and, now, we are  
10 asked to respond.

11 What I am telling you is that I  
12 think -- from my personal experience,  
13 and from what seems to be the case, is  
14 that the states just rushed with mass  
15 mailings -- huge, 250 at a time, maybe  
16 even with the bulk postage. They  
17 didn't put the attachments -- but to  
18 say -- it all raises so many questions  
19 as to really the veracity and the  
20 probity and the certainty of this all  
21 because we know for certain that that  
22 letter, if it did go out, didn't have  
23 a 2001 printout on it. It's  
24 impossible.

25 So it speaks to potential NPM,

0920

1 Grand River Arbitration  
2 which the Respondent didn't mention.  
3 It says it's going out to potential  
4 NPMs, and, if you don't respond, you  
5 will be deemed the manufacturer. Iowa  
6 never sued this company. If they were  
7 going to be deemed manufacturer --  
8 there was no response, right. This is  
9 what Mr. Teague says, no response.

10           The letter says: "If you don't  
11 respond, you are going to be deemed a  
12 manufacturer." Why didn't Iowa sue  
13 that company then? They didn't. They  
14 didn't.

15           PRESIDENT NARIMAN: And you  
16 have deposited nothing in escrow then.

17           MR. VIOLI: For Iowa, no.

18           MR. CLODFELTER: Before you go  
19 on --

20           MS. GUYMON: Would the Tribunal  
21 like the explanation now for why --

22           MR. CLODFELTER: He questioned  
23 our veracity.

24           MR. VIOLI: No, no, not yours,  
25 the MSA's.

0921

1           Grand River Arbitration

2           MR. CLODFELTER: We are the  
3 ones that put the exhibit in. At  
4 least, let us explain why it had a  
5 different date.

6           MR. VIOLI: But my point is --

7           MR. CLODFELTER: You have  
8 raised it three times now and cut us  
9 off.

10           MR. VIOLI: Mr. Clodfelter, I  
11 accept any explanation you want to  
12 give. But my point is that it's good  
13 faith -- why is it good faith when  
14 these people don't receive a letter, a  
15 mass mailing -- why is that so  
16 incredible, unintelligible, and bad  
17 faith?

18           MR. CLODFELTER: We will argue  
19 the letters in our rebuttal tomorrow,  
20 but we would like to explain. What  
21 you suggested now is an erroneous  
22 conclusion, and offer that to the  
23 Tribunal.

24           MR. VIOLI: Actually, I don't  
25 have much time; but if we had time at

0922

1           Grand River Arbitration

2           the end I would be more than happy.

3           Okay. Let me get right to it.

4 Sent to the wrong address -- we know  
5 it was sent to the wrong address  
6 because it's October of 2000.  
7 Mr. Montour's relationship with Ross  
8 John -- severed, gone. There is an  
9 assignment agreement in the record --  
10 June 2000, Mr. Montour took over the  
11 operations of Native Tobacco Direct.  
12 He didn't take over the full stock  
13 ownership, but he was the sole manager  
14 and had the operations completely at a  
15 separate address.

16 Let's look -- if we look at the  
17 Iowa revenue letter, that is  
18 April 7th, right. And I believe that  
19 was sent "To Whom It May Concern"; but  
20 there is a spreadsheet that says it  
21 was sent to Grand River. Again,  
22 mailed to the wrong address. It says,  
23 quote, if -- well -- "if you are a TPM  
24 selling cigarettes to consumers in  
25 Iowa." This importer -- this Claimant

0923

1 Grand River Arbitration  
2 never sold to consumers in Iowa.  
3 Someone else -- actually, the  
4 cigarettes, we think, went to the  
5 Hochunks in Nebraska, and then the  
6 Hochunks sell it to Macy or -- or I  
7 don't know if it's Omaha -- it may be  
8 Macy in Omaha. Then it was taken off  
9 reservation. So it was like three or  
10 four parties removed.

11 But the bottom line is that  
12 these Claimants did not sell  
13 cigarettes to consumers in Iowa. No  
14 copy of the statute attached. The  
15 exhibit says a copy attached, but  
16 there is no copy attached even in  
17 their own exhibit.

18 So here under evidentiary  
19 rules, its an incomplete exhibit -- I  
20 don't know what it is; I forget the  
21 provision. But if the document says  
22 this is a letter to you and here is an  
23 attachment, it doesn't have the

24 attachment in the record. They didn't  
25 put the attachment in there. For

0924

1 Grand River Arbitration  
2 those grounds alone, the document  
3 should be dismissed from the  
4 proceeding.

5 MR. CROOK: By that standard a  
6 lot of your evidence would go out,  
7 Mr. Violi.

8 MR. VIOLI: There are no  
9 attachments?

10 MR. CROOK: Yes.

11 MR. VIOLI: Everything that was  
12 in the business record, the company's  
13 records, that are business records,  
14 have been attached with all  
15 attachments.

16 That Oregon letter -- that  
17 Oregon letter of March 14th -- another  
18 example -- that is a good point,  
19 Mr. Crook -- the March 14, 2001  
20 letter, the first letter that Grand  
21 River received, it says a copy of the  
22 statute or some kind of explanation  
23 attached. I have seen the files.  
24 They have seen the files. There is no  
25 copy of that attached, just that first

0925

1 Grand River Arbitration  
2 page.

3 Consistent with what we have  
4 seen here, that the April 7th letter  
5 doesn't have an attachment, not even  
6 here. The April -- the October 11th  
7 letter, it has an attachment, but it's  
8 not the attachment that was sent with  
9 the -- couldn't be the attachment that  
10 was sent with the letter. It's  
11 something that maybe they -- to record  
12 or replace it. I don't know, but  
13 let's just say it was a good faith  
14 whatever.

15 But we know it doesn't have it.  
16 It's not in the record. It's  
17 incomplete. It's not an accurate

18 description.  
19 If you read it, it says:  
20 "If your cigarettes are sold in  
21 Iowa, you just do this, deposit, open  
22 an escrow account and deposit money."  
23 That's not the law. The law  
24 is, if your cigarettes are sold in  
25 Iowa -- and this goes to did you know

0926

1 Grand River Arbitration  
2 about the MSA -- if your cigarettes  
3 are sold in Iowa, you must do one of  
4 two things -- join the MSA or deposit  
5 an escrow. They never said that, no  
6 invitation to join the MSA in those  
7 letters.  
8 PRESIDENT NARIMAN: There is no  
9 enforcement by Iowa against you.  
10 MR. VIOLI: There was  
11 subsequently much later.  
12 PRESIDENT NARIMAN: When?  
13 MR. VIOLI: 2001 or 2002.  
14 PRESIDENT NARIMAN: Where is  
15 that? Where is that enforcement?  
16 MR. VIOLI: Late 2001.  
17 PRESIDENT NARIMAN: Where is  
18 that later enforcement?  
19 MR. VIOLI: I don't know. They  
20 have -- they have it.  
21 PRESIDENT NARIMAN: Is that on  
22 record?  
23 MR. VIOLI: They have the case.  
24 MR. CROOK: It's in the record.  
25 MR. VIOLI: They have it in the

0927

1 Grand River Arbitration  
2 record.  
3 PRESIDENT NARIMAN: So just a  
4 minute. Therefore, when it says  
5 that -- you said that: "It was never  
6 enforced against us."  
7 MR. VIOLI: Yes.  
8 PRESIDENT NARIMAN: It was  
9 enforced later.  
10 MR. VIOLI: It wasn't enforced  
11 against that company, see. It said:



12 "If you do not respond to this  
13 letter" -- I'm sorry. It was a letter  
14 to Native Tobacco Direct, the  
15 importer. It says:

16 "If you do not respond to this  
17 letter, we will assume you are the  
18 manufacturer."

19 But they never did what the  
20 letter said they would do.

21 PRESIDENT NARIMAN: But  
22 enforced against whom?

23 MR. VIOLI: Grand River, I  
24 believe. It's in your -- their  
25 submissions. I have never seen it

0928

1 Grand River Arbitration  
2 before. I think it's in your  
3 submissions.

4 PRESIDENT NARIMAN: Not  
5 submissions. Is that document on  
6 record?

7 MS. GUYMON: The Iowa lawsuit  
8 against Grand River, yes, tab 45.

9 PRESIDENT NARIMAN: That's  
10 against Grand River?

11 MS. GUYMON: Yes, sir.

12 MR. VIOLI: Not against the  
13 person who received that letter.  
14 Well --

15 PRESIDENT NARIMAN: That letter  
16 was not sent to Grand River?

17 MR. VIOLI: No. The Montour  
18 letter, they point out -- by  
19 Ms. Montour, she wrote a letter  
20 because White River Distributing  
21 wanted to get a permit, a license in  
22 Missouri. So Ms. Montour wrote a  
23 letter to the tax department in  
24 Missouri saying that they're a  
25 designated wholesaler or distributor,

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1 Grand River Arbitration  
2 which is guess is what you need to --  
3 you need to get some kind of  
4 confirmation by a manufacturer in  
5 Iowa, perhaps -- or Missouri -- excuse

6 me. She wrote the letter to Missouri  
7 in March of 1999.

8 In March of 1999, or  
9 thereabouts, what is happening at that  
10 time? It's really close to the  
11 exemption period, right. The  
12 exemptions expire at the end of  
13 February. She writes that letter  
14 March 3rd, March 8th, March 1999.

15 Does the attorney general say,  
16 "Hey" -- does the tax department say:  
17 "Hey, you want to join the MSA?  
18 You can join the MSA? Do you want an  
19 exemption? You can get an exemption."

20 They don't contact Grand River  
21 or anybody until more than a year  
22 later after the escrow statutes are  
23 passed, and then say:

24 "Oh, by the way, if your  
25 cigarettes are sold in Missouri, you

0930

1 Grand River Arbitration  
2 have to do this."

3 The letters were also  
4 written -- and we talk about, well,  
5 what you should have known. The  
6 letter was written before the escrow  
7 statutes were passed. That letter was  
8 written in March of 1999. Nobody knew  
9 about escrow statutes. They certainly  
10 didn't apply, and it doesn't even  
11 speak to the escrow laws.

12 In fact, there is a -- the  
13 Respondent has submitted a  
14 distribution agreement between Grand  
15 River and White River, which is a  
16 Missouri company. It's completely  
17 silent on escrow or MSA.

18 Why? Again, this is consistent  
19 with what -- with their knowledge  
20 throughout. If they knew about MSA,  
21 if they knew about escrow in March of  
22 1999 when they enter into an  
23 agreement, a distribution agreement  
24 with a distributor in Missouri,  
25 wouldn't they say that the

0931

1 Grand River Arbitration  
2 distribution agreement said that White  
3 River shall be responsible for all  
4 applicable federal taxes, taxes and  
5 otherwise -- taxes and duties, not  
6 otherwise -- federal taxes and duties,  
7 state taxes?

8 Why would -- if they knew about  
9 the MSA and escrow settlement, why  
10 wouldn't they have put "and MSA"?  
11 They didn't know about it. It's  
12 clear. It's consistent.

13 The Missouri letter, April 25,  
14 2000, again, mailed to the wrong  
15 address, no copy of the statute  
16 attached. The letter doesn't say --  
17 it doesn't mention that the statute  
18 says you can join the MSA. And,  
19 again, we raised that the complaint --  
20 good faith -- whatever it was --  
21 said that Grand River already got  
22 notice a year before, but they never  
23 did. And they admit that they never  
24 did because the document that they  
25 submitted from North Dakota shows that

0932

1 Grand River Arbitration  
2 Grand River was not an addressee.  
3 Missouri knew about the  
4 Claimants in March 1999, which I just  
5 spoke about, because Ms. Montour wrote  
6 a letter. Why there was no mention,  
7 offer exemption or extension -- they  
8 could have just extended it another 30  
9 days. They extended it 30 days for  
10 the original eight from this  
11 January 28, 1999, to February 29th.  
12 Why didn't they just extend it another  
13 30 days for a company that wrote a  
14 letter in March 1999?

15 PRESIDENT NARIMAN: You  
16 wouldn't have at that point accepted  
17 that.

18 MR. VIOLI: I don't know.

19 PRESIDENT NARIMAN: You are

20 maintaining it.

21 MR. VIOLI: I don't know  
22 whether they would have accepted or  
23 whether it would have been better to  
24 stay under the original escrow  
25 statutes. If they had sought my

0933

1 Grand River Arbitration  
2 advice, I would have reviewed it and  
3 said: "You might do better under the  
4 escrow statute in its original form."

5 Now, what I want to mention is  
6 that Mr. Teague submits the affidavit;  
7 you know, they submit that affidavit  
8 with the spreadsheet. If you look  
9 closely at the spreadsheet, what does  
10 it say? It says, Native Tobacco  
11 Direct, NPM, which is the  
12 manufacturer.

13 Remember, we were talking about  
14 the ambiguity, who is the one  
15 responsible.

16 Mr. Teague didn't sue -- Iowa  
17 didn't sue NTD. What does it say  
18 under Grand River? It says: "Other";  
19 what "other" means I don't know. It  
20 says "other."

21 So two years forward, or a year  
22 forward, they bring a lawsuit, not  
23 against the company that is  
24 supposed -- that the spreadsheet says  
25 NPM, Native Tobacco Direct. They

0934

1 Grand River Arbitration  
2 bring it against the company that says  
3 "other." It's clearly ambiguity and  
4 no certainty. Excuse me.

5 And I would like to proceed  
6 with the conclusion if I may. Can you  
7 go to the next slide.

8 Prior to March 12, 2001,  
9 Claimants had no knowledge of the  
10 measure that had breached the NAFTA,  
11 expropriated their investments, or  
12 caused them loss or damage. And they  
13 had no reason to have that knowledge.

14 Claimants' first notice of a  
15 potential application of the escrow  
16 statute to them occurred in March --  
17 after March 12, 2001. The first act  
18 of expropriation, loss or damage  
19 occurred in July of 2002, although  
20 they brought today a judgment that  
21 apparently shows June of 2002 when an  
22 injunction was issued banning Grand  
23 River sales.

24 Claimants first acquired  
25 knowledge of any expropriation, loss  
0935

1 Grand River Arbitration  
2 or damage in October of 2002 when the  
3 Arizona attorney general sent a letter  
4 to a distributor, Turtle Island in  
5 Arizona, saying:

6 "We have obtained a judgment  
7 against Grand River."

8 Respondent's arguments to the  
9 contrary lack sufficient factual  
10 support or legal basis.

11 With that, I would like to  
12 conclude. The only thing I would  
13 offer or mention is that the  
14 speculation about their moving and not  
15 being at these addresses -- the two  
16 individuals who were responsible for  
17 the moving are in this room. One has  
18 told us that the landlord on March 1,  
19 2000 -- was it, Mr Williams?

20 You had to be out by March 15,  
21 2000, or the land owner was going to  
22 shoot them. And we can get the  
23 testimony, I think, from the tribal  
24 police -- Mr. Williams, excuse me.

25 Mr. Williams -- excuse me -- I

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1 Grand River Arbitration  
2 want to get the facts out, and I want  
3 the truth out. The man is here.  
4 Someone has implicitly questioned his  
5 veracity in his affidavits, and he  
6 doesn't take too kindly to it. And as  
7 his attorney, neither do I.

8 MR. CLODFELTER: You could have  
9 offered him as a witness. You had the  
10 opportunity.

11 MR. VIOLI: I didn't know we  
12 were going to get into this  
13 questioning his veracity and  
14 untenable. Putting it in writing and  
15 putting it in words are two different  
16 things.

17 PRESIDENT NARIMAN: What  
18 happened? You didn't pay rent? Why  
19 did he want to shoot you? He didn't  
20 pay rent?

21 MS. MONTOUR: It was a minority  
22 shareholder dispute. That's what it  
23 was.

24 PRESIDENT NARIMAN: That  
25 explains it.

0937

1 Grand River Arbitration

2 MR. CROOK: Mr. Violi, I have  
3 raised one question. You can answer  
4 it now, or you can answer it tomorrow.  
5 I do have here the Seneca trademark  
6 from the Trademark Office dated the  
7 19th of June of 2001, which does show  
8 the 1411 -- 14411 Four Mile Level Road  
9 as the address of record. And if the  
10 contact -- and communication had been  
11 severed and that was no longer a good  
12 address, somehow you became aware of  
13 this in June of 2001.

14 MR. VIOLI: Mr. Crook, I have  
15 an explanation. I stayed up late and  
16 did a little research. That address  
17 is the date -- is the address when  
18 they filed their application in June  
19 of 1999.

20 MR. CROOK: Right, and so --

21 MR. VIOLI: When it was  
22 registered, when the trademark office,  
23 filing attorney sees it, reviews it,  
24 oftentimes, it's a year or two later.  
25 That's the date that he puts on.

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1 Grand River Arbitration

2 That's the date you see, but I will  
3 get it further.

4 There was an assignment on  
5 record with the Patent and Trademark  
6 Office. If you look further for the  
7 assignment, you will see that the  
8 assignment is to Native Wholesale  
9 Supply. It has the other address, and  
10 I have the documents. Unfortunately,  
11 I asked -- Mr. Weiler has them on his  
12 computer, but he doesn't have them  
13 printed out. I can show them to you.

14 But, in fact, that 14411 Four  
15 Mile Level Road is the date -- is the  
16 address as of the date of the filing  
17 of the trademark, and that was in June  
18 of 1999 before the move, before the  
19 letters.

20 MR. CROOK: Do you know how  
21 they became aware of the approval of  
22 the trademark.

23 MR. VIOLI: Probably through  
24 counsel maybe.

25 MR. MONTOUR: Through our  
0939

1 Grand River Arbitration  
2 counsel.

3 MR. VIOLI: Through counsel.  
4 Mr. Look -- is Mr. Look on there -- is  
5 that his name.

6 MR. MONTOUR: Ann Downey.

7 MR. VIOLI: No, I have -- it's  
8 on the web site.

9 MR. CROOK: So you represent to  
10 us that you became aware of it by some  
11 means other than ordinary mail.

12 MR. VIOLI: In June of 2001 --

13 MR. CROOK: Yes.

14 MR. VIOLI: I think so, by  
15 counsel.

16 MR. MONTOUR: Through our  
17 counsel, the address.

18 MR. VIOLI: Yes, probably by --  
19 most of those things are done by  
20 counsel. You wouldn't get it  
21 directly. Just because it puts your

22 address -- when counsel files a patent  
23 or trademark, invariably, they don't  
24 send it to the --

25 MR. CROOK: That's fine, if

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1 Grand River Arbitration

2 that's your position. Okay.

3 PRESIDENT NARIMAN: Thank you  
4 very much.

5 MR. VIOLI: Thank you.

6 MR. CROOK: You said, you said  
7 if you had time left over, the other  
8 side could deal with this one  
9 question.

10 MR. VIOLI: What is the one  
11 question?

12 MR. CROOK: Their explanation  
13 of the purported discrepancy.

14 MR. VIOLI: Yes. That's fine.  
15 I have these documents which show the  
16 license of Grand River showing moves.

17 PRESIDENT NARIMAN: Give them  
18 to them.

19 MR. VIOLI: Do we have enough  
20 to pass out?

21 PRESIDENT NARIMAN: Let them  
22 address that.

23 MR. CLODFELTER: We will talk  
24 about it tomorrow. We will get the  
25 exhibit.

0941

1 Grand River Arbitration

2 PRESIDENT NARIMAN: The  
3 Tribunal will do it tomorrow.

4 (There was a discussion off the  
5 record.)

6 PRESIDENT NARIMAN: We have  
7 done a lot of work. Both sides have  
8 presented their cases extremely well.

9 MR. CROOK: This issue,  
10 Mr. Chairman, of the Claimants wanting  
11 to present their explanation of  
12 whatever this discrepancy was,  
13 Mr. Violi said that, if he had time  
14 available at the end, he would be  
15 prepared to have them --



16 MR. VIOLI: Actually, I thought  
17 I defused it by saying I would accept  
18 the good faith explanation from the  
19 Missouri attorney general, but I would  
20 accept good faith explain from our  
21 Claimants as to their address and not  
22 receiving letters.

23 MR. CROOK: I am easy, either  
24 way.

25 MR. VIOLI: If they want to

0942

1 Grand River Arbitration  
2 explain it --

3 MR. CLODFELTER: We have  
4 to explain it.

5 MS. MENAKER: I think that,  
6 just given the rejoinder, and it was  
7 in footnote 15 where you said, if it  
8 did, either the Iowa attorney general  
9 or Respondent has manipulated that  
10 correspondence to bolster Respondent's  
11 argument on the jurisdictional  
12 challenge. And that is why we do feel  
13 compelled on the record to respond to  
14 that. There was no manipulation in  
15 order to bolster arguments here.

16 MR. VIOLI: I will read it  
17 later.

18 MS. GUYMON: The copy is coming  
19 around with the document, so which --  
20 I guess.

21 PRESIDENT NARIMAN: What is  
22 this? What is this document?

23 MS. GUYMON: Well, let me  
24 back-track a little bit.

25 Professor Anaya has already

0943

1 Grand River Arbitration  
2 partly given the explanation by  
3 stating that the Missouri Department  
4 of Revenue -- or I'm sorry -- the Iowa  
5 Department of Revenue in this  
6 instance, did not, in fact, keep a  
7 copy of the printout the statute in  
8 its files. It kept a copy of the  
9 letter, but saw no need for keeping a

10 copy of the statute.

11 Subsequently, on April 4, 2001  
12 which is the letter that you have in  
13 front of you, the Department of  
14 Justice, which is the equivalent of  
15 the attorney general's office in the  
16 State of Iowa, sent another letter to  
17 Native Tobacco Direct. And that  
18 letter enclosed the previous  
19 correspondence sent by the Iowa  
20 Department of Revenue, along with the  
21 current version of the statute in 2001  
22 and also along with a reporting form  
23 which --

24 MR. VIOLI: I don't have that.  
25 Can I have that, please.

0944

1 Grand River Arbitration  
2 PRESIDENT NARIMAN: I only have  
3 this.

4 (There was a discussion off the  
5 record.)

6 MR. VIOLI: It's after the  
7 March 12, 2001, but I understand -- do  
8 we have the attachments? All I want  
9 to know is, do we have what purports  
10 to be the attachments to the  
11 October 11th letter?

12 MS. GUYMON: We do.  
13 Inadvertently, today, we did not copy  
14 the whole thing. But we do have the  
15 document in its entirety.

16 PRESIDENT NARIMAN: Give it  
17 tomorrow.

18 MS. GUYMON: Okay.

19 (There was a discussion off the  
20 record.)

21 MS. GUYMON: The attachments --  
22 let me just finish the explanation if  
23 I can.

24 The attachments to this letter  
25 are what we already put in the record,

0945

1 Grand River Arbitration  
2 as the October 11, 2000 letter to  
3 Native Tobacco Direct. That letter

4 includes the attachments that were  
5 provided with this April 4, 2001  
6 letter. So what we have provided at  
7 Exhibit 132, I believe --

8 PRESIDENT NARIMAN: Why don't  
9 you write it out there, these  
10 attachments -- a note or something.

11 MS. GUYMON: It's on the record  
12 right now. The Exhibit 132 is the  
13 attachment to this April 4, 2001  
14 letter. And that is why the statute  
15 is a 2001 statute because it was sent  
16 with a 2001 letter. The 2001 letter  
17 enclosed the earlier October 2000  
18 letter sent by the Department of  
19 Revenue to Native Tobacco Direct along  
20 with a certification form and along --

21 PRESIDENT NARIMAN: Unless we  
22 have the enclosure to that, we won't  
23 know.

24 MS. GUYMON: You have the  
25 enclosure to this at tab 132.

0946

1 Grand River Arbitration

2 PRESIDENT NARIMAN: Is that  
3 admitted, Mr. Violi.

4 MS. GUYMON: I'm sorry, 132B.

5 PRESIDENT NARIMAN: All right.  
6 132B.

7 MR. VIOLI: But that's not what  
8 this letter says. Right. We will  
9 talk about October 11th. Hold on.

10 PRESIDENT NARIMAN: Native  
11 Tobacco Direct is one of the  
12 Claimants.

13 MS. GUYMON: The Claimants'  
14 investment.

15 MR. VIOLI: This letter October  
16 11, 2000, doesn't say it encloses some  
17 kind of form. It says the legislation  
18 became Iowa code 453(c), copy  
19 enclosed. This enclosed a copy of the  
20 statute.

21 MS. GUYMON: Let me answer the  
22 first part of your question. You said  
23 that that letter does not refer to it

24 enclosing a certification form, but  
25 you will see that we have --

0947

1 Grand River Arbitration

2 MR. VIOLI: No, I am not

3 saying -- I didn't say that.

4 MS. GUYMON: Let me finish.

5 MR. VIOLI: Go ahead.

6 MS. GUYMON: What you stated

7 proves my point exactly, that the

8 October 2000 letter does not purport

9 to enclose a certification form. Our

10 tab 132B includes that certification

11 form, if you turn to the next page.

12 That is how we -- that is how we were

13 demonstrating that what is at 132B is

14 actually the attachment to this

15 April 4, 2001 letter.

16 MR. VIOLI: 132B is the

17 April 7th Iowa letter, 2000.

18 MS. GUYMON: I'm sorry. It's

19 130 --

20 MR. VIOLI: I just have a very

21 simple question. Let's look at the

22 October 11, 2000 letter. It says a

23 copy of the Iowa law -- code 453(c) of

24 the escrow statute, copy enclosed.

25 Did this enclose a copy of the Iowa

0948

1 Grand River Arbitration

2 law?

3 MS. GUYMON: As Professor Anaya

4 surmised, the Department of Revenue

5 did not keep a copy of the statute

6 that it sent with the letter in its

7 file where it kept the copy of the

8 letter. The Department of Justice did

9 keep a complete copy of its April 4,

10 2001 letter with the earlier letter

11 from the Department of Revenue, with

12 its attachments -- with the Department

13 of Justice's attachments to the

14 April 4th, 2001 letter, which included

15 Iowa code section 453(c), copy

16 attached, and also complete

17 instructions for compliance.

18           PRESIDENT NARIMAN: I don't  
19 think -- excuse me -- it's far better,  
20 even if you have wanted it as 132B or  
21 whatever it is, that you exhibit this  
22 entire bunch. Include it again, if  
23 you like. But exhibit it. Don't say  
24 that this is part of 132B because  
25 we -- it doesn't -- if you want to  
0949

1           Grand River Arbitration  
2 make a point of it, your point is that  
3 all of this was knowledge to them on  
4 an earlier date than this April  
5 letter.

6           Am I right?

7           MS. GUYMON: Our point --

8           PRESIDENT NARIMAN: Your point  
9 is that -- that the earlier letter of  
10 October --

11          MR. CROOK: Mr. Chairman, can  
12 we take this under advisement and we  
13 will look at the document in light of  
14 the explanation?

15          PRESIDENT NARIMAN: No, no, no,  
16 not like that, not that we look at it.  
17 I want her --

18          MR. CLODFELTER: We will put  
19 together the entire document,  
20 Mr. President.

21          PRESIDENT NARIMAN: Please be  
22 good enough to put together this  
23 document along with the "annexure"  
24 because then we can see what your  
25 point is.

0950

1           Grand River Arbitration

2           MS. GUYMON: I think I might  
3 have inadvertently passed the complete  
4 copy to Professor Anaya, if we can  
5 take that back.

6           PROFESSOR ANAYA: Yes, that's  
7 yours.

8           PRESIDENT NARIMAN: So that  
9 copy can be circulated to everybody.

10          MR. CLODFELTER: The  
11 master copy -- okay -- I was

12 wondering.

13 PRESIDENT NARIMAN: I take it  
14 your submission is that this shows  
15 that Native Tobacco Direct had  
16 received that other earlier letter of  
17 October, whatever that date is.

18 MS. MENAKER: It's quite  
19 independent from that argument. Yes,  
20 we have made a showing that they  
21 received it. All we are trying to do  
22 is explain that there was no  
23 manipulation here.

24 PRESIDENT NARIMAN: No, no,  
25 forget manipulation. You feel very

0951

1 Grand River Arbitration  
2 upset about it. I don't. But,  
3 please, we are more concerned with the  
4 knowledge part, and not on this  
5 vituperation.

6 MS. MENAKER: This really has  
7 not much to do with the knowledge  
8 part --

9 PRESIDENT NARIMAN: Not much.

10 MS. MENAKER: The statute was  
11 attached in the original letter. We  
12 are explaining why the date was  
13 different. Quite frankly, even if  
14 wasn't, the statute is cited in the  
15 letter.

16 MS. GUYMON: We wouldn't have  
17 provided this explanation had  
18 Claimants not harped on it themselves,  
19 but we felt compelled to do so.

20 PRESIDENT NARIMAN: But you  
21 don't reply on the letter of October  
22 for knowledge.

23 MS. MENAKER: Yes, we do rely  
24 on the letter.

25 PRESIDENT NARIMAN: That's what

0952

1 Grand River Arbitration  
2 I am asking you.

3 MS. MENAKER: No, we are just  
4 talking about the attachment, the  
5 attachment. The letter is very

6 important, but that was not what the  
7 dispute was.

8 PRESIDENT NARIMAN: I am not  
9 asking -- your dispute is a separate  
10 question. Either you answer it or  
11 don't answer it. My question is  
12 that -- that this particular letter,  
13 which is a letter of April, 2001, is  
14 that correct?

15 MS. GUYMON: The April 2001  
16 letter we did not provide because it  
17 is after the cut-off date. But the  
18 October 2000 letter we did provide  
19 extracted from the files of the  
20 Department of Justice.

21 PRESIDENT NARIMAN: I don't  
22 know -- I think we are prolonging the  
23 day for explanation.

24 MR. CLODFELTER: I think the  
25 answer is, yes, we do rely upon the

0953

1 Grand River Arbitration  
2 new letter --

3 PRESIDENT NARIMAN: That's what  
4 I thought.

5 MR. CLODFELTER: By reference,  
6 it corroborates the claim with respect  
7 to the first one.

8 PRESIDENT NARIMAN: That's what  
9 I thought.

10 MR. CLODFELTER: We will give  
11 you attachments and the entire letter  
12 tomorrow morning.

13 PRESIDENT NARIMAN: Exactly.

14 MR. VIOLI: I will just note  
15 that this is not Native Tobacco  
16 Direct's address. You see this  
17 address, Route 17, Killbuck, New York.  
18 So we know that this letter -- this  
19 letter definitely didn't go to Native  
20 Tobacco Direct.

21 PRESIDENT NARIMAN: Once again,  
22 your address problem.

23 MR. VIOLI: This is not my  
24 address problem. This is theirs. I  
25 don't think it's even in the same

0954

1 Grand River Arbitration  
2 city.

3 MR. CROOK: Mr. Chairman, what  
4 time should we convene tomorrow.

5 PRESIDENT NARIMAN: 9 a.m.  
6 (The arbitration adjourned for  
7 the day at 5:29 p.m.)

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0955

1  
2 CERTIFICATE

3  
4 I, TAB PREWETT, A Registered  
5 Professional Reporter, Notary Public and  
6 Certified Shorthand Reporter of the State  
7 of New Jersey, License No. XI01828, do  
8 hereby certify that the foregoing is a true  
9 and accurate transcript of the arbitration  
10 proceedings as taken stenographically by  
11 and before me at the time, place and on the  
12 date hereinbefore set forth.

13 I DO FURTHER CERTIFY that I am  
14 neither a relative nor employee nor  
15 attorney nor counsel of any of the parties  
16 to this action, and that I am neither a  
17 relative nor employee of such attorney or  
18 counsel, and that I am not financially  
19 interested in the action.



20

21

22 

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Notary Public of the State of New Jersey

23 My Commission expires August 30th, 2007

24 Dated: April 9, 2006

25