

NAFTA/UNCITRAL ARBITRATION RULES PROCEEDING

- - - - - x  
 :  
 In the Matter of Arbitration :  
 Between: :  
 :  
 GRAND RIVER ENTERPRISES SIX NATIONS LTD., :  
 et al., :  
 :  
 Claimants/Investors, :  
 :  
 and :  
 :  
 UNITED STATES OF AMERICA, :  
 :  
 Respondent/Party. :  
 :  
 - - - - - x Volume 2

HEARING ON THE MERITS

Tuesday, February 2, 2010

The World Bank  
 1818 H Street, N.W.  
 Conference Room MC 13-121  
 Washington, D.C.

The hearing in the above-entitled matter  
 came on, pursuant to notice, at 9:06 a.m. before:

- MR. FALI S. NARIMAN, President
- PROF. JAMES ANAYA, Arbitrator
- MR. JOHN R. CROOK, Arbitrator

**Also Present:**

MS. KATIA YANNACA-SMALL,  
Secretary to the Tribunal

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1 P R O C E E D I N G S

2 PRESIDENT NARIMAN: Shall we begin?

3 MICHAEL G. HERING, RESPONDENT'S WITNESS, CONTINUED

4 PRESIDENT NARIMAN: Mr. Luddy, the witness

5 is yours.

6 MR. LUDDY: Thank you, Mr. Chairman.

7 I'm going to have a few more--

8 PRESIDENT NARIMAN: Just one more minute.

9 Sorry to interrupt.

10 There is an administrative announcement to

11 be made by Ms. Katia.

12 SECRETARY YANNACA-SMALL: Yes, good

13 morning.

14 Yesterday, Mexico asked for the transcript,

15 to have access to the transcripts of the hearing,

16 and the parties in principle agreed on the condition

17 of confidentiality of the contents of the

18 transcript, and we would like to have this on the

19 record.

20 MR. LUDDY: No objection.

21 PRESIDENT NARIMAN: Is that all right?

22 MR. FELDMAN: That's fine.

09:06:48 1 PRESIDENT NARIMAN: Yes, please.

2 MR. LUDDY: Here is what I think is

3 the--going to be the schedule this morning,

4 Mr. Chairman, so we're all on the same page.

5 I have a few more questions for Mr. Eckhart

6 that Mr. Violi is going to

7 have--Mr. Hering--Mr. Violi is going to have a few

8 questions for Mr. Hering. We will conclude him.

9 At that point, Mr. Weiler is going to come

10 back on and present the portion of his opening that

11 was not--that we didn't reach yesterday, and then I

12 believe the State Department is going to question

13 Mr. Wilson, who is our damages expert, and that will

14 bring us probably through the morning, and then this

15 afternoon we will deal with when we get there.

16 PRESIDENT NARIMAN: Okay. Let's go.

17 CONTINUED CROSS-EXAMINATION

18 BY MR. LUDDY:

19 Q. Mr. Hering, could I ask you to go to

20 Exhibit 10, please.

21 I'm sorry if I called you Mr. Eckhart.

22 PRESIDENT NARIMAN: What's that?

09:08:05 1 MR. LUDDY: I was apologizing to Michael

2 for calling him Mr. Eckhart a while ago.

3 BY MR. LUDDY:

4 Q. Have you seen this document before,

5 Mr. Hering?

6 A. Only in relation to this proceeding. It's

7 well before I joined NAAG.

8 Q. When did you join?

9 A. I believe it was around June of--is it June

10 of '02, I think?

11 Q. June '02, okay.

12 Let's look at the last page of this

13 document.

14 Who were the signatories to this document?

15 I will read them off and then I'll give you

16 a question on them.

17 Liggett Group, Commonwealth Brands, Inc.,

18 The Medallion Company, Inc., King Marketing--King

19 Maker Marketing, Lignum-2, Inc., and Top Tobacco

20 L.P.

21 Do you see that?

22 A. Yes.

09:09:22 1 Q. And what class of manufacturers are all of  
2 those entities under the MSA?

3 A. These are each subsequent Participating  
4 Manufacturers or SPMs, and they are also SPMs that  
5 joined at the beginning--that is, within the first  
6 90 days--so, they are grandfathered NPMs.

7 Q. They each have a grandfather share?

8 A. That is correct.

9 Q. Now this, the first paragraph, records a  
10 meeting between the Attorneys General and these  
11 manufacturers and perhaps other SPMs recently in  
12 Washington.

13 I recognize you weren't a part--associated  
14 with NAAG at the time, but over the course of your  
15 involvement with NAAG, does NAAG meet periodically  
16 with SPMs?

17 A. Yes. Actually we meet with all the  
18 Participating Manufacturers. The Master Settlement  
19 Agreement calls for two types of meetings to be held  
20 per the terms of the MSA. One of these meetings is  
21 the so-called "industry meeting" which is a meeting  
22 between the signatories to the MSA; that is, the

09:11:54 1 A. I haven't read it.

2 Q. You could take a minute to read it if you  
3 want.

4 A. I haven't read the letter, so...

5 Q. Go ahead.

6 (Witness reviews document.)

7 A. No, I do not.

8 Q. Okay.

9 And when you met with the SPM--it's not  
10 your suggestion to the Tribunal, is it, Mr. Hering,  
11 that the SPMs or the exempt SPMs care whether or not  
12 the states do things that are in the interests of  
13 the public health, is it?

14 A. Well, I don't speak for the SPMs, but I  
15 have heard from time to time them talk about the  
16 public health and suggest that certain things should  
17 be done not only for the same reasons, reasons along  
18 the lines of this letter, but also for the public  
19 health perhaps in an effort to persuade us.

20 Q. In this letter, though, they're trying to  
21 give you his help on how to throttle NPM competition  
22 through the model act, aren't they?

09:10:45 1 Settling States on the one hand, and the  
2 Participating Manufacturers on the other hand, and  
3 there are two industry meetings each year. Most  
4 recently, we have held them telephonically, but in  
5 past years they have from time to time been in  
6 person.

7 And I do not know, but I would--it's really  
8 a guess that this was an industry meeting since it  
9 mentions other Participating Manufacturers.

10 The other sort of meeting that we have is  
11 what is known as a triennial meeting; and, as the  
12 name suggests, it's held once every three years, and  
13 this is a meetings that held with a specific focus  
14 on issues regarding public health. That meeting is  
15 often attended by not only the Participating  
16 Manufacturers in the states, but a variety of  
17 experts and other interested parties on tobacco and  
18 public health and the effects of the MSA. It's  
19 fairly broad ranging.

20 Q. Yeah.

21 Do you see you any reference to public  
22 health concerns in this letter?

09:14:37 1 A. Well, no, I wouldn't characterize--

2 MR. FELDMAN: Mr. Hering is not here to  
3 testify on behalf of the SPMs.

4 MR. LUDDY: I wasn't asking him a question  
5 in that regard, sir.

6 BY MR. LUDDY:

7 Q. Go ahead.

8 A. I wouldn't characterize it that way,  
9 certainly.

10 Q. Let's use your language. I will read it to  
11 you. The fourth paragraph on the first page, second  
12 line: "It is imperative that the states engage in  
13 prompt and vigorous enforcement of the model act--"  
14 And the model act is the escrow act; correct?

15 A. That is correct.

16 Q. --"the Model Act in order to prevent NPMs  
17 from continuing to evade their obligations to make  
18 appropriate escrow statements."

19 And then if you look on Page 3, they make a  
20 number of suggestions that NAAG undertake that all  
21 of which would make more difficult for the NPMs to  
22 compete.

09:15:33 1 Isn't that true, sir?

2 A. No, not at all. What those suggestions  
3 would do is make it more difficult for the NPMs to  
4 evade their responsibilities under the model acts.  
5 That is State law. That is why I would object to  
6 your characterization of it as throttling the NPMs.  
7 What we are talking about here is simply  
8 dealing with the NPMs that had been and, in some  
9 cases, continued to be evading the requirements of  
10 State law.

11 As I explained yesterday, one of the issues  
12 that we faced in the early years of the MSA was  
13 scofflaw NPMs, NPMs that simply made no effort, not  
14 even a token gesture towards following the  
15 requirements of the various state Escrow Statutes  
16 which are State law.

17 Q. Look at number six, "Elimination or  
18 modification of the requirement that escrow  
19 liability be limited to payments such NPM would make  
20 as a Participating Manufacturer."  
21 What is that a reference to, sir? Is that  
22 the type of suggestion that ultimately led to

09:17:55 1 as important an issue at that time perhaps, and that  
2 was, to some degree, speculation on my part, since I  
3 wasn't there and I did not draft the letter.

4 Q. I will read your testimony on that. I  
5 believe it was: "I'm sorry, this letter does not  
6 highlight the allocable share because it may not  
7 have been kind of a front-burner issue at that  
8 time."

9 A. Yes.

10 Q. But in June of 2001, 10 months earlier, it  
11 was already a front issue burner for the SPMS, and  
12 they included it in a letter to Attorney General  
13 Edmondson.

14 A. For the SPMS.

15 Q. Well, they wrote to Mr. Edmondson in his  
16 capacity as Chair of the Tobacco Committee; correct?  
17 The same position Mr. Sorrell when he wrote the  
18 letter 10 months later; correct?

19 A. Correct.

20 Q. So, the issue was an issue before the  
21 Tobacco Committee far before Mr. Sorrell wrote a  
22 letter 10 months later claiming that the rise in NPM

09:16:47 1 allocable share repeal?

2 A. I don't know. It looks like a reference to  
3 the Allocable Share Release.

4 Q. Okay. Now, the date of this letter is  
5 June 18th of 2001.

6 Do you remember when we were talking  
7 yesterday about the letter from Attorney General  
8 Sorrell of April 2002, where he said that the reason  
9 that NPM market share had risen so much was because  
10 the OPMs had raised their prices enormously to  
11 capture additional profit margin? Do you recall  
12 that discussion?

13 A. Yes.

14 Q. And at the time yesterday you mentioned  
15 that the reason that may have been different from  
16 the explanation given subsequently by NAAG as a  
17 reason for the allocable share appeal was that maybe  
18 Mr. Sorrell at that time wasn't really aware of the  
19 possibility of allocable share repeal or even  
20 Allocable Share Release; correct?

21 A. Not exactly what I think I said, and I'm  
22 sure the transcript will reflect, is that it wasn't

09:19:00 1 market share was attributable to only the OPMs'  
2 decision to raise prices and grab profit margin;  
3 correct?

4 A. That is apparently the case, but I  
5 don't--and you read my transcript, but--

6 MR. FELDMAN: Counsel, again, this document  
7 predates Mr. Hering's--

8 MR. LUDDY: Do you have an objection,  
9 Counsel?

10 MR. FELDMAN: Yes, I do.

11 MR. LUDDY: Direct it to the Tribunal,  
12 please.

13 PRESIDENT NARIMAN: The point is,  
14 Mr. Feldman, that he's answering the question  
15 because if he says that I don't know anything about  
16 it, that would be perfectly all right, but he  
17 volunteers to answer it, so he's entitled to ask  
18 him.

19 THE WITNESS: I was simply going to repeat  
20 what I said yesterday, that calling it not a  
21 front-burner issue, let me elaborate on that.  
22 It wasn't until in my experience in the

09:19:52 1 later years that the SPMs--I'm sorry, the  
2 NPMs--began to fully exploit the allocable share  
3 loophole.  
4 As I said, I think, yesterday, it took some  
5 time for the SPMs to, number one, discover this and  
6 then to exploit it, and I don't think I said  
7 yesterday that it wasn't an issue at all prior to  
8 the letter to Governor Glendening. It, as I said,  
9 was perhaps was not the front-burner issue that it  
10 became.  
11 BY MR. LUDDY:  
12 Q. Now, in Item 5 of that same bullet point  
13 list, it says, "allow third party cause of action to  
14 enforce the Act."  
15 Now, there this is the exempt SPM  
16 suggesting to NAAG that they should be given a  
17 private right of action so that they themselves can  
18 go sue for injunctive relief against NPMs; correct?  
19 A. It appears to be so.  
20 Q. Now, these are exempt SPMs who themselves  
21 have an advantage under the payment schemes set out  
22 in the MSA; correct?

09:22:03 1 Q. And you don't dispute that statement, do  
2 you, sir?  
3 A. No.  
4 Q. Above the bullet points--  
5 A. Okay--well, let me, if I could go back for  
6 just a moment, let me say no, but--and I'm not sure  
7 this came up yesterday, so I will just say it now,  
8 and I think you will get more into this with  
9 Professor Gruber's testimony. I'd just like to  
10 explain that the advantage is that they do not pay  
11 for any sales up to their grandfathered share; they  
12 make no payment under the MSA. Once they reach  
13 their grandfathered share limit, they make the same  
14 payment on every carton of cigarettes after that  
15 grandfathered share that any other SPM would make.  
16 And, as I said yesterday, 62--in 2008,  
17 about 62--I believe it was 62 percent of the sales  
18 made by all of the SPMs were made either by  
19 nongrandfathered SPMs or grandfathered SPMs above  
20 their grandfathered share, in which case they're  
21 making the same marginal payment that everybody else  
22 does.

09:21:10 1 A. These are SPMs that have grandfathered  
2 shares.  
3 Q. And they have an advantage because of that  
4 grandfathered share; correct?  
5 A. They do not make payments on their  
6 cigarettes up to their grandfathered share.  
7 Q. You're not going to use the term  
8 "advantage"?  
9 A. Yes, it's an advantage for those sales.  
10 Q. In fact, NAAG, and the Attorney General of  
11 Kentucky alleged in the brief that Mr. Violi  
12 displayed for the Tribunal yesterday on the screen,  
13 NAAG saying that exempt SPMs have an advantage in  
14 the marketplace because of their grandfathered  
15 share; correct?  
16 A. That's correct.  
17 Q. And you have seen the Liggett 10(k) where  
18 Liggett has said for its Investors and the SEC that  
19 they have a sustainable cost advantage against their  
20 competition because of the exempt market share;  
21 isn't that correct?  
22 A. I have seen that, yes.

09:23:12 1 Q. So, how does the--how does the SPM--I think  
2 back in the period of '06 or '07, SPM--exempt SPMs  
3 in the aggregate were selling volume about twice the  
4 amount of their exempt SPM share. Is that fair?  
5 A. It's a little more than twice I think.  
6 Q. A little bit more than twice, all right.  
7 Which means if they had an exempt share of  
8 a million sticks and they sold 2 million sticks,  
9 that would mean that they were on a per-stick basis  
10 paying about half what an NPM would have to pay on a  
11 per-stick basis; correct?  
12 A. Well, what you are focusing on is the  
13 average cost of a grandfathered SPM.  
14 Q. I am, and that's what I said, per-stick  
15 basis. That is true, isn't it?  
16 A. Correct. It is true, and again I think  
17 this will come up in Dr. Gruber's testimony; in our  
18 opinion, the relevant question is what the marginal  
19 cost is.  
20 Q. Are you competent to speak to that issue as  
21 an economist?  
22 A. I'll leave it to Dr. Gruber.

09:24:26 1 Q. Thank you.  
 2 Let's look at the fourth paragraph on  
 3 Page 3 of the Edmon--the letter to Edmondson. It  
 4 reads as follows: "The SPMs also object to the  
 5 practice of allowing an NPM to execute the agreement  
 6 and list only a single brand of cigarettes. These  
 7 new limited SPMs can hold themselves out as  
 8 Participating Manufacturers while marketing NPM  
 9 brands."  
 10 Do you see that?  
 11 A. I do.  
 12 Q. Now, that seems to suggest that the  
 13 SPMs--that the SPMs at least perceive a marketing  
 14 advantage as SPMs over NPMs; is that correct?  
 15 A. Honestly, I don't know what they're talking  
 16 about there.  
 17 Q. Could you look at CD--Claimants' Core  
 18 Document Number 45 and specifically the last three  
 19 pages of that. It's a NAAG memo titled "Why Join  
 20 the Tobacco Master Settlement Agreement?"  
 21 Do you see that?  
 22 A. Yes, I do.

09:27:19 1 that--  
 2 PRESIDENT NARIMAN: I didn't see it.  
 3 MR. LUDDY: Bottom right-hand corner, very  
 4 small font, Mr. Chairman.  
 5 BY MR. LUDDY:  
 6 Q. Now, we were talking about--I had asked you  
 7 whether or not the comment in the letter to  
 8 Edmondson suggested that the SPMs perceived a  
 9 marketing advantage over NPMs, and your response was  
 10 you didn't know what they were talking about. Can  
 11 you look at Page 2 under the heading Initial or  
 12 Additional Considerations. Can you read the first  
 13 sentence.  
 14 A. Wait, wait.  
 15 Q. Can you read the first sentence first.  
 16 A. Could you go back to the Edmondson because  
 17 when I said I didn't know what they were talking  
 18 about, your question wasn't simply about a marketing  
 19 advantage. They had a specific--do you recall what  
 20 that was? Was it 12, 10? Because when you said  
 21 that, they were talking specifically about--  
 22 Q. Holding themselves out as Participating

09:26:08 1 Q. Okay, let's look at Page--  
 2 PRESIDENT NARIMAN: Just one moment. 45?  
 3 I have--  
 4 MR. LUDDY: I'm sorry, it's a rebuttal  
 5 report of Dr. Eisenstadt, and the last three pages--  
 6 PRESIDENT NARIMAN: That's what you're  
 7 asking about?  
 8 MR. LUDDY: Correct. Thank you.  
 9 ARBITRATOR CROOK: Mr. Luddy, could you  
 10 indicate the date of this.  
 11 MR. LUDDY: I can't, but from context, I  
 12 would, and frankly I'll also defer to Mr. Hering on  
 13 this, by context I am--no, that was the report.  
 14 BY MR. LUDDY:  
 15 Q. Michael, can you discern from context the  
 16 date? And can I suggest that you guys date your  
 17 memos?  
 18 I have a date stamp in the bottom  
 19 right-hand corner that looks like a revision date of  
 20 12/15/03.  
 21 A. I was going to say that I saw that date. I  
 22 don't know whether that was our date or a date

09:28:30 1 Manufacturers.  
 2 A. Well, no, they said the practice of  
 3 allowing an NPM to execute the agreement and list  
 4 only a single brand of cigarettes, these new,  
 5 "limited SPMs can hold themselves out as  
 6 Participating Manufacturers while marketing NPM  
 7 brands."  
 8 I don't know what they're talking about  
 9 there. I don't know what practice that is.  
 10 Q. Okay. Can you now read the first  
 11 question--the first sentence of--under additional  
 12 considerations.  
 13 A. I'm sorry, where are we on this document?  
 14 Q. Page 2, additional considerations.  
 15 (Question off microphone.)  
 16 A. SPMs have the marketing advantage over  
 17 NPMs.  
 18 Q. Okay. And you agree with that, don't you?  
 19 Well, it's a NAAG document.  
 20 A. It is a NAAG document. I didn't write this  
 21 one.  
 22 I would like to--yes, I would agree with it

09:29:30 1 in the context in which this is written, which is  
2 that, again, this appears to be from late '03. At  
3 that time we had a great number of, as I've  
4 described them, scofflaw NPMs, NPMs that sold for a  
5 year, oftentimes more than a year; they could sell  
6 for 15 months, even two years, without making escrow  
7 deposits because it took some--the annual escrow  
8 deposits were made on April 15th of the following  
9 year. So, you could sell for a year then default on  
10 April 15th to the following year. Then it would  
11 take some time for the state to bring an action  
12 against the company in question, obtain an  
13 injunction, et cetera, the company would go out of  
14 business.

15 And typically some of these companies would  
16 start up the next day as a new company.

17 What this paragraph says is that, "SPMs  
18 that have complied with the MSA can provide  
19 assurance to distributors, retailers, and others  
20 that it is part of the MSA. Some wholesalers and  
21 distributors have advised they do not wish to deal  
22 with NPMs due to compliance concerns and potential

09:31:53 1 MSA, some states sued in addition to the  
2 manufacturers of the cigarettes. Some states  
3 brought actions against wholesalers and included  
4 them in the actions.

5 Potentially, a wholesaler by selling  
6 cigarettes that are not those of a Participating  
7 Manufacturer under the MSA, potentially they open  
8 themselves up to risk.

9 Q. Can you look at your testimony from your  
10 appearance before the--

11 A. Nevada?

12 Q. Nevada.

13 This is one of the two documents that I  
14 handed up yesterday that was not in the Core  
15 Documents, Minutes of Meeting of the Assembly  
16 Committee on Commerce and Labor.

17 MR. LUDDY: This is, for purposes of the  
18 record--

19 (Question off microphone.)

20 MR. LUDDY: I do.

21 For the purposes of the record, it is  
22 Appendix 181 to the Legal Authorities that

09:30:47 1 risk involved."

2 What this is talking about is essentially  
3 the idea that when the SPMs--I'm sorry, when the  
4 NPMs default on their escrow obligations, an  
5 injunction is entered against them. They are no  
6 longer legal for sale in a particular state, and at  
7 that point the retailer or wholesaler is left  
8 holding a whole bunch of cigarettes that it can't  
9 legally sell, cigarettes that in some states may be  
10 subject to seizure, et cetera, although I think this  
11 is before many states had such statutes.

12 There are retailers and wholesalers that  
13 don't want to deal with that possibility, and that  
14 is the marketing advantage that this document is  
15 referring to.

16 Q. Well, it also refers to an advantage  
17 because the wholesalers have a release when they're  
18 dealing with NPMs; correct? That has nothing to do  
19 with the issue that you're talking about.

20 A. That is correct.

21 A release of liability. Under the cases  
22 that were originally brought that resulted in the

09:33:05 1 accompanied the Counter-Memorial of the Respondents.

2 (Comments off microphone.)

3 MR. LUDDY: Just one?

4 ARBITRATOR CROOK: And give one to the  
5 Secretary.

6 (Comments off the microphone.)

7 MR. LUDDY: I don't have additional copies  
8 now. I handed a bunch out yesterday, but they're  
9 gone. I will get a copy at the break for the  
10 Secretary.

11 BY MR. LUDDY:

12 Q. Look at Page 13, Page 13.

13 And we have heard you refer a number of  
14 times to scofflaws. And I will read this particular  
15 here. It's quote, Page 13, first full paragraph,  
16 "Turning back to the actual legislation, the first  
17 part of the legislation is meant to deal with  
18 scofflaws, the companies that do not abide by the  
19 bill that I just described."

20 PRESIDENT NARIMAN: Where is this?

21 MR. LUDDY: Page 13, first full paragraph.  
22 Or continued.

09:35:07 1 THE WITNESS: Actually, it's not the right  
2 name.  
3 BY MR. LUDDY:  
4 Q. Mr. Hering's brother.  
5 A. It's not. He's kidding. It's meant to be  
6 me. They got the name wrong.  
7 Q. And then in the next paragraph it begins,  
8 "When it comes to chasing these companies down," we  
9 are talking about companies that are foreign.  
10 Correct?  
11 A. It says often foreign.  
12 Q. That are often foreign, I'm sorry.  
13 And you're calling these companies that are  
14 foreign, to use your term, that don't pay the escrow  
15 bills scofflaws; right?  
16 A. That is correct. They are among them.  
17 Some of them were domestic as well.  
18 Q. Now, if you could look at Core Document  
19 Number 9, Claimants' Core Documents Number 9--Core  
20 Document Number 9--this was a model NPM statute,  
21 frequently asked questions that NAAG distributed.  
22 That looks like there is a typed line on it, looks

09:37:56 1 have known themselves, that they could not require  
2 companies over whom they do not have personal  
3 jurisdiction to make escrow payments; correct?  
4 A. Well, they could require. They had no  
5 effective enforcement mechanism.  
6 Q. That's not quite what this says.  
7 PRESIDENT NARIMAN: That's not the  
8 question. Just please be careful. Answer the  
9 question directly.  
10 THE WITNESS: Well, I'm differing with his  
11 description of what this says because I think that  
12 what this is meaning that because of a lack of  
13 personal jurisdiction, there is no ability to  
14 collect the escrow.  
15 The statute still makes the manufacturer  
16 responsible. It simply means that the states have  
17 no ability to collect.  
18 Q. Let me read it for you again: "If the  
19 manufacturer is out of state, we may not have  
20 jurisdiction over the company and may not be able to  
21 require it to make escrow payments." That's  
22 different from what you just said, isn't it, sir?

09:36:48 1 like New York got it back in 1999, which would have  
2 been at about the time of the initial Escrow  
3 Statutes; right?  
4 A. Yes.  
5 Q. Or close to it.  
6 A. Yes.  
7 Q. Look on Page 13, Question 39(b), and I will  
8 read it. It's the Q&A on this. And again, I will  
9 read it. "If the manufacturer is out of state, we  
10 may not have jurisdiction over the company and may  
11 not be able to require it to make escrow payments.  
12 Likewise, if an importer is out of state and sells  
13 imported product through an out of state  
14 intermediary, e.g., an offshore corporation, to an  
15 out of state wholesaler, we may not have  
16 jurisdiction over the importer and could not require  
17 it to make escrow payments.  
18 "ANSWER: Correct."  
19 Do you see that?  
20 A. Yes, I do.  
21 Q. So, as early as 1999, your constituent  
22 Attorneys General were on notice and knew or should

09:39:01 1 Is it different, or not?  
2 A. I don't know. I would have to have it read  
3 back.  
4 Q. Read it back, please.  
5 A. Well, let me just--let me just try to  
6 clarify what I'm saying. I don't disagree with you  
7 regarding that this appears to be addressing the  
8 issue of lack of personal jurisdiction in certain  
9 circumstances. Certainly not for every foreign  
10 manufacturer, but for some of them who do not meet  
11 the standards of personal jurisdiction.  
12 What I suppose--maybe I'm jumping to is the  
13 conclusion, and maybe you're not suggesting this, so  
14 I apologize if you're not, that that means that the  
15 statute then holds somebody else responsible.  
16 Q. There is a central point here, though, and  
17 that is under our system, states and the Attorneys  
18 General of those states, there are limitations on  
19 their powers to require people beyond their  
20 jurisdiction to do things, aren't there?  
21 A. Yes.  
22 Q. Okay. And this is one of the examples, was

09:40:04 1 pointed out here in 1999 to your Attorneys General:  
2 You don't have the power to require someone over  
3 whom you do not have personal jurisdiction to make  
4 escrow payments--

5 A. Yes.

6 Q. --period; correct? Right?

7 A. Yes.

8 Q. Thank you.

9 PRESIDENT NARIMAN: One minute. So, this  
10 is a correct--the answer which reads correct,  
11 according to you, is correct.

12 THE WITNESS: Yes.

13 PRESIDENT NARIMAN: There is no ambiguity  
14 about it?

15 MR. FELDMAN: I object to Mr. Luddy's  
16 characterization of the document in that last  
17 statement.

18 PRESIDENT NARIMAN: I'm asking him. I want  
19 to know.

20 THE WITNESS: Yes, President Nariman, yes,  
21 I was trying to provide context.

22 PRESIDENT NARIMAN: That's all right. But

09:41:48 1 what they're not doing because they're not obliged  
2 to make the payments, what they're not doing is  
3 cooperating with NAAG's efforts to protect the  
4 profit margins of the OPMs; isn't that true, sir?  
5 A. Now, well, here is where we depart because  
6 I will not agree with your statement that we do not  
7 have jurisdiction over any foreign Tobacco Product  
8 Manufacturer. There are circumstances where the  
9 states will have jurisdiction, and there are  
10 circumstances where they do not. It's a question of  
11 whether they meet the standards for personal  
12 jurisdiction.

13 Q. Has South Dakota made a determination as to  
14 whether that state has jurisdiction over GRE?

15 A. Yes.

16 Q. And what was that determination?

17 A. South Dakota determined that it did not  
18 have the jurisdiction over GRE.

19 Q. Wisconsin, has that state made a  
20 determination as to whether it has jurisdiction?

21 A. I don't know.

22 Q. How about California? Has California

09:40:45 1 it's correct otherwise.

2 THE WITNESS: In certain circumstance, the  
3 states may not have personal jurisdiction and  
4 therefore may not have an ability to enforce, that's  
5 correct, yes.

6 BY MR. LUDDY:

7 Q. Which is again different from what we just  
8 agreed to. It's not ability to enforce. It's the  
9 ability to require them to do it. There is a  
10 difference, and you've made that distinction, have  
11 you not, Mr. Hering?

12 A. Require. I'm trying to think about the  
13 difference between require and ability. I'm not  
14 sure how much of a difference there is, so I will  
15 agree with you.

16 Q. Well, let's go back and look at your  
17 statement where you're calling these foreign  
18 companies over whom the states have no jurisdiction,  
19 you're calling them--for the past day and a half  
20 here you have been calling them scofflaws, and in an  
21 open hearing in Nevada you're calling them scofflaws  
22 for not making these escrow payments when, in fact,

09:42:41 1 recently made a determination over whether  
2 California had jurisdiction over GRE?

3 A. I don't know.

4 Q. Okay. And if a state doesn't have  
5 jurisdiction under these provisions that we just  
6 talked about, that state cannot make someone pay  
7 escrow; correct?

8 A. Correct.

9 PRESIDENT NARIMAN: I would just like to  
10 interrupt. Is this model NPM statute frequently  
11 asked questions, is it a NAAG document? Where does  
12 it emanate from.

13 THE WITNESS: President Nariman, I don't  
14 know. It predates my time at NAAG. From the fax  
15 number, it appears to have been faxed by NAAG.

16 PRESIDENT NARIMAN: So, it's a NAAG  
17 document?

18 THE WITNESS: Well, I'm not sure. I have  
19 heard--I will tell you that I have heard that it was  
20 put together at the beginning of the MSA by persons  
21 at NAAG in conjunction with some of the  
22 Participating Manufacturers. This was--again, as

09:43:48 1 Mr. Luddy said, at the very beginning of the MSA,  
2 when the statutes were just beginning to be enacted,  
3 and I believe this document was directed at the tax  
4 authorities in each of the states; that is, the  
5 departments of revenue, the heads of the departments  
6 of revenue in the various states.

7 PRESIDENT NARIMAN: And to your knowledge,  
8 was this question--was this answer corrected in some  
9 later document of NAAG?

10 THE WITNESS: I'm sorry? I didn't  
11 understand--

12 PRESIDENT NARIMAN: The question is that we  
13 may not have jurisdiction, and the answer is  
14 correct. You just said it was correct.

15 THE WITNESS: Yes, yes.

16 PRESIDENT NARIMAN: Now, is there any later  
17 NAAG document which puts a gloss over it and says,  
18 no, it may not be quite correct? I just want to  
19 know.

20 THE WITNESS: I don't know the answer to  
21 that question.

22 As I said earlier, though, I think it

09:46:11 1 A. An Assistant Attorney General with the  
2 State of Pennsylvania.

3 Q. Okay.

4 A. Bill Lieblich, Peter Levin, Michael Hering,  
5 Mark Greenwald, Tony Ogden--I'm sorry, they're  
6 listed here in the document, but--Bill Lieblich of  
7 NAAG, Peter Levin of NAAG, Michael Hering, that's  
8 me, of NAAG, Mark Greenwald of NAAG, Tony Ogden of  
9 NAAG.

10 And this says Greg Wilson, but I believe  
11 it's a reference to Gary Wilson, a consultant with  
12 NAAG. The industry representative--let's see.

13 For the SPMs they simply say Latham. It's  
14 a law firm Latham & Watkins. RJR, Lorillard, B&W,  
15 PMUSA, Legal and Government Affairs.

16 Q. So, that means there was Legal and  
17 Government Affairs representatives for those other  
18 tobacco--major tobacco manufacturers; correct?

19 A. Well, my recollection--I do recall  
20 Government Affairs being there for some of these  
21 companies. I'm not sure it was for all of them.

22 Certainly there was somebody in the room for each of

09:44:37 1 depends upon the circumstances of the foreign  
2 manufacturer exactly what they're doing in this  
3 country as to whether there is personal jurisdiction  
4 or not.

5 BY MR. LUDDY:

6 Q. Can you look at Core Document 28, please.  
7 Have you seen this document before,  
8 Mr. Hering?

9 A. Yes, I have.

10 Q. And this is a--well, can you identify it?

11 A. It's the notes of Virginia Murphy, who is a  
12 lawyer at Philip Morris, from a meeting held in D.C.  
13 on January 20th of 2004.

14 Q. And you attended that meeting; right?

15 A. I did.

16 Q. Okay. And who were the other attendees at  
17 that meeting?

18 A. Well, they're listed here. I don't--I  
19 don't know that I could remember, but they're listed  
20 here as Joel Ressler of Pennsylvania, Bill  
21 Lieblich--

22 Q. Who is Joe Ressler?

09:47:22 1 these.

2 Q. Okay. And then who is David? You're going  
3 to have to help me?

4 A. David Reams is a lawyer at Covington &  
5 Burling or he was--he's not there any  
6 longer--representing RJR and B&W. I think this was  
7 at the time that RJR and B&W were merging.

8 Q. And there were no NPMs at this meeting;  
9 correct?

10 A. That's correct.

11 Q. And the purpose of this meeting was to  
12 discuss various legislative proposals that dealt  
13 directly with NPMs; correct?

14 A. That's correct.

15 Q. What are the equity assessments that's  
16 referenced there?

17 A. The equity assessments in this context were  
18 bills that, as far as we could tell, were being  
19 pushed by RJR in some of the MSA States to enact a  
20 fee termed an "equity assessment" against NPMs.

21 Q. And in this meeting, the NAAG  
22 representatives were making clear how committed they

09:48:36 1 were to allocable share appeal; correct?  
 2 A. Well, certainly we were and have been  
 3 committed. I don't--I haven't read this recently,  
 4 so I don't know.  
 5 PRESIDENT NARIMAN: Who is Mark Greenwald?  
 6 THE WITNESS: Mark Greenwald is the--my  
 7 former boss.  
 8 PRESIDENT NARIMAN: He's part of NAAG.  
 9 THE WITNESS: Former Chief Counsel of NAAG,  
 10 of the NAAG Tobacco Project, not of NAAG, but of the  
 11 NAAG Tobacco Project.  
 12 BY MR. LUDDY:  
 13 Q. Now, read down to the third to last bullet  
 14 on the first page: "States are in favor of  
 15 balancing but uncomfortable with legislation that  
 16 would side them too closely with Participating  
 17 Manufacturers."  
 18 Do you see that?  
 19 A. Yes.  
 20 Q. Do you remember that being discussed?  
 21 A. Not in those terms. What I remember being  
 22 discussed is that we were not in favor of the equity

09:51:27 1 that?  
 2 Mark, do you have that? Does your copy  
 3 have the document, the language that I was reading,  
 4 the second page? It's the four, five lines down on  
 5 the second page. The media is reporting.  
 6 Mark, can you show that to Mr. Hering.  
 7 THE WITNESS: Yes, now I see it.  
 8 Q. Okay. And that's why the public guys NAAG  
 9 likes to distance itself from the OPMs, does it not?  
 10 A. I agree with you that as we discussed  
 11 yesterday, the AGs are certainly not enamored of the  
 12 perspective of some of the media that we are in bed  
 13 with the Participating Manufacturers and the OPMs in  
 14 particular.  
 15 However, I would like to point out that  
 16 this was said in the context of the equity fee which  
 17 I explained earlier was why we were there in large  
 18 part to speak with them; that RJR was at that time  
 19 pushing the equity fee, which again is a fee in  
 20 addition to the escrow in a number of the Settling  
 21 States, and we had nothing to do with this. In  
 22 fact, we were against it. If you read through this

09:49:36 1 assessment, and we tried to impress that upon RJR.  
 2 Q. But NAAG is concerned with how they are  
 3 perceived by the media when they're dealing with the  
 4 OPMs, are they not? I think you talked about this--  
 5 A. Yes, we did talk about it yesterday.  
 6 Q. And look at the second bullet on the second  
 7 page: Media is reporting that AGs and PMs are  
 8 conspiring to hurt the little guy.  
 9 A. Yes.  
 10 Q. And this is why you were trying to distance  
 11 yourselves from the OPMs; correct?  
 12 A. I'm looking for the statement, actually.  
 13 Where is it?  
 14 Q. Second bullet point.  
 15 A. Maybe I'm on the wrong page.  
 16 Q. Second page, I'm sorry. Second page. Do  
 17 you have second page, second bullet?  
 18 A. I'm missing the second page.  
 19 Q. Oddly enough. This is missing the second  
 20 page, too. Why is it in mine? One second. I'm  
 21 sorry.  
 22 MR. LUDDY: Does the Tribunal's copy have

09:53:04 1 memo, you see several points where we said we didn't  
 2 want them to be doing this.  
 3 And because they were attaching it to bills  
 4 together with the Allocable Share Amendment and  
 5 together with complementary legislation, the  
 6 perception was that we were pushing it, and we were  
 7 pushing, of course, allocable share and  
 8 complementary, but we have never been pushing the  
 9 equity assessment.  
 10 Q. But the same notion that NAAG doesn't want  
 11 to be perceived by the media as too close to the  
 12 OPMs would also explain why NAAG could not go to a  
 13 legislature and say we need allocable share appeal  
 14 because we need to protect the OPMs' elevated  
 15 margins because they raised their prices; right?  
 16 A. That's true, and that's also not why we  
 17 do it.  
 18 Q. But that's not exactly what Mr. Sorrell's  
 19 letter claimed, is it?  
 20 A. Well--  
 21 Q. And he was essentially--he was the head of  
 22 the entity for which you now work; correct?

09:54:11 1 A. He was, and I'm not sure I agree with your  
2 characterization of Mr. Sorrell's letter.  
3 Q. This meeting was in January, and again this  
4 is a private meeting, no media at this meeting, SPMS  
5 at this meeting, lobbyists at this meeting, OPMS at  
6 this meeting, and no NPMs at this meeting; correct?  
7 A. That's correct.  
8 Q. And this was in January, and on Page 3 it  
9 refers to the most recent gathering of these people  
10 had been in November only, two months earlier.  
11 How often did you meet with the OPMS on  
12 these issues?  
13 A. Can I find the reference first, if you tell  
14 me where it is.  
15 Q. It's the top line of Page 3, Mazinga during  
16 our November meeting.  
17 A. I don't recall. I'm trying to recall that  
18 meeting. I don't recall that specific meeting.  
19 We meet, as I said, with the participating  
20 manufacturers twice a year per the MSA.  
21 Occasionally they will also show up to one of the  
22 NAAG meetings that we have, and by NAAG meetings, I

09:58:28 1 Department for production in this matter?  
2 A. I don't know.  
3 Q. Were any of the notes from meetings with  
4 the OPMS in NAAG concerning the allocable share  
5 appeal produced to the State Department for  
6 production in this matter?  
7 A. I don't know.  
8 Q. Were any of the documents at NAAG  
9 contained--has in its possession concerning the GRE  
10 Working Group produced to the State Department for  
11 production in this matter?  
12 A. I don't know.  
13 Q. Were they--did the State Department even  
14 ask for them?  
15 A. I don't know.  
16 Q. Who would they have asked?  
17 A. Who at NAAG?  
18 Q. Yes.  
19 A. Most likely Bill Lieblich.  
20 PRESIDENT NARIMAN: May I just ask one  
21 question. I just want to know one thing. Why  
22 weren't the NPMs requested to attend this or any

09:55:29 1 mean a meeting that's held by NAAG, the larger  
2 umbrella organization for any number of topics.  
3 At the time that we were attempting to pass  
4 allocable share and complementary, we met a number  
5 of times. I don't recall how many.  
6 Q. Could you--now, this was--this was a  
7 private meeting, so there weren't any legislatures  
8 around or Tribunal Members around.  
9 Can you tell me--can you see if there is  
10 any references to healthcare in that memo.  
11 (Witness reviews document.)  
12 A. No, I don't see any reference.  
13 Q. Now, there were seven people--six, seven--I  
14 don't know how many people from NAAG. One, two,  
15 three, four, five, six. Did any of the NAAG  
16 representatives make notes of this meeting,  
17 presumably?  
18 A. I don't know.  
19 Q. You're a conscientious guy. I assume you  
20 had notes of this meeting?  
21 A. Presumably I did.  
22 Q. Were these notes produced to the State

09:59:18 1 other meeting? Is there any particular reason?  
2 They could have been told that, yes, we could do  
3 this. Now, what do you want to say about it? Or  
4 were they purposefully kept out? I mean, was that  
5 the intention?  
6 THE WITNESS: The NPMs had no interest in  
7 passing this legislation as I've explained earlier.  
8 PRESIDENT NARIMAN: Yes, but they had an  
9 interest in it, I mean, ultimately when passed.  
10 THE WITNESS: I suppose that's correct,  
11 but, President Nariman, we were very much in favor  
12 of this legislation for all the reasons I've  
13 described.  
14 PRESIDENT NARIMAN: Therefore you can't  
15 explain why the NPMs were not present. That's all.  
16 THE WITNESS: Well, I suppose what I'm  
17 trying to say is there's no reason to invite the  
18 persons that are attempting to--I'm looking for the  
19 right word--perpetuate the loophole, to maintain it.  
20 As I say--well, in my affidavit, I think  
21 I'm not sure I said it here. I testified--well, in  
22 sum, I think I said 13 states and in some states

10:00:28 1 multiple times. In every state that I went to, I  
 2 was--well, nearly every state--I was opposed by  
 3 Non-Participating Manufacturers. NPMs had  
 4 absolutely no interest in having this statute,  
 5 either one of them, passed. They were quite happy  
 6 with the situation whereby they could either avoid  
 7 the escrow simply by not paying and remain  
 8 scofflaws, as I've said earlier, or having the  
 9 Allocable Share Amendment--I'm sorry, the original  
 10 Allocable Share Release in place.

11 I'm not sure we saw the point of inviting  
 12 the people that had no interest in passing the  
 13 statute to a meeting where we were discussing ways  
 14 on getting the statute passed. However, as I said  
 15 earlier, I note that if you look at this document  
 16 you will see that we opposed the efforts of the OPMS  
 17 to impose additional fees above the escrow amounts  
 18 known as the equity assessment against the NPMs.

19 PRESIDENT NARIMAN: There is one sentence  
 20 at Page 2, Hering, that's you, I suppose.

21 THE WITNESS: It is.

22 PRESIDENT NARIMAN: Notes media tie

10:02:21 1 of the one allocable share and complementary, which  
 2 was sometimes part of the package, too. We were  
 3 opposed to the equity assessment.

4 However, when they were tied together  
 5 by--at the efforts of, we believe, RJR, we were  
 6 tarred. We, the states, were tarred with the same  
 7 brush. The media perceived us as not only trying to  
 8 level the playing field by passing the Allocable  
 9 Share Amendment, but also trying to do more by  
 10 passing the equity assessment. That is what I'm  
 11 referring to here.

12 PRESIDENT NARIMAN: What is this passing  
 13 the equity assessment? I want to make sure we  
 14 understand what is the equity assessment.

15 THE WITNESS: The escrow statute, as I  
 16 explained yesterday, its purpose was to impose the  
 17 requirement of putting money into escrow that was  
 18 roughly equal to, but always a little bit less than  
 19 the amount that you would pay as a Participating  
 20 Manufacturer. The equity assessment was a fee on  
 21 top of that, and it wasn't money into escrow. It  
 22 was a fee that went to the state along the lines of

10:01:37 1 Attorneys General to the equity assessment.  
 2 What does that mean?

3 THE WITNESS: Let me--that was what I was  
 4 referring to--

5 PRESIDENT NARIMAN: What does this exactly  
 6 mean? I mean, this is all cryptic sort of notes.  
 7 After all they are notes.

8 THE WITNESS: They're not my notes.  
 9 Remember, they're not my notes.

10 PRESIDENT NARIMAN: But you attended it.  
 11 That's why I say.

12 THE WITNESS: Yes.

13 PRESIDENT NARIMAN: This is attributed to  
 14 you.

15 THE WITNESS: Yes.

16 What I was saying earlier, and I will try  
 17 to say it again, our concern regarding the media  
 18 ties was that the two pieces of legislation, the one  
 19 that we endorsed and supported and the one that we  
 20 were opposed to were being tied together to the  
 21 same--they were being sold to the legislature as a  
 22 package. And as I said, we were very much in favor

10:03:33 1 a tax, and the amounts varied, but it was a fee.  
 2 Ultimately, it was, I think, passed in a handful of  
 3 states, and it was a fee in addition to the escrow  
 4 amount.

5 Does that make sense?

6 PRESIDENT NARIMAN: Yes.

7 MR. LUDDY: I have no more questions.  
 8 I believe Mr. Violi has a few questions on  
 9 a different area for Mr. Hering.

10 BY MR. VIOLI:

11 Q. Good morning, Mr. Hering.

12 A. Good morning.

13 Q. I just want to follow up on a couple of  
 14 questions that the President raised regarding the  
 15 equity assessment fees.

16 Currently the equity assessment fees exist  
 17 in Michigan, Alaska, and Utah, is that right?

18 A. And in two of the previously settled  
 19 states, although I suppose we wouldn't call it--we  
 20 call those something different, but yes.

21 Q. And the position of NAAG in that document  
 22 was that the equity assessment fee would be hard to

10:04:55 1 defend. In fact, would give the appearance of  
2 disfavoring or disadvantaging NPMs as far as NAAG  
3 saw it in those MSA States; correct?  
4 A. That's correct.  
5 Q. Can you give--let's take Michigan, for  
6 example.  
7 What is currently the NPM payment or escrow  
8 payment in Michigan under the Escrow Statute,  
9 approximately?  
10 A. Approximately, it was--for sales in '08, it  
11 was 517 a carton. For sales in '09 it's likely to  
12 be on the order of \$5.35 a carton.  
13 Q. And the equity assessment fee in Michigan?  
14 A. I'm not sure.  
15 Q. \$2.50 sound right?  
16 A. It could be.  
17 Q. Okay.  
18 And for cigarettes sold by a Participating  
19 Manufacturer, leaving aside the previously Settling  
20 States deduction for OPMS which reduces their  
21 payment, what is the marginal or average cost to a  
22 Participating Manufacturer for a carton of

10:07:10 1 Q. And that's the reason for the basis for the  
2 conclusion and the report that Ms. Virginia Murphy  
3 makes in that document for NAAG's--relating or  
4 conveying NAAG's position as to why NAAG is not in  
5 support of the NPM assessment fee; right?  
6 A. I'm not Virginia Murphy, so I'm not sure I  
7 can say what she was saying.  
8 Can I clarify, though, one thing. You said  
9 payment. Just to be clear, the escrow amount is a  
10 deposit into escrow, whereas the equity assessment  
11 is a payment.  
12 Q. But it's a payment by NPMs; correct? It's  
13 a deposit, but it's a payment, is it not?  
14 A. It's a payment into escrow.  
15 Q. Okay, that's fair enough.  
16 ARBITRATOR CROOK: At some point, will you  
17 tell us where we go in the record to find the figure  
18 you were using of 2.50.  
19 THE WITNESS: I will get that for you.  
20 It's in the expert reports.  
21 And it's also a matter of public law under  
22 the Michigan statutes which we could pull also.

10:06:01 1 cigarettes sold in Michigan, approximately?  
2 A. It's, as I say, a bit larger. I think last  
3 year, again for '08, it was 5.17 for  
4 Non-Participating Manufacturers, and 5.36 for  
5 participants. That would be for sales in '08. For  
6 sales in '09, we don't know the numbers yet. My  
7 best estimate would be on the order of 5.30, 5.33  
8 for nonparticipants and somewhere around 5.50 for  
9 participants.  
10 Q. But the numbers in the reports between the  
11 NPMs and the SPMs, their payments are just a few  
12 pennies per carton; isn't that right?  
13 A. I'm sorry? I'm sorry, I don't think I  
14 understood the question.  
15 Q. In the reports, the expert reports, in  
16 these proceedings. Have you seen them?  
17 A. Actually I haven't, no.  
18 Q. Okay. So, with the addition of 2.50 per  
19 carton in Michigan under the NPM assessment fee, you  
20 will have a per-carton cost to an NPM that's over \$2  
21 greater than that of an SPM; is that right?  
22 A. Yes.

10:08:14 1 It's in the Michigan Code, Tax Code.  
2 ARBITRATOR CROOK: I understand, Mr. Violi,  
3 but the Tribunal has to write an award at some  
4 point.  
5 MR. VIOLI: I apologize.  
6 BY MR. VIOLI:  
7 Q. Now, Mr. Hering, are you aware of any  
8 recent attempts by R.J. Reynolds, for example, to  
9 reinstate efforts to have the equity assessment  
10 fees passed or proposed in the MSA States?  
11 A. No, I'm not.  
12 Q. When was the last time NAAG has received  
13 any communication regarding a Participating  
14 Manufacturer's proposal to initiate efforts again to  
15 have the equity assessment fees passed in any state?  
16 A. Honestly I don't recall. It may have been  
17 around the time of the Virginia Murphy memo.  
18 Q. Okay. Now, I would like to speak to you a  
19 little bit about the Master Settlement Agreement  
20 history and the history of its negotiations.  
21 You were employed by the Massachusetts  
22 Attorney General; is that right?

10:09:32 1 A. Yes, I was.  
 2 Q. And what years were you employed with the  
 3 Attorney General there?  
 4 A. Roughly '94 through '99. Then I came back  
 5 briefly in 2001.  
 6 Q. And that was under General Harshbarger; is  
 7 that right?  
 8 A. Originally under General Harshbarger.  
 9 Q. Was General Harshbarger involved, his  
 10 office involved in the negotiations of the MSA?  
 11 A. He was for a time. I think it was  
 12 primarily his Chief deputy. However, he pulled out  
 13 of the negotiations towards the end.  
 14 Q. Towards the end.  
 15 But was it his office or another office  
 16 that has a principal focus, the health initiatives  
 17 of the MSA?  
 18 A. General Harshbarger--principal focus. I  
 19 think all of them were focused on public health, but  
 20 certainly I think my General was, yes.  
 21 Q. Wasn't he selected to focus or concentrate  
 22 on the health initiatives?

10:11:46 1 effects, and the anticipated consequences of the  
 2 Escrow Statutes? Do you know those documents were  
 3 produced?  
 4 A. I do know that I have here a copy of the  
 5 MSA.  
 6 I mean, the purposes are set forth--  
 7 (Comment off the microphone.)  
 8 A. I understand that the MSA has the model  
 9 Escrow Statute attached to it as Exhibit T to the  
 10 MSA, and the purposes, findings and purposes are set  
 11 forth in the first part of the Model T Escrow  
 12 Statute.  
 13 Q. But those are not the purposes of the  
 14 legislature; right? Those are draft model purposes  
 15 that the Attorneys General with the tobacco  
 16 companies drafted; right?  
 17 A. These are the purposes set forth in the  
 18 Model Escrow Statute, and some of the legislatures  
 19 adopted these.  
 20 Q. Okay. Where are the documents relating to  
 21 the negotiation, the meeting minutes, the  
 22 discussions of the MSA and its various provisions,

10:10:46 1 A. I don't know.  
 2 Q. Were you involved at all with that office  
 3 in the context of the settlement negotiations?  
 4 A. I was not involved in the settlement  
 5 negotiations, no.  
 6 Q. And he pulled out before the end; correct?  
 7 A. Yes.  
 8 Q. Do you know why he pulled out?  
 9 A. He was not as satisfied as the others with  
 10 the public health provisions.  
 11 Q. He was not satisfied or as satisfied with  
 12 the others with respect to the public health  
 13 provisions; right? Is that what you just said?  
 14 A. That's correct.  
 15 Q. Now, has the Respondent in this case  
 16 produced any documents relating to or  
 17 contemporaneous with the negotiation of the MSA?  
 18 A. I don't know.  
 19 Q. How about the Escrow Statute, in drafting  
 20 the Escrow Statute? Any documents produced by  
 21 Respondent in connection with the purposes--and I'm  
 22 talking about the negotiations--the purposes, the

10:12:43 1 including the Escrow Statute and the health  
 2 initiatives?  
 3 A. I--I have no idea.  
 4 Q. Are you familiar with the prior Federal  
 5 proposal that predated or preceded the MSA in which  
 6 the states had made a Federal proposal to settle  
 7 their lawsuits in about June of 2007?  
 8 A. Only very generally.  
 9 Q. Only generally?  
 10 A. Yes.  
 11 Q. May I hand you what's in the Claimants'  
 12 Memorial, factual materials in support of the first  
 13 Memorial at Tab 27, and it's an abridged version.  
 14 PRESIDENT NARIMAN: Core Document?  
 15 MR. VIOLI: It's not in the Core Document.  
 16 It's in the caches to the Memorial, Claimants'  
 17 Memorial, First Memorial, Tab 27.  
 18 I will provide you, Mr. President, with the  
 19 excerpted version. It's lengthy, and I just wanted  
 20 to focus on a couple of provisions.  
 21 THE WITNESS: I have a copy of it.  
 22 I'm sorry.

10:14:02 1 BY MR. VIOLI:  
 2 Q. It's Exhibit 27 in the Claimants' Memorial.  
 3 It's a lengthy document, so I have excerpted the  
 4 relevant provisions with the first page there. It  
 5 may be easier than pulling up Exhibit 27.  
 6 PRESIDENT NARIMAN: What is this a copy of?  
 7 MR. VIOLI: This is the Federal proposal  
 8 that predated the MSA. It was an earlier draft, a  
 9 precursor to the MSA that the states drafted,  
 10 Mr. President.  
 11 BY MR. VIOLI:  
 12 Q. Do you recognize this document that I have  
 13 put before you, the excerpted version?  
 14 A. No, I don't know that I have ever seen it  
 15 before.  
 16 Q. Okay. Are you aware that the prior Federal  
 17 proposal had something called a Youth Look-Back  
 18 provision in it?  
 19 A. I have heard that.  
 20 Q. And I refer you to Page 35 of 47, which is  
 21 the third page in. 35 of 47. Do you see towards  
 22 the middle of the page where it says Appendix 5,

10:15:57 1 smoking, and there would be a financial incentive or  
 2 penalty, depending upon what the reductions were or  
 3 were not in youth smoking.  
 4 Q. Now, if I could, direct you to Page 37 of  
 5 47?  
 6 A. Thirty-seven?  
 7 Q. Of 47, right, at the top.  
 8 And I will refer the Tribunal to the  
 9 heading B "Surcharge," the surcharge.  
 10 Is that the surcharge that is imposed on  
 11 manufacturers in connection with the Youth Look-Back  
 12 provisions?  
 13 A. Well, again, I'm seeing this for the first  
 14 time, but it appears to be, yes.  
 15 Q. Okay. And then were there Look-Back  
 16 provisions for states who failed to attain certain  
 17 reductions in consumption?  
 18 A. I don't know.  
 19 Q. You don't recall that in connection with  
 20 the Federal proposal?  
 21 A. No, I don't.  
 22 Q. Could I turn you to Page 41 of 47, and ask

10:15:05 1 Look-Back?  
 2 A. Yes.  
 3 Q. And in the next page that follows, does  
 4 this not describe a Look-Back provision whereby  
 5 manufacturers were given requirements to attain  
 6 certain reductions in youth smoking?  
 7 A. I haven't read this before, so give me a  
 8 moment.  
 9 Q. I will give you a moment. I just want to  
 10 ask you, from your memory--you recall that there was  
 11 a proposal; correct? A Federal proposal.  
 12 A. Yes.  
 13 Q. Do you recall that it had Youth Look-Back  
 14 provisions in it?  
 15 A. Yes, I recall vaguely--  
 16 Q. Why don't you describe first before reading  
 17 that because you just said you saw it for the first  
 18 time today what your understanding was of the Youth  
 19 Look-Back provisions of the Federal proposal.  
 20 A. My general understanding is that the  
 21 Look-Back portion is the idea that you would see  
 22 what the reductions were or were not in youth

10:17:04 1 you if that would refresh your recollection in any  
 2 regard with respect to the Look-Back provisions that  
 3 apply to states, towards the top third, required  
 4 attainment goals for state enforcement?  
 5 MR. FELDMAN: Mr. President, we would have  
 6 to object at this point. This is well beyond the  
 7 scope of Mr. Hering's statement.  
 8 MR. VIOLI: Not at all. This has to do  
 9 with the MSA, health provisions of the MSA.  
 10 MR. FELDMAN: Doesn't this have to deal  
 11 with the Federal side of that?  
 12 MR. VIOLI: Indeed, and I had mentioned it  
 13 in the opening, and it's been the subject of our  
 14 Memorials. This is clearly, clearly within the  
 15 scope.  
 16 PRESIDENT NARIMAN: He can say he doesn't  
 17 know, he cannot answer, because he's entitled to ask  
 18 him the question.  
 19 ARBITRATOR CROOK: Mr. Violi, I would ask  
 20 you to please slow down a little bit because I can't  
 21 follow you, and I would like to be able to read the  
 22 documents that are being discussed.

10:17:52 1 MR. VIOLI: Okay.  
 2 ARBITRATOR CROOK: We are on Page 41 of 47?  
 3 MR. VIOLI: I was were on 41 of 47.  
 4 ARBITRATOR CROOK: Okay. And could you  
 5 tell the Tribunal what is the language that you were  
 6 just asking about, please.  
 7 MR. VIOLI: Well, I was asking him if this  
 8 refreshed his recollection and so--  
 9 THE WITNESS: The answer is no because I  
 10 have no recollection of this.  
 11 MR. VIOLI: All right.  
 12 BY MR. VIOLI:  
 13 Q. So, you don't have any recollection that  
 14 there were terms in the proposed Federal legislation  
 15 that predated the MSA that contained Look-Back  
 16 provisions for the states themselves as well as the  
 17 manufacturers?  
 18 A. No, this is the first time I have seen  
 19 this.  
 20 Q. Do you recall whether or not the proposed  
 21 Federal legislation had provisions in it that  
 22 applied to Native Americans?

10:19:49 1 population of the state in which the Tribe is  
 2 located. The funds to be distributed to the  
 3 Indian--to Indian Tribes shall be used for the same  
 4 purposes as those funds are to be used by the states  
 5 and be subject to the same compliance requirements  
 6 for retail sales to minors as are the states under  
 7 the Act."  
 8 Q. Now, this indicates, does it not, that at  
 9 last when the states were proposing the Federal  
 10 legislation, what I would call the Federal MSA,  
 11 there was specific mention and treatment of Indian  
 12 tribes, does it not?  
 13 A. I don't know.  
 14 Q. Do you dispute that that's not the case?  
 15 A. I don't know.  
 16 Q. Okay.  
 17 PRESIDENT NARIMAN: I just want to know,  
 18 Mr. Violi, was this--according to this document, was  
 19 this compensation to be paid out of what fund?  
 20 THE WITNESS: The MSA.  
 21 MR. VIOLI: The MSA settlement payments.  
 22 PRESIDENT NARIMAN: The entire fund?

10:18:40 1 A. No, I have no idea.  
 2 Q. I would ask you to turn to Page 33 of 47,  
 3 and I ask you to look at--or if you would read  
 4 Paragraph C-1 there, please, into the record.  
 5 A. I don't see a C-1. I see a 1, 2--  
 6 Q. Paragraph 33 of 47, C-1.  
 7 A. Oh, I'm sorry. Okay. Now I see it.  
 8 Q. The heading says "Tobacco compensation and  
 9 public health threats." You see that?  
 10 A. Yes.  
 11 Q. Could you read the first paragraph there?  
 12 A. One: A portion of the settlement funds to  
 13 which a state is otherwise entitled may be paid to  
 14 HHS for distribution to--  
 15 Q. May be or shall be?  
 16 A. I'm sorry, shall be. Did I say may?  
 17 "Shall be paid to HHS for distribution to the Indian  
 18 tribes which have been certified by FDA for  
 19 treatment as states. The funds to be paid for such  
 20 purposes on behalf of Indian tribes shall be  
 21 determined by the proportion of registered tribal  
 22 members resident on the Reservation to the total

10:20:47 1 MR. VIOLI: Out of the fund of the MSA.  
 2 PRESIDENT NARIMAN: For the Tribes?  
 3 MR. VIOLI: They would pay for the Indian  
 4 Tribes, yes.  
 5 MR. FELDMAN: Mr. President, this is a  
 6 proposed Federal settlement completely separate from  
 7 the MSA.  
 8 PRESIDENT NARIMAN: Okay.  
 9 MR. VIOLI: This was proposed by--  
 10 BY MR. VIOLI:  
 11 Q. Well, let me ask you, Mr. Hering. Did the  
 12 MSA States propose a Federal settlement of their MSA  
 13 claims?  
 14 A. As I said earlier, I wasn't involved in the  
 15 settlement negotiations. I don't know who proposed  
 16 this.  
 17 Q. Does NAAG have--does anyone at NAAG have  
 18 knowledge of the Federal proposal?  
 19 A. I don't know.  
 20 Q. Does NAAG have any documents relating to  
 21 the Federal proposal?  
 22 A. I don't know.

10:21:27 1 Q. Are you denying that the states made a  
2 proposal, a Federal proposal, to settle their MSA  
3 claims?  
4 A. I don't know. I simply wasn't involved in  
5 that chapter of the tobacco litigation.  
6 Q. I'm not asking if you were involved. I'm  
7 asking you if you are denying--  
8 A. I'm not stating or denying anything. I'm  
9 saying I have no knowledge.  
10 Q. Of a Federal proposal that was made by the  
11 states?  
12 A. I know there was a Federal proposal made.  
13 I don't know who made it.  
14 Q. Okay.  
15 MR. FELDMAN: Mr. President, we are so far  
16 afield from the witness's declaration at this point  
17 we would request that this line of questioning just  
18 end at this point.  
19 MR. VIOLI: I just have a few more  
20 questions, and it does relate to something that was  
21 in the opening, it's in the Memorial, and it relates  
22 to the applicability of the Escrow Statutes and the

10:23:19 1 So, let me repeat the question.  
2 Do you know whether or not any Attorneys  
3 General of any Indian Tribe or Native American  
4 Nation was invited to the negotiations for the MSA?  
5 A. I don't know.  
6 Q. Now, in the MSA--  
7 PRESIDENT NARIMAN: Do you know that  
8 Attorneys General for the Tribes or Nations,  
9 sovereign Nations?  
10 THE WITNESS: Did I know that they had  
11 Attorneys General for--  
12 PRESIDENT NARIMAN: Some of them have or  
13 they don't?  
14 THE WITNESS: No, I did not know that.  
15 BY MR. VIOLI:  
16 Q. Do you know that now?  
17 A. Well, you've just told me that.  
18 Q. So, you haven't known until this day that  
19 there are Native American Nations in this country or  
20 within the geographic borders of the United States  
21 that have their own Attorneys General?  
22 A. No.

10:22:15 1 MSA to Indian Tribes.  
2 BY MR. VIOLI:  
3 Q. Now, were the persons who negotiated the  
4 MSA were Attorneys General from the various states;  
5 right?  
6 A. Yes, some Attorneys General. Some  
7 Attorneys General, not all of them were involved,  
8 and obviously Tobacco Companies.  
9 Q. Were any Attorneys General of any Native  
10 sovereign American--Native American Indian Tribe  
11 invited to negotiations to your knowledge?  
12 A. One of the Chief negotiators was Attorney  
13 General Christine Gregoire, now Governor of  
14 Washington State, and Washington I know has a number  
15 of federally recognized Indian Tribes.  
16 Q. I'm sorry, I should have made that clearer.  
17 I meant an Attorney General of the sovereign--do you  
18 know that sovereign Native American Indian Tribes  
19 and Nations have their own Attorneys General? Some  
20 do. Do you know that?  
21 A. No.  
22 Q. You don't know that.

10:24:08 1 Q. Now, when the MS--the Federal proposal you  
2 know was rejected--correct?--by Congress. It never  
3 was passed.  
4 A. Yes.  
5 Q. And then the MSA States proceeded  
6 thereafter to negotiate the MSA apart from and after  
7 that rejection by Congress; correct?  
8 A. Yes.  
9 Q. Now, the MSA specifically excludes the  
10 rights of tribes to bring their own claims in  
11 connection with tobacco and tobacco manufacturers;  
12 correct?  
13 A. I don't specifically recall. What section  
14 are you referring to there?  
15 Q. I'm going to give you an excerpted version.  
16 It's Exhibit 3 to the Claimants' Main Memorial. I  
17 have an excerpted version for the Tribunal and for  
18 our friends.  
19 PRESIDENT NARIMAN: What exhibit?  
20 MR. VIOLI: It's Exhibit 33 to the main  
21 Memorial, the first Memorial. Just one page. It's  
22 one page extra, and I have a copy for you so that

10:25:25 1 you could just refer to that page.  
 2 BY MR. VIOLI:  
 3 Q. And if you would like to look at your  
 4 little handbook, it's 12(a)(6), Mr. Hering.  
 5 A. Okay. I just want to be sure I know where  
 6 it is.  
 7 Q. And when you find it in your manual, can  
 8 you please read that into the record, Section  
 9 12(a)(6) of the MSA.  
 10 A. The Settling States do not purport to waive  
 11 or release any claims on behalf of Indian tribes.  
 12 PRESIDENT NARIMAN: I didn't find it.  
 13 MR. VIOLI: It's Number 6.  
 14 THE WITNESS: It's the bottom of this  
 15 excerpt. It's Section 12(a)(6) of the MSA.  
 16 BY MR. VIOLI:  
 17 Q. And it says, "The Settling States do not  
 18 purport to waive or release any claims on behalf of  
 19 Indian tribes."  
 20 Do you see that?  
 21 A. Yes.  
 22 Q. So, at some point, the MSA States at least

10:28:02 1 MSA?  
 2 MR. VIOLI: It was omitted in the MSA  
 3 except for this one little--  
 4 PRESIDENT NARIMAN: But you're not  
 5 challenging the MSA.  
 6 MR. VIOLI: That's correct.  
 7 The Escrow Statutes are also attached to  
 8 the MSA, which I was going to ask him.  
 9 BY MR. VIOLI:  
 10 Q. My next question was: Is there any mention  
 11 of Indians or Indian Tribes in the Escrow Statute to  
 12 which are attached as a model statute to the MSA?  
 13 Let the record reflect the witness is  
 14 turning to model statute Exhibit T.  
 15 A. I would have to read it because it's again  
 16 a lengthy--  
 17 PRESIDENT NARIMAN: He could do whatever he  
 18 wants.  
 19 MR. VIOLI: Do you deny that there is no  
 20 mention of Indian Tribes or Indian Country in the  
 21 Escrow Statutes?  
 22 THE WITNESS: I don't know. If you'll give

10:27:00 1 considered or had in their minds in drafting this  
 2 MSA the concerns, the rights of Indian Tribes; is  
 3 that correct? Is that fair to say?  
 4 A. Apparently, yes.  
 5 Q. Apparently.  
 6 But that's the only thing we see in the MSA  
 7 in connection with Indian Tribes as far as releases  
 8 of claims; correct?  
 9 A. I don't know. It's a lengthy document.  
 10 Q. It's a lengthy document.  
 11 PRESIDENT NARIMAN: Sorry, Mr. Violi, but  
 12 this line of questioning, I just want to know, and  
 13 the Tribunal would like to be--we don't want to shut  
 14 you out at all, but we would like to know--I mean,  
 15 what are you driving at at the moment, if you could  
 16 tell us without--  
 17 MR. VIOLI: Sure. Attached to the MSA is  
 18 the Escrow Statute. In the MSA, we know the prior  
 19 Federal proposal of the MSA the same states that  
 20 negotiated had a very lengthy provision for Indians,  
 21 Indian tribes.  
 22 PRESIDENT NARIMAN: It was omitted in the

10:28:44 1 me a moment, I'll take a quick look.  
 2 BY MR. VIOLI:  
 3 Q. It's only three pages long, I believe or  
 4 maybe four.  
 5 A. It's five, actually, I think.  
 6 Q. Beyond the Preamble. Sorry.  
 7 ARBITRATOR CROOK: Mr. Violi, I would  
 8 invite you not to ask--put words in the witness's  
 9 mouth. He's indicated he does not know. You ask  
 10 him the question, do you deny, but he has indicated  
 11 he did not know.  
 12 MR. VIOLI: I guess my difficulty is,  
 13 Mr. Crook, that do you deny, the response saying I  
 14 don't know is generally not responsive to do you  
 15 deny. It's either yes or no. That's why I'm trying  
 16 to help the witness out, but I will refrain from  
 17 that.  
 18 ARBITRATOR CROOK: So, you're inviting him  
 19 to say either yes or no when he does not know. You  
 20 are inviting him to misrepresent to the Tribunal?  
 21 MR. VIOLI: No, the response is yes or no  
 22 whether or not he denies the fact. That's all.

10:29:32 1 He could say I don't know if it contains  
 2 it. That's different than saying I don't know if  
 3 I'm denying it. That's my point, but I will make it  
 4 clear. I will pose the question in a different way.  
 5 PRESIDENT NARIMAN: Is it your case that  
 6 the Escrow Statutes and the amendments are  
 7 inapplicable to Indian Tribes?  
 8 MR. VIOLI: Yes, that's where I'm going.  
 9 PRESIDENT NARIMAN: There's your case.  
 10 That's what I want to know. That's your case.  
 11 MR. VIOLI: The whole history.  
 12 PRESIDENT NARIMAN: I just want to know.  
 13 MR. VIOLI: I just needed a foundation for  
 14 it from the beginning until the end.  
 15 THE WITNESS: I have read it very quickly  
 16 once again, and I don't see any reference.  
 17 BY MR. VIOLI:  
 18 Q. Okay. And I gather, I take it from your  
 19 not having a familiarity with the Federal proposal  
 20 that you couldn't testify today whether or not the  
 21 Federal proposal had any compensation or reward for  
 22 Participating Manufacturers if they lost market

10:31:59 1 opening.  
 2 A. Yeah, there is a definition of units sold.  
 3 Exactly what it means is a matter of dispute.  
 4 Q. And the FAQ memorandum that Mr. Luddy  
 5 showed you this morning, which was drafted just  
 6 after the MSA was executed, that mentioned Indians  
 7 and Indian Tribes; correct?  
 8 A. Yes, it did.  
 9 Q. And do you recall it saying that if the  
 10 state does not collect excise taxes in Indian  
 11 Country, that it would not constitute the sale, and  
 12 the cigarettes sold would not execute constitute the  
 13 units sold under the definition of the Escrow  
 14 Statute?  
 15 A. I think it said something slightly  
 16 different. I think it referred to taxable sales;  
 17 that is, that if they weren't taxable, they weren't  
 18 units sold. But if they were taxable, they could be  
 19 units sold.  
 20 Q. And it depended on whether or not--the  
 21 units sold depended on whether the state collected  
 22 the tax; correct?

10:30:53 1 share; is that right?  
 2 A. Are you suggest something akin to the NPM  
 3 adjustment?  
 4 Q. Indeed.  
 5 A. No, I don't, but my understanding was that  
 6 under the Federal proposal everyone would, by  
 7 definition, be participating, so there would  
 8 be--there could not be any loss of market share.  
 9 Q. Correct.  
 10 And there also were no exemptions,  
 11 grandfathered exemptions, for any Participating  
 12 Manufacturers under that scenario you just  
 13 presented; correct?  
 14 A. My, again, vague understanding is, yes. I  
 15 mean, it was legislation. It wasn't a settlement.  
 16 Q. And it applied equally across the board to  
 17 all manufacturers; correct?  
 18 A. I don't know the details.  
 19 Q. Okay. And the definition of units sold in  
 20 the Escrow Statute is one that is computed based on  
 21 the measure of excise taxes collected by the state;  
 22 correct? We saw that in the slide during the

10:33:11 1 A. Again, that's a point of dispute.  
 2 Q. Well, is it a point of dispute or is it a  
 3 point of dispute in the document?  
 4 A. It's a point of dispute as to what the  
 5 document means.  
 6 Q. Okay, why don't we refer to the document.  
 7 Do you have it there?  
 8 A. Which document?  
 9 Q. The FAQ.  
 10 A. Oh. Can you remind me where it is.  
 11 MR. VIOLI: He's asking about the--  
 12 MR. LUDDY: Document 9.  
 13 THE WITNESS: It's not 10.  
 14 MR. VIOLI: It's Document 9. Sorry, Core  
 15 Document 9. FAQ, sorry, frequently asked questions.  
 16 BY MR. VIOLI:  
 17 Q. And you have seen this document before  
 18 today; correct?  
 19 A. I have.  
 20 Q. And the reference you made is to Item  
 21 Number 11, and I will quote it into the record:  
 22 "There are NPMs located on Indian Reservations. Are

10:34:23 1 these manufacturers liable under the model statute  
 2 or qualifying statute to remit escrow payments?"  
 3 The answer is: "They are if they make  
 4 taxable sales."  
 5 Correct?  
 6 A. Yes.  
 7 Q. And in selling--are you familiar with the  
 8 operations of Grand River by some chance?  
 9 A. To a degree, yes.  
 10 Q. Grand River sells to Native Wholesale  
 11 Supply and to Tobaccoville; correct?  
 12 A. Yes.  
 13 Q. Do you know if any of those sales are  
 14 taxable under any state, state law, for purposes of  
 15 excise taxes?  
 16 A. Yes. Well, certainly the sales made  
 17 through Tobaccoville are.  
 18 Q. I didn't say going through. I said the  
 19 sales to, to Tobaccoville or Native Wholesale  
 20 Supply.  
 21 A. Are taxable?  
 22 Q. Yes.

10:36:34 1 Wholesale Supply, some of those sales are taxable  
 2 and some are not. Some of the on-Reservation sales  
 3 are clearly not taxable. However, some of the sales  
 4 made by the cigarettes brought in by Native  
 5 Wholesale ultimately are sold in a way that they  
 6 could be taxable.  
 7 New York, I suppose is the best example; is  
 8 a state whereby a number of the sales made through  
 9 Native Wholesale Supply could be taxable, but New  
 10 York engages in a policy of forbearance and does not  
 11 collect tax on the sales.  
 12 Q. Just New York?  
 13 A. No, I think there are some other States.  
 14 They're, as I say, the most prominent example.  
 15 PRESIDENT NARIMAN: So, they would be,  
 16 according to you, not taxable sales, or they would  
 17 still be taxable sales.  
 18 THE WITNESS: Some are taxable.  
 19 PRESIDENT NARIMAN: In this answer to this  
 20 FAQ.  
 21 THE WITNESS: Some are taxable--for the  
 22 Native Wholesale Supply cigarettes, some are

10:35:27 1 A. Well, you're talking about when they import  
 2 them before they are sold in a state to consumers?  
 3 Q. What are the taxes referred to in number 11  
 4 there? They're state cigarette excise taxes;  
 5 correct?  
 6 A. These--well, there are two levels of  
 7 taxation in the U.S. There is Federal excise tax  
 8 and there's state excise tax. When the cigarettes  
 9 come in from Canada or any other country to the  
 10 importer and they are entered into the United States  
 11 for consumption, Federal excise tax is due.  
 12 Therefore, both Tobaccoville and Native Wholesale  
 13 Supply pay Federal excise tax. At that point, of  
 14 course, they haven't made it to the consumer. When  
 15 they are then in turn sold to a consumer, in some  
 16 instances those sales are taxable. In others they  
 17 are not.  
 18 For instance, if I could just finish, in  
 19 Tobaccoville, I believe all of them are sold in the  
 20 way that that state excise taxes are due because  
 21 they are sold off Reservation in South Carolina and  
 22 other states. They pay SET. In the case of Native

10:37:34 1 taxable, some are not.  
 2 PRESIDENT NARIMAN: No, I'm saying for New  
 3 York as a matter of policy does not enforce its  
 4 taxing statute. The answer would be that they are  
 5 taxable sales or not?  
 6 THE WITNESS: Some of them are taxable,  
 7 yes.  
 8 PRESIDENT NARIMAN: Even in New York.  
 9 THE WITNESS: Yes.  
 10 PRESIDENT NARIMAN: We are talking only of  
 11 New York.  
 12 THE WITNESS: Yes.  
 13 BY MR. VIOLI:  
 14 Q. Which sales are taxable that Grand River  
 15 makes to NWS, and I'm talking about just between  
 16 Grand River and NWS, because the Escrow Statute  
 17 applies to Grand River, does it not, according to  
 18 the states?  
 19 A. The Tobacco Product Manufacturer, which is  
 20 Grand River.  
 21 Q. Okay. And Grand River doesn't sell to any  
 22 consumer itself, does it?

10:38:18 1 A. To my knowledge, no, they don't sell  
2 directly.  
3 Q. To a consumer. They sell to, as I said  
4 before, NWS or Tobaccoville.  
5 So, my question was, number 11, we are  
6 talking about taxable sales, state excise taxes;  
7 correct? The preceding discussion--can I finish my  
8 question?  
9 A. Okay.  
10 Q. The preceding discussion talks about fixing  
11 a stamp, a state tax stamp, and calling it a unit  
12 sold. Under the Escrow Statute, a unit sold is  
13 defined not by reference to the Federal excise tax,  
14 but to the state excise tax; correct?  
15 A. I'm sorry, I lost you. Say the last part  
16 again, please?  
17 Q. The Federal excise tax is not an issue  
18 under the Escrow Statute. It's the state excise  
19 tax.  
20 A. Yes.  
21 Q. And Number 11 speaks to taxable sale with  
22 reference to the Escrow Statute; correct?

10:40:14 1 Grand River engages in, those sales to NWS and  
2 Tobaccoville, they do not result in units sold under  
3 the Escrow Statute; correct?  
4 A. I think we are talking apples and oranges  
5 here. The Escrow Statute doesn't address sales, the  
6 FET sales. Again, it is FET sales, as you pointed  
7 out.  
8 ARBITRATOR ANAYA: So, in light of this  
9 number 11 as to Grand River cigarettes that are--end  
10 up being sold on a Reservation, are those or are  
11 those not taxable sales for the purpose of the  
12 Escrow Statute?  
13 THE WITNESS: They are clearly some--  
14 ARBITRATOR ANAYA: Which ones?  
15 THE WITNESS: You're wading into an area of  
16 Indian law that I'm not the expert on, but there are  
17 clearly some sales under U.S. Federal law that are  
18 not taxable by the states, and those would not be  
19 units sold under the escrow. Then there are some  
20 that clearly are. And then there are some that--  
21 ARBITRATOR ANAYA: Which? Give me an  
22 example, please, of those that clearly are, as you

10:39:04 1 A. Yes.  
2 Q. Therefore, it refers to the state excise  
3 tax; correct?  
4 A. Right, yes.  
5 Q. Okay.  
6 A. But what I was trying to say was that 11  
7 doesn't apply to Grand River. Grand River is not a  
8 manufacturer located on an Indian Reservation within  
9 the United States, which is what this is directed  
10 at.  
11 Q. It may be directed at that, but Grand River  
12 does not make a taxable sale when it makes its only  
13 sale to NWS; correct? Under number 11.  
14 A. That would be true for any cigarettes  
15 coming in from any country to an importer or, for  
16 that matter, cigarettes made by a domestic--sales  
17 made by domestic participating or non-Participating  
18 Manufacturer to a wholesaler.  
19 The incidence of state excise tax doesn't  
20 arrive at the manufacturer to wholesale level. It  
21 arises when the cigarettes are sold at retail.  
22 Q. So, at least with respect to the sales that

10:41:32 1 said.  
2 THE WITNESS: Even by Native Wholesale  
3 Supply or by--I mean, clearly the Tobaccoville ones  
4 are, I guess is what I'm saying, and then some of  
5 the Native Wholesale Supply ones are. I--  
6 ARBITRATOR ANAYA: The ones that are sold  
7 on the Reservation?  
8 THE WITNESS: Oh.  
9 My understanding is, and I know you,  
10 Professor Anaya, are an expert on this.  
11 ARBITRATOR ANAYA: I'm trying to understand  
12 for the purposes of the Escrow Statute. That's what  
13 I'm trying to figure out, and not just in the--under  
14 Federal law what the incidence of the taxes, the  
15 taxability of sales for cigarettes generally are.  
16 But for the purposes of the Escrow Statute, how do  
17 you view that or how do the states view it?  
18 THE WITNESS: This is a matter of dispute,  
19 first of all--  
20 PRESIDENT NARIMAN: How do you view it?  
21 He's asking you, how do you view it?  
22 ARBITRATOR ANAYA: I mean, if you don't

10:42:27 1 know, that's fine. But who knows? I mean, someone  
 2 has got to be making a determination, right?  
 3 THE WITNESS: Well, it's an individual  
 4 state determination.  
 5 ARBITRATOR ANAYA: Okay.  
 6 THE WITNESS: And I'm struggling a little  
 7 bit because I'm a little bit out of my depth, but  
 8 also because we--and when I say there is some  
 9 disagreement on this, there is not universal  
 10 agreement among the states.  
 11 ARBITRATOR ANAYA: Okay. But--  
 12 THE WITNESS: Let me give you an example.  
 13 In Oklahoma, for instance. Oklahoma has state  
 14 stamps that are the "normal non-Reservation" state  
 15 stamps. It also has compacts with a number of its  
 16 tribes. And under those compacts, a version of the  
 17 state tax stamp is applied to those sales and at a  
 18 different rate usually and with the Tribe retaining  
 19 a portion or in some cases I think all of the funds,  
 20 and those are considered by Oklahoma to be units  
 21 sold.  
 22 ARBITRATOR ANAYA: Okay. Thanks.

10:44:44 1 transaction, that transaction is absolutely not  
 2 taxable by the states. I understand that.  
 3 PRESIDENT NARIMAN: Now, even though--but  
 4 this is an on-Reservation sale because I'm not quite  
 5 sure of this.  
 6 THE WITNESS: Yeah. The concept of  
 7 on-Reservation also becomes fuzzy. I mean, in  
 8 Oklahoma, there is no Reservation, there is just  
 9 Indian lands. Not every state even has a defined--  
 10 PRESIDENT NARIMAN: It all depends on state  
 11 to state?  
 12 THE WITNESS: It depends very much, and  
 13 that's why I'm struggling and also because as I  
 14 said, I'm a bit out of my depth.  
 15 BY MR. VIOLI:  
 16 Q. Other than Oklahoma, are you aware of any  
 17 states' enforcement of the Escrow Statutes prior to  
 18 2006 with respect to on-Reservation sales of an  
 19 NPM's cigarettes?  
 20 A. No, not offhand.  
 21 Q. Not offhand.  
 22 Did something in 2006 that changed in the

10:43:32 1 PRESIDENT NARIMAN: I just want to ask you  
 2 one thing. Do you happen to know, if you don't,  
 3 please tell us you don't, what is the portion of  
 4 on-Reservation sales regarding the Claimants to the  
 5 off-Reservation sales? Do you happen to know?  
 6 THE WITNESS: No. It's very hard to  
 7 measure because so many of them occur through  
 8 channels that we have no way of measuring. For  
 9 instance, Internet sales. There are a great number  
 10 of sales made on-line. I'm aware of this because I  
 11 work with folks in, for instance, Upstate New York  
 12 who are working to curb what are oftentimes illegal  
 13 Internet sales, and I know that there's a huge  
 14 number of cigarettes moving through the Buffalo Post  
 15 Office.  
 16 PRESIDENT NARIMAN: No, but genuine  
 17 on-Reservation sales, I just want to know. Would  
 18 they be exempt or not exempt from the statute?  
 19 THE WITNESS: What I know is exempt is that  
 20 if you and I are members--here is what I know is at  
 21 the absolute core of what has to be exempt, if you  
 22 and I are member was the same Tribe, we have a

10:45:43 1 law with respect to the Escrow Statutes such that  
 2 they would require enforcement of the Escrow  
 3 Statutes with respect to on-Reservation sales?  
 4 A. I know there were changes in New York. I  
 5 know that at one time New York was prohibited from  
 6 collecting taxes against certain Native American  
 7 sales because there was no mechanism for ensuring  
 8 that the genuine Native American-to-Native American  
 9 sales were not taxed and until that I believe it  
 10 was--it might have been the Court of Appeals of New  
 11 York, which is the highest court in New York, said  
 12 that you couldn't tax these sales until you figured  
 13 out or you established a mechanism for providing a  
 14 refund to tribal members or ensuring that the tribal  
 15 members were not taxed on those sales, and New York  
 16 didn't have that in place until later.  
 17 PRESIDENT NARIMAN: How long will you take?  
 18 There is a coffee break. Do you want to take a  
 19 break now?  
 20 MR. VIOLI: Yeah. One quick on this, and  
 21 then we could take a break.  
 22 BY MR. VIOLI:

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10:46:57 1 Q. So, the question was prior to 2006, are you  
2 aware of any enforcement actions with respect to  
3 on-Reservation sales of cigarettes under the Escrow  
4 Statutes.

5 A. I don't know. I didn't go and review that.

6 Q. All right. Are you aware whether or not  
7 any of the states brought enforcement actions  
8 against Grand River with respect to sales of the  
9 Seneca cigarette on-Reservation?

10 A. Well, here is what I do know, and this  
11 is--again, you would have to ask the states, and I  
12 know that you have some state witnesses coming up,  
13 but prior to 2006, there were a number of state  
14 judgments against Grand River for--under the Escrow  
15 Statutes for sales of cigarettes that were made  
16 through Native Wholesale Supply, not Tobaccolville.  
17 And so, I do know that the states were enforcing  
18 prior to '06 against the Grand River sales.

19 How the circumstances of those sales that  
20 led to the liability under the Escrow Statute I  
21 don't know the details of.

22 Q. We will pick up on that when we come back

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11:05:48 1 under the Escrow Statutes.

2 A. Again, no, not that I'm aware of. The  
3 states did bring and obtain judgments against GRE,  
4 among others, prior to 2006. I think we had a dozen  
5 or more judgments against GRE. However, as I said,  
6 I do not--and I do know, and I'm not speaking here  
7 about the sales through tobacco. I'm speaking about  
8 the sales through Native Wholesale. However, I do  
9 not know the details of the circumstances of the  
10 sales in the various states that is as to why the  
11 states determined that those gave rise to liability  
12 for deposit of escrow under the State Escrow  
13 Statutes.

14 Q. There is nothing in the record that says,  
15 prior to 2006, the State of Nevada, for example,  
16 sued Grand River for escrow deposits due in light of  
17 sales that took place on Indian Reservations in  
18 Nevada; right?

19 A. I don't know the full record.

20 Q. Okay. And with respect to the NWS sales  
21 that you just mentioned, there is nothing in the  
22 record that says that those sales reflect sales of

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10:48:09 1 from the break.

2 PRESIDENT NARIMAN: Okay. 15-minute break.  
3 (Brief recess.)

4 PRESIDENT NARIMAN: Before you resume,  
5 there is a little announcement by the Secretary  
6 about the time already taken. She tells me it's  
7 about four hours with this witness. Now, it's all  
8 right, you can take all day or all night with him,  
9 but the problem is so far as I'm concerned--but the  
10 problem is that we have to accommodate it into the  
11 schedule. So there are also other witnesses, so you  
12 will have to ration time in such way as you feel is  
13 appropriate. I don't want to shut you up.

14 MR. VIOLI: Okay.

15 PRESIDENT NARIMAN: But please consider  
16 that and bear that in mind.

17 MR. VIOLI: I will, Mr. President. Thank  
18 you. I will wrap up, I think, in 10 or 15 minutes.

19 BY MR. VIOLI:

20 Q. Just before the break, Mr. Hering, I asked  
21 you if there was a change in the enforcement  
22 conceptually with respect to on-Reservation sales

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11:07:22 1 Seneca cigarettes on Reservation land, do they?

2 A. Well actually, there might be, because I  
3 think that I've heard, and I don't know in what  
4 context but I think it--

5 Q. I'm asking in the context of what's in the  
6 record--

7 A. I understand that, but I think that there  
8 are things in the record most likely where I have  
9 always heard it said from GRE that all of their  
10 sales through Native Wholesale Supply are made on  
11 the Reservation, that they say okay, our channel for  
12 sales off the Reservation is Tobaccolville. Our  
13 channel for sales on the Reservation is Native  
14 Wholesale Supply, and those are all made on the  
15 Reservation.

16 So, yes, I think there is something most  
17 likely in the record that says these are sales on  
18 the reservation. However, as I have said, some  
19 states did bring actions against Native Wholesale  
20 Supply--I'm sorry, against GRE for cigarettes that  
21 were sold through Native Wholesale Supply.

22 I do not know the individual circumstances

11:08:17 1 on each of those sales as to why they gave rise to  
 2 escrow liability.  
 3 Q. So, you don't know if they were sales to  
 4 consumers on Reservations?  
 5 A. I don't know the circumstances.  
 6 Q. Okay. I would like to move on, if I may.  
 7 Is there a mechanism in the MSA that  
 8 provides for a compensation or a form of rebate to  
 9 the Participating Manufacturers in the MSA if they  
 10 lose market share?  
 11 A. I take it you're referring to the  
 12 non-Participating Manufacturer adjustment which we  
 13 covered yesterday briefly. Again, this is the  
 14 adjustment, that it's a potential adjustment that  
 15 may apply when Participating Manufacturers' market  
 16 share declines below a certain point. It doesn't  
 17 necessarily apply. There are certain circumstances  
 18 that must take place first.  
 19 Q. And the circumstances are if the  
 20 Participating Manufacturers lose more than 2 percent  
 21 and a state--and the 2 percent loss of market share  
 22 is caused by the MSA, determined by an economics

11:10:16 1 applies.  
 2 Q. Now, to get that reduction, these  
 3 Participating Manufacturers under the MSA have to  
 4 engage the states in an arbitration proceeding which  
 5 is variously known as an NPM proceeding, adjustment  
 6 proceeding; correct?  
 7 A. Umm.  
 8 Q. The adjustment is not automatic.  
 9 A. It's not automatic.  
 10 Q. Right.  
 11 A. I suppose what we are engaged in currently  
 12 is a proceeding in arbitration over diligent  
 13 enforcement, yes.  
 14 Q. Diligent enforcement.  
 15 And diligent enforcement, the reason why  
 16 you're engage in the latter, the last aspect at this  
 17 point, whether or not the states diligently enforced  
 18 it, is because an economics firm has already  
 19 determined that there is an NPM adjustment. There  
 20 was a market share loss to Participating  
 21 Manufacturers above 2 percent that resulted in or  
 22 that was caused by the MSA; correct?

11:09:23 1 firm, and the state is also found not to diligently  
 2 enforce the Escrow Statute, then there would be a  
 3 reduction in NPM adjustment in the form of a credit  
 4 or a payback to the Participating Manufacturers;  
 5 correct?  
 6 A. I think there is one more circumstance, but  
 7 yes, that's essentially it.  
 8 Q. And it's for less than 16-percent loss in  
 9 market share, it's 3-percent reduction in the MSA  
 10 payment for every 1-percent loss in market share;  
 11 correct?  
 12 A. Above the--  
 13 Q. After the 2 percent.  
 14 A. After the 2 percent, above the 2 percent,  
 15 yes.  
 16 Q. So, PMS--excuse me.  
 17 PMS lose 1 percent, assuming other all the  
 18 other conditions apply, they get a 3-percent credit  
 19 or reduction, and the states consequently get a  
 20 3-percent reduction in their MSA payments under that  
 21 circumstance we just described; right?  
 22 A. Yes, that's correct assuming it all

11:11:07 1 A. Not quite. It's the mechanical aspect of  
 2 determining what the market share loss is done by  
 3 the independent auditor which is  
 4 PricewaterhouseCoopers. At that point, the  
 5 significant factor test, the test to determine  
 6 whether the MSA was a significant factor  
 7 contributing to the market share loss is done by the  
 8 economics firm, and now, yes, we are at the stage  
 9 where we are determining whether or not the states  
 10 diligently enforced the statutes because diligent  
 11 enforcement of the model Escrow Statutes is  
 12 essentially a safe harbor. It gives the states the  
 13 ability to avoid the negative adjustment.  
 14 Q. And the proceedings that--the first  
 15 proceeding before the independent--or the consulting  
 16 firm, the economics consulting firm for the  
 17 determination of calculation of the adjustment, NPMs  
 18 were not invited to participate in that proceeding;  
 19 correct?  
 20 A. That's correct.  
 21 Q. And none of those documents that were  
 22 exchanged or submitted in those proceedings had been

11:12:15 1 produced to this Tribunal; is that correct?  
 2 A. I don't know.  
 3 MR. FELDMAN: Mr. President, Mr. Hering has  
 4 been asked several questions about document  
 5 production. He's testified repeatedly that he was  
 6 not involved in that, and I think that should be an  
 7 end to that line of questioning.  
 8 MR. VIOLI: I asked him a question if he  
 9 knows it's in the record. That's a fair question.  
 10 THE WITNESS: Yeah, I said I don't. Some--  
 11 MR. VIOLI: That's fine. Okay.  
 12 PRESIDENT NARIMAN: Let's move on.  
 13 BY MR. VIOLI:  
 14 Q. Now, and in the arbitration for diligent  
 15 enforcement that's currently underway, have NPMs  
 16 been invited to participate in those proceedings?  
 17 A. No.  
 18 Q. Now, in connection with this diligent  
 19 enforcement, the second part, and the causation  
 20 factor, the first part, those proceedings--in either  
 21 of those proceedings did the Participating  
 22 Manufacturers make the argument or take the position

11:14:19 1 A. Well, what you're referring--  
 2 Q. --as a matter of public policy, are you  
 3 saying that was not done in connection with or to  
 4 obtain a determination the Escrow Statutes don't  
 5 apply for purposes of the NPM adjustment?  
 6 A. Well, what you're referring to is the units  
 7 sold dispute, which I referred to earlier. The  
 8 question of what is a unit sold is a matter of  
 9 dispute between the states on the one hand and the  
 10 Participating Manufacturers on the other.  
 11 It's also not a matter of complete  
 12 agreement among the states, and it depends somewhat,  
 13 as I explained earlier, on state law.  
 14 And I'm not entirely--I am somewhat  
 15 familiar with the lawsuit that you're referring to,  
 16 but I don't know the details. What I--but I think  
 17 you're mischaracterizing it because I think that it  
 18 wasn't a question of sales on-Reservation. It was  
 19 again a question of whether New York had to collect  
 20 escrow for the sales that were clearly taxable.  
 21 The PMs--that is, Philip Morris and the  
 22 other Participating Manufacturers--have from time to

11:13:18 1 that the states have to give the PMs a credit, a  
 2 rebate or a return of their payments because the  
 3 states were not diligently enforcing these Escrow  
 4 Statutes by enforcing them on Indian Reservations or  
 5 tribal land?  
 6 A. If I understand your question correctly,  
 7 no, they haven't made that argument.  
 8 Q. They haven't made it? So when Philip  
 9 Morris brought the lawsuit against NWS and every  
 10 tribe and nation in New York State for a declaration  
 11 about the applicability of the Escrow Statutes on  
 12 Indian land or Indian country in New York, that was  
 13 not for the purposes of obtaining a judgment to show  
 14 that the Escrow Statutes don't apply as a matter of  
 15 public policy in New York?  
 16 A. I'm not familiar with that suit. You're  
 17 saying Philip Morris brought a lawsuit in New York?  
 18 Q. No. Excuse me. When the State of New York  
 19 brought the lawsuit against Philip Morris and all  
 20 the Indian Nations and Tribes in New York for a  
 21 declaration that the Escrow Statute does not apply  
 22 on Indian Country in New York--

11:15:33 1 time maintained that the states should be collecting  
 2 taxes on the sales that are taxable or, in the  
 3 alternative, if they aren't collecting taxes on  
 4 those sales, at least collect the escrow.  
 5 And again, this is sales that they believe  
 6 are taxable, not the sales that occur on-Reservation  
 7 that are clearly not taxable.  
 8 Q. Is there a dispute among Philip Morris and  
 9 the various states on what is a taxable sale on the  
 10 Reservations?  
 11 A. I don't know.  
 12 Q. Okay.  
 13 A. I don't think we've reached the point where  
 14 I have a clear understanding of what their position  
 15 is or exactly what our position is. We haven't  
 16 reached that point.  
 17 Q. And you don't know if the Tribunal or if  
 18 Claimants have been provided with copies of those  
 19 documents which reflect the positions taken by the  
 20 states and the positions taken by the manufacturers  
 21 vis-à-vis sales on Indian land.  
 22 A. Aside from the documents which you've just

11:16:35 1 referred to, that is the one in New York, the case  
 2 in New York; there are no documents. We haven't  
 3 reached the stage in our proceeding where any  
 4 documents have been filed.  
 5 Q. I didn't say proceeding.  
 6 A. Or discovered.  
 7 Q. I didn't say proceeding.  
 8 What about letters? Has Philip Morris or  
 9 any of the PMs written letters to the states at  
 10 various times discussing the aspects or terms of  
 11 enforcement of the Escrow Statutes, like the letter  
 12 that Mr. Luddy referred to this morning of June 18  
 13 of 2001?  
 14 A. I'm sorry. The June 18 letter--which one  
 15 are you referring to?  
 16 Q. The one from the exempt SPMs, saying that  
 17 the states are not doing enough to enforce the  
 18 Escrow Statutes.  
 19 A. No, there is not a whole lot of  
 20 correspondence along those lines. There might be a  
 21 handful of other documents, but that isn't something  
 22 that regularly happens.

11:18:09 1 MR. VIOLI: That's right.  
 2 ARBITRATOR CROOK: I was reminding  
 3 Mr. Luddy that under Rule 3 of the IBA Rules, the  
 4 requirement is to identify documents and make a  
 5 showing as to their materiality. Did you do that?  
 6 MR. VIOLI: I believe we identified what  
 7 documents we were specifically aware of, and we  
 8 identified generally other documents that we could  
 9 not be aware of because we had never gotten a list.  
 10 We just know about their general existence, and  
 11 that's from general knowledge in the business and in  
 12 the public documents.  
 13 ARBITRATOR CROOK: And, in your view, that  
 14 conforms to Rule 3 of the IBA Rules.  
 15 MR. VIOLI: To the best of our abilities,  
 16 yes, and whether they would produce them separately.  
 17 PRESIDENT NARIMAN: No, no, we only have 45  
 18 minutes until lunch.  
 19 MR. FELDMAN: Mr. President, I would just  
 20 note that the Tribunal has already ruled in this  
 21 case. The document request submitted by the  
 22 Claimants were inconsistent with the IBA Rules, and

11:17:28 1 Q. And--but we don't have--we didn't have the  
 2 opportunity to see them nor has the Tribunal--  
 3 ARBITRATOR CROOK: Mr. Luddy, did you make  
 4 a request for those as identifiable documents under  
 5 Rule 3 of the IBA Rules?  
 6 MR. VIOLI: We made a document request that  
 7 encompassed all of these.  
 8 ARBITRATOR CROOK: I understand that, but  
 9 did you ever make a request that conformed to the  
 10 requirements of Rule 3 of the IBA Rules?  
 11 MR. VIOLI: I'll leave it to the NAFTA  
 12 counsel, but I know that we requested it and we  
 13 requested these documents specifically.  
 14 ARBITRATOR CROOK: You specifically  
 15 requested these documents.  
 16 MR. VIOLI: We specifically requested  
 17 documents dealing with this issue.  
 18 ARBITRATOR CROOK: You know that under Rule  
 19 3 of the IBA Rules--  
 20 MR. VIOLI: We have to--  
 21 ARBITRATOR CROOK: --the requirement is to  
 22 identify a document.

11:19:03 1 so the one question after another about document  
 2 production is simply irrelevant at this point,  
 3 particularly given this witness.  
 4 MR. VIOLI: I'll allow Mr. Weiler to  
 5 address the issue on whether or not the request--we  
 6 respectfully disagree with our friends here, but  
 7 whether the requests deal with this issue, but apart  
 8 from whether we have requested it, if it's relevant  
 9 to a factual issue, the question was whether or  
 10 not--  
 11 PRESIDENT NARIMAN: Okay. Try to wind up  
 12 now, if you can.  
 13 BY MR. VIOLI:  
 14 Q. Now, just prior to the execution of the  
 15 MSA, the states were in discussions with Liggett and  
 16 Commonwealth regarding joining the MSA with an  
 17 exemption; right?  
 18 A. Again, I wasn't involved. That was a  
 19 chapter in my life where I was not involved with the  
 20 MSA, and I wasn't part of the settlement  
 21 negotiations.  
 22 Q. Have you seen the Press Release of the--or,

11:19:53 1 excuse me--the transcript of the press conference  
 2 that the negotiating Attorneys General provided in  
 3 connection with the announcement of the MSA on  
 4 November 18 of 2008--I mean, excuse me, 1998?  
 5 PRESIDENT NARIMAN: What date?  
 6 MR. VIOLI: 1998, I'm sorry, press  
 7 conference announcing the MSA.  
 8 THE WITNESS: Probably sometime in my life  
 9 I have seen that. But if I have, it hasn't been for  
 10 years.  
 11 BY MR. VIOLI:  
 12 Q. Okay. And the exemption or grandfather,  
 13 you call it, was based on the two years prior to the  
 14 Grandfathered SPMs joining the MSA, correct? That  
 15 was--they joined in 1999 and the exemption was based  
 16 on '97 and '98 market share.  
 17 A. The offer was if you were to become a  
 18 Participating Manufacturer to the MSA within 60, and  
 19 then it was later amended to 90 days of the MSA--I'm  
 20 sorry, of the MSA execution date and submit  
 21 yourselves to the public health restrictions and the  
 22 payment provisions, those companies would not have

11:21:58 1 Q. Now, during the opening yesterday, there  
 2 was a slide that talked about equal choice, that the  
 3 manufacturers--the Claimants here are given the same  
 4 choice to join the MSA as the manufactures--what we  
 5 called the grandfathered manufacturers,  
 6 Grandfathered SPMs, right? We saw the slide  
 7 yesterday that discussed that they both have a  
 8 choice and the choice was an equal choice--or the  
 9 same choice.  
 10 A. I'm really not sure which side you're  
 11 referring to, but I get the concept, I think.  
 12 Q. Okay. And that was an incentive to join  
 13 the MSA, we said.  
 14 A. You're talking about the grandfathered  
 15 share?  
 16 Q. Right.  
 17 A. Yes, it was.  
 18 Q. So, and there was a consultation with  
 19 Liggett and Commonwealth prior to their execution of  
 20 the MSA and prior to the MSA's execution by the OPMs  
 21 to come in to get a grandfather, to live by the  
 22 requirements of the MSA, and we'll give you this

11:21:02 1 to make payments on the greater of their '98 market  
 2 share or 125 percent of their '97 market share.  
 3 Q. And that was the two years prior to the  
 4 execution of the MSA by them, correct?  
 5 A. Yes.  
 6 Q. Okay. And it was originally 60 days, but  
 7 the signatories to the MSA agreed to extend it to 90  
 8 days, correct?  
 9 A. That's correct.  
 10 Q. All right. So, it was something that could  
 11 be changed. It wasn't fixed in stone at the time of  
 12 first signing of the MSA, correct?  
 13 A. Well, there is an amendment to the MSA. In  
 14 theory, any part of the MSA can be amended--  
 15 Q. And that was amended to go from 60 days to  
 16 90 days, the part that allowed people to join with  
 17 an exemption, correct?  
 18 A. That's correct.  
 19 Q. All right. And that grandfathered  
 20 exemption, grandfathered share, that was part of an  
 21 incentive to join, correct?  
 22 A. Yes, it was.

11:23:05 1 grandfather as an incentive to join, correct? Is  
 2 that generally the concept?  
 3 A. I have no knowledge of any consultation  
 4 with any companies in regards to this.  
 5 Q. Okay. And given that the basis for the  
 6 incentive to join the MSA was the two years prior to  
 7 joining the MSA for those exempt SPMs currently,  
 8 wouldn't it seem reasonable to you to have that same  
 9 offer provided to the Claimants here--that is, join  
 10 the MSA today and you can join with two year--with  
 11 your prior two years' market share as an exemption.  
 12 Wouldn't that be the way to look at it as a same  
 13 offer to those that were made the offer in 1998 or  
 14 1999?  
 15 A. No. And--  
 16 Q. Would your testimony change--  
 17 A. No. Can I--can I--  
 18 Q. Okay, let me follow up and then you can  
 19 explain.  
 20 A. Can I answer? Or--  
 21 Q. Yeah, but I want--  
 22 A. All right. You want to follow up first and

11:23:53 1 then I can answer.

2 Q. And would your answer change if they  
3 offered this exemption even prior to the execution  
4 of the MSA by the OPMs? In other words, if they  
5 negotiated with them, if they consulted with them  
6 outside the public purview, said we're going to  
7 enter into the agreement with the OPMs but we want  
8 you to join within 90 days thereafter, we just  
9 haven't signed it yet, we haven't inked a deal, but  
10 we want to know if you'll go along with it. Would  
11 your testimony change that the offer made to them  
12 based on a two year--prior two years' market share  
13 not be the same as should be offered the Claimants  
14 in this case?

15 A. No, I really don't think so, if I  
16 understand what you're saying.

17 And if I could now give my complete answer.

18 Q. Yes, please.

19 A. This is an argument that has been made from  
20 time to time by a number of NPMs who have not been  
21 pleased with the grandfathered share. They've said,  
22 well I want the same deal, and the deal I want is

11:26:19 1 share in 1997 or 1998. I suppose if we had extended  
2 the grandfathered deal to today, if we enacted an  
3 amendment as Mr. Violi has suggested and extended it  
4 to today, if Grand River accepted that, it would  
5 have a zero grandfathered share because in 1997 and  
6 '98 it had no market share in the United States.

7 So, that's not the deal they want. They  
8 want the deal to be able to build up the market  
9 share as an NPM with the advantages of an NPM and  
10 then, as I say, switch at the point that is  
11 advantageous to become a PM.

12 And if I understood the opening from the  
13 Claimants in this case yesterday, they're also  
14 asking or really asking for a different deal. They  
15 would like a grandfather essentially as an NPM.  
16 They don't wish to become--or really to become a  
17 Participating Manufacturer and make the payments for  
18 all the cigarettes on which they pay FET because as  
19 I explained yesterday, that is the basis for your  
20 payments under the MSA. The FET, not the SET. What  
21 they wished to do is to remain an NPM and to argue  
22 that the Allocable Share Release is akin to the

11:24:52 1 that I can be an NPM, I can build up my market share  
2 through use of either sales in the previously  
3 settled states where no escrows do because of course  
4 they are not part of the MSA. I'm not sure I made  
5 that clear. But there are no Escrow Statutes in the  
6 previously settled states. So, in those states you  
7 can sell currently at about a \$6-per-carton  
8 advantage to a company that has to make settlement  
9 payments under the MSA.

10 (Technical interference.)

11 A. Okay. So the--as I was saying, the deal  
12 that the NPMs are looking for from our perspective  
13 is the ability to build up your market share through  
14 sales in the PSS, staying out of the MSA, and  
15 through, as I have said earlier, exploitation of the  
16 allocable share loophole; and then at the time when  
17 they determine that's advantage to become a  
18 Participating Manufacturer, to demand that they  
19 receive an exemption for the year that--prior to  
20 when they join rather than 1999--I'm sorry, 1997 or  
21 1998. And in most instances, like with Grand River  
22 Enterprises, these are companies that had no market

11:27:32 1 grandfathered share. That is, they don't want to  
2 make payments, they don't want to submit to the  
3 public health provisions of the MSA, and yet they  
4 want to be able to get a release of nearly all of  
5 their escrow under the allocable share provision,  
6 arguing that that is essentially the same deal that  
7 the SPMs got.

8 So, no, I don't agree.

9 Q. But you testified yesterday also that there  
10 is no evidence in the record of Grand River engaging  
11 in any conduct that's not--excuse me, that's  
12 prohibited under the MSA.

13 PRESIDENT NARIMAN: That's argument.

14 BY MR. VIOLI:

15 Q. You said that yesterday or--

16 A. I'm not sure I said that, but let--the  
17 transcript will speak for that.

18 Q. Okay. One last question. You mentioned  
19 the four previously settled states.

20 A. Yes.

21 Q. They don't have an Escrow Statute.

22 A. That's correct.

11:28:21 1 Q. But they have an agreement similar to the  
2 MSA. It has conduct restrictions in it.  
3 A. Yes.  
4 Q. It has payments based on national market  
5 share; right?  
6 (No response.)  
7 Q. And there's one state that hasn't passed  
8 the allocable share. That's Missouri; right?  
9 A. That's correct.  
10 Q. And with respect to just the record in this  
11 case, because that's all I have and that's all I've  
12 been provided, is there anything in the record in  
13 this case that indicates that the MSA world, the MSA  
14 agreement falls apart from Missouri or in the  
15 previously Settling States because A) they either  
16 don't have an Escrow Statute in the case of  
17 previously Settling States or that Missouri didn't  
18 pass the Allocable Share Amendment? I'm talking  
19 about the record and the evidence in this case.  
20 A. I um--  
21 Q. You're not familiar with the--  
22 A. I don't know enough about the record or

11:30:11 1 Q. And you were also asked several questions  
2 about the proposed 1997 Federal tobacco settlement.  
3 A. Yes.  
4 Q. What is the relationship, if any, between  
5 the proposed 1997 Federal settlement and the MSA  
6 agreement?  
7 A. Again, I'm not very familiar with the terms  
8 of the proposed settlement, but my understanding, as  
9 we discussed a little bit earlier, that it's  
10 completely different. There is no such thing as a  
11 PM or an NPM or an NPM adjustment or an Escrow  
12 Statute because it's Federal legislation.  
13 Q. And you were also asked several questions  
14 about, in Document 9 of Claimant's Core Bundle,  
15 Paragraph 39 involving out-of-state tobacco  
16 manufacturers.  
17 A. Oh, yes. The--this is--  
18 Q. This is the document?  
19 A. This is the frequently asked question  
20 document?  
21 Q. Yes, this is document nine, and  
22 specifically Paragraph 39.

11:29:05 1 evidence to answer that question.  
2 MR. VIOLI: No further questions,  
3 Mr. Chairman.  
4 PRESIDENT NARIMAN: Thank you.  
5 Do you want to ask some questions?  
6 MR. FELDMAN: Yes, please.  
7 REDIRECT EXAMINATION  
8 BY MR. FELDMAN:  
9 Q. Good morning, Mr. Hering.  
10 A. Good morning.  
11 Q. I just had a few questions for redirect  
12 examination.  
13 You were asked on cross-examination about  
14 your testimony before state legislatures in support  
15 of the Allocable Share Amendment.  
16 A. Yes.  
17 Q. Were Non-Participating Manufacturers  
18 involved in that legislative process?  
19 A. The Non-Participating Manufacturers, as I  
20 mentioned, were quite often at my testimony  
21 testifying in opposition and active in lobbying  
22 efforts against the legislation.

11:31:28 1 A. The one that says the--this is question 39:  
2 The Tobacco Product Manufacturer is the person  
3 responsible for paying into the escrow fund?  
4 Q. Yes.  
5 A. Okay.  
6 Q. So, if you could just complete it.  
7 A. Okay. This is on 39: The Tobacco Product  
8 Manufacturer, TPM, is the person responsible for  
9 paying into the escrow fund. It includes a  
10 manufacturer intending its cigarettes to be sold  
11 anywhere in the United States. And the first  
12 purchaser for resale of cigarettes which were not  
13 intended to be sold in the United States.  
14 Q. So, under the Escrow Statutes, if a foreign  
15 manufacturer does not intend for their cigarettes to  
16 be sold in the United States, are they--is that  
17 foreign manufacturer subject to escrow obligations?  
18 A. No, they're not.  
19 Q. And are you aware of foreign NPMs that have  
20 complied with their escrow obligations under the  
21 Escrow Statutes?  
22 A. Yes, I am.

11:32:31 1 Q. Are you aware of any examples of foreign  
2 NPMs?  
3 A. KT&G, a company that's also represented by  
4 Mr. Violi, in fact, is one that, as far as I know,  
5 is at least in general compliance, if not complete  
6 compliance, with the Escrow Statute in a good number  
7 of states.  
8 Q. And have states obtained judgments--  
9 A. And maybe I should say that KT&G is Korea  
10 Tobacco & Ginseng. I'm sorry, for those that don't  
11 know, it's a company out of Korea.  
12 Q. And have states obtained judgments against  
13 foreign NPMs for the collection of escrow deposit  
14 obligations?  
15 A. Yes, they have.  
16 Q. And can you recall any examples of  
17 judgments that were obtained against foreign NPMs?  
18 A. We have dozens and dozens of judgments  
19 against foreign NPMs from really across the world in  
20 any number of countries.  
21 I--let's see. I'm just trying to think of  
22 the countries. We have some from China. We have

11:35:19 1 on recross?  
2 PRESIDENT NARIMAN: Yes.  
3 RECCROSS-EXAMINATION  
4 Q. Mr. Hering.  
5 PRESIDENT NARIMAN: You could take more  
6 than a couple of minutes.  
7 MR. LUDDY: I'm going to be expeditious.  
8 BY MR. LUDDY:  
9 Q. On Page 39--or, I'm sorry, Question 39 on  
10 the document we were just looking at, the NAAG  
11 frequently asked question document.  
12 A. Well, yes. It's the FAQ. Again, I'm not  
13 sure whether it's solely a NAAG document or  
14 something else, but yes.  
15 Q. Okay. We did establish it had a NAAG fax  
16 number on it, though; right?  
17 A. I believe NAAG had a part in it, yes.  
18 Q. Right. Okay.  
19 Let's just look at the first sentence for a  
20 minute and parse it from the second sentence that  
21 deals with importers. The first sentence reads: If  
22 the manufacturer is out of state, we may not have

11:33:42 1 some from Greece, from India, from the Philippines,  
2 from a number of countries in South America, from  
3 other countries in Europe and the Middle East, from  
4 Canada, not including GRE, other Canadian companies,  
5 although there's only just a couple, very small  
6 ones.  
7 MR. FELDMAN: Thank you, Mr. Hering.  
8 No further questions.  
9 PRESIDENT NARIMAN: I just wanted to know,  
10 is he your principal witness on liability? Am I  
11 correct?  
12 MR. FELDMAN: Principal witness?  
13 PRESIDENT NARIMAN: Yes? No?  
14 MR. FELDMAN: No. He's one of--  
15 PRESIDENT NARIMAN: One of several.  
16 MR. FELDMAN: We have several witnesses.  
17 Mr. Hering is one of them.  
18 PRESIDENT NARIMAN: On liability, yes.  
19 MR. FELDMAN: Yes. He's one of several  
20 witnesses.  
21 PRESIDENT NARIMAN: Okay.  
22 MR. LUDDY: May I have just a few moments

11:36:08 1 jurisdiction over the company, may not be able to  
2 require it to make escrow payments.  
3 Now, that sentence on its face also applies  
4 to a foreign company; correct? Because that foreign  
5 company is, obviously, by definition, out of state;  
6 right?  
7 A. I'm sorry. The first sentence says the  
8 Tobacco Product Manufacturer, TPM.  
9 PRESIDENT NARIMAN: According to B.  
10 BY MR. LUDDY:  
11 Q. B, I'm sorry.  
12 A. Oh, I'm sorry. I'm looking at the wrong  
13 place.  
14 Q. B. If the manufacturer is out of state, we  
15 may not have jurisdiction over the company and may  
16 not be able to require it to make escrow payments.  
17 A. Yes.  
18 Q. That sentence, on its face, applies to  
19 foreign companies; correct?  
20 A. Yes.  
21 Q. Okay. All right. And that was the focus  
22 of my questioning before, not the second sentence

11:36:55 1 that Mr. Feldman now focuses on with respect to the  
2 importers.

3 And with respect to judgments, do you know  
4 the difference between a judgment on the merits and  
5 a default judgment?

6 A. Yes.

7 Q. What is the difference?

8 A. A default judgment is a judgment in which  
9 the defendant has not made an appearance.

10 Q. Right.

11 And the court just enters a judgment on the  
12 basis of the allegations made by the plaintiff  
13 because no one is there to defend it; correct?

14 A. Roughly speaking, yes.

15 Q. And most of the judgments that you have  
16 obtained against foreign manufacturers have been  
17 default judgments; correct?

18 A. Yes.

19 Q. And, in fact, you've obtained some default  
20 judgments against Grand River Enterprises, haven't  
21 you?

22 A. Yes.

11:38:49 1 specifically South Dakota, and Ohio attempted to  
2 domesticate--I believe they did--in the State of  
3 South Carolina where Grand River was known to have a  
4 creditor, Tobaccoville, that owed Grand River money,  
5 and then thereby collect on the judgments. It was  
6 only at that point where efforts to collect were  
7 made that Grand River entered the case and attempted  
8 to intervene.

9 Similarly in the California case,  
10 California was ignored until such time as California  
11 moved to enforce by domesticating its judgment in  
12 New York. Grand River first defended on the basis  
13 that their name was misspelled on the pleading.  
14 Instead of saying Grand River Enterprises Six  
15 Nations Limited SIX, California entitled it Grand  
16 River Enterprises 6--the numeral--Nations Limited,  
17 and Grand River moved to dismiss on those grounds,  
18 and has fought it ever since.

19 Q. And what happened when it went back to  
20 California after that procedural battle you just  
21 mentioned?

22 A. I think you ought to ask Mr. Eckhart.

11:37:48 1 Q. And on some occasions, Grand River  
2 Enterprises has come back in and opened those  
3 default judgments and tried to contest them, have  
4 they not?

5 A. Well, actually--

6 Q. Is that--have they or haven't they?

7 A. Well, if I could explain again. I mean, I  
8 think there is some context here. A good number of  
9 default judgments were obtained against Grand River  
10 at great effort and expense in trying to serve Grand  
11 River in Canada.

12 At times, my understanding is the Mounties  
13 feared to go on the Reservation and even serve  
14 because they were not welcome after a while in  
15 serving process on the owners of Grand River.

16 And Grand River certainly had notice and  
17 the ability to defend. It did not choose to show up  
18 and defend itself, and yes, the judgments were  
19 default judgments.

20 At that point, a number of states,  
21 including you mentioned South Dakota earlier,  
22 attempted to domesticate their judgments in a state,

11:39:52 1 Q. Do you know, sir, or you don't know?

2 A. I don't know.

3 Q. Okay. Well, I think we'll hear from  
4 Mr. Eckhart, and the opinion is in the record as of  
5 yesterday that the California courts said that  
6 California had no jurisdiction over Grand River  
7 Enterprises to require escrow payments; isn't that  
8 correct, sir?

9 A. I don't know.

10 Q. And again, this gets back to the  
11 fundamental point that we're talking about that is  
12 in this NAAG memo. There is a difference between  
13 not being able to enforce a judgment and not being  
14 able to require Grand River Enterprises to make  
15 escrow payments to go along with your MSA scheme,  
16 isn't it? There is a fundamental difference there,  
17 isn't there?

18 A. Could you read that back?

19 Q. You know what, I'll rephrase it.

20 It's difficult to call somebody a  
21 "scofflaw"--and you're sitting 20 people from people  
22 from Grand River Enterprises. It's difficult to

11:40:52 1 call somebody a "scofflaw" when the State of  
 2 California doesn't have the authority to require  
 3 them to make escrow payments, isn't it?  
 4 A. Well, California and South Dakota are not  
 5 the only states in which Grand River has sold, and  
 6 I--my own opinion is that Grand River is subject to  
 7 personal jurisdiction in the United States.  
 8 Q. Okay. Your argument, though, is always  
 9 that the states can't enforce a judgment and make  
 10 Grand River pay what you think they're entitled to,  
 11 correct?  
 12 A. I'm not sure where you're going with that.  
 13 My argument--  
 14 Q. Let's look back--let's look back at Page 13  
 15 of this document: If the manufacturer is out of  
 16 state, we may not have jurisdiction over the company  
 17 and may not be able to require it to make escrow  
 18 payments.  
 19 PRESIDENT NARIMAN: I don't think that's in  
 20 the re-examination, but you had better limit  
 21 yourself.  
 22 MR. LUDDY: I will.

11:43:19 1 MR. WEILER: Okay, so how long do I have?  
 2 (Discussion off microphone.)  
 3 MR. WEILER: So I've got lots of time,  
 4 then. Okay.  
 5 PRESIDENT NARIMAN: What are you addressing  
 6 here because there's a bit of a mixup here.  
 7 MR. WEILER: You remember that lovely  
 8 introduction yesterday that we began yesterday, with  
 9 the long--this is more of that introduction. This  
 10 would be the--see if I can move this towards  
 11 you--this is basically the Claimants' continuing  
 12 submissions on--more in this regard on the law.  
 13 Basically it's the introduction I didn't do  
 14 yesterday that I'm going to do now.  
 15 PRESIDENT NARIMAN: Please. Go ahead.  
 16 (Discussion off the record.)  
 17 MR. WEILER: So I have two PowerPoint  
 18 presentations. One is with the introduction that I  
 19 had planned yesterday. The other is in answer to  
 20 some of the questions that have come up concerning  
 21 the nature of the investment. It would be what you  
 22 would call one of those more detailed times when

11:42:02 1 PRESIDENT NARIMAN: You should have asked  
 2 this earlier.  
 3 MR. LUDDY: Actually, I am following up on  
 4 his, but you know what? I will--I think the record  
 5 is clear on this point, and I will let it stand on  
 6 that point.  
 7 Thank you, Mr. Chairman.  
 8 MR. FELDMAN: Thank you, Mr. President. No  
 9 further questions.  
 10 PRESIDENT NARIMAN: All right. Thank you  
 11 very much.  
 12 THE WITNESS: Thank you.  
 13 (Witness steps down.)  
 14 PRESIDENT NARIMAN: All right. So what's  
 15 next?  
 16 MR. WEILER: Well, you could have 15  
 17 minutes of me, Mr. President, or we could start--we  
 18 could start lunch 15 minutes earlier and end at 15  
 19 minutes earlier and then you would get me  
 20 completely.  
 21 PRESIDENT NARIMAN: Let's start because we  
 22 stopped at before eleven.

11:44:54 1 Professor Anaya keeps getting to the questions that  
 2 he keeps asking both parties. When do I get to ask  
 3 you questions. We are getting close to that time,  
 4 which I think you'd appreciate.  
 5 To begin, I want to try to set up a bit of  
 6 a road map for the parties and for the Tribunal for  
 7 how the remaining 15 hours of our time will be used.  
 8 Our time will continue to be devoted primarily to  
 9 cross-examination of witnesses. Assuming we have  
 10 some time remaining, though, we'd also like to show  
 11 you the short promotional video that GRE produced a  
 12 few years ago, which was included with the  
 13 Claimants' Memorial, and it was attached to the  
 14 First Witness Statement of Mr. Montour. If we don't  
 15 have time for it, we're probably sure you have seen  
 16 it already and that you can see it at your own time.  
 17 We also, though, will be providing you with  
 18 some what we might call question-and-answer session  
 19 opportunities as we have the witnesses breaking up  
 20 at various points. What we're going to try to do  
 21 instead is give you a very short 5- or 10-minute  
 22 presentation of what we think the issues are in a

11:45:58 1 particular topic and then invite your questions on  
2 that topic because we have a sense that you already  
3 have nice long lists of questions prepared, and that  
4 might make it easier for us to have that flow.

5 As an aside, I should mention that we were  
6 quite surprised that Mr. Montour, Jerry Montour,  
7 actually hasn't been asked by our friends to be  
8 cross-examined. It seems that they prefer the  
9 safety of their Rejoinder to take shots at his  
10 credibility and question a lot of his evidence, but  
11 despite the fact we've given them repeated  
12 opportunities to actually cross-examine Mr. Montour,  
13 they don't want to.

14 And we are of the opinion that oral  
15 hearings are to provide arbitrators with the  
16 opportunity to take their own measure of a witness,  
17 and we think it's one thing for the parties to  
18 conclude that perhaps an extraneous expert witness  
19 isn't necessary, but the key--one of the two key  
20 witnesses for the Claimant to not to be  
21 cross-examined, we submit, is a little odd.

22 MR. FELDMAN: Mr. President, this issue has

11:47:58 1 And then on Friday morning, if not also on  
2 Thursday, we would basically have the residual of  
3 any other questions you might have.

4 So, that's hopefully the road map,  
5 dependent upon witnesses and how they go.

6 Yes.

7 ARBITRATOR CROOK: As you go forward--and I  
8 thank you for giving us your PowerPoint, and I took  
9 the advantage of looking at it beforehand--it would  
10 be helpful to the Tribunal, as you go to clarify if  
11 at any point you are modifying the claims that were  
12 set out in the Memorial. At the moment we are sort  
13 of taking the Memorial as your case.

14 Now, you're setting out points of emphasis  
15 here that are maybe a little different than what was  
16 done there. But insofar as you are sort of  
17 reframing the issues that you think we are supposed  
18 to decide, it would be helpful to make that clear  
19 because at the moment we're taking your Memorial as  
20 the baseline.

21 MR. WEILER: Thank you, Mr. Crook.

22 In a nutshell--I actually--the writing is

11:47:02 1 already been decided by the Panel.

2 PRESIDENT NARIMAN: Beg pardon?

3 MR. FELDMAN: The issue of Mr. Montour's  
4 testimony has already been decided by the Panel.

5 MR. WEILER: If I understand, the decision  
6 was that the Respondent is allowed to call whom the  
7 Respondent requires or believe they require, and the  
8 Claimant is also. That doesn't mean that the  
9 Claimant can't have an opinion about the reasons  
10 behind why you choose to exercise your discretion  
11 the way you do.

12 In any event, space between the  
13 cross-examine of the witnesses we're going to try to  
14 do these question-and-answer periods. We think this  
15 afternoon, time permitting, we're going to try to  
16 answer questions on the remaining jurisdictional  
17 objections.

18 Tomorrow, we are going to try to invite you  
19 to ask questions about the on-reserve business, and  
20 starting off with a short recap on that.

21 On Thursday we are going to try to cover  
22 the off-reserve business.

11:49:15 1 right there, but I'll just tell you--essentially no,  
2 every claim that we have in the Memorial is still  
3 our claim. What I'm trying to do here is I'm trying  
4 to demonstrate simple pathways for the Tribunal  
5 because there have been--there is a lot of evidence,  
6 and there are lots and lots of books, and we think  
7 it would be useful for the Tribunal to see that it  
8 is quite possible for us to demonstrate the case we  
9 have to make, and I give you six examples.

10 So, the case to make, I tried to decide how  
11 to best explain to you why we believe the Claimants  
12 have been wronged and why you should give them  
13 compensation, and I, perhaps being the law  
14 professor, went back to basics, and so I tried to  
15 say to myself, well, what do we need to prove?  
16 What's the bottom line? I came up with three things  
17 to answer a question on the merits.

18 One needs to know whether or not the  
19 obligation exists: Has the Claimant articulated an  
20 obligation owed to the host State--owed by the host  
21 State to the Investors under the Treaty?

22 Breach: Has the Claimant demonstrated how

11:50:24 1 an action or inaction that's attributable to the  
2 host State is not in compliance with that  
3 obligation?  
4 And causation: Can they connect the dots?  
5 It seems to me that that's the basics of  
6 any claim, and so in these preceding six slides what  
7 I've tried to do is provide you with a demonstration  
8 with respect to these six slides, how we get there.  
9 PRESIDENT NARIMAN: You will, for my  
10 benefit at least, at some point of time tell us as  
11 to how you put the Claimants' case on investment, is  
12 there an investment--at some point of time.  
13 MR. WEILER: Certainly, Mr. Chairman. I  
14 actually have the other slide set that you see there  
15 as well but...  
16 So, with respect to the essence of the  
17 claims, as I have referred to them here, I think  
18 it's easy to look at them in these six manners.  
19 So, with respect to the first one--and this  
20 is actually the other reason why I gave them to you  
21 in print because that's kind of small.  
22 With respect to the first one, off-reserve,

11:52:23 1 they are a good comparator for any national  
2 treatment test.  
3 ARBITRATOR ANAYA: Okay, so, but the U.S.  
4 doesn't agree; right?  
5 MR. WEILER: Yes.  
6 ARBITRATOR ANAYA: You say "it seems to be"  
7 like there is no issue, and I just want to--  
8 MR. WEILER: I accept that the U.S. doesn't  
9 agree.  
10 ARBITRATOR ANAYA: Okay. And how do you  
11 respond?  
12 MR. WEILER: Well, I would need the U.S. to  
13 articulate--  
14 ARBITRATOR ANAYA: They have in their  
15 Memorial.  
16 MR. WEILER: Well, with respect, they don't  
17 actually go down to brass tacks on the issue of why  
18 you wouldn't compare competitors.  
19 ARBITRATOR ANAYA: Okay. So you don't see  
20 any--  
21 MR. WEILER: I mean their position  
22 essentially--

11:51:32 1 less-favorable treatment. It seems pretty  
2 straightforward that the appropriate comparators are  
3 going to be the exempt SPMs such as Liggett. That's  
4 because it's Liggett's brands, it's JTI's brands,  
5 General Tobacco's brands, it's these that are  
6 competing directly in the same locations with Grand  
7 River's brands.  
8 It seems that they're also in the same  
9 geographic areas.  
10 So, they seem to be the appropriate  
11 comparators.  
12 The breach has to be proved with more  
13 favorable treatment.  
14 ARBITRATOR ANAYA: You say "they seem to  
15 be."  
16 MR. WEILER: They are.  
17 ARBITRATOR ANAYA: Okay. But the United  
18 States doesn't agree.  
19 MR. WEILER: Well, I say "seem" in the  
20 sense that it's not my position to tell the Tribunal  
21 how to ultimately determine the facts, but in my  
22 opinion they clearly are competitors, and therefore

11:53:00 1 ARBITRATOR ANAYA: Okay, if you don't want  
2 to address that, that's fine.  
3 MR. WEILER: Oh, no, I do want to address  
4 it.  
5 What they essentially try to do is they try  
6 to do--they try to parse up the comparators based  
7 upon the measure itself, and one cannot--if one does  
8 that, one is--you're rigging the results. If you  
9 say, oh, well, you're not in competition with each  
10 other, you're not comparable because the measure  
11 doesn't treat you the exact same way, but it's the  
12 measure that's on the dock. So, if you use the  
13 measure as the basis by which you define the  
14 comparators, you're never--you're never going to  
15 have a breach.  
16 ARBITRATOR ANAYA: Why wouldn't the  
17 comparator be domestic NPM?  
18 MR. WEILER: The comparator would be a  
19 domestic NPM because they are the people who are  
20 taking advantage of their particular type of benefit  
21 or bonus or quota, whatever you want to call it, to  
22 be able to compete on the same shelf space, in the

11:53:52 1 same locations with Grand River's products. They  
2 are in competition with each other. They both--CEOs  
3 of either company might get along on the golf field,  
4 for all I know, but they're competitors. They  
5 basically want the best advantage they can from  
6 whatever means they can to be able to compete with  
7 each other. So that's why it seems to me--it seems  
8 to me--that they are the correct comparators.

9 ARBITRATOR ANAYA: Go ahead.

10 MR. WEILER: Mr. Violi is not sure that I  
11 understood your question.

12 MR. VIOLI: I believe you asked why aren't  
13 NPMs also comparators.

14 ARBITRATOR ANAYA: Domestic NPMs.

15 MR. VIOLI: Exactly. And NPMs are  
16 certainly competitors. And my understanding, and  
17 Mr. Weiler will speak to it, is that we're talking  
18 about a standard of law that is supposed to impose  
19 or at least require least-favorable treatment or a  
20 most-favored-nation treatment. So other NPMs would  
21 not be the comparators who have the  
22 most-favored-nation treatment that we would compare

11:55:44 1 the domestic, other domestic NPMs? Are you  
2 considering them? Not considering them? What's  
3 your case on them?

4 MR. WEILER: As a matter of comparison at  
5 the first level of a national treatment or MFN  
6 treatment test, you compare anyone who is in a  
7 competitive like circumstance, the people who are  
8 having the same competitive basis. So that would  
9 include both domestic NPMs, foreign NPMs, domestic  
10 SPMs, and foreign SPMs--anybody whose cigarettes are  
11 on that same shelf space in the same tier, in the  
12 same region.

13 Now, with respect to the  
14 most-favored-nation treatment or treatment no less  
15 favorable, what one does, what the jurisprudence  
16 shows us, is the most logical application of that  
17 word. What the Pope & Talbot Tribunal did is they  
18 say who among this group has received the best  
19 treatment? It's not required, but it's always only  
20 the nationals that got the best deal.

21 For example, it's very common that there  
22 may be a national champion, and the national

11:55:04 1 ourselves to when determining the breach and the  
2 consequent damage.

3 But certainly NPMs are competitors, exempt  
4 SPMs and NPMs in the discount segment of the market,  
5 they all are competitors.

6 ARBITRATOR ANAYA: I understand.

7 MR. VIOLI: And to some extent I said at  
8 the opening--

9 ARBITRATOR ANAYA: Now, I understand.

10 Thank you, Mr. Violi. Now I better understand your  
11 question.

12 MR. VIOLI: The words NPMs and SPMs sound  
13 so similar sometimes from this side of the table  
14 that when we see a PM sometimes we don't hear--and  
15 likewise you hear us say S instead of N or M or--

16 ARBITRATOR ANAYA: There seems to be a  
17 critical difference between the S and the Ns--

18 MR. VIOLI: Yes, yes, yes.

19 PRESIDENT NARIMAN: The point is that you  
20 are only referring to the exempt SPMs like  
21 so-and-so.

22 Now, the question, therefore, is what about

11:56:57 1 champion will get a better deal somehow from the  
2 government than even other competitors who are also  
3 domestic, but one is favored. The example in Canada  
4 is Bombardier. Another example from aerospace in  
5 Brazil is Embraer. They get the best deal. And so  
6 the question, when one asks for this treatment as an  
7 individual Claimant, I do not represent Canada. I  
8 represent the Claimant. So my comparison is not all  
9 Canadians versus all Americans.

10 Because this is an individualized  
11 obligation, I get to have, as the Pope & Talbot  
12 Tribunal said, the best treatment going from the  
13 host State, whether that be--and this is the point,  
14 by the way of Article 1104--whether that be to  
15 another foreigner or whether that be to a national,  
16 I get the best treatment going, not the average of  
17 that treatment. So that's why I target whoever got  
18 the best deal, in this case an exempt SPM, not an  
19 SPM without an exemption.

20 PRESIDENT NARIMAN: I just have--it's a  
21 little above me all this. I would rather--I would  
22 ask you to deal with it so far as I'm concerned,

11:58:12 1 that is there any other NPM who is treated more or  
2 less favorably than you?  
3 MR. WEILER: Any other NPM treated more or  
4 less favorably.  
5 PRESIDENT NARIMAN: (Off microphone.)  
6 MR. WEILER: Oh, no. To the best of my  
7 knowledge, I think the answer is no.  
8 PRESIDENT NARIMAN: (Off microphone.)  
9 MR. WEILER: I would say no but I would  
10 make one caveat: An NPM off--that is not  
11 indigenous, not Indian, is in like--is not exactly  
12 in like circumstances with a provider such as my  
13 Claimants, my clients, because they have two  
14 businesses, an on-reserve and an off-reserve. So I  
15 would say that it's best to compare apples and  
16 apples so that if we're talking--we should be  
17 talking about the on-reserve or the off-reserve, and  
18 to a certain extent goes into what I presaged that  
19 we wanted to have your question-and-answer sessions  
20 about. No, I don't want to hold all of your  
21 questions. We can certainly also come back to them  
22 in the future.

12:00:14 1 right? But Grand River never went in the state,  
2 never sold to anybody who sold in the state: South  
3 Dakota, California, Wisconsin being examples.  
4 Domestic NPMs who are in those states, who are  
5 selling in those states should be and may be subject  
6 to those Escrow Statutes. But when Grand River  
7 sells from Canada to another distributor that sells  
8 to another and perhaps to another or even a third  
9 party that goes into California, Nevada, or  
10 Wisconsin, and all the other states that are  
11 off--that are off-reserve that led to the judgments,  
12 then there is a violation of international law. As  
13 Mr. Luddy pointed out, there is an application of  
14 law beyond the jurisdictional limits of the states.  
15 So in that situation, we would be treated less  
16 favorable than domestic NPMs. Because as they've  
17 said, they said that they want to reach across  
18 far-flung jurisdictions--those are the words they  
19 used, "far-flung"--to countries like Philippines,  
20 Germany, China, India--"far-flung"--these are the  
21 words they use to go and grab them to subject them  
22 to jurisdiction in the remote state of California,

11:59:17 1 PRESIDENT NARIMAN: I don't understand this  
2 question, and I'm going--I mean, we will ask you  
3 whatever questions we feel like.  
4 MR. WEILER: Yes, whenever you like.  
5 PRESIDENT NARIMAN: No, no. But you said  
6 there's going to be a question-and-answer session.  
7 I mean that's not the program. When we feel some  
8 difficulty, we will ask you whatever we want to ask  
9 you. So if you ask a question, you answer it  
10 yourself, by all means, because we are not going to  
11 ask you or answer it in either you or your opponent.  
12 MR. WEILER: We are completely in your  
13 hands, Mr. President. All we were suggesting was  
14 that if we can provide some structure to the  
15 proceedings, that we would try to do it in that  
16 matter.  
17 MR. VIOLI: And we will reserve for another  
18 time this question because, Professor Anaya, I  
19 wasn't prepared for the question at this point, but  
20 there is one circumstance where I can address  
21 specifically. Where we're talking about a state  
22 where Grand River's product is sold off-reserve;

12:01:18 1 Nevada or Wisconsin and South Dakota. In that  
2 situation, there is a different treatment among NPMs  
3 who are domestic and foreign.  
4 PRESIDENT NARIMAN: Okay, I that's better  
5 for argument after lunch.  
6 MR. VIOLI: It's sometimes difficult to  
7 give those on the spot and if we can reserve to  
8 answer them.  
9 PRESIDENT NARIMAN: Okay, if it's  
10 convenient at this point, we can break and meet  
11 again at 1:00.  
12 (Discussion off microphone.)  
13 PRESIDENT NARIMAN: So sorry. My mistake.  
14 Keep going.  
15 MR. WEILER: So, with respect to this first  
16 slide in this first concept, we're suggesting that  
17 under Article 1102, the appropriate comparators  
18 starts with competitors. Then one turns to the  
19 question of treatment and decides what best  
20 treatment is on offer. The best treatment on offer  
21 here, we submit, is for the exempt SPMs.  
22 We would go further to suggest that they

12:02:25 1 are--and at this point I should caution, with  
 2 respect to the off-reserve business, the Tribunal  
 3 has ruled that the Claimant is time-barred from  
 4 speaking to whether or not there was or was not  
 5 better treatment offered prior to--I think it was  
 6 2001-2002. While it is true as a factual matter  
 7 that that better treatment was available, we come on  
 8 line here with respect to liability when the  
 9 Allocable Share Amendments are passed.

10 Our position is that we took the market as  
 11 we found it when we came into the market in  
 12 2001-2002. And I'll be corrected on the exact  
 13 dates. When we came into the market, simply as a  
 14 matter of the Tribunal's Decision on Jurisdiction,  
 15 we take it as we find it. What do we have when we  
 16 find it? We see that there are two choices  
 17 presented to a party with this legislation. You  
 18 either join the MSA, and when we are  
 19 suggesting--when we asked to join the MSA, we're  
 20 told because we're tracking your cigarettes as they  
 21 come across the border and you pay Federal tax on  
 22 all of them, we don't really care how many do or

12:05:04 1 turns out that they ended up having good markets in  
 2 those states because they could take advantage of  
 3 this Allocable Share Release.

4 So, when the Allocable Share Release is  
 5 taken away, which we know is a valid measure for  
 6 these proceedings, when it's taken away, what do we  
 7 have now? Well, we had roughly similar  
 8 circumstances before, taking advantage of the  
 9 allocable share admittedly only in six markets  
 10 versus these other competitors who have this general  
 11 exemption across the country and can actually choose  
 12 to keep their sales higher in places where we're not  
 13 in, take advantage of that fact, keep their prices  
 14 higher there, lower their prices against us to meet  
 15 us, and you have an equilibrium to a certain extent.

16 It's clear that the Claimants were able to  
 17 compete like that. You take away the allocable  
 18 share and all of a sudden can't compete anymore  
 19 because you're getting better treatment for the  
 20 people who still have that general reserve, that  
 21 general exception. We don't have the ability to go  
 22 out to get the allocable share anymore.

12:03:55 1 don't go on-reserve because we're calculating them  
 2 at that border point.

3 So, in our particular case, it was just not  
 4 economical to join the MSA. So, what is our other  
 5 choice? Our other choice is either to just stay  
 6 on-reserve or just find some way to go off-reserve.

7 The choice was made for the Claimants  
 8 because we start seeing increased enforcement  
 9 on-reserve. They realize they've got to do  
 10 something because they can hire Mr. Violi and hire  
 11 some other people as much as they can to fight in  
 12 these various places, but they're seeing an  
 13 encroachment on their on-reserve sales.

14 So, what do they do? They look at the  
 15 measure, and they conclude that there is a way to  
 16 compete off-reserve. It is to use the Allocable  
 17 Share Release formula.

18 And it is true that when the claim was  
 19 originally filed, the Claimants were of the opinion  
 20 that they were going to be out of luck. Fortunately  
 21 for them, though, it turned out that this other  
 22 strategy blossomed. It did well. And that's why it

12:06:13 1 So, this measure causes--brings about a  
 2 difference in treatment, and it's clear on the facts  
 3 of this case that it was intended to have this  
 4 result. It was intended to prevent not just this  
 5 company but any NPM from using this Allocable Share  
 6 Release.

7 So, that much is clear, that there is  
 8 better treatment being offered to competitors who  
 9 previously for about three or four years were  
 10 competing fairly well together. Treatment--but it  
 11 results in those six regions, and keep in mind all  
 12 of these measures are state measures, so they're not  
 13 Federal measures, they're state measures. So, it is  
 14 in those six regions that we're focusing on.

15 So, then the next question is: Is there a  
 16 rational nexus to--I'm sorry--is there a reasonable  
 17 nexus to a rational policy goal here? Is there a  
 18 good reason to do this?

19 The Respondent has provided its reasons.  
 20 We, as you can see through the cross-examination of  
 21 the witnesses, are suggesting to you that the record  
 22 shows that there are other reasons.

12:07:22 1 We are suggesting that it doesn't make  
 2 sense from a health protection standpoint that one  
 3 would allow this general exemption to continue. All  
 4 of those billions of cigarettes are still able to be  
 5 sold without any drag, any penalty. They don't have  
 6 to put into MSA. They have this market share  
 7 grandfathered for a whole lot of cigarettes.  
 8 Now, my friends say, yeah, but we got your  
 9 cigarettes out. Well, that's great. But what  
 10 about--I mean, if it was really about healthcare, if  
 11 it was really about making sure that every single  
 12 cigarette got taxed a certain amount, you'd just use  
 13 a general tax. You'd just apply a general tax to  
 14 everybody, and then everybody would be able to  
 15 compete rather than saying, okay, well, we're going  
 16 to have this really crazy mechanism where these guys  
 17 have to pay but not for the this exempt stuff, and  
 18 you guys, you don't get that exemption thing we had  
 19 before.  
 20 States do have the discretion to impose  
 21 whatever measure they want, but they are responsible  
 22 for the effects of that measure, and they--you can't

12:09:52 1 words, didn't make sense?  
 2 MR. WEILER: For starts I would say only  
 3 six because we're dealing with the off-reserve. We  
 4 don't have any issue with the 40-some-odd other  
 5 state legislatures where we were not competing so--  
 6 ARBITRATOR CROOK: We're only talking six  
 7 states?  
 8 MR. WEILER: Yes. With respect, we're  
 9 talking about only the state measures that are  
 10 actually at issue with respect to the offers of six.  
 11 ARBITRATOR CROOK: Okay. And at some point  
 12 you'll clarify what those were because I somehow  
 13 have the sense there are only five.  
 14 MR. WEILER: I'll leave that for my  
 15 colleagues to confirm the number. Oftentimes with  
 16 numbers, I have to admit five and six--  
 17 ARBITRATOR CROOK: Okay. But the essence  
 18 of your claim here, though, is that those five or  
 19 six state legislatures acted in a way that didn't  
 20 make sense.  
 21 MR. WEILER: Well, I'm sure it made sense  
 22 to them, Mr. Crook.

12:08:32 1 just jump up and say "healthcare" and not expect the  
 2 Tribunal to be fully authorized to say, well, wait a  
 3 second, you say "healthcare," but does that really  
 4 make sense here? You are allowed to look at that  
 5 issue. It's not--you do not--you are not limited to  
 6 simply take their word for it because we're talking  
 7 about a difference in treatment that we have, we  
 8 believe, we have proved prima facie.  
 9 Yes, Mr. Crook.  
 10 ARBITRATOR CROOK: Okay, Professor Weiler,  
 11 in the argument you were just making, it seems to me  
 12 you were rolling together two things, the exemption  
 13 for exempt non--subsequent participating measures  
 14 and the Allocable Share Amendments, but the action,  
 15 I take it that you're--is the action that you  
 16 complain of here the perpetuation of the exemption  
 17 for subsequent--some SPMs, or is it the Allocable  
 18 Share Amendments?  
 19 In either case--well, in the second case,  
 20 are you asking the Tribunal essentially to find that  
 21 46 democratically elected state legislatures did  
 22 something that was unjustified and, to use your

12:10:45 1 The question is whether--I mean, it seems  
 2 to me that your question begs whether or not a  
 3 legislature, democratically elected or appointed  
 4 otherwise, can never be wrong, can never make an  
 5 unreasonable--  
 6 ARBITRATOR CROOK: All right. But  
 7 essentially you're inviting us to examine whether  
 8 their judgment was an appropriate one.  
 9 MR. WEILER: I would suggest to you,  
 10 Mr. Crook, that the very purpose of international  
 11 economic law, the very obligation to which the  
 12 United States has committed itself is to subject its  
 13 policy decisions, whether they be made at the  
 14 executive, the judicial, or the legislative level to  
 15 the test of international standards. So, yes,  
 16 that's exactly what you are supposed to do as a  
 17 tribunal. You are authorized--  
 18 ARBITRATOR ANAYA: Okay. So, what is the  
 19 test here, whether they're unreasonable, whether  
 20 they're...  
 21 MR. WEILER: The test would be--and here as  
 22 a law professor--

12:11:45 1 ARBITRATOR ANAYA: Rational relation test?  
2 MR. WEILER: As a law professor you--I  
3 don't know if you're going to relish this or not,  
4 but there have only been a handful of national  
5 treatment cases--

6 ARBITRATOR ANAYA: I'm here as a member of  
7 the Tribunal. I don't know about the law professor  
8 business but...

9 MR. WEILER: Well, I'm just saying  
10 as--the--go on.

11 ARBITRATOR ANAYA: No. I think there is a  
12 question here. I mean you seem to be dismissive of  
13 what Mr. Crook is asking.

14 I think that there is something we need to  
15 come to grips with. What are you asking us to do in  
16 this regard, and what kind of standard would we  
17 apply in reviewing whether or not the legislatures  
18 acted properly under international law, under the  
19 standard?

20 MR. WEILER: I would submit that, as you  
21 see in our briefings and as we've seen from the  
22 handful of cases that have been made by other NAFTA

12:13:17 1 MR. WEILER: I'm arguing to you that it is  
2 unreasonable, and in showing it is unreasonable, I  
3 am suggesting that one of the most simple ways that  
4 they could have acted reasonably, that they could  
5 have raised prices and--

6 ARBITRATOR ANAYA: No, that's different.  
7 To say that there are many reasonable ways to act, I  
8 mean we could find other reasonable ways to act. I  
9 mean we have to find, I understand your argument to  
10 be, that this particular scheme was unreasonable, is  
11 that right?

12 MR. WEILER: You have to find that the way  
13 that this regime has impacted upon these  
14 differentiated comparators is unreasonable in the  
15 circumstances. And part and parcel of concluding  
16 whether they were reasonable in the circumstances,  
17 you should consider that an arbitrary,  
18 discriminatory, or unfair result is generally in  
19 international economic law not considered to be  
20 reasonable.

21 ARBITRATOR ANAYA: Arbitrary,  
22 discriminatory, and what else?

12:12:32 1 Tribunals on this particular issue, on Article 1102,  
2 that the standard is, as I have there, reasonable  
3 nexus to a rational policy goal. So, basically the  
4 question is, if you were to--extricate that--try to  
5 break that out--

6 ARBITRATOR ANAYA: There is a rational--

7 MR. WEILER: You need a rational policy  
8 goal.

9 ARBITRATOR ANAYA: Okay.

10 MR. WEILER: Healthcare is a rational  
11 policy goal.

12 ARBITRATOR ANAYA: All right. Okay.

13 MR. WEILER: So we know that they have put  
14 on the table a rational policy goal. Is it a  
15 reasonable--is there a reasonable nexus between the  
16 policy goal they have enunciated and the measures  
17 they've taken?

18 ARBITRATOR ANAYA: Okay.

19 MR. WEILER: Is it reasonable.

20 ARBITRATOR ANAYA: And you're arguing to us  
21 that it's unreasonable and we should find it  
22 unreasonable.

12:14:14 1 MR. WEILER: Arbitrary,  
2 discriminatory--unfair, but I mean really--

3 ARBITRATOR ANAYA: Okay. All right. I'm  
4 trying to get the handle on this because I want to  
5 know what I need to find, you know. It's one thing  
6 for us to argue about, you know, it was effective or  
7 less effective or more effective, but arbitrary,  
8 discriminatory and--

9 MR. WEILER: Or unfair.

10 ARBITRATOR ANAYA: Unfair.

11 MR. WEILER: I mean--no really, when you  
12 say arb--when I say "arbitrary," that pretty much is  
13 pretty close to unfair. What is arbitrary is  
14 unfair.

15 ARBITRATOR ANAYA: Yes, but arbitrary--

16 MR. WEILER: I'd say it's probably smaller  
17 than unfair. So and I would--basically, I think if  
18 you go with discriminatory or unfair--manifestly  
19 unfair let's say, than arbitrary because--well, it  
20 has to be manifest obviously so...

21 I would like to say that there is a clear  
22 dark-line test from a positive standpoint.

12:15:06 1 ARBITRATOR ANAYA: No, no, no. I'm not  
2 looking for a clear-line test. I'm looking for some  
3 good markers, you know.  
4 MR. WEILER: Yeah. Well, then these would  
5 be the markers.  
6 ARBITRATOR ANAYA: Is there a margin of  
7 appreciation that often is provided in international  
8 law and in litigation?  
9 MR. WEILER: I would say there is a margin  
10 of appreciation, and we who write about it and who  
11 argue about it are groping for it. Where that  
12 margin is is a matter it seems--  
13 ARBITRATOR ANAYA: No, I understand that,  
14 but you're saying there is a margin of appreciation.  
15 MR. WEILER: Yes.  
16 ARBITRATOR ANAYA: I mean, yeah, we can  
17 argue, you know, about what that is.  
18 MR. WEILER: How far it goes or--  
19 ARBITRATOR ANAYA: I understand that.  
20 MR. WEILER: Yeah.  
21 ARBITRATOR ANAYA: So there is a margin of  
22 appreciation--

12:16:16 1 that--without--  
2 MR. WEILER: Without borrowing all the  
3 jurisprudence from U.S. law that comes with it,  
4 capricious would be useful, too.  
5 Essentially, when we look to try to find  
6 other examples, we would go to--we would much prefer  
7 to go to WTO Law--  
8 ARBITRATOR ANAYA: Right. Okay.  
9 MR. WEILER: --than we would domestic U.S.  
10 law to find out.  
11 ARBITRATOR ANAYA: I know, but I'm asking  
12 you to bring that in, and I'm, you know, searching  
13 for what I can to help.  
14 MR. WEILER: Yes. Did I--  
15 ARBITRATOR ANAYA: I think so, I think so.  
16 But the next question is--and I guess this is  
17 coming, that you have more proof about--that will  
18 help us see this as arbitrary and unfair and all  
19 these things, even applying a margin of  
20 appreciation.  
21 MR. WEILER: We hope so.  
22 ARBITRATOR ANAYA: You're not asking us to

12:15:44 1 MR. WEILER: I would say that there is a  
2 margin of appreciation.  
3 ARBITRATOR ANAYA: I just what to  
4 understand what the argument is, and I'm not trying  
5 to be combative. I just really am trying to  
6 identify what you are putting to us and what we need  
7 to--what you say we need to find.  
8 And so you are saying that there is a  
9 margin of appreciation here--  
10 MR. WEILER: Yes.  
11 ARBITRATOR ANAYA: --to be accorded the  
12 United States.  
13 MR. WEILER: Yes.  
14 ARBITRATOR ANAYA: And its constituent  
15 Federal units access.  
16 MR. WEILER: Yes.  
17 ARBITRATOR ANAYA: Okay. And we would have  
18 to find, then, that there is arbitrary,  
19 capricious--I guess that's another word.  
20 MR. WEILER: Capricious. I mean it's a  
21 U.S. term I'm unsure about but it's--  
22 ARBITRATOR ANAYA: I know but

12:17:03 1 step in, as I understand it, in the shoes of a  
2 legislator who would balance among various different  
3 options?  
4 MR. WEILER: No, that is not your function.  
5 ARBITRATOR ANAYA: Okay.  
6 MR. WEILER: Your function is to test  
7 whether or not this particular measure in the  
8 circumstances, given the particular grief of the  
9 Claimant--their particular grievance, I should  
10 say--whether it, this particular example, not the  
11 measure in its entirety, but this particular  
12 example, application of the measure, does or does  
13 not comply with the Respondent's obligations as a  
14 NAFTA Party.  
15 ARBITRATOR ANAYA: Well, that begs the  
16 question of what I'm asking, I mean, whether or not  
17 it applies goes to the question of--  
18 MR. WEILER: Whether or not it's--  
19 ARBITRATOR ANAYA: Yes.  
20 MR. WEILER: Yeah, whether or not you have  
21 a reasonable nexus to a rational policy goal.  
22 ARBITRATOR ANAYA: Yes.

12:17:47 1 MR. VIOLI: Professor Anaya, I'm just--I  
2 wanted to respond and--  
3 ARBITRATOR ANAYA: Okay, go ahead.  
4 MR. VIOLI: --respond--but as I read the  
5 cases and as I read the law, we have pretty much a  
6 bright line straightforward test, most-favored  
7 nation and least-favorable treatment. So you look  
8 at our comparators and you say are they treated more  
9 favorably. The rational basis minimum  
10 scrutiny/strict scrutiny test is more subject--it's  
11 more of a procedural or a substantive due process.  
12 I was looking at this more as a commerce  
13 issue; and, in Commerce Clause or international  
14 commerce cases, trade cases, are we looking at it  
15 from a procedural or substantive due process  
16 violation or a violation of the--which is brought in  
17 in most contexts under a constitution or in some  
18 context in a treaty.  
19 In this context, I believe we're dealing  
20 with a fairly straightforward question as to the  
21 reasonable basis for the legislature in adopting one  
22 measure or another and having a policy goal behind

12:19:54 1 ARBITRATOR ANAYA: I think I understand  
2 what your argument is. It seems to differ from  
3 Mr. Violi's.  
4 MR. WEILER: That's why I'd like to--  
5 ARBITRATOR ANAYA: You seem to present a  
6 very different framework from what he just  
7 presented, but--  
8 MR. WEILER: Well, I'd like to clarify so  
9 we can put it where it belongs.  
10 ARBITRATOR ANAYA: I don't want to get  
11 bogged down.  
12 MR. WEILER: S.D. Myers versus Canada, a  
13 case in which I was involved as counsel. The  
14 question ultimately came down for the Tribunal as to  
15 whether or not the environmental justification that  
16 Canada provided was reasonable as--was--I'm sorry,  
17 was a reasonable connection to a rational objective.  
18 The Tribunal clearly said protecting the environment  
19 is a rational objective. In this case, protecting  
20 health is a rational objective. The question is--in  
21 that case essentially it was whether or not there is  
22 a reasonable nexus. That Tribunal decided that

12:18:57 1 it. If it shrinks, there may be good reason why you  
2 want just American companies or just the people who  
3 have been in the market in '97 and '98. There may  
4 be good reason to give only those people  
5 grandfather; right? Because you want to promote  
6 incentive or this is the way you want the world to  
7 look like in the United States in perpetuity: Lock  
8 the market shares of these people in, the big guys  
9 at the big level, the little guys maybe with a  
10 little bit more, but they stay there. That may be  
11 something the legislature may wants to do, but  
12 if--and it may be reasonable in their mind--but if  
13 it violates the NAFTA because it treats the Canadian  
14 investor less favorably, presents a barrier to  
15 entry, which it does, affects an investment already  
16 made and pares it, expropriates it, then I submit  
17 that that would violate the NAFTA regardless of the  
18 rational basis which is the foundation for the  
19 measure.  
20 MR. WEILER: I'd like to just give  
21 you--I'll give you an example which might be  
22 helpful.

12:21:01 1 while Canada vociferously argued that this was to  
2 protect the environment, that the measure was  
3 necessary because they just couldn't trust the  
4 Americans to deposit the waste properly themselves  
5 when it went across the border. The Tribunal found  
6 that based on the weight of the evidence, that the  
7 real reason this was happening was because Minister  
8 Sheila Copps (ph.) had a national preference for  
9 someone who had turned out six months earlier had  
10 been on her personal staff and now was lobbying for  
11 a company out in Alberta that wanted to get that  
12 waste for itself.  
13 So, the question in that case was who were  
14 the comparators. Well, it was S.D. Myers that had  
15 one way of destroying waste, and it was this  
16 company--Swan Hills was the name--I can't  
17 remember--I think it was called Swan Hills. The  
18 name of the place where it was located was Swan  
19 Hills--and the Tribunal looked at them and said,  
20 yeah, they both want to destroy waste. They're both  
21 in the same--they're both comparable, and definitely  
22 one's now got better treatment than the other

12:22:06 1 because they closed the border, and now S.D. Myers  
2 can't access the market anymore, and then they  
3 looked at the rationale and said, you know, Canada  
4 can say it's about the environment, and that's a  
5 legitimate reason, but the facts here suggest that  
6 you may have had some color of the environment  
7 there, but you had some other things going on.  
8 In this case, we submit we have the same  
9 problem; and we submit that you, the Tribunal, will  
10 have to value and weigh the evidence. They say it's  
11 about healthcare. We say it's about protecting  
12 revenues as part of a deal, and you have to decide  
13 who you believe. If you believe us, then I would  
14 say it's not reasonable. It's not a reasonable  
15 nexus to a rationale alternative. If you believe  
16 them, then you go with them.  
17 PRESIDENT NARIMAN: I have one difficulty,  
18 and I would like you to later expound. My problem  
19 is, to what extent, for purposes of this NAFTA  
20 legislation, can we second-guess legislative  
21 judgment? To what extent?  
22 And, secondly, all other manufacturers are,

12:24:18 1 other--no, no, only if they join the MSA do all  
2 those obligations as part of that package kick in.  
3 In the meantime, though, we do have the Federal  
4 legislation that appears to have largely overlapped  
5 that anyway, but that's neither here nor there in  
6 the context of your question.  
7 To submit to the escrow regime or to pay  
8 into escrow does not oblige an NPM to do anything  
9 else for healthcare. They may do whatever they do  
10 on their own. They still have quality standards for  
11 the cigarettes and all that kind of thing but  
12 they're not under the obligation--  
13 PRESIDENT NARIMAN: I'm not talking about  
14 NPMs. I'm talking of the other manufacturers.  
15 MR. WEILER: An SPM?  
16 PRESIDENT NARIMAN: Who don't fall under  
17 the NPM category. They are subjected to certain  
18 discipline with regard to measures for public  
19 health.  
20 MR. WEILER: Anybody who joins the MSA  
21 takes on those obligations.  
22 PRESIDENT NARIMAN: Yeah, the NPMs don't.

12:23:16 1 are they not, subjecting themselves to a certain  
2 discipline or standards of health like  
3 advertisements and so on and so forth, whereas the  
4 NPMs are not?  
5 You see, under the Allocable Share  
6 Amendments as well, there are a large number--all  
7 the manufacturers have an obligation to subject  
8 themselves to certain aspects which promote public  
9 health, such as deleterious advertisements, things  
10 of that sort.  
11 MR. WEILER: Actually, Mr. President, I  
12 don't think that's accurate. If I understand  
13 correctly, and I'm sure my friends will correct me--  
14 PRESIDENT NARIMAN: That's why I want you  
15 to address that, yes.  
16 MR. WEILER: Well, what happens is the  
17 escrow payment--skip aside all the rest of the stuff  
18 about it, but the escrow payment is simply money put  
19 aside--  
20 PRESIDENT NARIMAN: But isn't there an  
21 obligation?  
22 MR. WEILER: There is no--there is no

12:25:20 1 MR. WEILER: NPMs do not.  
2 PRESIDENT NARIMAN: That's what I--please  
3 address that.  
4 MR. WEILER: Yes.  
5 PRESIDENT NARIMAN: That's the problem  
6 that's vexing me.  
7 And the second problem is with regard to  
8 what extent are we to second-guess legislative  
9 judgment? That's my difficulties.  
10 So, I'm putting it to you. Address it in  
11 due course, not immediately.  
12 MR. WEILER: Okay. With respect to your  
13 first question. It's important to keep in mind that  
14 the majority of the additional responsibilities that  
15 come with joining the MSA were part of a negotiated  
16 process between the very largest companies who were  
17 accused of very serious things that the smaller  
18 players were not accused of doing and that, for  
19 example, a prohibition on television advertising is  
20 not really relevant when we are talking about these  
21 Claimants. There's only a few big, big companies  
22 that that really applies to, that those health

12:26:33 1 protections really apply to. They certainly--all  
 2 the rest of them say, sure, we take them on, but  
 3 they don't care. It's not going to add to the  
 4 marginal costs. They weren't doing that kind of  
 5 thing before.  
 6 And that's even to the extent that it  
 7 actually worked because we know that we have  
 8 evidence from the Respondent in its own Federal  
 9 court saying, yeah, it didn't work.  
 10 So, I would be cautious about putting that  
 11 much emphasis on the notion that the exempt SPM has  
 12 somehow taken on this extra burden, that puts it in  
 13 a different circumstance than the Claimants because,  
 14 on the ground, the facts just aren't there to  
 15 support that.  
 16 With respect to your second question, I  
 17 would say that you were not here to second-guess a  
 18 legislature, a court or a policy-maker because  
 19 "second-guess" implies that you would stand in their  
 20 shoes, imbued with their powers and their  
 21 responsibilities. That is not your job. Your job  
 22 is to conclude--with respect, if I may tell you your

12:28:56 1 we ought to look to for authority for your  
 2 proposition that the proper comparator is the  
 3 economic competitor.  
 4 MR. WEILER: Pope & Talbot would be the  
 5 first place to look.  
 6 ARBITRATOR CROOK: Well, I understand so  
 7 Pope--  
 8 MR. WEILER: Feldman would be the second  
 9 place to look.  
 10 ARBITRATOR CROOK: Second world be?  
 11 MR. WEILER: Feldman. Feldman v.  
 12 ARBITRATOR CROOK: So, Pope & Talbot and  
 13 Feldman.  
 14 MR. WEILER: Yeah.  
 15 ARBITRATOR CROOK: Okay.  
 16 MR. WEILER: I would argue actually that  
 17 UPS also stands for that proposition. Some may  
 18 disagree.  
 19 ARBITRATOR CROOK: Yeah, all right, well.  
 20 So, it's either the two or the three. Okay.  
 21 MR. WEILER: Certainly the trucking case  
 22 would be another one.

12:27:49 1 job. Your job is to conclude whether or not these  
 2 circumstances we present to you do or do not violate  
 3 the international obligations of the Respondent. It  
 4 is the Respondent that has obliged itself to meet  
 5 these standards.  
 6 It didn't say when it met those standards  
 7 we agreed to accord national treatment, unless, of  
 8 course, we decide later that the particular policy  
 9 in this case would override it. They subjected  
 10 themselves to this regime very similar to they  
 11 subjected themselves to the WTO regime and to many  
 12 other trade and investment regimes because they  
 13 meant it. They meant that they would be allowing an  
 14 international tribunal not to second-guess but to do  
 15 its job and figure out whether in this particular  
 16 case they crossed a line, the line drawn in the  
 17 Treaty.  
 18 Mr. Crook, you had a question a while ago.  
 19 ARBITRATOR CROOK: Well, actually, I had,  
 20 three, Professor Weiler.  
 21 Number one, not necessarily off the top of  
 22 your head, but in due course you will tell us what

12:29:27 1 ARBITRATOR CROOK: Okay.  
 2 MR. WEILER: U.S. Trucking, it was another  
 3 NAFTA case. I'm sticking mostly with NAFTA cases.  
 4 ARBITRATOR CROOK: Okay.  
 5 Now, next question. Let's assume that the  
 6 argument you've been developing in cross-examination  
 7 at length over the last two days is true and that  
 8 the states--that a major, if not the sole  
 9 motivation, for the things they did was revenue  
 10 enhancement. You said a moment ago that that would  
 11 not be a rational basis for action. Is that your  
 12 position?  
 13 MR. WEILER: No, it would not be a--that  
 14 would not be a legitimate and/or reasonable--it  
 15 would--I'm trying to make sure I say it correctly.  
 16 You need a rational--I'm sorry. You need a  
 17 reasonable nexus to a rational goal. Healthcare is  
 18 a rational goal--  
 19 ARBITRATOR CROOK: Is revenue enhancement a  
 20 rational goal?  
 21 MR. WEILER: Rational, yes. Yes, in this  
 22 regard. Revenue enhancement is a rational goal if

12:30:34 1 they were exercising their taxing powers, and that's  
2 why there is a whole different regime and a whole  
3 bunch of carve-outs for taxing powers.

4 ARBITRATOR CROOK: Okay. So, your position  
5 is that revenue enhancement is only a rational goal  
6 if it's done in a certain way.

7 MR. WEILER: I would say that the parties  
8 in the NAFTA have been very clear and very careful  
9 to protect the right of a country to tax, and that's  
10 why there are provisions in the NAFTA that prevent  
11 complainants from going very close to judging--or  
12 I'm sorry, second-guessing--whatever word you want  
13 to use--challenging a tax measure, and that  
14 safeguards their revenue collection authority.

15 If revenue collection is used in a  
16 different context, especially if it's used in an  
17 unfavorable context, in an unfair context, then I  
18 would suggest no, it's not reasonable.

19 ARBITRATOR CROOK: Well, we're not there  
20 yet. We're just--so, it only becomes unreasonable  
21 if it's--

22 MR. WEILER: No, revenue collection is not

12:32:38 1 the fact that the Respondent has not been talking  
2 about it and has been hiding that reasoning.  
3 They've made it very clear, oh, no, this isn't about  
4 that.

5 ARBITRATOR CROOK: Okay.

6 MR. WEILER: So, within that context,  
7 saying one thing and doing another, that certainly  
8 diminishes whether or not you should consider it to  
9 be rational.

10 ARBITRATOR CROOK: Okay, so your--we'll  
11 stop there.

12 Third question, and again I'm trying to  
13 focus in on--this goes back to the issue that I  
14 raised yesterday of the scope of our earlier  
15 jurisdictional judgment, and I'm looking at your  
16 slides here describing the breach. And the breach  
17 that you list is that exempt SPMs were accorded a  
18 significant competitive advantage, and we have an  
19 argument whether that's true or not, but let's  
20 assume for the moment that you're right.

21 That argument per se is, as I understand  
22 it, now time-barred, and you--I just want to see if

12:31:36 1 rational within the circumstances of a healthcare--  
2 ARBITRATOR CROOK: I'm assuming that you  
3 win the argument. Let's assume you've persuaded us  
4 that all this healthcare stuff was just made up and  
5 fantasy.

6 MR. WEILER: Well, I wouldn't go quite that  
7 far.

8 ARBITRATOR CROOK: I sort of thought that  
9 was the drift but if not, in any case--

10 MR. WEILER: There's always a veneer of  
11 truth in any lie.

12 ARBITRATOR CROOK: Okay, but it was reduced  
13 to veneer of truth.

14 Well, I don't want to take more of your  
15 time. I think you've made your position clear, and  
16 that position is, as I understand it, that revenue  
17 per se would not in this context be a, to use your  
18 phrase--

19 MR. WEILER: Rational policy goal.

20 ARBITRATOR CROOK: --rational policy goal.

21 MR. WEILER: In this context, it would not  
22 be a rational policy goal. Part of that context is

12:33:41 1 I--make sure I understand your argument. Your  
2 argument is that no, it's not time-barred because we  
3 only began to experience the bite at the point of  
4 the Allocable Share Amendments. Is that the  
5 argument?

6 MR. WEILER: No, that is not our argument.

7 ARBITRATOR CROOK: It's not the argument,  
8 okay. Maybe you can clarify, then.

9 MR. WEILER: Certainly.

10 A time bar prevents a complaint to be  
11 registered that as of 2001, when confronted with  
12 these measures, when driven to make the choice to go  
13 into this regional strategy, that when that--when  
14 that was taking place, because of the time bar we  
15 could not complain, and it turns out it's a good  
16 thing we couldn't complain because it turns out that  
17 things were better than we thought they were, that  
18 actually they were able to compete quite well with  
19 that allocable share.

20 Admittedly, the Claimants, when they first  
21 launched this case, were not very sure of that.  
22 They really thought that they were going to be out

12:34:48 1 of luck anyway, and it turns out we--the numbers  
 2 show it--that they were able to compete very well in  
 3 a limited number of states with the allocable share.  
 4 So no, we are not saying that it's a  
 5 continuation or any such thing. The status quo when  
 6 we joined was those guys got the exemption, we got  
 7 the Allocable Share Release. The change took place  
 8 when they took the Allocable Share Release away. By  
 9 taking that Allocable Share Release away, there was  
 10 a new status quo of treatment. The treatment, which  
 11 is the effective result of the measure, the  
 12 treatment is these guys still got--still have their  
 13 exemption, and we don't have an effective means to  
 14 compete with them anymore.  
 15 ARBITRATOR CROOK: I'm sorry, I'm just  
 16 trying to think how the Tribunal is to put this down  
 17 into words.  
 18 So, do I then understand that the 1102  
 19 complaint is that you have the allocable share  
 20 repeal, and as a consequence of that you were placed  
 21 at a significant competitive disadvantage vis-à-vis  
 22 the Grandfathered SPMs? Is that the argument? Is

12:36:55 1 what was left? We submit unfair treatment.  
 2 Now, we also submit, we go further because  
 3 they have--my friends have a competition case going  
 4 on in domestic court that--and in that case they  
 5 have a burden that's a little bit tougher. They  
 6 actually have to prove that competitive  
 7 disadvantage. Here, we just have to prove who got  
 8 the best treatment, and did we get it or did we not?  
 9 If you find that we didn't get it, then the next  
 10 question is, is there a valid reason? We don't  
 11 think there is a valid reason. Your next question  
 12 is, what's that worth to them?  
 13 And we have a valuator who you will hear  
 14 from later this afternoon who will be asked about  
 15 his conclusions about how you would value that  
 16 breach.  
 17 ARBITRATOR CROOK: Well, in the Tribunal's  
 18 analysis, in your view, is the Tribunal allowed to  
 19 look at the reasons for originally granting the  
 20 grandfather exemption to SPMs, or is that out of  
 21 reach for us?  
 22 MR. WEILER: Only as a factual matter. If

12:36:05 1 that the claim?  
 2 MR. WEILER: Yes.  
 3 ARBITRATOR CROOK: That's an accurate  
 4 statement of the claim.  
 5 MR. WEILER: Yes.  
 6 ARBITRATOR CROOK: Okay, thank you.  
 7 MR. WEILER: And I should mention by the  
 8 way that the claim is nonetheless valid even if one  
 9 was to accept Professor Gruber's argument, for  
 10 example, that it wasn't a competitive advantage but  
 11 nonetheless, that it was a windfall. That's good  
 12 enough. It's not necessary for you to become a  
 13 competition Tribunal. The bottom line is, was  
 14 someone getting better treatment than someone else?  
 15 You start with the question: Are they comparators?  
 16 Are these people a fair comparison to begin with?  
 17 Because their products are seen on the same market  
 18 shelves, their employees go in there and they both  
 19 kind of fight for market share, all that stuff, if  
 20 that makes them comparative, and we submit that it  
 21 does, then you look to the treatment. When they  
 22 took away the Allocable Share Release mechanism,

12:38:02 1 you find that--it's no different than any other  
 2 time-barred case. There was one, I can't think of  
 3 the name of it. It was a South American case or it  
 4 might have been Central American, where they had  
 5 this. There was a Mexican one like this. Where  
 6 essentially if you find that something that  
 7 happened--I think the case is involved when there  
 8 wasn't--when the Treaty wasn't yet in force. The  
 9 conclusion was that that factual matrix may be  
 10 useful in informing you with respect to what their  
 11 goals were. It's not a tabula rasa. You don't  
 12 start from the day we were allowed to claim and say  
 13 we don't know what happened before, we weren't born  
 14 then. We were born today, and so we only take the  
 15 evidence of what's here. You can look at the  
 16 evidence behind that.  
 17 ARBITRATOR CROOK: We may not be  
 18 communicating here. Let's accept your analysis and  
 19 that, as a result of the repeal of the allocable  
 20 share provisions, you were placed in a much less  
 21 desirable position than you were previously.  
 22 MR. WEILER: And if I may interrupt, that

12:39:11 1 somebody else was getting better treatment at the  
2 time.  
3 ARBITRATOR CROOK: Okay. Fine.  
4 Then I'm trying to understand what the  
5 state action is here that the Tribunal is to  
6 analyze. You say the state action that we need to  
7 analyze is the repeal of the Allocable Share  
8 Amendments.  
9 MR. WEILER: In those six states.  
10 ARBITRATOR CROOK: In however many states.  
11 MR. WEILER: Five states, whatever.  
12 ARBITRATOR CROOK: My question to you is:  
13 Is it open to us to consider at that time whether  
14 the original grandfathering met your test of  
15 being--whatever?  
16 MR. WEILER: No, it's not.  
17 Well, I wouldn't say that your analysis  
18 should actually lead you to conclude whether or not  
19 there was a breach before because we're time-barred.  
20 ARBITRATOR CROOK: It's not a question of a  
21 breach. You're now saying you suffered a  
22 disadvantage because somebody else gets better

12:41:16 1 changed. They are join the MSA with someone who--  
2 ARBITRATOR CROOK: I understand your  
3 argument there, Mr. Violi--  
4 MR. VIOLI: But you're saying whether you  
5 can look back in time to '98, the original  
6 formulation--  
7 ARBITRATOR CROOK: I'm trying to figure out  
8 what is the measure at issue here that results in  
9 the violation of NAFTA Article 1102.  
10 MR. VIOLI: It's the allocable share. It  
11 is, indeed, the allocable share.  
12 ARBITRATOR CROOK: And we cannot consider  
13 whether the original granting of exemption was--met  
14 your test or whatever it is.  
15 MR. WEILER: Actually, my opinion would be  
16 that you can, regardless of whether you do or don't,  
17 you should come to the same conclusion.  
18 So, I would say, sure, in a sense. If  
19 you'd like to determine that everything was  
20 copacetic and would meet a test beforehand, and that  
21 now you conclude that the rules have changed, you  
22 don't accept the reason why those rules have

12:40:15 1 treatment than you do.  
2 MR. WEILER: As a result of a measure, yes.  
3 ARBITRATOR CROOK: As a result of the  
4 measure, the allocable share repeal.  
5 But let us suppose the Tribunal says, well,  
6 okay, it seems to us what they did back in 1998 was  
7 reasonable and appropriate, that there were certain  
8 benefits that stemmed from it. There were certain  
9 costs, but on balance it was a reasonable and  
10 appropriate measure.  
11 Are we allowed to consider that, in your  
12 view, or not?  
13 MR. VIOLI: May I speak to that? The  
14 problem is that back in 1998 through 2001, the  
15 measure was an Escrow Statute that said join the MSA  
16 with these conditions or not join the MSA and have  
17 an Allocable Share Release. So that's the measure.  
18 And the measure existed in 1998, it existed in 1999,  
19 all the way through until 2004.  
20 The measure has changed. So at that  
21 point--because now the terms under which we  
22 exercised the option under that measure have

12:42:16 1 changed, and therefore you conclude that the unfair  
2 treatment deserves a remedy, that would be perfectly  
3 fine with the Claimants. It seems to me that  
4 you--it is open to you to conclude that.  
5 As you know from what Mr. Violi just  
6 intervened with, we don't think it was fair before,  
7 but we know one thing: It's less fair now. We were  
8 only in six states or five states--whichever it  
9 is--because--and I'll confirm that before you see me  
10 begin again--because we were not allowed to compete  
11 across the whole country. The measure only gave  
12 us--the old measure, which we cannot complain about  
13 anymore, only gave us the chance to go into these  
14 five, but in those states we were able to compete.  
15 So, did we get the best treatment going?  
16 No. The general exemption was still the best  
17 treatment. If you conclude, though, that, you know,  
18 all things being equal, yeah, they were restricted  
19 to eight--to six states, to five states. These guys  
20 may have had a slightly better deal, eh, it's  
21 not--you know, let's say you say the treatment is  
22 still close enough, that you can't discern

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12:43:25 1 economically a difference, you could make that  
 2 finding. That would be fine. The question is:  
 3 Today, now, what position are they in? Because you  
 4 will see in our arguments that we have essentially  
 5 admitted that we were wrong when we first came to  
 6 you six, seven years ago. We thought that we were  
 7 going to be out of business a lot sooner than we  
 8 were. It turns out we competed a lot better than we  
 9 thought we would in those five states, and we took  
 10 that as the status quo. We're not challenging that  
 11 anymore. We just say that they should have left  
 12 well enough alone, stop trying to grab our  
 13 off-reserve--our on-reserve sales, and let us  
 14 compete in those five markets, but I'm afraid the  
 15 Respondent just couldn't leave it there. They've  
 16 decided to assert claims all across the board on our  
 17 on-reserve sales and tried to close us off on those  
 18 six states.

19 So, I would say yes, you can make that  
 20 finding, but it's immaterial to where we are today.

21 How are we doing for--oh, no, I've got  
 22 another 15 minutes, okay.

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12:45:38 1 detrimental reliance has essentially been borrowed  
 2 from the minimum standard jurisprudence and placed  
 3 into the 1110 jurisprudence.

4 So, now we see no Tribunal actually looks  
 5 at the language, the straight language, of  
 6 Article 1110 and finds on it because the  
 7 Article 1110 language is stark. It actually says  
 8 parties can't expropriate unless--and it gives four  
 9 options--unless it's in accordance with  
 10 Article 1105, unless it's not discriminatory.

11 Another one is escaping me at the moment. Something  
 12 like that, and the final one is, and you pay.

13 Public purpose, thank you.

14 So it's "and you pay." It's not "or."  
 15 It's an "and." So, if you actually take that  
 16 provision the way it's written, and that's actually  
 17 why environmental groups and other concerned  
 18 citizens were so worried about that provision  
 19 because, as it sits, it doesn't ask you to do any  
 20 more than simply check off everything. It doesn't  
 21 matter if it was nondiscriminatory. It doesn't  
 22 matter if it was for public purpose. It doesn't

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12:44:30 1 So we'll see if we can get--you know I have  
 2 six. It's no mystery now. We will go to the second  
 3 one and see if we can get through it.

4 And by the way, this might change to a  
 5 certain extent the need for us to have our  
 6 question-and-answer sessions earlier because we're  
 7 having it now. So we may not need to have to come  
 8 back and say, well, this is the time we can--we're  
 9 all prepared to talk about it. We'll talk about it  
 10 all right now, and if we--to the extent that we have  
 11 some time later, then we'll answer any other  
 12 questions you have.

13 So, with respect to the second one, I made  
 14 some statements yesterday concerning Article 1105  
 15 and 1110, and they still are consistent. I haven't  
 16 changed my mind. I think that it's fairly  
 17 straightforward that the only difference  
 18 between--and I should say--the way the law has gone,  
 19 the way other tribunals have--consensus seems to  
 20 have formed with respect to what tribunals have  
 21 done, you're not bound by what they have done, but  
 22 the consensus seems to be now that the notion of

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12:46:56 1 matter if it was in accordance with fair and  
 2 equitable treatment. Did you pay? Well, I think,  
 3 frankly, that was just too unpalatable from a  
 4 political standpoint for most tribunals that have  
 5 sat on these issues to take.

6 So, what they have done instead is they've  
 7 gone back to Vonseidelhoven (ph.) is the German  
 8 writer, who was--Ignots (ph.), who basically  
 9 advanced this idea that essentially it's a matter of  
 10 your legitimate investment-backed expectation. So  
 11 now we need to look to see whether or not your  
 12 investment was legitimately placed and whether you  
 13 really should have expected that you would be free  
 14 from this expropriation, and so we've imported this,  
 15 and that's fine, but--and my friends now actually  
 16 seem to be admitting that detrimental reliance,  
 17 legitimate expectations is a valid theory, if you  
 18 will, of the claim in Article 1110.

19 So, what I hear my friends saying is  
 20 basically, if you have a case with the impairment,  
 21 where the impairment is so severe that it  
 22 effectively constitutes a taking, then you look at

12:48:03 1 the detrimental reliance.  
 2 Our opinion is that the jurisprudence is a  
 3 bit broader than that. Yes, I agree that's  
 4 essentially where we are on expropriation, but I  
 5 would say we're also there on 1105, on fair and  
 6 equitable treatment.  
 7 PRESIDENT NARIMAN: Mr. Weiler, are you  
 8 saying that the repeal of the Allocable Share  
 9 Amendment was to treat you unfairly, or were there  
 10 other reasons for it? I mean, what's your case?  
 11 MR. WEILER: Well our case--  
 12 PRESIDENT NARIMAN: Was that repealed in  
 13 order to treat you unfairly?  
 14 MR. WEILER: I believe--doesn't matter what  
 15 I believe.  
 16 Yes.  
 17 PRESIDENT NARIMAN: On the evidence, yes.  
 18 MR. WEILER: Yes.  
 19 PRESIDENT NARIMAN: You have to say yes.  
 20 MR. WEILER: On the evidence, it was  
 21 intended to treat, not just Grand River but anybody  
 22 in Grand River's position who wasn't grandfathered,

12:50:20 1 legitimate for a government to change its mind and  
 2 change the measure.  
 3 PRESIDENT NARIMAN: Provided it has good  
 4 reason.  
 5 MR. WEILER: Provided it has good reason.  
 6 Thank you, Mr. President.  
 7 PRESIDENT NARIMAN: And if they show good  
 8 reason, then your claim must fail.  
 9 MR. WEILER: If they show good reason, our  
 10 claim--  
 11 PRESIDENT NARIMAN: And if they don't, then  
 12 your succeed. That's your point.  
 13 MR. WEILER: Then our claim succeeds.  
 14 That's our point.  
 15 And it's all about the evidence we see  
 16 before us. Do we believe--and you weigh it. So, in  
 17 a sense, while we have different pathways to get to  
 18 the results, I think you can already see that  
 19 essentially we're going to keep coming to the same  
 20 result. It's a matter of weighing the evidence and  
 21 determining on the balance and probabilities what  
 22 story you believe.

12:48:59 1 it was meant to get them. They're considered  
 2 scofflaws. We've heard it repeatedly. They  
 3 basically were--that was the design of it.  
 4 I should mention, though, with respect to  
 5 this detrimental reliance argument, we're not out of  
 6 national treatment. We're in to just detrimental  
 7 reliance, and here the question is a different  
 8 question. The question is: Did my clients deserve  
 9 to have a legitimate expectation that when in  
 10 2001-2002 they entered into the off-reserve market  
 11 in those five states, were they entitled to  
 12 legitimately expect that they would have that  
 13 regime, that that would that be available to them?  
 14 And I should mention that we're not  
 15 suggesting--as my friends have suggested that we  
 16 think--were not suggesting that an obligation is  
 17 frozen. There is no--we do not have one of those  
 18 kinds of agreements or treaties here. There are  
 19 other cases--one I was involved in, Duke versus  
 20 Ecuador--no, sorry, Duke and Peru--where we actually  
 21 had a stabilization clause. We don't have a  
 22 stabilization clause here. It is completely

12:51:08 1 Yes, Mr. Crook.  
 2 ARBITRATOR CROOK: I'm a little confused by  
 3 the exchange you just had with the Chairman, and I  
 4 would be very careful, however, to suggest, you  
 5 know, any difference between myself and the  
 6 Chairman.  
 7 MR. WEILER: Me, too.  
 8 ARBITRATOR CROOK: But I want to go back to  
 9 this sort of legitimate expectations notion. I mean  
 10 it's a buzz word. We throw it around. I'm not sure  
 11 we know clearly what it means.  
 12 What was it that made it a legitimate  
 13 expectation on the part of the Claimants that the  
 14 regime would not change?  
 15 Now, in some of your written papers, there  
 16 is a certain element of sort of deal, an offer was  
 17 made, and we accepted it. Mr. Violi said yesterday  
 18 no, that's not it at all.  
 19 So, what makes this different than any  
 20 other change in law? Why was there--what made this  
 21 expectation different than any other expectations?  
 22 MR. VIOLI: What makes it principally

12:52:21 1 different is that we have the first time a  
 2 legislation, a statute, adopted by a state  
 3 legislature that says you have two options: Join  
 4 agreement--join an agreement or comply with the  
 5 statute. So, I guess at various points in time  
 6 you're constantly faced with that decision. It's a  
 7 melding, it's a combination of something that is  
 8 very foreign, certainly in U.S. law, certainly when  
 9 these investors entered the U.S. market, a statute  
 10 that says enter into an agreement or abide this way.  
 11 And so in that respect you are one person facing two  
 12 choices, choices that others and all manufacturers  
 13 in the market must face and exercise.

14 So, the agreement and the statute coexist  
 15 at the time we entered the market and contributed  
 16 significantly, and invest significantly.  
 17 \$50 million in the Escrow Statutes, right? Set up  
 18 distribution channels. Enter into an agreement with  
 19 exclusive licensee wholesalers who have a trademark  
 20 (ph.) in our trademark. We set up this whole system  
 21 in this regime under this regulatory system that  
 22 says you join an agreement or you follow this--you

12:54:41 1 years with that understanding, and then the state  
 2 comes along and says, well, we want to change one  
 3 part. We're are going to go through that funnel  
 4 again, and we're going to change one part. We're  
 5 not going to change the MSA part where your  
 6 competitors you have this exemption and you have  
 7 this Allocable Share Release. We're just going to  
 8 change this part. And that's where there is  
 9 abridgment and in encroachment or an impairment and  
 10 an expropriation of our investment. Our  
 11 expectation-backed interest or investment. And  
 12 that's how I would explain it.

13 PRESIDENT NARIMAN: Following up on what  
 14 you said, Mr. Violi, can there be an estoppel not to  
 15 change a statute?

16 MR. VIOLI: You know--

17 PRESIDENT NARIMAN: Isn't it tantamount to  
 18 that?

19 MR. VIOLI: It would appear that way.

20 PRESIDENT NARIMAN: You say that no, you  
 21 can't repeal it. In essence, square (ph.) you?

22 MR. VIOLI: Exactly. And the way--

12:53:36 1 follow this payment schedule.

2 So, it's this sort of--it's not a complete  
 3 just comply with the statute or it's not a complete  
 4 mandate that you enter into an agreement. It's this  
 5 combination.

6 So, now, when there comes time to change,  
 7 they change the statute. They change the statute in  
 8 one respect. They don't change it with respect to  
 9 the MSA, the agreement part of it. See? So, now  
 10 they're just changing one part of it. And there,  
 11 when you are putting an agreement on a table or you  
 12 are put in this kind of a situation, which is  
 13 hybrid, certainly hybrid and unique, where you have  
 14 one statute that flows into two options: An  
 15 agreement or a payment schedule as an NPM. You have  
 16 an expectation on the day you make that decision, on  
 17 the day you invest heavily to go with one or the  
 18 other that those two are going to, just like the  
 19 Turowappen (ph.) Treaty, they are going to proceed  
 20 in parallel in mutual coexistence without crossing  
 21 and encroaching or one going in front of the other,  
 22 on top of the other. And they proceed for four

12:55:34 1 PRESIDENT NARIMAN: So, that's what you are  
 2 saying.

3 MR. VIOLI: Yes, but they have. We don't  
 4 have the power to stop the legislature, so they've  
 5 done it so they would have to compensate us, but  
 6 that is the argument.

7 There is an estoppel, and if you don't want  
 8 to recognize our right and you want to sort of  
 9 change it and breach the estoppel-type of concept  
 10 here, then there has got to be some recompense.

11 MR. WEILER: If I could, Mr. Crook, also  
 12 answer your question.

13 ARBITRATOR CROOK: Okay. Well, I just  
 14 wanted to put a question.

15 MR. WEILER: Because this is where I get to  
 16 where you are.

17 ARBITRATOR CROOK: We're burning up all  
 18 your time.

19 MR. WEILER: Okay. So, a couple of things.  
 20 I just want to stress first something that Mr. Violi  
 21 just mentioned. You are not empowered as would a  
 22 panel under Chapter Twenty of this agreement.

12:56:19 1 You're not empowered to make a determination  
 2 that--well, actually even Chapter Twenty Panels  
 3 aren't. They simply decide whether there is or  
 4 isn't compliance. It's a matter of good faith  
 5 whether the Respondent chooses to comply by changing  
 6 its rules. But the implicit obligation with a  
 7 Chapter Twenty Tribunal is that that will happen, so  
 8 you effect our issuing an injunction of sorts. It's  
 9 understood--if you were a Chapter Twenty Panel, it's  
 10 understood that the U.S. would want to comply with  
 11 you. But you're not. You're a Chapter Eleven  
 12 Tribunal. You can't change the law, and we're not  
 13 asking to you change the law. We're simply  
 14 suggesting that because there's been noncompliance,  
 15 we deserve compensation. And there is nobody else  
 16 coming in the door behind us because the three-year  
 17 rule is over for the Allocable Share Amendments. We  
 18 are it. There is no floodgates problem here. It's  
 19 really straightforward. Do we deserve compensation  
 20 for the way this played out?  
 21 And with respect to that, I would mention  
 22 that you asked about, Mr. Crook, where this concept,

12:58:47 1 compensation should also be owing as a result of  
 2 that change, you are entitled, and we submit you  
 3 should look at the procedural fairness and the  
 4 substantive fairness of that. That's why we talk  
 5 about things like transparency. Did we get invited  
 6 to the show? Did we get consulted? Did they pass  
 7 this in some sort of clandestine manner? That's the  
 8 procedural side. The other side is how do we end  
 9 up?  
 10 ARBITRATOR ANAYA: Does that go to the--  
 11 MR. WEILER: Sure.  
 12 ARBITRATOR ANAYA: What you're just saying  
 13 there, you described as the procedural side, where  
 14 does that fit in here? Does that go to the  
 15 legitimate expectation part or the--  
 16 MR. WEILER: No, it doesn't go to the--I  
 17 mean these obligations are overlapping. It goes to  
 18 the consultation part in a few slides and it also  
 19 goes to legitimate expectation. When one is  
 20 evaluating whether or not a legitimate expectation  
 21 exists and was reasonable and, therefore--because  
 22 it's not just finding that there was legitimate

12:57:32 1 this--I think you said catchword or something to  
 2 that extent of legitimate expectation, where it  
 3 comes from. We submit, and further to our arguments  
 4 that we've submitted in writing, that it comes from  
 5 the general international law principle of good  
 6 faith, and we would suggest that the notion of  
 7 detrimental reliance is found in all of the  
 8 civilized legal systems--in quotes--of the world.  
 9 And we would submit that a number of tribunals,  
 10 including Tecmed, Saluka--a whole host of the many  
 11 of them involving Argentina--have concluded that the  
 12 minimum standard of treatment, whether that is the  
 13 customary version or the Treaty version, that the  
 14 minimum standard of treatment--and I should add  
 15 whether that's full protection and security, which  
 16 is the way the Vivendi Tribunal went or whether it's  
 17 fair and equitable treatment, which is the way the  
 18 Tecmed Tribunal went--that there is this minimum  
 19 standard of transparency and certainty that is  
 20 expected of the host State.  
 21 The host State is entitled to change its  
 22 laws, but in deciding in this case whether

12:59:45 1 expectation. You also have to find that there was  
 2 reasonable reliance. And in doing so, part of the  
 3 evaluation is to determine how did they make the  
 4 change? Because governments are allowed to make  
 5 changes. The question is: How did they do it? Did  
 6 they--was the result fair and was the process fair?  
 7 Was it equitable? And we would submit that the  
 8 process in this case wasn't fair and that the  
 9 substance, the substantive result wasn't fair.  
 10 PRESIDENT NARIMAN: But could they not  
 11 say--I mean the other side of the picture--that it  
 12 was your conduct which was inequitable? Because we  
 13 would have continued the existing state of affairs,  
 14 the allocable share, but you mean the whole lot of  
 15 NPMs. By your conduct you were too greedy and you  
 16 deliberately--you deliberately restricted your sales  
 17 to one or two states and not to the entire country  
 18 as it was before in order to get an unintended  
 19 benefit of the original statute; hence the  
 20 amendment. Could then--just as you plead legitimate  
 21 expectation, that you had some legitimacy but--and  
 22 you say that you went on and thought everything

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01:00:55 1 would be all right, but you--the answer would  
2 be--and that's their answer--is you change your  
3 conduct. You deliberately or unintentionally in  
4 order to gain an advantage, which was not intended  
5 to be given--adjusted your sales in this matter. So  
6 just think about that.

7 MR. WEILER: We have an answer to that,  
8 though. The answer to that is that implicit in your  
9 restatement of the Respondent's position, which I  
10 take to be accurate, is almost a notion of equal  
11 bargaining power, that there's, you know, well, just  
12 like two children saying, well, you were unfair, or  
13 you were unfair, too.

14 PRESIDENT NARIMAN: No, no. Sorry. No,  
15 no. I'm not talking about two children. I'm  
16 talking about the intent with which it was amended.  
17 This was not just--it was a fortuitous circumstance  
18 that they found that ultimately that this doesn't  
19 work as was expected because everything would go on  
20 as it were, and everything would have gone on but  
21 for the fact that a few people concentrated their  
22 sales only in one or two states.

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01:03:09 1 you believe the Respondent, not the, you know, the  
2 faithfulness of their arguments and how much they  
3 truly believe in their argument, but on the facts is  
4 it actually true that this was a loophole, that this  
5 was by accident or that there is evidence that  
6 suggests it wasn't that surprising to anybody.

7 And I would also mention that a part of a  
8 baseline legitimate expectation of any investor is  
9 they take the law as they find it, and they are  
10 allowed and should be expected and understood to use  
11 the law as it's provided to them.

12 PRESIDENT NARIMAN: Okay.

13 Mr. Anaya had a question.

14 ARBITRATOR ANAYA: And it goes back to the  
15 intent, the issue of what the intention was behind  
16 all this.

17 MR. WEILER: The intention of the  
18 Respondent or the intention of the Claimants?

19 ARBITRATOR ANAYA: The Respondent in doing  
20 away with the allocable share regime.

21 MR. WEILER: Yes. It goes back to the  
22 intent.

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01:02:02 1 MR. VIOLI: Mr. President, I would submit,  
2 as Mr. Luddy pointed out earlier, what the Claimants  
3 did and the people in the Claimants' position  
4 addressing exactly what you're saying is they simply  
5 complied with the law. And what was the effect of  
6 the law? Was it unintended consequence? The effect  
7 of the law, as we mentioned yesterday, was that the  
8 NPMs grew in market share identical to the exempt  
9 SPMs. Identical. They were about 8.1 or 2 percent  
10 the same. 8.2, 8.3, 8.4, 8.7, nine--they're almost  
11 identical.

12 So, if what we did under this regime which  
13 starts here and then gives you two choices, if what  
14 we did on this parallel track mirrored what this set  
15 of competitors did under their choice, their  
16 parallel track, how could it have been unintended  
17 when the result is they want to stop us but not stop  
18 them? See? That is why the conclusion is it's not  
19 unintended; it wasn't unintended for this group or  
20 this--it wasn't unintended for us.

21 MR. WEILER: You will have to make a  
22 factual finding, Mr. President, on whether or not

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01:04:18 1 ARBITRATOR ANAYA: Right, the intent. You  
2 seem to be focusing on that, what the real intent  
3 was.

4 MR. WEILER: Yes.

5 ARBITRATOR ANAYA: And it wasn't healthcare  
6 you're saying it was--or not primarily.

7 MR. WEILER: And we're saying it wasn't a  
8 loophole, but actually the evidence is that it was  
9 actually--it is what it is, that the rules were what  
10 they thought they'd be, and no one should be  
11 surprised and that they're feigning surprise now.  
12 We doubt the veracity of the statement that it was a  
13 loophole, and we think they're feigning surprise.

14 ARBITRATOR ANAYA: What was it?

15 MR. WEILER: It was--the mechanism  
16 was--well, actually Mr. Violi will probably--

17 MR. VIOLI: It's an equal mechanism. It  
18 was an option that was--

19 ARBITRATOR ANAYA: I know that, but what  
20 was the intent then or who--

21 MR. VIOLI: The intent of the allocable  
22 share or the original?

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01:04:56 1 PRESIDENT NARIMAN: No, the amendment.  
 2 MR. VIOLI: Yes, yes. The intent was to  
 3 stamp out the market share of the NPMs and  
 4 effectively that's what happened, and the market  
 5 share went to the SPMS, which caused reduction of  
 6 NPM--  
 7 ARBITRATOR ANAYA: I know that but--  
 8 MR. VIOLI: --loss of profits and increase  
 9 of the MSA revenues.  
 10 ARBITRATOR ANAYA: The intent was--  
 11 MR. VIOLI: To increase the MSA revenues,  
 12 correct. Protect the market share--  
 13 ARBITRATOR ANAYA: To protect--  
 14 MR. VIOLI: --manufacturers.  
 15 ARBITRATOR ANAYA: Okay. So you're  
 16 basically asserting--  
 17 MR. VIOLI: That's what the letter showed,  
 18 right.  
 19 ARBITRATOR ANAYA: You're asserting  
 20 collusion between, you know, the government, state  
 21 governments, and the SPMS.  
 22 MR. VIOLI: Right, and the OPMS. Right.

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01:05:55 1 intent, but you can find intent and it would lead to  
 2 the same result.  
 3 ARBITRATOR ANAYA: We seem to be spending a  
 4 lot of time on that, and so I'm just trying to  
 5 figure out--  
 6 MR. WEILER: With respect--  
 7 ARBITRATOR ANAYA: --analysis.  
 8 MR. WEILER: With respect to the legitimate  
 9 expectation intent--  
 10 ARBITRATOR ANAYA: No, no, no. In any  
 11 case, all right? Let's go back.  
 12 MR. WEILER: Well, no. With respect to  
 13 legitimate expectation, we have a burden to show  
 14 that we had a legitimate expectation and that the  
 15 state made a change in such a manner that was unfair  
 16 and unreasonable and--  
 17 ARBITRATOR ANAYA: Okay, but that could be  
 18 just negligence. That could be just they forgot to  
 19 pay attention to your interests.  
 20 MR. WEILER: Yes, it could be, you're  
 21 right.  
 22 And so, no. You do not have to make a

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01:05:30 1 There was collusion--  
 2 ARBITRATOR ANAYA: OPMS, SPMS to protect  
 3 their market share.  
 4 MR. VIOLI: Yeah.  
 5 ARBITRATOR ANAYA: Is that what you're  
 6 saying?  
 7 MR. VIOLI: Indeed.  
 8 ARBITRATOR ANAYA: And you're saying that  
 9 we have to find that for you to win.  
 10 MR. VIOLI: I don't know if there's going  
 11 to be a finding that there was collusion. The fact  
 12 that even if the states--  
 13 ARBITRATOR ANAYA: That that was the--  
 14 MR. VIOLI: Right. Even if the states did  
 15 it on their own. So, you know what, as Mr. Crook  
 16 said, is it--  
 17 ARBITRATOR ANAYA: All right. Okay, okay.  
 18 I understand.  
 19 So we have to find there was some kind of  
 20 intent along those lines, is what you're saying. Is  
 21 that right? I just want it clear.  
 22 MR. VIOLI: I don't think you need to find

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01:06:29 1 finding. We would argue that you could make that  
 2 finding. But no, you don't have to make it to come  
 3 to that conclusion.  
 4 ARBITRATOR ANAYA: The other issue we were  
 5 talking about, the no-less-favored-treatment  
 6 standard--intent.  
 7 MR. WEILER: They end up being very similar  
 8 in application.  
 9 ARBITRATOR ANAYA: Just one last one. And  
 10 if we get into this intent stuff, whose intent? Is  
 11 it Mr. Hering's intent? Is it the state  
 12 legislatures' intent? I mean who among the state  
 13 legislatures is--  
 14 MR. VIOLI: I think we have to look at the  
 15 states as one body. We would have to look at the  
 16 states as one body because you have the Attorneys  
 17 General--  
 18 ARBITRATOR ANAYA: I know but how can we  
 19 find intent?  
 20 MR. VIOLI: The problem is you have an  
 21 agreement that's the Attorneys General's, and that's  
 22 combined with the statute--

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01:07:12 1 ARBITRATOR ANAYA: I know the problem.  
 2 That's what I'm asking you to give some guidance on.  
 3 So, do we look at the Attorneys General? Do we look  
 4 at the state legislatures? Do we look at the  
 5 governors? That's always the problem with intent;  
 6 right?  
 7 MR. WEILER: And actually, I'd like to  
 8 strongly make a point. That is actually one of the  
 9 key differences between the national treatment  
 10 standard and a fair and equitable treatment  
 11 standard. In the national treatment standard, there  
 12 are tribunals and WTO Panels who very clearly said  
 13 we don't want to get into the mugs game of trying to  
 14 guess intent. We're not going to go there. We're  
 15 not going to see if we can go find what the intent  
 16 was because whose intent do we check?  
 17 PRESIDENT NARIMAN: But you don't want us  
 18 to go into intent at all. Is that your--  
 19 MR. WEILER: Not with respect to national  
 20 treatment.  
 21 PRESIDENT NARIMAN: It doesn't matter about  
 22 anything. I mean you--putting in pigeon holes makes

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01:08:36 1 actually have to find intent to discriminate against  
 2 a foreign national.  
 3 ARBITRATOR ANAYA: No, I understand that.  
 4 I understand that. I'm trying to find out what  
 5 you're trying to tell us.  
 6 MR. WEILER: We're trying to tell you that  
 7 you don't need to look for specific intent, that the  
 8 result is manifest in the facts. Was there or was  
 9 there not unfair treatment. They say it's for  
 10 healthcare. Did they meet that strategic burden,  
 11 did they really prove to you enough that it really  
 12 was about healthcare or was it about something else.  
 13 MR. VIOLI: Professor Anaya, just that--did  
 14 they--there is a distinction here between did they  
 15 intend to discriminate or did they intend the  
 16 result? Our point is clearly that they intended the  
 17 result, the result being pass the allocable share  
 18 and take away the market share--  
 19 ARBITRATOR ANAYA: I understand that. I  
 20 understand that.  
 21 MR. VIOLI: That's why I'm trying to follow  
 22 what you're saying about intent. Are we talking

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01:07:57 1 no difference. I'm saying do you want us to go into  
 2 it or not? That's all I want to know. Whether in  
 3 under one pigeon hole of 1102 or 1105--whichever.  
 4 MR. WEILER: You don't need to, but we  
 5 think you can.  
 6 PRESIDENT NARIMAN: That's not an answer.  
 7 MR. WEILER: No?  
 8 ARBITRATOR ANAYA: I understood the whole  
 9 argument you were making with regard to 1102 is that  
 10 we had to, you know, find that they didn't  
 11 intend--this wasn't really about healthcare, it was  
 12 about something else, and so we have to find out--  
 13 MR. WEILER: And that's manifest in the  
 14 facts.  
 15 ARBITRATOR ANAYA: Okay. So, we do have to  
 16 find that, and you can prove it is what you're  
 17 saying.  
 18 MR. WEILER: Yes, manifest in the facts.  
 19 ARBITRATOR ANAYA: Okay--  
 20 MR. WEILER: So it's not a matter of  
 21 actually finding out--there's a diff--the difference  
 22 is that my friends are going to tell you that you

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01:09:22 1 about the intended result or does it have to be an  
 2 intent to discriminate?  
 3 ARBITRATOR ANAYA: Either way. But I  
 4 understand what you're saying. My question is  
 5 precisely that, do we have to find intent one way or  
 6 the other, and you're saying yes, we do.  
 7 MR. VIOLI: Certainly the intended result.  
 8 MR. WEILER: Intended result, yeah. It may  
 9 be a matter of semantics.  
 10 PRESIDENT NARIMAN: Whose intent? Please  
 11 address us.  
 12 MR. WEILER: Well--  
 13 PRESIDENT NARIMAN: Whose intent?  
 14 MR. WEILER: Manifest in the facts. I  
 15 mean, we're never going to be able to, you know,  
 16 examine, x-ray the heads of the particular Attorneys  
 17 General to know exactly, you know, so you know, to  
 18 be clear. It's more a question of manifest and the  
 19 result.  
 20 PRESIDENT NARIMAN: Okay. Lunchtime.  
 21 MR. WEILER: Okay.  
 22 (Whereupon, at 1:09 p.m., the hearing was

01:10:22 1 adjourned until 2:20 p.m., the same day.)  
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02:26:18 1 A. Yes, sir, I did.  
 2 Q. The most recent was under the heading--the  
 3 letterhead of Protiviti, as you mentioned; correct?  
 4 A. That's correct.  
 5 Q. And the first one was with your former  
 6 firm; is that correct?  
 7 A. That's correct. It would be under Gordius  
 8 Consulting.  
 9 Q. Gordius Consulting, okay.  
 10 Your witness, Mr. Sharpe.  
 11 CROSS-EXAMINATION  
 12 BY MR. SHARPE:  
 13 Q. Thank you, and good afternoon, Mr. Wilson.  
 14 MR. SHARPE: I will be referring most to  
 15 Mr. Wilson's report and documents, and we have a few  
 16 additional documents which we can distribute just  
 17 for reference that are referenced in the Table of  
 18 Contents, just five or six documents.  
 19 We also have a number of slides. We will  
 20 put the documents up on the slides for your  
 21 convenience, and we can give you a copy of those  
 22 slides at the end of the examination of Mr. Wilson.

1 AFTERNOON SESSION  
 2 WAYNE WILSON, CLAIMANTS' WITNESS, CALLED  
 3 DIRECT EXAMINATION  
 4 BY MR. LUDDY:  
 5 Q. Sir, would you state your full name for the  
 6 record.  
 7 A. Wayne Roy Wilson, Junior.  
 8 Q. And by whom are you employed or affiliated?  
 9 A. I work with Protiviti, Incorporated, which  
 10 is a wholly owned subsidiary of Robert Haff  
 11 International.  
 12 Q. And were you retained by the Claimants in  
 13 this matter?  
 14 A. Yes, I was.  
 15 Q. For what purpose?  
 16 A. To evaluate their claims and to determine  
 17 what, if any, damages arose from their claims  
 18 related to the actions of individual states  
 19 off-Reservation and individual states on-Reservation  
 20 for certain sales.  
 21 Q. And you rendered two reports in this  
 22 matter; correct?

02:27:45 1 PRESIDENT NARIMAN: Okay.  
 2 BY MR. SHARPE:  
 3 Q. I'm Jeremy Sharpe from the Office of Legal  
 4 Adviser at the State Department.  
 5 Thank you for agreeing to answer questions.  
 6 You submitted two expert reports in this  
 7 case you noted?  
 8 A. That's correct.  
 9 Q. And do you have copies of those?  
 10 A. Not as I sit here, I do not.  
 11 Q. Do you have copies of those for him?  
 12 Great.  
 13 And, Mr. Wilson, did you draft these  
 14 reports?  
 15 A. Yes, I did.  
 16 Q. Okay. If you could open your First Report  
 17 to Exhibit 1 Revised, and I will put this on the  
 18 screen for convenience as well.  
 19 Do you have that?  
 20 A. I'm not sure this is--this is not revised.  
 21 I just have the Exhibit 1. I don't have the Exhibit  
 22 1 Revised.

02:29:40 1 Q. In the meantime, why don't we use the  
2 document off the screen, and perhaps you could give  
3 Mr. Wilson his revised report with his revised  
4 numbers in it.  
5 Thank you.  
6 Looking at the screen, Mr. Wilson, you used  
7 two methodologies to determine the impairment to  
8 Claimants' investment in the United States; is that  
9 correct?  
10 A. Yes. In one I used an analysis whereby we  
11 were evaluating the impact to the brand on the five  
12 individual states, five original states that the  
13 off-Reservation sales occurred in, as well as the  
14 on-Reservation sales in order to ascertain the  
15 damage to those lost profits.  
16 We looked specifically at the lost sales,  
17 which is a widely accepted measurement of diminution  
18 of value of an intellectual property, and we  
19 analyzed that because, frankly, the damages in this  
20 case didn't happen in the U.S. as a whole. It only  
21 happened in certain specific states.  
22 To use the overall measurement of the

02:31:56 1 represent the benefit or the damages since it wasn't  
2 done in this case to the Claimants?  
3 Those are the two analyses.  
4 Q. So, look looking at the screen, one of your  
5 methodologies is called the lost sales approach, and  
6 the other is called the exemption approach; is that  
7 correct?  
8 A. That's correct.  
9 Q. And the lost sales calculations include  
10 what you've called an investment in markets;  
11 correct?  
12 A. Yeah, that's the investment, the physical  
13 investment in actual assets that is not included in  
14 the subsequent two numbers because that investment  
15 in markets is actually depreciated over a period of  
16 time, and that depreciation expense is a reduction  
17 that is applied to the revenues that are experienced  
18 by GRE off-Reservation and through the sales  
19 off-Reservation, on-Reservation.  
20 Q. The equipment you identified is for the  
21 Ontario plant that's used, as you say, exclusively  
22 to serve the U.S. market; is that correct?

02:30:44 1 entire country would have been very sloppy and would  
2 not have been an appropriate analysis because  
3 damages, for instance, in the state of Arizona or  
4 Nevada would have been offset by successes in, say,  
5 the state of New York.  
6 Then we also performed an analysis where we  
7 essentially looked at what occurred when what I  
8 describe in my original report as the last  
9 significant legal change took place, which was the  
10 adoption of the MSA to see what activities took  
11 place around the adoption of the MSA by the states.  
12 And what occurred was an exemption from escrow for  
13 individual companies that chose to participate in  
14 the MSA as subsequent participating members, and we  
15 performed an analysis similar to the analysis that  
16 was occurred at the point in time that the MSA was  
17 put in place at the point in time that the ASA would  
18 have been put in place, the Allocable Share  
19 Amendment.  
20 So, looking at it as a last time we had a  
21 major legal change, this is what happened. If the  
22 same type of thing happened today, how would that

02:32:56 1 A. Those were assets--I assume we are going to  
2 talk about the rebuttal report as well because this  
3 gets refined later on as we sit down and are able to  
4 more fully explore what that asset listing is.  
5 This initially was a request by myself to  
6 identify the assets that were incremental in nature.  
7 When evaluating lost profits, total costs  
8 are not a relevant measure. Generally the process  
9 that takes place is the damages expert for  
10 plaintiffs or in this situation Claimants,  
11 calculates the lost profits that were incurred based  
12 predominantly on variable costs, and then all of the  
13 overhead costs which are not necessarily variable or  
14 analyzed in order to evaluate what costs are  
15 incremental to the investment. For instance, if you  
16 already have a building and you don't need an  
17 additional building, then that's not an incremental  
18 cost to expand your operations. On the other hand,  
19 if you have to buy more trucks or you have to buy  
20 additional machinery, those are incremental costs.  
21 And so, our goal was to understand the  
22 assets that were incremental in nature for GRE when

02:34:06 1 they decided to move into the United States market  
2 and were, in fact, incremental to moving into the  
3 U.S. market, and incremental to their activities in  
4 there on a go-forward basis.

5 Q. All right. So your argument is that you  
6 are claiming for both lost profits and for certain  
7 equipment that you feel was necessary in order to  
8 generate the sales for the United States; is that  
9 correct?

10 A. My understanding is there is essentially  
11 three reasons that we do that. The first one is the  
12 depreciation reason that I just explained.

13 The second, as I articulated in my report,  
14 there are two aspects of the value that was  
15 invested. The first value was an investment made  
16 specifically for the market in physical assets, and  
17 the second is the investment that's made in  
18 developing a brand within the United States.

19 And then my understanding, and I apologize  
20 for not being a little more precise about this, but  
21 we were also asked by counsel to evaluate that  
22 investment because my understanding is, under

02:35:58 1 rate based upon GRE's historic growth and growth we  
2 saw of other brands in the marketplace, and we  
3 applied that growth rate, so it gives a range for  
4 the Tribunal to be able to evaluate where they think  
5 the damages are more likely to occur going forward.

6 Q. Right.

7 And looking at the screen, you calculated  
8 initially about R248.7 million in damages, assuming  
9 further growth in sales; correct?

10 A. That is correct.

11 Q. And you also calculated about  
12 \$173.6 million in damages, assuming no further  
13 growth in sales; correct?

14 A. That's correct.

15 Q. Now let's look at the exemption approach  
16 which is below. Under that approach you calculated  
17 a value, as you said, of the negative impact of  
18 Claimants' escrow obligations under the Allocable  
19 Share Amendments; correct?

20 A. Can you ask that question again?

21 Q. I'm just reading from your report. It says  
22 exemption approach, this is at Section 5-A of the

02:35:01 1 Chapter Eleven of NAFTA, due to the way this case is  
2 filed, that there is also a claim under that that is  
3 separate and apart from our usual analysis, and I  
4 apologize. I'm not an attorney, and would love to  
5 be more articulate.

6 Q. That's okay. That's wrong in any event,  
7 but let's go back to your screen.

8 The lost sales approach quantifies lost  
9 profits for on- and off-Reservation sales; that's  
10 correct?

11 A. That's correct, for the specific states in  
12 which damages occurred.

13 Q. Right. And so using this approach, you  
14 calculated a range of impairment; correct?

15 A. That's correct, because what we did is we  
16 evaluated under two models. We did one that just  
17 said, okay, if there is no growth, if we just  
18 retained the market share that we had at the point  
19 in time that the actions in question took place,  
20 what would those projected sales look like.

21 And then the second thing we did is  
22 evaluate what we thought was a reasonable growth

02:36:55 1 second report, Exemption: Value of the negative  
2 impact of the escrow terms under the ASA.

3 A. Correct.

4 Q. Okay. So, you calculated the value of the  
5 exemption at about \$315.3 million, assuming further  
6 growth in sales; correct?

7 A. That's correct. And that analysis, one  
8 important thing to differentiate the two that we  
9 haven't mentioned is that, in the previous analysis,  
10 at least in the off-Reservation sales, we offset  
11 those sales with the sales--the lost profits with  
12 the sales that they continued to make. And, of  
13 course, under the escrow exemption, we are  
14 calculating the escrow exemption at kind of time  
15 zero with no offset necessarily for whatever GRE or  
16 Claimants were able to successfully achieve in spite  
17 of the higher costs and the actions that were taken.  
18 So, there was going to be a differential between the  
19 two by necessity.

20 Q. And so you calculated the value of the  
21 exemption of about \$282.1 million, assuming no  
22 further growth in sales; correct?

02:37:58 1 A. That's correct.  
 2 Q. Okay. Now, if you could--I don't know if  
 3 you have your revised report now, but I will put it  
 4 on the screen. This is Exhibit 1 to your revised  
 5 report.  
 6 I'm sorry, your second Report.  
 7 A. The rebuttal report?  
 8 Q. Yes, the Rebuttal Report.  
 9 This is titled Summary of Valuation and  
 10 Impairment Values; correct?  
 11 A. That's correct.  
 12 Q. And it summarizes your revised  
 13 calculations; correct?  
 14 A. Yes. It summarizes the calculations that  
 15 we made in light of probably three primary issues.  
 16 The first was criticisms raised by NCI, Navigant  
 17 Consulting, in their report, and our eval based upon  
 18 our evaluation of their criticisms and either  
 19 acceptance or rejection of those criticisms.  
 20 The second was because we've achieved--we  
 21 have been able to receive more precise information  
 22 as well as updated information.

02:39:58 1 Do you see that?  
 2 A. Yes.  
 3 Q. And under the growth model, you calculated  
 4 about \$97.2 million in damages; correct?  
 5 A. That's correct.  
 6 Q. Under the flat or no growth model you  
 7 calculated about \$74.9 million in damages; correct?  
 8 A. That's correct.  
 9 Q. Okay. And you also readvised your  
 10 calculations for the exemption approach; correct?  
 11 A. Yes, there were some minor revisions  
 12 because of volumetric differences in the data we  
 13 originally received. Our goal was to try to get the  
 14 best information, and unfortunately we are dealing  
 15 with companies that don't necessarily track their  
 16 sales all the way to individual states in some  
 17 cases. They would track them to a regional  
 18 distributorship, and it's just not in their nature.  
 19 They have clients in those states and are able to  
 20 build it back up, but in the normal course of  
 21 business, these aren't the types of data that they  
 22 normally keep.

02:39:00 1 And then finally, if you actually look  
 2 through the text of the original report, when we  
 3 discuss the on-Reservation sales, there is a line at  
 4 the end of the paragraph that indicates they are  
 5 offset by actual sales that occurred. Due to a  
 6 last-hour change, we did not do that offset, so  
 7 there is a significant change just because of  
 8 something that we intended to do and ended up not  
 9 getting done because we didn't get the data at the  
 10 time to be able to do it. We didn't have the data  
 11 in time, unfortunately.  
 12 Q. Is this the reduction to the 2005 base  
 13 year?  
 14 A. No. I mean, the 2005 falls under Navigant  
 15 Consulting raised that issue, so we evaluated it.  
 16 If there is kind of a basket of things that we  
 17 looked at that they had raised in an effort to  
 18 engage in intellectual discourse. We evaluated what  
 19 they said.  
 20 Q. Okay. Well, let's look at this table.  
 21 Using the lost sales approach, there is a heading,  
 22 "Total Impairment Due to Lost Sales."

02:40:51 1 So, as we continued to move forward through  
 2 several conversations with personnel at Tobaccoville  
 3 and at NWS, we achieved a better understanding as to  
 4 what data we actually needed, and our goal was to  
 5 get the best information we could about what the  
 6 sales were in individual states.  
 7 Q. Right.  
 8 So, looking under the exemption approach,  
 9 under the growth model you calculated about \$267.9  
 10 million in damages; correct?  
 11 A. That's correct.  
 12 Q. And the flat or no growth model, you  
 13 calculated about \$238.2 million in damages; is that  
 14 correct?  
 15 A. That's correct.  
 16 Q. Okay. So, and you may know, Navigant's  
 17 Rebuttal Report contained a table that set out your  
 18 primary damages finding, and I will put that on the  
 19 screen for convenience, and that's in the packet  
 20 that we distributed.  
 21 This table is called Summary of  
 22 Mr. Wilson's Revised Primary Damages Estimates.

02:41:48 1 Correct?

2 A. That's correct.

3 Q. Start at the top of the table in the growth

4 scenario. Your calculations for off-Reservation

5 lost profits decreased from about \$87.6 million to

6 about \$50.9 million; correct?

7 A. That's correct.

8 Q. And that's a decrease of about 42 percent?

9 A. And as I said before, the issue we ran into

10 is we had information for off-Reservation sales that

11 we were able to update, and in some cases I

12 identified additional sales that were made

13 subsequent to our First Report.

14 The second issue we ran into was that we

15 were able to better understand where sales took

16 place in terms of individual states.

17 So, it was my preference, even though it

18 wasn't in the best interest of my client to use the

19 right information as opposed to the information that

20 perhaps would have been opportunistic and allow me

21 to have higher damages in the interest of trying to

22 find the truth.

02:43:53 1 profits decreased from about 123.1 million to about

2 \$22.1 million; correct?

3 A. Yes.

4 And the majority of decrease is caused by

5 two primary things. As I indicated previously, our

6 inability to apply the actual sales that had

7 occurred, and by doing that we had a significant

8 reduction.

9 And the second was that the Claimants, in

10 spite of letters that they had received, for

11 instance, in the case of California, from the

12 Attorney General of California saying that their

13 cigarettes were banned, were actually able to

14 successfully mitigate damages by continuing to argue

15 that case and continuing to make sales in

16 California.

17 So, in fact, unfettered or at least being

18 able to continue to compete and not being labeled as

19 contraband and kicked out of the state, they were

20 able to gain significant market share in that

21 market, and as a consequence, I didn't feel like it

22 was reasonable to evaluate those damages at this

02:42:52 1 And then finally, when we looked at the

2 off-Reservation profits, there were some more minor

3 adjustments like you reference, the 25 percent

4 versus 18 percent adjustment in the 2005 numbers,

5 where we looked at what NCI had proposed in terms of

6 their criticisms, evaluated the efficacy of those

7 criticisms, and made adjustments where we felt it

8 was appropriate in order to find the correct number

9 for the Tribunal to look at.

10 Q. I see. So, your client would have

11 preferred that you used the erroneous numbers?

12 A. We didn't ask really their input because

13 generally speaking, I view this as more a matter of

14 personal credibility and integrity than a matter of

15 placing myself in a subservient role to my client.

16 We looked at the information. The facts

17 were what the facts were, and we were simply trying

18 to get the right answer so that we would be able to

19 provide good information to the Tribunal as it made

20 its decisions.

21 Q. I see. So, let's go down the chart.

22 Your calculations for on-Reservation lost

02:44:55 1 point.

2 Unfortunately, if the State of California

3 is ever successful in applying the MSA to the

4 on-Reservation sales, those damages would occur at

5 some point in time in the future. But due to the

6 interesting situation we find ourselves in, where

7 due to statutes of limitations and the need to

8 evaluate the damages in this matter, and not being

9 able to wait until every case and every state as a

10 result, we removed that number because we felt--I

11 felt personally that it was improper to include it

12 at this point because it had not actually occurred.

13 It's one of the difficulties in this business is you

14 try to identify the damages that are actually

15 happening, not the damages that will someday happen

16 if they're successful in what they're trying to do

17 in California.

18 Q. I see. So, your initial speculation that

19 would be zero damages in California was incorrect,

20 but now you would like the Tribunal to assume no

21 further--you had at the time of your report asked

22 the Tribunal--

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02:45:59 1 A. No, there really was no speculation when I  
2 received--there really is no speculation about no  
3 sales in California. When you receive a letter from  
4 the Attorney General of California that says that  
5 you are banned, your tobacco is labeled contraband,  
6 and you're not allowed to sell anymore, and you have  
7 gotten notification from your main customer in  
8 California that basically they're scared and don't  
9 think they can continue to do business with you,  
10 there is not a lot of speculation there.

11 I didn't know at the time that GRE and  
12 Claimants would be successful in fighting the  
13 actions that were being taken in California. That's  
14 the reason that we updated the numbers when we  
15 reached the Rebuttal Report in an effort to evaluate  
16 fairly the damages.

17 I guess the alternative is I could have  
18 just left the numbers the same and we would have had  
19 the wrong answer, and we would be talking about why  
20 my numbers are wrong. I would rather talk about why  
21 my numbers change so that they are correct.

22 Q. Okay. Well, let's continue in that vein.

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02:48:00 1 So, there was really--there was no benefit  
2 one way or the other, in my mind, in terms of moving  
3 this number any direction. It was simply a matter  
4 of we had additional conversations more or less  
5 confirming that that 38 million was what we expected  
6 it to be, and it became clear to me very quickly in  
7 talking to the accountants that the train had gone  
8 off the tracks, and that their understanding of what  
9 incremental costs were were not what I needed it to  
10 be.

11 And so, we literally sat down in Canada and  
12 went asset by asset in order to understand what each  
13 individual piece of equipment made, what that did,  
14 and where it fit, if it was used for a particular  
15 marketplace, if it was unique in its nature. If it  
16 was required because of the volumetric increases  
17 that happened in California or if there was a  
18 regulatory requirement for it.

19 So, it was a rather arduous process to  
20 identify those individual assets, but the numbers  
21 shrink.

22 Q. You noted that the train went off the

560

02:46:55 1 Your calculations for the investment in  
2 markets or the as you noted the equipment purchased  
3 to serve U.S. market decreased from \$38 million to  
4 about \$24.2 million; correct?

5 A. Exactly. And one of the reasons that this  
6 decrease as I describe when we discussed my First  
7 Report was we made--I made attempts in conversations  
8 with GRE personnel to identify the actual assets  
9 that were incremental to the market. Unfortunately,  
10 we are asking--you ask that of almost of any company  
11 in the world, that is not the type of information  
12 that they have, and so there is a series of  
13 conversations that need to take place.

14 Frankly, it didn't help us or hurt us  
15 regardless of which way this number went. If it was  
16 38 million, it would mean that our depreciation  
17 expense that's applied to the lost profits would  
18 have been higher. If the number is lower, it means  
19 that the amount that you claim as the investment in  
20 assets is higher and the amount--or lower and the  
21 amount you take for depreciation would be lower as  
22 well.

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02:49:03 1 tracks. Are you referring to GRE accountants?

2 A. Well, it's a matter of trying--the problem  
3 of being a damages expert is, we speak a language  
4 that's not--not in the general course of business  
5 for accountants. So, when I go and I ask an  
6 accountant what are the incremental costs to go into  
7 the United States, that's typically not a cost that  
8 they look at, that they don't analyze their  
9 investments that way. They analyze their  
10 investments because we need a new machine or this  
11 would increase efficiency.

12 And it's oftentimes not even their  
13 decision. It's just their decision to account for.

14 So, you can't just have an accountant in  
15 the room. You have to have someone who understands  
16 what all the equipment does. You then have to have  
17 someone who actually understands the maintenance of  
18 that equipment and then generally have to have  
19 someone that understands the regulatory nature to  
20 understand if there is any regulatory need for some  
21 of this equipment.

22 And so, we had started the conversation

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02:49:58 1 with the accountants. I was satisfied at the time  
 2 we filed our First Report that we were all in  
 3 agreement; and, unfortunately, when we revisited the  
 4 subject prior to filing our second Report, it became  
 5 obvious to me that it was unclear. And my  
 6 general--like I said, my take on it was I don't care  
 7 if the number goes up or goes down. I just need to  
 8 know that we are actually getting the right number  
 9 because for a lost-profits analysis I need to make  
 10 sure we are talking about incremental costs. And as  
 11 I understood from counsel, what we needed for this  
 12 investment numbers for their legal issue is it has  
 13 to be the incremental costs to go into the United  
 14 States market.

15 So, that's what we were trying to do, is  
 16 get the right number, and that's what I mean when I  
 17 say the train went off the tracks. My communication  
 18 skills apparently failed me. Perhaps their  
 19 listening skills failed them, and ultimately  
 20 in-house counsel or in-house accountants  
 21 communicating with a damages expert rarely goes  
 22 extraordinarily smoothly because we're asking them

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02:51:55 1 serve the U.S. market?

2 A. I'm not sure how I would do that. You  
 3 know, that's a nice theory, but the reality is that,  
 4 unless, and I do not intend to underestimate the  
 5 Tribunal at all, but unless they are intimately  
 6 familiar with the workings of a cigarette  
 7 manufacturer and what each individual piece of  
 8 equipment does and, more importantly, the volumetric  
 9 demands of GRE at any given point in time and  
 10 whether these demands are driven by demand in the  
 11 U.S. market and growth in the U.S. market, or if  
 12 they're being driven by worldwide demand in Germany  
 13 or in Mexico, you know, other than presenting the  
 14 people that I spoke to and letting them communicate,  
 15 that's part of my role, is to evaluate as an expert  
 16 what assets are relevant and to use the intelligence  
 17 and background of the people that operate this  
 18 machinery in order to make sure that I'm getting the  
 19 right information because I'm kind of speaking the  
 20 damages language. I have accountants that speak the  
 21 in-house accounting language, and then I have  
 22 operational people that speak the language of making

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02:50:56 1 to make their accounting system more or less stand  
 2 on its head.

3 Q. Let me see if I understand this correctly.  
 4 You made a claim for \$38 million for equipment in  
 5 Canada. Navigant said that you didn't produce any  
 6 evidence that this equipment was used solely to  
 7 serve the U.S. market. You went back, you realized  
 8 the train had gone off the tracks, and you sorted  
 9 everything out, and now the evidence in the record  
 10 is such that you're confident that the \$24 million  
 11 that you're claiming is for equipment in Canada to  
 12 solely serve the U.S. market.

13 A. I could answer that the evidence that I  
 14 have seen in the conversations I have is sufficient.  
 15 I can't say that I have reviewed every single piece  
 16 of paper in the record, so I would hesitate to  
 17 answer that part of your question, but in terms of  
 18 what I revised in my understanding, I feel  
 19 comfortable.

20 Q. Did you produce evidence that would allow  
 21 the Tribunal independently to determine that the  
 22 \$24 million claimed for this equipment is solely to

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02:53:04 1 cigarettes, and so I have to get those three  
 2 languages all together so we can find an answer that  
 3 allows us to get the right answer for this matter.  
 4 Q. So, in theory, it would be nice if there  
 5 were documents that showed that this equipment  
 6 exclusively served the U.S. market, but, to your  
 7 knowledge, there are no documents that demonstrate  
 8 that this equipment exclusively serves the U.S.  
 9 market?

10 A. I don't think there would ever be that kind  
 11 of information for any asset because  
 12 ultimately--outside of, say, I know there is a  
 13 machine that makes one hundreds, a type of cigarette  
 14 that's only sold in U.S. market. Nobody else in the  
 15 world buys these. If you're in Europe, you want to  
 16 buy a pack of 100s, they don't sell them there.  
 17 They only sell them in the U.S. markets.

18 So, that's an example of a machine that if  
 19 you know about cigarettes, and I tell you there is a  
 20 one hundreds machine there, you know that that  
 21 machine is only used for the U.S. market, so that  
 22 cost is in our analysis.

02:54:02 1 But there are other machines that are in  
2 there that may have other purposes, but would be  
3 based on conversations why they put it in there,  
4 that's why. It's not part of accounting. It's not  
5 part of normal recordkeeping. It's likely not part  
6 of any corporate bylaws or standards to ever create  
7 a document like that, so what you're asking for is  
8 is there a mythical shield of Aries? I don't know.  
9 I don't have that piece of information because, in  
10 fact, there would never be that piece of information  
11 unless someone saw fit to create it and say we need  
12 to buy this for the U.S. market.

13 Q. Did someone see fit in this case, to your  
14 knowledge, to put in a report saying that I met with  
15 Mr. Wilson, I work for GRE, and I can attest that  
16 this equipment exclusively serves the U.S. market  
17 for the following reasons?

18 A. I don't know the answer to that question.

19 Q. Okay. Let's move on. Let's go back to our  
20 chart here.

21 Let's go to the growth scenario, the total  
22 impairment line, where we left off.

02:56:03 1 do because of the Claimants' ability to fight off  
2 some of the enforcement actions that were being  
3 taken against them.

4 And then finally just evaluating the things  
5 that Mr. Kaczmarek brought up. I'm a big believer  
6 that experts ignoring one another serves no role for  
7 the Tribunal. The damages experts need to engage,  
8 and so I'm a big believer that when a damages expert  
9 represents to me that there are things that I ought  
10 to look at, I ought to look at that, and I will  
11 evaluate the efficacy of his arguments. In some  
12 cases I flat out disagree with Mr. Kaczmarek because  
13 his volumes that he uses are completely  
14 opportunistic where he's went out of his way to use  
15 an allocation methodology to move sales from states  
16 that aren't part of damaged states in the damaged  
17 states in order to further offset sales. He's  
18 ignored any changes to the volume based purely on  
19 his representation that it's a handwritten note.

20 These are companies who deal in handwritten  
21 notes. They don't have a multimillion dollar  
22 accounting system, and oftentimes that's how they

02:55:04 1 There is a reduction from \$248.7 million to  
2 about \$97.2 million; is that correct?

3 A. That's correct. That's a mathematical  
4 process.

5 Q. Yes. And that's about a about 61 percent  
6 reduction; correct?

7 A. That's correct.

8 Q. And in the no growth scenario, we see  
9 similar results; right? Your calculations for  
10 off-Reservation lost profits decreased from about  
11 \$70.3 million to about \$40.3 million; correct?

12 A. And I would expect that as based on the  
13 things that we evaluated and changed in our rebuttal  
14 analysis versus the original analysis. It's not  
15 surprising in any way, you know. If we want to talk  
16 about how--what a horrible thing it is that I  
17 reduced the damages that the Federal Government is  
18 facing, U.S. Government is facing, that's fine, but  
19 the end result is we have got the better answer. We  
20 have got the right answer. That makes sense and is  
21 supported by the data because of subsequent  
22 information, because of one thing we weren't able to

02:57:06 1 communicate.

2 When I evaluate the volumes and try to  
3 measure them correctly and respond to  
4 Mr. Kaczmarek's responses, I'm somewhat frustrated  
5 because my general belief is after reading his  
6 Rejoinder, he's by and large ignored the things that  
7 we brought up, and he's doing the exact opposite of  
8 not engaging on the disagreements that we have.

9 Q. That's curious you mention that on your  
10 first point. You noted in your Rebuttal Report that  
11 Mr. Kaczmarek had opportunistically moved these  
12 numbers. Mr. Kaczmarek responded and said he did  
13 not move these numbers. In fact, he pointed it out  
14 that this was an issue for you to look at, but maybe  
15 you could point to where in his report--are you  
16 familiar with where it is in the report?

17 A. The difficulty in his report is--what he  
18 did is he used I think it was the Eisenstadt method  
19 that he used to allocate sales from Texas into  
20 Oklahoma.

21 Q. Oh, I see.

22 A. There were direct instructions provided by

02:58:00 1 Tobaccoville that said these sales should be  
2 allocated in this way.  
3 And instead of doing that, he chose instead  
4 to allocate 100 percent of those sales to Oklahoma,  
5 which is, of course, was one of the five original  
6 states, thus creating sales in Oklahoma that never  
7 occurred in Oklahoma, based upon everything that we  
8 have been told, all the records that we have seen,  
9 and all of the analysis we have been provided by  
10 Tobaccoville.  
11 Q. We will let Mr. Kaczmarek speak to this  
12 issue, but my understanding is that Mr. Kaczmarek  
13 said he relied on the data that was provided to him,  
14 and to the extent that you had different data and  
15 were relying on that data, that that's a separate  
16 issue. But I think--  
17 A. He selectively relied on the data. There  
18 was data in the analysis that by his own words he  
19 chose to ignore and footnoted that it was a  
20 handwritten document, and that was literally the  
21 entire import of his analysis.  
22 Q. Right. Well, let's take this up with

03:00:02 1 Did I read that correctly?  
2 A. That is correct.  
3 Q. Right.  
4 But, isn't it true that in order to  
5 calculate combined profits for GRE and NWS you can't  
6 simply look at GRE's costs? You would need to look  
7 at NWS's costs as well?  
8 A. To the extent they were applicable, yes.  
9 Q. To the extent they were applicable. So, if  
10 you were looking at combined profits for GRE and  
11 NWS, you would need to look at NWS's costs to the  
12 extent--  
13 A. Not all costs. You would specifically look  
14 at the incremental costs that were relevant to the  
15 state. So, when you try to identify incremental  
16 costs--in accounting terms we use the phrase  
17 accounting, we use the phrase variable costs, fixed  
18 cost, and now this phrase incremental costs. And I  
19 know Mr. Kaczmarek refers a lot to the Audited  
20 Financial Statements. Well, GRE has no requirement  
21 to file Financial Statements. The only reason NWS  
22 has any Financial Statements is because they have a

02:58:52 1 Mr. Kaczmarek, shall we?  
2 Let's just go down to the total impairment  
3 value there.  
4 A. For the growth or nongrowth?  
5 Q. For the nongrowth.  
6 \$173.6 million down to about \$74.9 million;  
7 correct?  
8 A. That is correct.  
9 Q. That's a 57 percent decrease?  
10 A. That's what the math says.  
11 Q. Right. Well, let's look at some of the  
12 reasons for these changes.  
13 If you could look at Paragraph 68 of your  
14 First Report, which addresses how you calculated  
15 Claimants' on-Reservation lost profits--I will put  
16 that up on the screen also--it states, "The  
17 on-Reservation profits are calculated by taking the  
18 per unit profit achieved by Claimants on sales  
19 on-Reservation and applying that rate to the  
20 projected sales volumes. The rate of profits  
21 represents the difference between NWS's sales price  
22 and GRE's costs for production."

03:00:57 1 loan, and the bank requires them to file the  
2 Financial Statements. They required them at one  
3 point in time.  
4 So, there is no legal reason why GRE would  
5 ever have Audited Financial Statements.  
6 And Audited Financial Statements would  
7 simply have variable costs and overhead costs, which  
8 would not be useful for this analysis because it  
9 would be total variable costs independent of which  
10 market it was in. And, in fact, the variable costs  
11 are different for different markets. You have  
12 different raw materials. You have different sizes.  
13 You have different equipment that may be more  
14 efficient because it's more modern. You also have  
15 different labor costs because everyone on the floor  
16 is paid a different salary. So whoever runs that  
17 machine is going to be the relevant direct cost.  
18 And then you have to look at overhead, and  
19 the question with overhead is which of these costs  
20 change incrementally with an investment decision?  
21 So, as an example, Mr. Jerry Montour runs, owns, and  
22 is employed by GRE. Do you need another Jerry

03:02:00 1 Montour because you go in to the United States  
 2 market? No, that's not an incremental cost.  
 3 There is no additional cost to having--for  
 4 another Jerry Montour.  
 5 So, that's the type of analysis you do.  
 6 And as we discussed earlier on, you would  
 7 want to actually analyze each of these costs after  
 8 you first agree on what are the costs that are  
 9 relevant on a variable basis, so we look at variable  
 10 costs.  
 11 Q. You mentioned the audited Financial  
 12 Statements for the Claimants. Did you review  
 13 Claimants' Audited Financial Statements for years  
 14 ending 2006, 2007, and 2008?  
 15 A. Are you talking about the NWS Financial  
 16 Statements?  
 17 Q. NWS GRE, the Claimants.  
 18 A. As far as I know, GRE doesn't have Audited  
 19 Financial Statements.  
 20 Q. As far as you know. Did you ask them?  
 21 A. Yes, I did, several times.  
 22 Q. And what did they say?

03:03:50 1 and as Mr. Kaczmarek thinks about them.  
 2 Q. So, there are GRE audited financials before  
 3 year ending 2006, so GRE stopped having their  
 4 Financial Statements audited? Is that your  
 5 understanding?  
 6 A. There is no--I don't know why they made the  
 7 decision. I would say it's a smart decision because  
 8 I don't know why you would spend the money outside  
 9 of you were trying to get a bank loan and the bank  
 10 required you to have Audited Financial Statements.  
 11 But the statements themselves have no use for the  
 12 analysis that we are talking about. They don't help  
 13 you from a volume standpoint. They don't help you  
 14 from a revenue standpoint because they're done at  
 15 such a high level, and the costs represented in that  
 16 Financial Statement are of no import to the  
 17 evaluation of lost profits because the incremental  
 18 costs are never measured in those financials.  
 19 Q. I see. So, given your testimony that the  
 20 accountants at Grand River are bit of a train wreck  
 21 and given the massive--  
 22 MR. LUDDY: Objection. You're being

03:02:47 1 A. They said they didn't have them.  
 2 Q. They didn't have them--  
 3 (Simultaneous conversation.)  
 4 Q. Did they tell you that they did not produce  
 5 them or that they did not have them to produce to  
 6 you?  
 7 A. My understanding is no audit was ever  
 8 performed, and I would go one step further to say as  
 9 an accountant, if GRE had called me independent of  
 10 my involvement in this case and asked should we have  
 11 an audit done, my answer would be a firm no. Unless  
 12 you have a bank that requires it, you intend to  
 13 start being traded and in the United States or  
 14 subject yourself to regulation by being a public  
 15 company, there is really no advantage. Your money  
 16 would be better spent in other areas to enhance your  
 17 accounting records, to enhance the efficiency of  
 18 your operations, to evaluate the process.  
 19 So, based on my conversations with people  
 20 from Jerry Montour all the way down to some of their  
 21 more junior accounting personnel, there are no  
 22 Audited Financial Statements as we think about them,

03:04:54 1 offensive.  
 2 BY MR. SHARPE:  
 3 Q. I apologize. Given that the evidence in  
 4 the record, massive discrepancies in the numbers,  
 5 it's your testimony that an Audited Financial  
 6 Statement would not help make sense of these, the  
 7 financials in this case?  
 8 A. I'm not sure what you mean by--you said  
 9 huge discrepancies in the data, so first, I want  
 10 to--you're talking about the changes in our damages  
 11 numbers?  
 12 Q. No, no, no. I'm talking about all of the  
 13 discrepancies in the data that Navigant identified.  
 14 For instance, sales to tobacco, the amount  
 15 of the escrow deposits that were notified to the  
 16 states versus that were notified to the Tribunal for  
 17 purposes of this case. There are discrepancies in  
 18 the data. My question is: Would Audited Financial  
 19 Statements help clarify these or not?  
 20 A. Well, the discrepancies you talk about,  
 21 it's fascinating you asked that question because  
 22 Audited Financial Statements, if you were looking at

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03:05:54 1 Audited Financial Statement from GRE, it's going to  
2 talk about GRE's operations, not Tobaccoville's  
3 sales, not NWS sales, not sales that were reported  
4 by retailers to individual states, which are  
5 all--which is where all that information comes by.  
6 And ultimately, I'm a little--I was a  
7 little mesmerized by this discussion by  
8 Mr. Kaczmarek because when I read through this, my  
9 first thought was, outside of an amazing  
10 coincidence, I can't imagine that the numbers would  
11 be exactly equal. Because outside of the ability to  
12 produce a cigarette and instantaneously put that  
13 cigarette up for sale in Arizona, you're by  
14 definition going to have delays that occur between  
15 GRE and its distributors, so that's NWS and  
16 Tobaccoville, and between those--between  
17 Tobaccoville and the retailers where the eventual  
18 number gets reported to the state.  
19 In fact, if there weren't discrepancies, I  
20 would be very concerned that something wrong had  
21 happened. So, that's kind of the first part.  
22 The second part is when you look at some of

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03:08:08 1 retailers not associated with any of these entities  
2 to individual states across the United States.  
3 I can't even imagine where that Financial  
4 Statement would exist.  
5 Q. Let me ask a more simple question: Do you  
6 think that Audited Financial Statements would assist  
7 the Tribunal in deciding any damages that might be  
8 appropriate to award to Claimants?  
9 A. Absolutely not. I can't imagine how you  
10 would be able to glean the relevant information in  
11 order to evaluate the impact of the U.S. market.  
12 The first thing you would have to assume is that the  
13 Audited Financial Statements would provide detailed  
14 geographic segmental breakdown for you to even know  
15 what percentage of sales were actually made in the  
16 U.S. in general by GRE of Seneca branded cigarettes  
17 because it would combine the Seneca brand as well as  
18 the private label brands into one volume in the U.S  
19 that's problem number one.  
20 Problem number two, the only damages that  
21 are relevant in this discussion are the damages in  
22 the states where these actions took place. We are

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03:06:58 1 the analysis that Mr. Kaczmarek has in volumes, he  
2 opportunistically again takes the position that if  
3 in one year you have a negative variance and in the  
4 following year you have a positive variance, it  
5 cannot be due to these timing issues. Obviously,  
6 those two should be--the absolute value of those two  
7 differences should be added together to magnify.  
8 So, for instance, if you had a negative  
9 16 percent differential in Year 0 and in Year 1 you  
10 had a positive 15 percent, that's a 31 percent  
11 difference instead of the real 1 percent difference  
12 that it likely represents because of a delay between  
13 a manufacturer, a distributor, and a retailer.  
14 And so when you talk about these  
15 differences first Financial Statement, I've never  
16 seen a financial statement that would list the sales  
17 made by companies that are not affiliated, so you  
18 are basically saying that somewhere in the world  
19 there exists a financial, Audited Financial  
20 Statement for GRE that would show sales by  
21 Tobaccoville, sales by NWS, and the amounts  
22 reported, the volumes reported by individual

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03:09:09 1 not talking about offsetting the damages that are  
2 incurred on-Reservation in Arizona with the benefit  
3 that the fact that the State of New York hasn't  
4 decided to, based on counsel's explanation,  
5 incorrectly apply the MSA to on-Reservation sales.  
6 Likewise, you know, from that perspective,  
7 you can't just take all the sales in the United  
8 States and clump them together, and that's the most  
9 information you would ever get out of a Financial  
10 Statement if it provided the maximum detail  
11 necessary in order to be an Audited Financial  
12 Statement.  
13 So, no, they serve no purpose whatsoever  
14 because when you look at it, you're going to look at  
15 numbers that are generalized and that are at such a  
16 high level as to preclude any meaningful analysis  
17 for the damages at issue in this matter.  
18 PRESIDENT NARIMAN: Mr. Wilson, what is the  
19 difference between an audited Financial Statement  
20 and an unaudited Financial Statement?  
21 THE WITNESS: Essentially the difference,  
22 if we are speaking about United States GAAP, and it

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03:10:13 1 generally applies across countries, is that an  
2 independent auditor comes in and reviews the  
3 Financial Statements, and in performing that review  
4 they perform statistical testing to make sure that  
5 the numbers are, quote-unquote, correct, and they  
6 then sign off on those Financial Statements as being  
7 correct. The problem is in the United States we are  
8 faced with the reality that Bernie Madoff had  
9 Audited Financial Statements, Enron, Global  
10 Crossing, Adelphia, WorldCom all had Audited  
11 Financial Statements.

12 The only thing that the Audited Financial  
13 Statements serve is that an independent party had  
14 reviewed your accounting standards--accounting  
15 application and evaluated whether or not it's in  
16 conformity with generally accepted accounting  
17 principles.

18 Now, whether or not those principles  
19 adequately account for the activities, whether or  
20 not it provides any meaningful data, it has to be  
21 evaluated on a case-by-case basis. And when you're  
22 evaluating incremental costs, what you're really

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03:12:15 1 The problem is it's not broken down by  
2 product line, so if you went and looked at  
3 Coca-Cola, and I haven't done this, but I would be  
4 very surprised if we had broken out the revenue for  
5 instance in the United States between Coca-Cola and  
6 Diet Coke. That would be a relevant factor if you  
7 were trying to measure the damages to a Diet Coke  
8 infringement; right? You would want to know how  
9 many sales you actually had of Diet Coke. Your  
10 sales of Coke don't really matter, but if it's Diet  
11 Coke that's being knocked off or infringed in some  
12 way, then that's what you want what to look at.  
13 That information is not available in a Coca-Cola  
14 audit.

15 PRESIDENT NARIMAN: But the totality of  
16 revenue sales would be better represented by an  
17 audited statement rather than by an unaudited one,  
18 obviously. Or no?

19 THE WITNESS: Well, I don't agree with that  
20 as a general rule. I think it would represent that  
21 the controls in place were better, it would  
22 represent that the accounting for the revenues were

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03:11:13 1 interested in is the managerial cost accounting  
2 system which is what individual companies use to  
3 manage their day-to-day operations. That's where  
4 you're going to see incremental costs.

5 When you looks at audited financials,  
6 that's what we call Financial Statements or  
7 financial accounting, and what that does is  
8 represent the values to the Investor, so that's why  
9 we have the SEC in the United States. It's to  
10 protect Investors through performing audits under  
11 standards that are designed to protect the  
12 quote-unquote common individual from being misled by  
13 Financial Statements. Whether that's successful or  
14 not probably has yet to be seen, but the reality is  
15 that the information is very high level. It's very  
16 conglomerated in an effort to provide as much--as  
17 much overall input as they can, and we have some  
18 requirements in the U.S. of very large companies  
19 where they have what we call identifiable segments,  
20 so you'll have companies that say these are all of  
21 our profits in the United States. These are all of  
22 our profits in Germany.

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03:13:09 1 according to generally accepted accounting  
2 principles, but when you're talking about the sales,  
3 especially when you're talking about GRE sales,  
4 those occur, you know, FOP shipping point at Canada,  
5 and so those sales, the timing of those sales is  
6 pretty clear to GRE. The question that you're  
7 asking are the costs that are associated with that,  
8 and ultimately is up to the Tribunal to decide  
9 whether they believe that the sales prices and costs  
10 that we used were appropriate or if you should be  
11 using all of the costs in the Financial Statements.

12 BY MR. SHARPE:

13 Q. Let me just read you this one paragraph  
14 from Navigant's Rejoinder report, Paragraph 77. It  
15 says, "The importance of Audited Financial  
16 Statements--"

17 A. Excuse me, is this in your book that you  
18 handed me? I'm just curious. Is it in this?

19 Q. No, this is from Navigant's Rejoinder  
20 report, 13 May 2009.

21 Paragraph 77, "The importance of audited  
22 Financial Statements for the damage analysis is

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03:14:12 1 threefold. First, they provide a holistic snapshot  
2 of the financial performance of a company for a  
3 given year. Second, the Financial Statements are  
4 certified by an independent auditor and prepared in  
5 accordance with generally accepted accounting  
6 principles, GAAP, which enhances the accuracy and  
7 reliability of the information. Third, Audited  
8 Financial Statements can be used to substantiate the  
9 accuracy of underlying or more detailed data  
10 produced from the company's sales or accounting  
11 systems."

12 Do you disagree with that?

13 A. Can I--do you have a copy I could kind of  
14 walk through it? I apologize. I just can't  
15 remember exactly everything you just said.

16 Well, this is the on-Reservation, this is  
17 the quote that's up is from my report, right?

18 MR. LUDDY: It's in your--

19 THE WITNESS: So, if we walk through each  
20 of those points, first they provide a holistic  
21 snapshot of the financial performance of a company  
22 for a given year.

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03:16:22 1 Financial Statements are certified by an independent  
2 auditor and prepared in accordance with generally  
3 accepted accounting principles. Well, that's true  
4 except that the generally accepted accounting  
5 principles that we are talking about here aren't  
6 necessarily relevant again to evaluating the  
7 damages.

8 So, that statement in and of itself is a  
9 true statement, but doesn't provide any real import  
10 into the usability of the Financial Statements or  
11 that it would provide any benefit. I don't think it  
12 would necessarily enhance the accuracy or  
13 reliability of the information, if the information  
14 that you're using is from a managerial accounting  
15 system that, by definition, never necessarily flows  
16 into the financial accounting system. And that's  
17 the system you have to look at in order to find much  
18 of this cost information.

19 And finally, it says third, Audited  
20 Financial Statements can be used to substantiate the  
21 accuracy of underlying or more detailed data  
22 produced from the company's sales or accounting

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03:15:19 1 Well, that can be useful, but it's not  
2 always useful, and so the question that we have that  
3 both Mr. Kaczmarek and I have as damages experts, as  
4 quantum experts in this matter, are to determine  
5 what evidence is relevant to our analysis. Is it  
6 relevant to have a picture that may include all of  
7 Canada and U.S. sales? It may include inside of  
8 U.S. sales. Off-Reservation and on-Reservation  
9 without any distinction between the two as well as  
10 sales of private brands and Mexico because Mexico is  
11 actually included in the Financial Statements of GRE  
12 as the U.S.

13 So, while generally speaking they are  
14 useful, but I don't think they're useful in this  
15 damages analysis. So, if he's trying to make an  
16 overarching statement, my modification would be the  
17 importance of Audited Financial Statements for some  
18 damages analysis can be threefold: First, they may  
19 provide a holistic snapshot which may or may not be  
20 relevant to the damages calculation of the financial  
21 performance of a company for a given year.

22 Then the next point he makes is that

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03:17:14 1 system. I would change "can" to "it may be able to  
2 be used." Not in all cases, and certainly not in  
3 this case because the Financial Statements--when  
4 you're talking about a financial accounting system,  
5 the information that you have to look at in order to  
6 evaluate lost profitability is of such a granularity  
7 that it is impossible to distill between--it's  
8 similar to saying if you decided you were going to  
9 look at--well, I don't even know that there is a  
10 good metaphor, but on one case it's the financial--I  
11 mean, there are two different sets of rules:

12 Managerial accounting is devised so  
13 management can run the company, so it can measure  
14 its costs, it can measure its incremental costs. It  
15 can evaluate the decision do I or do I not move into  
16 a new market? So, if you're sitting in Jerry  
17 Montour's seat and you're trying to make a decision  
18 do I want to go into the U.S. market, I have some  
19 relevant decision criteria. And if I have to rely  
20 on the financial information, I'm not going to be  
21 able to make that decision because it doesn't  
22 provide me one level of granularity or, two, even

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03:18:22 1 the information that I would need at any granularity  
2 to make that ultimate decision.  
3 Q. Thank you.  
4 A. So you have to rely on the managerial.  
5 Q. Thanks.  
6 I would like to move away from audited  
7 Financial Statements, but I'm not sure we got to  
8 NWS. Did you request NWS's Audited Financial  
9 Statements for the years ending 2006, 2007, 2008?  
10 A. We did, and we reviewed them.  
11 Q. You did and you reviewed them. And did you  
12 produce them with your Rebuttal Report?  
13 A. My understanding is they were produced. I  
14 don't know that they were part of what--I mean, we  
15 had--the financials--maybe I should restate that.  
16 The financial statements that we received  
17 from NWS included some detailed cost breakdowns,  
18 but, and we have looked at the--some of them are  
19 audited, some of them are reviewed, and I believe  
20 one of them may have even been compiled, which are,  
21 and if you want to spend the time, we can talk about  
22 what the differences are between those, but I can't

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03:20:18 1 Q. You presume he has access to them, and if I  
2 understand you're agreeing that it would have been  
3 useful for Mr. Kaczmarek to have had these Audited  
4 Financial Statements when preparing his Rebuttal  
5 Report?  
6 A. Well, I'm not sure how he got the numbers  
7 if he didn't have those statements. So, I mean,  
8 Brent and I have known each other for years, but we  
9 make it a professional courtesy not to discuss  
10 cases. So, I didn't call him up and say did you  
11 receive these Financial Statements. But the  
12 Financial Statements, as far as I know, were  
13 produced.  
14 Q. Let's just finish off the point we started  
15 with here on Paragraph 68 in your report where you  
16 calculated net profits for GRE and NWS, and as you  
17 acknowledged, that there were certain costs that  
18 Navigant pointed out should have been included for  
19 NWS that were not included in your calculation; is  
20 that correct? Is that fair?  
21 A. So this is from--is this from the Rebuttal  
22 Report that I'm looking at right now, or is this the

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03:19:19 1 imagine very many people wanting to talk that much  
2 about accounting standards, but if you would like to  
3 know, I'm happy to tell you. But basically they run  
4 the gamut from a simple compilation which is  
5 equivalent taking a shoe box to an accountant and  
6 saying give me Financial Statements to review where  
7 someone read through them and didn't see any glaring  
8 errors to a formal audit. And all those Financial  
9 Statements, my understanding, were produced. My  
10 process kind of ends when I hand it over to the  
11 attorney, so...  
12 Q. So, from your perspective, they should have  
13 been produced because those could have been useful  
14 for the Tribunal for making a determination of any  
15 damages that might be awarded to Claimants?  
16 A. I believe that Mr. Kaczmarek's cost  
17 analysis on NWS where he attempts to essentially  
18 apply all of the overhead costs to the lost profits  
19 on-Reservation are based on information from those  
20 Financial Statements that we received. Like I said,  
21 some were audited, some were reviewed, and some were  
22 compiled, so I presume he has access to those.

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03:21:20 1 original report?  
2 Q. That is your original report.  
3 A. Okay. So, your comment is that--  
4 Q. I read to you the sentence that says the  
5 rate of profits for Claimants the difference between  
6 NWS's sales price and GRE's costs for production,  
7 and you acknowledged that you made changes to your  
8 report when Navigant pointed out that in order to  
9 calculate profits for NWS, GRE needed to include not  
10 only GRE's costs, but NWS's costs; correct?  
11 A. Well, it wasn't that simple. It was a  
12 matter of reviewing--first, we got additional cost  
13 information from NWS, so we didn't have initially.  
14 When we talked to NWS initially, it did not appear  
15 that there were really variable costs of any  
16 substance. We continued that communication after we  
17 got Mr. Kaczmarek's report and identified some  
18 costs.  
19 Mr. Kaczmarek essentially takes all of the  
20 costs that NWS incurred and assumes that all of  
21 those must be incremental costs that they would  
22 incur, and that's not true. In fact, if you look at

03:22:30 1 most of those costs, they actually go down as  
 2 volumes increase, and the only overhead costs that  
 3 go up are the discretionary cost where essentially  
 4 NWS pays large bonuses based on profitability that  
 5 has nothing to do with going into the U.S. market or  
 6 not. It's simply a matter of as they have been  
 7 successful, they have passed that money on to their  
 8 employees.  
 9 Q. What was the financial impact of including  
 10 the NWS costs that you included in your model?  
 11 A. I don't know that we broke it out that way.  
 12 Q. Navigant determined that in the growth  
 13 scenario, it was about \$78 million. Does that sound  
 14 about right?  
 15 A. For the inclusion of NWS costs?  
 16 Q. That's right.  
 17 A. And our total decline was what amount?  
 18 Give me a second.  
 19 Q. On-Reservation lost profits gross scenario  
 20 from \$123.1 million down to \$22.1 million, a  
 21 decrease of 82 percent.  
 22 A. The percent doesn't really help me because

03:24:51 1 Q. I see.  
 2 So when you acknowledge that the  
 3 on-Reservation lost profits decreased from  
 4 \$123.1 million to \$22.1 million between your first  
 5 and second Reports; correct?  
 6 A. For the growth method?  
 7 Q. In the growth scenario.  
 8 A. That's correct.  
 9 Q. But what you're saying is of that  
 10 \$101 million, you don't know if the inclusion of  
 11 NWS's costs accounted for \$78 million?  
 12 A. I don't know the exact number it accounted  
 13 for. It did account for a significant part of it  
 14 because, as we went through and analyzed the costs,  
 15 we were, like I said, got additional information  
 16 about what the true cost structure was at NWS. We  
 17 were able to identify the variable costs that they  
 18 didn't think had really been incurred, and we were  
 19 able to identify some incremental costs, but it  
 20 wasn't that significant.  
 21 Q. Let's move on, if we could turn to  
 22 Exhibit 2 of your First Report, and I will put that

03:23:48 1 you said it was 70-some.  
 2 Q. \$78 million.  
 3 It might be easier if you made reference to  
 4 this decrease of \$78 million to look at your  
 5 Rebuttal Report where you might have told the  
 6 Tribunal about this reduction.  
 7 A. Well, I walked through what the reductions  
 8 were, but I don't think I--as I recall, I didn't  
 9 break that out, so--  
 10 Q. I think that's right.  
 11 A. Well, isn't that right?  
 12 Mr. Kaczmarek did the math, then fine. My  
 13 problem is that much of Mr. Kaczmarek's math seems  
 14 to get polluted by the inclusion of other costs that  
 15 we didn't include, so when he says the costs we  
 16 included, he doesn't just include the costs that we  
 17 included. He includes the costs that he would have  
 18 included. So, I can't sit here and tell you that  
 19 Mr. Kaczmarek's numbers are right because we didn't  
 20 perform that analysis. I can't really evaluate  
 21 that, and at least in many of his volume numbers and  
 22 other analysis he seems to kind of mix and match--

03:25:44 1 on the screen as well, it's titled Off-Reservation  
 2 Process for Seneca Brand Sales in Five Original  
 3 States."  
 4 Do you see that?  
 5 A. Yes.  
 6 Q. And first row is Tobaccoville projected  
 7 sales in cartons; correct?  
 8 A. That's what it says.  
 9 Q. And you projected sales going forward from  
 10 actual sales from a base year; correct?  
 11 A. That's correct.  
 12 Q. And the base year you've identified here  
 13 was 2005?  
 14 A. That's correct, the sales ended 2005.  
 15 Q. [REDACTED]  
 16 [REDACTED]  
 17 A. [REDACTED]  
 18 Q. If you could turn to your second Expert  
 19 Report at Paragraph 33, and I will put that on the  
 20 screen, you state, "It is my understanding, based  
 21 upon conversations with the owners of Tobaccoville,  
 22 that increased purchasing prior to the end of a year

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03:26:55 1 in order to maximize profitability and avoid future  
2 cost increases is fairly common within the consumer  
3 tobacco products industry."

4 Do you see that?

5 A. That is correct.

6 Q. You then note in that paragraph that you  
7 modified your valuation to account for the spike in  
8 sales that occurred in the latter half of 2005,  
9 which occurred because of the anticipated increase  
10 in the state tax rate, as well as the measures that  
11 you complain of in this arbitration; is that  
12 correct?

13 A. That's correct.

14 Q. Okay. Now, if you could just turn a couple  
15 of pages to the second chart at the bottom of  
16 Paragraph 37, I will put it on the screen for you.  
17 You note at Footnote 2, sales in 2005 have been  
18 reduced by 18 percent; correct?

19 A. That's correct.

20 Q. And that reduction is meant to offset the  
21 spike in sales that you mention in Paragraph 33; is  
22 that correct?

03:28:35 1 tax increase is going to happen, or they may be  
2 aware of changes in pricing even from GRE where they  
3 would reap a benefit if they bought the cigarettes  
4 in December as opposed to wait until January, for  
5 instance, if the price increase goes up. And we ask  
6 them if that happened in '05, and they said yes.

7 So, we looked at their data and we analyzed seasonal  
8 trends across individual years to see how they  
9 typically purchased, and then we also went out and  
10 looked at data that was available on sales of other  
11 companies where we were able to identify times when  
12 there was clearly information in the marketplace of  
13 either tax increases or changes in escrow rates in  
14 order to identify what the rates should be.

15 The reasonable rate looks to be 18 percent,  
16 and that was why we picked that number.

17 Q. I see.

18 So, you didn't notice the spike in sales at  
19 the end of 2005, when you prepared your First  
20 Report?

21 A. Well, I'm not sure we looked at the  
22 seasonality of the cigarette sales. It's not--maybe

03:27:44 1 MR. LUDDY: Jeremy, I'm sorry for  
2 interrupting. What page is that insert there?

3 MR. SHARPE: That is at the bottom of  
4 Paragraph 37.

5 MR. LUDDY: Oh, okay. I thought you said  
6 Page 37. I'm sorry for interrupting. Go ahead.

7 BY MR. SHARPE:

8 Q. So, that reduction is meant to offset the  
9 spike in sales you mentioned in Paragraph 33?

10 A. That's correct.

11 Q. Okay. And you noted that you confirmed  
12 that spike through conversations with the owners of  
13 Tobaccoville?

14 A. Yeah. What we did is we looked at several  
15 data points. The first one was we had a  
16 conversation with Tobaccoville and said, hey, the  
17 opposing experts raised this issue. Did you have  
18 any purchasing aberrations or sales aberrations that  
19 occurred in 2005, or do you change your buying  
20 trends as opposed to buying based on purely demand  
21 because perhaps some opportunity presents itself,  
22 and they say, yes, from time to time they may know a

03:29:36 1 I should be thinking that when people get close to  
2 Christmas, perhaps they want to smoke more, but I  
3 didn't really do that analysis in order to evaluate  
4 if there was a seasonality in the sales because we  
5 were looking at annual data. When Brent raised this  
6 issue, my first question was, well, is there  
7 seasonality, and there is seasonality. Ironically  
8 people do apparently want to smoke more as they get  
9 closer to the holidays by about 7 percent. And so  
10 if you look at sales across time in that last  
11 quarter, sales tend to peak every year, and it's not  
12 because necessarily they're planning anything. It's  
13 just sales pick up for whatever reason. That's when  
14 demand is increasing.

15 But we were able to identify this  
16 18 percent differential that occurred in 2005 versus  
17 other years.

18 Q. Right.

19 And Claimants didn't apprise you of this  
20 spike when you were preparing your initial report  
21 either; correct?

22 A. No. When Mr. Kaczmarek raised it, it was

03:30:34 1 the first time that it was raised on our radar  
 2 screen. And at that time we started immediately  
 3 evaluating his argument, so...

4 Q. I see. Why don't we move on to the cause  
 5 of lost sales. Let's turn to the on-Reservation  
 6 lost sales where we have seen the big decreases in  
 7 your Claimants' damages claim. If you could turn to  
 8 Exhibit 7 Revised of your First Report, put that on  
 9 the screen. This is titled "Impairment of  
 10 on-Reservation Seneca sales due to the MSA measures  
 11 Present Value Calculation Based on 15 Percent  
 12 Growth."

13 So, this table addresses the growth  
 14 scenario; correct?

15 A. That's correct.

16 Q. Let's start with California. You  
 17 calculated about \$46.8 million in damages for lost  
 18 profits in California; correct?

19 A. Yeah, that was based on a letter that we  
 20 reviewed that indicated that GRE cigarettes were  
 21 going to be banned from sale anywhere in the state  
 22 of California, including on-Reservation. And based

03:32:38 1 So, your current valuation no longer  
 2 includes any damages on-Reservation for California;  
 3 is that correct?

4 A. Well, as I said, there is basically two  
 5 pieces of information that impacted California. The  
 6 first was when we got the updated 2008 data, which  
 7 we obviously did not have available in 2008. There  
 8 were sales in California. Being a reasonably minded  
 9 person, I picked up the phone and called and said  
 10 why are there sales in California because there's a  
 11 letter that says they're banned? And we talked  
 12 about it, and they explained to me that they had  
 13 been fighting the ban, had been successful in  
 14 convincing their customer to continue to sell the  
 15 GRE cigarettes on-Reservation, and so they had not  
 16 as of yet lost it.

17 The dilemma we found ourselves in is, we at  
 18 that point in time felt that they were going to lose  
 19 California at some point. We had a letter from the  
 20 Attorney General that said you're contraband. You  
 21 cannot sell cigarettes anywhere in the state of  
 22 California. That's a pretty clear causation,

03:31:40 1 upon that information, we assumed a total loss of  
 2 the market since it was going to be banned.

3 Q. I see.

4 Let's look at Exhibit 8 Revised in that  
 5 same report. It's titled "Impairment of  
 6 on-Reservation Seneca Sales Due to MSA Measures  
 7 Present Value Calculation Based on No Growth." So,  
 8 this table addresses the no growth scenario; is that  
 9 correct?

10 A. That's correct.

11 Q. And for California and the no growth  
 12 scenario you calculated about \$25 million in damages  
 13 for lost profits; correct?

14 A. That's correct.

15 Q. Let's turn to Paragraph 43 of your second  
 16 Report. You state, "In addition, I have received  
 17 additional information from the Claimants regarding  
 18 on-Reservation sales in the state of California."  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]  
 22 [REDACTED]

03:33:37 1 unless, of course, you can stop that from happening  
 2 through legal action.

3 If they are ever unsuccessful in the future  
 4 at fending off that action, then those damages would  
 5 occur, and so the dilemma we ran into was I can't  
 6 call that a damage because it hasn't occurred, but  
 7 what I can do is measure what the impact would be if  
 8 they were to lose California at some given point in  
 9 time.

10 So, I kind of provided a hypothetical that  
 11 just said I'm not claiming this as a damage. I'm  
 12 not saying this is a damage because I can't in good  
 13 faith call it a damage because the events that would  
 14 be necessary for it to be, meaning that they had  
 15 lost all of their legal recourses in trying to fight  
 16 off the ban, and at that point in time the damages  
 17 become real, we were talking about hypothetical  
 18 damages, and I didn't want to include that.

19 And so, that's why we took that out. So,  
 20 yes, all those were removed because they had these  
 21 sales. Historically they have been successful in  
 22 California, and I think California is a pretty good

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03:34:32 1 example of what happens if they're allowed to sell  
2 in a market.  
3 Q. Let's look at Exhibit N.  
4 ARBITRATOR ANAYA: I might be getting a  
5 little slow in the middle of the afternoon, so the  
6 answer is, to the question--  
7 THE WITNESS: We took California out of our  
8 damages analysis. There are no damages claimed as  
9 part of our calculation. We included as an exhibit  
10 purely for the Tribunal's edification.  
11 ARBITRATOR ANAYA: I understand.  
12 THE WITNESS: So...  
13 BY MR. SHARPE:  
14 Q. Let's look at Exhibit N to Navigant's First  
15 Report. Put that on the screen. It's titled "NWS  
16 Sales Volume, 2000-2007."  
17 If you look at the bottom at Footnote 1, it  
18 says. "data from Wilson source documents-NWS state  
19 sales reports, 2000 to 2007."  
20 If you then look at the chart under sales  
21 volume by state, cartons, you see California in the  
22 second row.

03:36:26 1 the on-Reservation sales by actual sales? And I  
2 said that we did not do that just because the time  
3 kind of ran out, and we didn't get a chance to put  
4 it in. That's one of the corrections that we made  
5 that we should have made in the First Report but  
6 didn't? That's why that wasn't included. It wasn't  
7 an active decision. In fact, if you look at the  
8 paragraph--it was not an active decision on my part  
9 to say I don't want to offset. In fact, if you look  
10 at the paragraph that discusses the on-Reservation  
11 sales, the last line says it's reduced by the actual  
12 sales.  
13 So, this was merely a matter of not enough  
14 time on the clock. We literally sent the report  
15 within minutes of when we needed to have it in here.  
16 Q. I see.  
17 You also assumed zero sales in Nevada for  
18 2005, 2006, and 2007; correct?  
19 A. It would be true of all of the  
20 on-Reservation sales.  
21 Q. So, that was a mistake?  
22 A. It was--we can call it a mistake. I mean,

03:35:29 1 Do you see that?  
2 A. That's correct.  
3 Q. [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 Do you see these figures?  
8 A. I don't understand why the ASA would have  
9 any bearing on on-Reservation sales.  
10 Q. Well, let's leave that aside.  
11 Do you see these figures? You had this  
12 information when you prepared your First Report;  
13 correct?  
14 A. Yes.  
15 Q. Did you review these figures before you  
16 prepared your First Report?  
17 A. Yes, I did.  
18 Q. You nonetheless assumed zero sales in  
19 California during those years; correct?  
20 A. Well--oh, that--remember the conversation  
21 that we had at the beginning of this  
22 cross-examination where I said we intended to reduce

03:37:29 1 it was a matter of literally if we didn't get the  
2 report in, there wasn't going to be a report, and we  
3 had a significant change that occurred about three  
4 hours before we had the on-Reservation sales offset  
5 in there, and about three hours before we had a  
6 significant change in the volumes because we got  
7 additional information. And when we did that, when  
8 we changed it, that offset fell out of our model, so  
9 I will sit here and say, mea culpa, it was my  
10 mistake, it's why we corrected it in the rebuttal.  
11 We didn't argue with Mr. Kaczmarek about the offsets  
12 because we should have offset it.  
13 And, in fact, obvious from our original  
14 report we intended to offset it, but we didn't, and  
15 we would have in the revision, but we knew we would  
16 have a rebuttal, so there was very little point in  
17 just providing more documents that we knew would  
18 likely change when we had to respond to  
19 Mr. Kaczmarek's evaluations of our damages.  
20 Q. I see.  
21 So, when I read the statement in Paragraph  
22 43 of your second report, I will read it again, "In

03:38:34 1 addition, I have received additional information  
2 from the Claimants regarding on-Reservation sales in  
3 the state of California. I understand you now to be  
4 saying you aren't trying to mislead the Tribunal by  
5 saying you received new information, but information  
6 that existed previously that you hadn't put the  
7 pieces together, so to say?

8 A. Both are true. The first--this data we had  
9 and did not get it in. That's my fault.

10 The data when we are talking about 2008, I  
11 did not have. I had--what I had was a letter that  
12 said you're banned. You're contraband. And based  
13 upon that, I said, well, that's when the damages are  
14 going to occur, and we are going to assume they're  
15 not going to have any sales beyond that period of  
16 time because we didn't--one, we were not aware nor  
17 could I think I would be aware that they would be  
18 able to successfully fight off the ban and labeling  
19 as contraband, number one.

20 Number two, based on that, we certainly  
21 didn't expect there to be any subsequent sales in  
22 California.

03:40:57 1 even though you have a letter from an Attorney  
2 general that says you're banned, that doesn't  
3 necessarily mean it's immediate. You may have a  
4 fight on your hands. When you have that kind of  
5 action that takes place, and you're listed as  
6 contraband and cannot be sold in the state, also  
7 another example would be Oklahoma where GRE is  
8 banned, and you can't sell in Oklahoma.

9 And when you have that, the causation is  
10 very clear. It's not because people stop smoking.  
11 I know Mr. Kaczmarek kind of points to look at all  
12 this other data, but if you look, there is plenty of  
13 specific brands that have benefited in market share  
14 and increased in sales in spite all the things that  
15 we read in the press about how bad smoking is, and  
16 all the medical evidence that we have.

17 So, it may not mean that the market share  
18 of Philip Morris is going up, but it may mean that  
19 the market share of a particular brand is going up  
20 either because they positioned themselves  
21 differently, because they're available in unique  
22 places. It may be because of the branding is

03:39:36 1 In fact, both of those were true, and as a  
2 result, that was new information that we received  
3 when we filed our Rebuttal Report in '09 that simply  
4 was not available when we filed in '08.

5 Q. Let's move on to a new topic, the issue of  
6 causation. Let me put Paragraph 31 of your second  
7 Report up on the screen. It says, in the last  
8 sentence, "There is not a more clear causal link  
9 between the decline in sales and the measures and  
10 actions implemented by the states."

11 It's your opinion that the measures and  
12 actions implemented by the states caused all of the  
13 reduction in sales that the Claimants complain of?

14 A. Well, talk through this because there is a  
15 few datasets here that I think are important. You  
16 have states like New York and California where thus  
17 far GRE, through NWS, has been able to compete and  
18 sell cigarettes in those markets, and they have been  
19 very successful.

20 When a state bans and isn't successfully  
21 challenged--I will add that proviso because that's  
22 something I've learned during this process, that

03:42:03 1 appealing because people will believe that if it's  
2 native, then it must be natural; and if it's  
3 natural, it must be better for you than if you buy a  
4 pack of Marlboros.

5 And whatever those facts are the evidence  
6 that we have seen is that GRE, NWS, and GRE through  
7 Tobaccoville has been very successful in competing.  
8 They have gained significant market share and had  
9 significant growth, eclipsing any of the growth  
10 numbers that we used until a state says you're  
11 banned, you're contraband. You will not ever be  
12 sold in our state again, and I don't know how it  
13 could be more causal.

14 Mr. Kaczmarek later comes on to say, well,  
15 they equalize. Well, if I'm banned, they equalize  
16 at zero. I don't see that the equalization somehow  
17 fixes the damages that occur. Yes, the sales  
18 equalize. They equalize with no sales whatsoever or  
19 they continue to decline until eventually they can't  
20 compete in the market anymore, and there were some  
21 states Tobaccoville wasn't immediately banned in,  
22 North Carolina, South Carolina, and they have been

03:43:08 1 successful in fighting off assessments and--but  
 2 based upon the affidavit filed by personnel by the  
 3 owner of Tobaccoville, they can't continue that as a  
 4 going business function without borrowing money  
 5 unless they can somehow offset the escrow price, and  
 6 they tried that through price increases and they  
 7 still had market share, so there is some value  
 8 obviously to the brand there.

9 Q. Let me just ask you a couple of questions  
 10 about possible other elements of causation.

11 Is it your opinion that--

12 PRESIDENT NARIMAN: How much longer do you  
 13 have? Roughly because at 3:45 I have a phone call.

14 MR. SHARPE: I think I still have 15  
 15 minutes.

16 PRESIDENT NARIMAN: We can take our break  
 17 at 4:00.

18 MR. SHARPE: Okay, that's fine.

19 BY MR. SHARPE:

20 Q. Is it your opinion that local and state  
 21 smoking bans had no effect on the reduction in  
 22 sales?

03:45:22 1 which is lower than the price Mr. Kaczmarek showed  
 2 was the price for GRE. So, everybody is doing.  
 3 Everybody is saying if we sell cigarettes cheaper,  
 4 we can take market share out of pocket A and put it  
 5 into pocket B. I can take some of your market  
 6 share.

7 And it's not unique to cigarettes. IBM did  
 8 the very same thing to Apple Computers in the 1980s.  
 9 When they released the PC, they released it at  
 10 hugely discounted prices to kill off the Apple, and  
 11 it worked for almost 15 years. That's a basic  
 12 strategy.

13 Q. Let me just ask you a series of questions.  
 14 In areas where cigarettes have--these cigarettes  
 15 have not been banned, is it your opinion that local  
 16 and state smoking bans have had no effect?

17 A. No effect on--

18 Q. Sales?

19 A. Sales in total?

20 Q. Reductions in sales.

21 A. When you say reductions in sales, are you  
 22 talking about reductions in sales on individual

03:44:10 1 A. Well, many of those smoking bans that I  
 2 have observed in my travels happened in 2008 and  
 3 2009, well after most of our damages occurred. So,  
 4 if you ban a cigarette and then you ban smoking in a  
 5 bar, I'm not sure that the banning the smoking in  
 6 the bar a year later impacts banning the brand of  
 7 cigarettes in terms of damages to--I mean, I'm sure  
 8 that cigarette smoking has declined in total, but  
 9 you can't take these gross numbers as NCI does and  
 10 say well, because smoking as a whole has declined,  
 11 everybody has declined. That's not true. Some  
 12 brands have been very successful. Obviously those  
 13 are brands that are more geared towards price  
 14 sensitivity, not complete price sensitivity like  
 15 Mr. Kaczmarek would lead you to believe, but try to  
 16 be more sensitive to price, try to be a bargain  
 17 cigarette while still having a great taste.

18 You know, when you go out on the Internet  
 19 today, as an example of how you sell cigarettes to  
 20 people, if you go out on the Internet and Google  
 21 carton of cigarettes is all you type in, the first  
 22 thing you get is Marlboro Lights at \$18 a carton

03:46:13 1 brand names or in total cigarettes? Because there  
 2 is a difference between those. One brand may be  
 3 negatively impacted while other brands may be able  
 4 to gain market share. The overall volume.

5 I firmly believe that the bans--I would  
 6 happily grant you that the bans of tobacco in bars  
 7 and in public places has negatively impacted the  
 8 overall sales volume of cigarettes in the states or  
 9 cities where that has occurred, but to then  
 10 extrapolate that to the impact on individual  
 11 manufacturers and individual brands without any  
 12 consideration of the actual performance historically  
 13 of those brands I think is incredibly naive.

14 Q. Do you think that changes in consumer  
 15 tastes and preferences have had an impact in the  
 16 reduction of sales?

17 A. Well, I think that's purely a brand issue.  
 18 We talk about that in our initial report, that  
 19 branding for cigarettes is a matter of developing a  
 20 taste and a package that appeals to a specific  
 21 audience, and that taste does evolve from time to  
 22 time as the taste of your consumers evolve.

03:47:16 1 The same way, you know, frankly if you  
2 picked up a McDonald's hamburger from 30 years ago  
3 and tasted it and a McDonald's hamburger today, I  
4 can tell you, they don't taste much alike because as  
5 I kid I ate them, and I liked them a lot better back  
6 then.

7 Q. What about public advisory campaigns? Do  
8 you think they've had any impact on reducing the  
9 sales of cigarettes?

10 A. As a whole when we are talking about the  
11 total volume of cigarettes in the United States? I  
12 don't think there is any doubt that public  
13 information has negatively impacted total volumes of  
14 cigarettes sold in the U.S., but again you cannot  
15 extrapolate from an overall trend to individuals  
16 when, in fact, when you look at the individual  
17 company and that company has been fabulously  
18 successful because of its branding and its  
19 positioning in the marketplace.

20 Q. Let's look at Seneca cigarettes in  
21 particular, then.

22 Here is an article from the Buffalo News

03:49:15 1 A. Let's walk through your question because  
2 the first part is you base it on the presumption  
3 that an article in March 2009 retroactively impacted  
4 the banning of cigarettes in 2006 and 2007, which I  
5 find implausible. That's kind of number one.

6 So, it's a news article today.

7 Q. Seneca cigarettes aren't sold in New York?

8 A. No, that's not my point. We are not  
9 claiming any damages within New York. But when you  
10 talk about did it reduce, you leave this kind of  
11 open, did it reduce the sales or did it have any  
12 impact on the sales. We are not talking about sales  
13 in 2009. We are talking about sales that occurred  
14 in '06 and '07, long before the article.

15 Second, I was in Canada at GRE's  
16 facilities, what, three or four weeks ago, I guess,  
17 as kind of a final preparation process, and I asked  
18 them about the article because we saw the article,  
19 we read the article, it was in Kaczmarek's Rebuttal  
20 Report, and I had a lot of questions about it.

21 There are some interesting points they  
22 made. If you walked outside probably definitively

03:48:09 1 March 9th of last year. I will put it on the  
2 screen. It's called "Indian made cigarettes seen as  
3 cheap, toxic, and tax-free," and as you can see,  
4 it's about Seneca cigarettes, and it begins: "In  
5 Iroquois history, Seneca is a name of great pride,  
6 the keepers of the western door, but to thousands of  
7 smokers from California to Florida and from the  
8 Caribbean to Mexico and especially in Upstate New  
9 York, Seneca is something entirely different: A  
10 cheap cigarette has prompted grave health concerns  
11 and dozens of lawsuits."

12 If you look at Page 3 under the heading  
13 "Metallic Elements," it states, "Where is the  
14 tobacco for these products grown? Researchers at  
15 Roswell Park Cancer Institute want to know, in part,  
16 because higher than normal levels of two metallic  
17 elements--strontium and barium--have been found in  
18 some of the brands. Both of those elements can be  
19 radioactive."

20 Do you think newspaper reports that Seneca  
21 cigarettes may contain toxic and radioactive  
22 elements might have a negative impact on sales?

03:50:16 1 in Washington, D.C., if you walked outside and you  
2 reached down and took a handful of dirt and you did  
3 a test, the odds are you would find stuff a lot  
4 worse than that. That's number one.

5 Number two, it doesn't say--it's very loud  
6 in what it doesn't say that every other cigarette  
7 also has strontium and barium in it. In fact, most  
8 products, most plants on the planet Earth have some  
9 level of that, doesn't have anything to do with the  
10 behavior of GRE. It has everything to do with the  
11 fact that we have ignited nuclear weapons, we have  
12 mined for heavily metals, we do a lot of things as a  
13 species that's not particularly good.

14 And then finally, at no point in time in  
15 any of this does it say that it is in excess of the  
16 allowable amounts.

17 And, finally, it's an article that is in  
18 the Buffalo News. I can't find any corroboration.  
19 I have looked for this since Mr. Kaczmarek's  
20 Rebuttal Report. I have a team that goes out about  
21 once a week to see what, if anything, happens on  
22 GRE. I would expect that if this had any real

03:51:18 1 validity, there would be 75 to 100 articles,  
 2 including articles in The New York Times, the Wall  
 3 Street Journal and the Financial Times, major press  
 4 institutions highlighting the fact that these things  
 5 will kill you, but that's not what this article  
 6 says. It says where are they grown. Look, they're  
 7 smuggling these things, and we don't know what the  
 8 quality is of these, and when I asked about this  
 9 specifically to my clients, the feedback I got  
 10 wasn't, oh, we are really concerned about it because  
 11 we have known about this for years, and we have been  
 12 selling people radioactive cigarettes. It was, you  
 13 know, if you go outside and pick up a handful of  
 14 dirt, the odds are you going to find things just  
 15 like that. We tested. They have explained to me  
 16 they've tested their cigarettes, they've run them  
 17 through tests on a regular basis, and we even walked  
 18 through and looked at this real cool machine called  
 19 the smoking machine that they actually plug all  
 20 these cigarettes into so that it will smoke the  
 21 cigarettes so that they can sample the air that you  
 22 would get off the cigarette both externally and as

03:53:16 1 is it a continuing message, is this something that  
 2 you see in the news a lot.  
 3 And ultimately, nowhere in the quotes that  
 4 you have shown me does it say that these are in  
 5 violation of any laws.  
 6 I mean, the reality is, you're sticking  
 7 something in your mouth and lighting it on fire and  
 8 consuming a product that as far as I know all the  
 9 evidence says causes cancer. I don't know that's  
 10 it's going to impact you that it may have some  
 11 strontium and barium in it as well. I'd like to  
 12 tell you it's going to make a big impact, but I'm  
 13 not sure this is going to have a huge impact.  
 14 Q. I see. So, your understanding is consumers  
 15 understand that this is a deadly product in any  
 16 event, so an normally high levels of toxic and  
 17 radioactive elements then probably wouldn't impact  
 18 their purchasing of cigarettes?  
 19 A. Their purchasing of cigarettes?  
 20 Q. Yes, purchasing of Seneca cigarettes.  
 21 A. I have--given the way it's worded, the  
 22 party that did the test, I'm not sure how much

03:52:15 1 the smoker to evaluate what chemicals are in it.  
 2 So, I would expect, and they have to  
 3 submit--they submit that to an external lab to  
 4 evaluate.  
 5 So, it's a fascinating article. I have  
 6 read lots of fascinating articles in my life  
 7 including some that Elvis Presley is still alive and  
 8 well. I don't put a lot stock in this partially  
 9 because of the source and partially because I have  
 10 done a lot of questioning of my client as well as  
 11 continuing to search the Internet to see if there is  
 12 anything else, and I haven't found anything.  
 13 Q. So, do I understand your testimony that you  
 14 think newspaper articles reporting that Seneca  
 15 cigarettes have abnormal levels of radioactive and  
 16 toxic elements would not or might not--have no  
 17 possibility of negatively impacting sales?  
 18 A. I don't think they have any possibility of  
 19 impacting sales in 2006, 2007, and 2008.  
 20 Q. What about in 2009?  
 21 A. I think a lot would depend on what GRE does  
 22 as a response to this. I think a lot of it would be

03:54:24 1 weight--if I were a Seneca smoker, I'm not sure how  
 2 much weight I would put in.  
 3 Q. Let's move on.  
 4 A. I think every consumer has to evaluate the  
 5 source of the information, how it's worded, what the  
 6 potential motivations are, and ask yourself do I see  
 7 this repeatedly?  
 8 Q. Thank you.  
 9 Turn to the last slide.  
 10 Using your--before we get there, sorry,  
 11 using your exemption approach, you calculate the  
 12 value of the exemptions I understand that you  
 13 believe would have resulted had Claimants been  
 14 treated, as you say, in a manner equal to the best  
 15 treatment afforded Claimants' competitors. Is that  
 16 fair?  
 17 A. Well, it's a little more nuanced than that.  
 18 And essentially what we did was we sat down. We  
 19 read--there is a lot of kind of background reading  
 20 on this case, more so than is usually the case  
 21 because the voluminous MSA and then all the actions  
 22 that took place and understanding all of the escrow

03:55:24 1 and exemptions, so we went through and looked at it.  
 2 We looked at how companies that were in the  
 3 marketplace and what we did is, and I'm not an  
 4 attorney, so don't take this as some legal opinion,  
 5 but what we did was said, there was a big law change  
 6 that happened, the adoption of the MSA. It was a  
 7 significant change in the marketplace.

8 And what happened when that occurred?  
 9 Well, what happened was that the states granted, and  
 10 the MSA in general granted exemptions to companies  
 11 that were in the marketplace for their market share.  
 12 Basically acknowledge we are going to charge you X  
 13 amount more per carton of cigarettes, and we are  
 14 going to give you an exemption for your market  
 15 share. What we don't want you to do is to take  
 16 advantage of this and grow market share, but because  
 17 if you do, you are going to pay a big penalty. And  
 18 if you lose in market share, then there is some  
 19 benefit in terms of not having to pay as much, but  
 20 it exempted you from the escrows. And what we did  
 21 is said, well, we just had a major legal change, so  
 22 what if we look at how they calculated that when

03:57:34 1 negatively impacted by the ASA, by the Allocable  
 2 Share Amendments that wipe out the Allocable Share  
 3 Release mechanism.  
 4 Now, there is a huge difference between  
 5 those two because when we do our lost profits, we  
 6 offset with sales where they continue to fight, and  
 7 when we do the escrow analysis, the escrow  
 8 exemption, we don't do any offset for that because  
 9 if you keep in mind it's only off-Reservation, and  
 10 in the off-Reservation markets, even if they  
 11 continued to have sales, if they were having to pay  
 12 escrow, they're incurring extra costs, so we didn't  
 13 look for any kind of offset of actual sales, so  
 14 there is going to be a big difference between the  
 15 two, but that was the theory behind it. That's why  
 16 we did it in terms of how we calculated this as an  
 17 alternative damages number.

18 I don't want you to read some legal  
 19 decision on my part because I'm not qualified to  
 20 make those legal decisions. That's up to the  
 21 Tribunal, but ultimately what I did was try to  
 22 evaluate if they did the same thing they did the

03:56:27 1 they did the MSA, and we used those same parameters,  
 2 you know, the previous year and the year before, the  
 3 same percentages, 100, 125 percent, and we  
 4 calculated what that exemption would be worth if  
 5 they granted a similar treatment today, today being  
 6 '06 and '07 when these things came into position,  
 7 and actually they vary across states because states  
 8 adopted them kind of an ad hoc across the country.  
 9 But as the state adopted it, if we said we are going  
 10 to give you an exemption because you were treated in  
 11 way A under the ASRM, and now we are going to treat  
 12 you in way B. And it's a significant change. It's  
 13 going to impact your business, and what we want to  
 14 do is give you an opportunity to come in and you pay  
 15 some of these other fees, but we'll give you an  
 16 exemption on the escrow for your market share. If  
 17 you grow market share, you are going to pay more.

18 And so, we did that calculation just as  
 19 really an alternative measurement. What would have  
 20 happened if the governments of these states had  
 21 said, this is what we did last time. Why don't we  
 22 do this again for the people who are going to be

03:58:29 1 last time they had a major legal change in the  
 2 cigarette industry, what would that impact be in  
 3 terms of cost savings to GRE, and this is what it  
 4 would have been, so.

5 Q. In the last sentence that I have up on  
 6 the--pulled out on that slide, you state the value  
 7 of the exemption ranges from \$238.2 million to about  
 8 \$267.9 million; is that correct?

9 A. That's correct.

10 Q. So, I think if I understand your testimony,  
 11 the reason that this alternative valuation is more  
 12 than five times greater than your primary is because  
 13 you were not seeking to find a corroborative  
 14 methodology; is that correct?

15 A. Well, I think if we didn't include any  
 16 offset--you can't corroborate because, frankly, in  
 17 one methodology, to be precise, if you say that--we  
 18 ultimately put it to the Tribunal, at least this is  
 19 how I would put it to the Tribunal, is if on one  
 20 hand you believe that a fair measure of the damages  
 21 to the Claimants is the lost profits that they have  
 22 suffered on-Reservation and off-Reservation, then

03:59:39 1 lost profits are the right numbers, and they  
2 measure, and they have offsets for where they have  
3 been able to continue to make sales, so it doesn't  
4 punish anybody for their ability to continue to  
5 compete other than them, because they are continuing  
6 to compete and having to pay huge legal costs on top  
7 of that.

8 If, on the other hand, the view of the  
9 arbitration Tribunal is that, you know, they should  
10 have been treated in a way consistent with how  
11 companies were treated when the MSA happened, not in  
12 the same way, not with the same exemptions, not with  
13 some hypothetical exemption, but take the  
14 methodology that we did in the MSA and apply it to  
15 when we did the ASA and calculate what the impact  
16 is. And if that happened, what would those damages  
17 be?

18 I wouldn't say they are interchangeable.  
19 They are alternative damages, but they're done in  
20 such different ways, and because you don't have  
21 offsets in the exemption, but it ultimately depends  
22 on what the Tribunal feels is the more reasonable

04:19:42 1 had really just two questions for you.

2 First, at several points in your report,  
3 you say that Respondent's expert did things that  
4 were inconsistent with the Tribunal's instructions,  
5 and you, yourself, said that you would refrain from  
6 doing some things in order to honor the Tribunal's  
7 instructions.

8 Can you clarify for the Tribunal which of  
9 its instructions you had in mind there.

10 THE WITNESS: I apologize that we never  
11 actually had the conversation, so I kind of had that  
12 understanding from legal counsel in terms of your  
13 directions. But generally speaking, that limitation  
14 was that the MSA was not an issue, the adoption of  
15 the MSA. That the damages off-Reservation were  
16 limited to adoption of the ASA, so that was only on  
17 the specific states that were impacted, and then the  
18 MSA was really only on States in places where they  
19 were impacted. So...

20 ARBITRATOR CROOK: Okay. So, you're  
21 referring to our jurisdictional decision?

22 THE WITNESS: That's right. And I

04:00:35 1 and more fair measure of damages to the Claimants.

2 Q. Thank you, Mr. Wilson.

3 Thank you, Members of the Tribunal.

4 ARBITRATOR CROOK: I had a couple of  
5 questions for Mr. Wilson. I wondered, is it  
6 envisioned that the Tribunal would be able to ask  
7 some questions of him?

8 MR. SHARPE: Yes, that's my understanding.  
9 We have no further questions.

10 ARBITRATOR CROOK: When we come back from  
11 the break, we could trouble Mr. Wilson to be back  
12 with us for a few minutes?

13 THE WITNESS: I would be happy to.

14 PRESIDENT NARIMAN: Okay. Let's break.

15 MR. SHARPE: Mr. President, we would also  
16 like to reserve the right to recross.

17 PRESIDENT NARIMAN: Yes.

18 MR. SHARPE: Thank you.

19 (Brief recess.)

20 PRESIDENT NARIMAN: Let's go.

21 There is a question here.

22 ARBITRATOR CROOK: Thanks, Mr. Wilson. I

04:20:47 1 apologize because--I'm not an attorney, so, you  
2 know, I read it it as a layperson and asked for  
3 guidance, and that was more or less the guidance  
4 that I got.

5 ARBITRATOR CROOK: Okay. That's good,  
6 thank you.

7 Now, secondly, your lost profits valuation,  
8 part of what we've got here is an expropriation case  
9 where we are looking at the value of an asset that  
10 was either taken or substantially impaired, and you  
11 valued that by basically arriving at the present  
12 value of projected lost sales or lost profits,  
13 rather.

14 THE WITNESS: That's correct.

15 ARBITRATOR CROOK: And you included as well  
16 investment in the income generating property.

17 THE WITNESS: Correct.

18 ARBITRATOR CROOK: Now, I have always been  
19 taught by experts like you that you can't do that;  
20 that you can either claim for the discounted value  
21 of lost profits or you can claim for loss of  
22 investment, but to do otherwise is double counting.

04:21:54 1 Now, can you explain to me why it's not  
2 double counting here?  
3 THE WITNESS: Well, I will tell you that  
4 for probably 99 percent of the time I would be right  
5 in line with the other experts.  
6 The first and easiest answer is I was  
7 instructed by counsel that they needed that number,  
8 that that was part of the legal claim that I  
9 referred to probably quite inarticulately as being  
10 their personal investment, and I can't really take  
11 it beyond. I'm sorry, Mr. Crook, I don't have any  
12 ability to articulate the legal argument. The  
13 attorneys asked me to determine that, so that's kind  
14 of, number one. As my lawyer friends would tell me,  
15 that's the number one copout.  
16 Number two is, frankly, when we do our lost  
17 profits, we also take out accumulated depreciation.  
18 So, while it's not a dollar-for-dollar swapout,  
19 there is a percentage that is being taken out of our  
20 lost-profits calculation of the very assets that we  
21 are counting. So, you're right, they're income  
22 generating assets. As a general rule, if I

04:23:54 1 lost. And it's just impossible because I can't  
2 evaluate from the Tribunal's standpoint what  
3 percentage of that value is relevant to the loss of  
4 the Arizona market, of the Nevada market, of the  
5 Idaho market, of the five original states  
6 off-Reservation.  
7 But the short of it is I would typically  
8 agree with you if you do a valuation of a business  
9 because you're basically taking the fixed asset that  
10 is part of that present value of business, but we  
11 are not really valuing a business here. We are  
12 valuing the lost profits of a business, and there is  
13 a little nuance there that's fundamentally different  
14 from valuing the overall business of the North  
15 American operations that GRE was investing in. I  
16 hope that answers.  
17 ARBITRATOR CROOK: That does and I  
18 appreciate that.  
19 Two quick questions actually. When I  
20 looked at your CV, you're obviously a man of wide  
21 experience. Have you ever been involved in an  
22 expropriation case where you were asked to value

04:22:53 1 did--it's a little bit of a difference here because  
2 we are not calculating the present value of all of  
3 the income. We are not calculating the value of all  
4 of the U.S. business. What we are calculating is  
5 just the lost profits that they experienced in  
6 specific markets, but they made an investment  
7 assuming that they could reap the benefits of all of  
8 these markets. And, in fact, they're not going to  
9 be able to.  
10 And I would go so far as to say I think the  
11 arbitration should probably look at that \$24 million  
12 roughly and evaluate what amount that you feel is  
13 relevant to what they don't have anymore. In other  
14 words, relevant to the markets that they lost.  
15 It's virtually impossible for me to do that  
16 because, for instance, the hundreds maker that I  
17 talked about earlier that makes hundreds cigarettes,  
18 you sell those in New York, but you also sell them  
19 in Arizona.  
20 Clearly you can't sell them in Arizona  
21 anymore, but you're still selling them in New York,  
22 so some portion of that asset probably hasn't been

04:24:48 1 only a piece of an investment?  
2 THE WITNESS: It was a very unique case, I  
3 have to give you that, and that was, you know,  
4 frankly, one of the reasons I was initially  
5 contacted was that I tend to look at things a little  
6 bit different.  
7 I didn't want to do--when I looked at this  
8 case, the short answer is no, I have never seen a  
9 case like this before because usually when we are  
10 talking about expropriation, we are talking about a  
11 situation where you had a factory, the government  
12 came and took the factory, and now you don't have  
13 the factory, so you value the factory.  
14 And, in fact, that's more or less what  
15 Navigant has done. It said let's value what the  
16 value was of this asset, the brand at the beginning  
17 of time and at the end. And the problem with that  
18 is there are places where not only were we not--was  
19 the Claimants not negatively impacted, but where  
20 they actually succeeded because they haven't had the  
21 MSA applied on-Reservation.  
22 And so, from that perspective, I couldn't

04:25:43 1 do what was the most comfortable thing for all of us  
 2 to do because in international--in Bilateral  
 3 Investment Treaty cases where we are dealing with  
 4 expropriation, you are exactly--I think your point  
 5 is exactly right. That's what we do. We value  
 6 beginning and ending, and I think what Brent brings  
 7 up is very valid. We value beginning and ending.  
 8 The difficulty is, like you said, I have  
 9 never seen an animal like this before where it only  
 10 happened in specific states. It didn't happen to  
 11 the market as a whole. They haven't lost the whole  
 12 market. They're still in New York. They're still  
 13 in North Carolina and South Carolina, and they're  
 14 competing favorably in these states and being able  
 15 to reposition their business. But the actions did,  
 16 if you look at Arizona where there are no sales or  
 17 you look at Oklahoma where they're banned, those are  
 18 clearly expropriations, but not like you said, an  
 19 expropriation of the entire business.  
 20 So, the short answer is, no, I have never  
 21 seen anything where it was just one or was a subset  
 22 of assets, and it's really difficult to build that

04:27:45 1 THE WITNESS: Thank you very much.  
 2 MR. LUDDY: I have--  
 3 THE WITNESS: Oh, you have some for me?  
 4 MR. LUDDY: No, I don't.  
 5 (Witness steps down.)  
 6 PRESIDENT NARIMAN: What do we do now?  
 7 (Pause.)  
 8 MR. FELDMAN: Mr. President, we would like  
 9 to pick up on the discussion from yesterday  
 10 regarding recent developments in U.S. court, and we  
 11 have five documents concerning recent developments  
 12 in U.S. court that we would like to supplement the  
 13 record with at this time.  
 14 MR. VIOLI: Basically the Claimants'  
 15 position is we just wanted a little bit of  
 16 clarification because I was of the same view as the  
 17 President in that Legal Opinions and the law is  
 18 something that is always a matter of public record  
 19 or is always looked at in determining what the law  
 20 is. And one of these opinions involves Grand River  
 21 is my understanding.  
 22 MR. FELDMAN: Two are from Grand River

04:26:50 1 as a business and do what we would traditionally do  
 2 which is basically the value before and the value  
 3 after.  
 4 And so we said, well, there is a way in  
 5 intellectual property to measure that impact what we  
 6 would ultimately get to, and that's lost profits.  
 7 It's pretty widely used in the U.S. in intellectual  
 8 property cases. If someone infringes on your  
 9 property or does a knockoff, if someone makes a  
 10 knockoff iPod and sells it, the damages Apple is  
 11 going to seek are lost profits. And that's a  
 12 measure of the negative impact to their brand, to  
 13 their investment in that brand. And so, from that  
 14 perspective we thought, well, if you can't observe  
 15 the way we always do it, which is find before and  
 16 find after and take the difference, we can at least  
 17 observe the difference, and so that was the way we  
 18 had to do it.  
 19 But the short of it is, no, I have not seen  
 20 cases like this in my career.  
 21 ARBITRATOR CROOK: Thank you, sir.  
 22 PRESIDENT NARIMAN: Thank you very much.

04:29:27 1 challenges to the Allocable Share Amendment.  
 2 MR. LUDDY: One decision.  
 3 MR. FELDMAN: One decision and one  
 4 affidavit from the New York case.  
 5 MR. VIOLI: That's right. And there are  
 6 other opinions which don't involve Grand River and  
 7 just generally on the law, the topic of the law, is  
 8 that?  
 9 MR. FELDMAN: There is a decision from  
 10 Idaho which concerns application of the Idaho  
 11 complementary legislation to a member of the Seneca  
 12 Nation.  
 13 MR. VIOLI: Okay. So, you're preferring  
 14 that for the law, correct?  
 15 MR. FELDMAN: Yes.  
 16 MR. VIOLI: Okay.  
 17 And I just wanted some clarification from  
 18 the Tribunal, matters of law, there is no limitation  
 19 to what the Tribunal could consider. I mean, it's  
 20 not something that should have been in evidentiary  
 21 material or a Memorial. If there is a development  
 22 or recent development in the law, then the Tribunal

04:30:16 1 would wish to have that brought to its attention, I  
2 would think.  
3 I don't know the relevancy of the opinions.  
4 PRESIDENT NARIMAN: We will deal with that  
5 later--I did--saw that we understand what it is and  
6 its relevance. We can decide later. The question  
7 is only at the moment of whether we should entertain  
8 it or not.  
9 MR. LUDDY: My only concern, and I agree  
10 with that take on that. The law is the law. It is  
11 what it is. My only concern is if Mr. Feldman  
12 intends to redirect, as it were, Mr. Eckhart on  
13 these cases. Then I'm at a little bit of  
14 disadvantage on that. There's hundreds of pages of  
15 cases that he gave me this morning. We spent the  
16 courtesy giving them to me last night so I would  
17 stay up all night reading them.  
18 MR. FELDMAN: Of the five documents, there  
19 is only one document that may come up during  
20 Mr. Eckhart's testimony which is a four-page  
21 California court decision, and the Claimants were  
22 given that decision this morning, and so they have

04:32:18 1 that since it looks like it's snowing tomorrow, can  
2 we sit an hour more today, if it's possible, by  
3 agreement of parties, of course?  
4 MR. LUDDY: I think we are going to be out  
5 of witnesses.  
6 PRESIDENT NARIMAN: No, because  
7 tomorrow--you see the problem is of the weather.  
8 Tomorrow we may be totally snowbound, according to  
9 our information. Going to be like Tuesday. That's  
10 the forecast.  
11 MR. LUDDY: Well, at least we will be  
12 snowbound together.  
13 PRESIDENT NARIMAN: In different parts of  
14 the city.  
15 DENNIS ECKHART, RESPONDENT'S WITNESS, CALLED  
16 PRESIDENT NARIMAN: Good evening,  
17 Mr. Eckhart. We should have said good morning to  
18 you outside, but I didn't know that you were  
19 Eckhart.  
20 THE WITNESS: Good afternoon, sir.  
21 PRESIDENT NARIMAN: You have been sitting  
22 all day.

04:31:26 1 now had about eight hours to review the four-page  
2 decision.  
3 MR. LUDDY: Except we didn't know it was  
4 just four pages until before five minutes before  
5 Mr. Wilson.  
6 MR. VIOLI: As far as evidence, you're  
7 submitting the affidavit for an evidentiary  
8 submission; is that right?  
9 MR. FELDMAN: That's correct.  
10 MR. VIOLI: Okay.  
11 MR. LUDDY: That's kind of a different  
12 annual.  
13 MR. VIOLI: That's a different animal, so  
14 we may speak on that issue.  
15 PRESIDENT NARIMAN: Let's deal with it as  
16 it gets on.  
17 MR. LUDDY: Note the precedent they set.  
18 PRESIDENT NARIMAN: So, what do you want to  
19 do now?  
20 MR. LUDDY: We are going to get  
21 Mr. Eckhart.  
22 PRESIDENT NARIMAN: I was just wondering

04:34:20 1 THE WITNESS: But I tried to stay busy.  
2 PRESIDENT NARIMAN: Good.  
3 MR. LUDDY: This is going to involve the  
4 California decisions which I had handed out  
5 yesterday.  
6 PRESIDENT NARIMAN: Yes, you did.  
7 These are the decisions?  
8 MS. CATE: If I may, I would like to first  
9 introduce the witness briefly.  
10 PRESIDENT NARIMAN: Yes, please go ahead.  
11 MS. CATE: Thank you very much. Just sort  
12 of as a point of sort of procedure, I sort of  
13 noticed in the proceedings that the  
14 cross-examination has not been limited to the scope  
15 of the direct testimony.  
16 PRESIDENT NARIMAN: Yes.  
17 MS. CATE: For example, Mr. Hering's  
18 declaration was a total of three paragraphs, and the  
19 entire cross-examination lasted approximately four  
20 hours.  
21 So, I wanted to sort of get some sort of a  
22 clarification, if I could. The declaration of

04:35:52 1 Mr. Eckhart is a total of 25 paragraphs, and I was  
2 wondering if we could somehow have some sort of  
3 ruling as to whether or not we can have a limitation  
4 as to the scope of the cross-examination?  
5 PRESIDENT NARIMAN: I'm against any  
6 limitation on cross-examination.  
7 MS. CATE: Okay, I understand.  
8 PRESIDENT NARIMAN: Unless it's totally  
9 irrelevant, you can object on the grounds it's  
10 irrelevant, but not because it's something outside  
11 your examination-in-chief, no.  
12 MS. CATE: Okay.  
13 And with regard to the--pardon me,  
14 redirect, the scope there, is that also--  
15 PRESIDENT NARIMAN: Yes, you can--  
16 MS. CATE: I appreciate that.  
17 Okay, in light of that, I will begin.  
18 DIRECT EXAMINATION  
19 BY MS. CATE:  
20 Q. Please state your name in full.  
21 A. Dennis Eckhart.  
22 Q. And where are you currently employed?

04:37:25 1 to the ground rules.  
2 PRESIDENT NARIMAN: Ask anything in  
3 addition. If you say something, if you want to.  
4 The same thing. You are on the record now.  
5 MS. CATE: I'm asking him to briefly state  
6 what we was--  
7 PRESIDENT NARIMAN: That's not necessary.  
8 MS. CATE: Okay.  
9 PRESIDENT NARIMAN: That's all there.  
10 MS. CATE: All right.  
11 Your witness.  
12 MR. LUDDY: Thank you.  
13 CROSS-EXAMINATION  
14 Q. Good afternoon, Mr. Eckhart.  
15 A. Good afternoon, sir.  
16 Q. I have 56 in front of me.  
17 A. Okay.  
18 Q. If you could turn to Page 2, Paragraph 3.  
19 A. Okay.  
20 MS. CATE: For the record, what is this  
21 document?  
22 MR. LUDDY: It's core Document 56. And it

04:36:40 1 A. At the California Attorney General's  
2 Office.  
3 Q. And what is your current title or position?  
4 A. I'm Senior Assistant Attorney General. I  
5 head the Tobacco Litigation and Enforcement Section.  
6 Q. And how long have you been working at the  
7 Office of the Attorney General for the State of  
8 California?  
9 A. Since July 1st, 1980.  
10 Q. And how long have you been in your current  
11 position?  
12 A. Since July 1st, 1999.  
13 Q. And you submitted one declaration in this  
14 case; correct?  
15 A. Yes.  
16 Q. And can you briefly address what you stated  
17 in that declaration.  
18 MR. LUDDY: Objection, Your Honor. The  
19 ground rules from the very beginning that we worked  
20 out with Mr. Feldman in July was that there were  
21 going to be three our four introductory questions  
22 and move to cross, and I would request that we stick

04:38:35 1 is Mr. Eckhart's declaration.  
2 MS. CATE: Thank you.  
3 MR. LUDDY: Dated 12/18/08.  
4 BY MR. LUDDY:  
5 Q. I'm going to read for you--the third  
6 paragraph I take it is addressing the California  
7 Escrow Statute; correct?  
8 A. Well, it addresses the Escrow Statute, but  
9 in addition the complementary legislation would also  
10 apply.  
11 Q. Okay. The third sentence reads as follows,  
12 "A primary purpose of that statute is to prevent  
13 manufacturers such as GRE from exploiting the  
14 significant cost advantage they have over  
15 manufacturers that participate in the Master  
16 Settlement Agreement and undermine the public health  
17 benefits the states derive from lower cigarette  
18 consumption driven by higher cigarette prices."  
19 I'm going to try to go through this quickly  
20 since this is ground we have covered before, but  
21 this is the same formulation that we consistently  
22 see from Respondent on these documents. And I would

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04:39:55 1 ask you, sir, do Non-Participating Manufacturers  
 2 have a significant cost advantage over exempt SPMs?  
 3 A. I don't understand the question.  
 4 Q. What is an exempt SPM?  
 5 A. I assume by that you mean an SPM that has a  
 6 grandfathered share?  
 7 Q. Correct. I'm sorry.  
 8 A. They're not exempt. They just have a  
 9 certain market share that does not--if they sell up  
 10 to that market share, they do not have an MSA  
 11 payment obligation.  
 12 Q. Right. So, NPMs do not have a significant  
 13 cost advantage or any cost advantage over  
 14 grandfathered SPMs in California, do they, sir?  
 15 A. I'm not an economist. I don't know the  
 16 full cost structure of the various companies. They  
 17 do not--to the extent that an SPM that has a  
 18 grandfathered share does not make a payment on  
 19 cigarettes that it sells that are within that--up to  
 20 that amount, they don't make an MSA payment. An NPM  
 21 needs to make an escrow payment.  
 22 Q. So that would be the grandfathered SPM has

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04:42:11 1 MS. CATE: I actually would like to note  
 2 that we've hired an expert on this issue, and that  
 3 really should be cross-examination for him.  
 4 BY MR. LUDDY:  
 5 Q. Let's explore it. Maybe it's more  
 6 confusing than I anticipate.  
 7 You have a grandfathered SPM that does not  
 8 exceed his grandfather exemption; correct?  
 9 A. Well, that's the assumption you're asking  
 10 me to make, yes.  
 11 Q. Yes. All right. So, he pays how much on  
 12 those sticks?  
 13 A. He pays Federal excise tax and he pays--  
 14 Q. Just on MSA payments?  
 15 A. He does not make an MSA payment.  
 16 Q. Zero, okay?  
 17 A. That's correct.  
 18 Q. And over here we have an NPM who sells  
 19 sticks and has to pay escrow on each stick; correct?  
 20 A. Yes, each stick that he sells in  
 21 California--doesn't have to pay escrow. He deposits  
 22 escrow into an escrow fund. It's not paid to the

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04:41:07 1 a cost advantage over the NPM; correct?  
 2 A. Well, they have different costs, I guess  
 3 that--I guess you could say it's a cost advantage.  
 4 Again, I think this is a matter that's in dispute.  
 5 It's an ultimate issue in this case.  
 6 Q. Is it really? What's the ambiguity here?  
 7 If a grandfathered SPM sells below--take the  
 8 example. If it sells below its grandfathered share,  
 9 it pays how much under the MSA?  
 10 A. On the cigarettes that are below its  
 11 grandfathered market share, it pays nothing.  
 12 Q. Zero; correct?  
 13 A. Yes.  
 14 Q. And an NPM is required to pay the escrow  
 15 under California statute; right?  
 16 A. Yes.  
 17 Q. Is there something about that that requires  
 18 the economist to say who has the cost advantage  
 19 there? And I don't mean to be sarcastic, but is  
 20 there?  
 21 A. Well, I think you've answered your own  
 22 question.

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04:43:05 1 state like an MSA payment.  
 2 Q. Okay. It's his cost, though. He has to  
 3 cut a check for that. Is that amount greater than  
 4 zero?  
 5 A. Yes, it's greater than zero.  
 6 Q. Now, we see here that you say a primary  
 7 purpose of the Escrow Statute is to prevent NPMs  
 8 from undermining the public health benefits.  
 9 I take it from your formulation there of  
 10 referencing a primary purpose that there is another  
 11 purpose for the Escrow Statute, is there not?  
 12 A. There are a number of purposes that are set  
 13 forth expressly in the statute as adopted by the  
 14 California legislature, and one could also look to  
 15 what the statute does in effect as to determine what  
 16 its purpose is.  
 17 Q. Okay. And I take it you would not disagree  
 18 that one of its purposes is to protect California's  
 19 MSA payments from the OPMS; correct?  
 20 A. I wouldn't--not exactly. Enactment of the  
 21 statute is a condition of protecting the State of  
 22 California from an NPM adjustment.

04:44:20 1 Q. Right.  
 2 A. The statute itself is--I guess the  
 3 existence of the statute is a way of protecting,  
 4 yes.  
 5 Q. That's what I meant.  
 6 A. Okay.  
 7 Q. Is there any reason that you decided to  
 8 include in your affidavit here one primary purpose  
 9 being the health benefits and not the other primary  
 10 purpose of protecting California from losing MSA  
 11 payments?  
 12 A. Well, because the--I don't specifically  
 13 remember why it mentioned this purpose and not other  
 14 purposes. I don't necessarily agree that a primary  
 15 purpose is protecting California's payments.  
 16 Q. You don't think that's a primary purpose?  
 17 A. Well, I think it's a matter of debate.  
 18 This is certainly a primary--stated in the statute.  
 19 The statute states what its purposes are. It does  
 20 not state the other purpose which you mentioned as a  
 21 purpose.  
 22 Q. Okay. The statute says what it says.

04:46:35 1 to get rid of that provision?  
 2 A. Well, we didn't get rid of it it. We  
 3 amended it.  
 4 Q. You amended it. Even though you hadn't  
 5 released any dollars to NPMs, correct?  
 6 A. It was still a possibility that those--  
 7 PRESIDENT NARIMAN: Sorry to interrupt, but  
 8 do we have the California statute on record?  
 9 MR. LUDDY: I believe they all are.  
 10 PRESIDENT NARIMAN: No, no, I have not seen  
 11 it.  
 12 MS. CATE: They're referred to in  
 13 Mr. Eckhart's declaration.  
 14 PRESIDENT NARIMAN: Referred to i know, but  
 15 I read the statute.  
 16 MR. LUDDY: I know that we have in our Core  
 17 Documents--  
 18 PRESIDENT NARIMAN: If you can supply it--  
 19 MS. CATE: Happy to do so.  
 20 PRESIDENT NARIMAN: Thank you. That's all  
 21 I meant.  
 22 MR. LUDDY: I thought that was actually in

04:45:21 1 A. That's correct.  
 2 Q. And my question is, beyond what the text of  
 3 the statute says, there is another purpose, right?  
 4 If you don't have that statute, and you don't--you  
 5 being California, forgive me. If you don't have  
 6 that statute and you don't diligently enforce it,  
 7 California is subject to losing dollars because of  
 8 the NPM adjustment, correct?  
 9 A. That's correct.  
 10 Q. Can you go back to Page 1 for a minute.,  
 11 please.  
 12 You say here--by the way, real quick on the  
 13 Escrow Statutes, California adopted an Allocable  
 14 Share Amendment, did they not?  
 15 A. Yes.  
 16 Q. Had California prior to the adoption of its  
 17 Allocable Share Amendment released any monies to  
 18 NPMs under the--what was then the prior Allocable  
 19 Share Release mechanism?  
 20 A. No.  
 21 Q. But you still thought it was necessary to,  
 22 and the legislature still thought it was necessary

04:47:15 1 your evidentiary submissions.  
 2 MR. FELDMAN: I don't know the number off  
 3 the top.  
 4 MR. LUDDY: Between one of us, we will get  
 5 it to you, Mr. Chairman.  
 6 PRESIDENT NARIMAN: Thank you.  
 7 (Comments off microphone.)  
 8 BY MR. LUDDY:  
 9 Q. Paragraph 2, sir, in early 2007--I'm  
 10 reading and choking. In early 2007, I received  
 11 information that for some time Native Wholesale  
 12 Supply Company, a corporation headquartered in New  
 13 York, had been importing cigarettes from Canada into  
 14 the United States by way of a Foreign Trade Zone in  
 15 Las Vegas.  
 16 Do you see that?  
 17 A. Yes.  
 18 Q. Where did you receive that information?  
 19 A. I'm afraid that's attorney work product. I  
 20 can't reveal that.  
 21 Q. Can you tell me who you received it from?  
 22 A. That would breach the attorney work product

04:48:18 1 as well. It was provided to me on a confidential  
2 basis.  
3 Q. A confidential basis or privileged basis?  
4 A. I said attorney work product.  
5 Q. Okay. Had you at any time prior to 2007  
6 received this information concerning NWS sales  
7 through the FTZ in Nevada?  
8 A. No.  
9 Q. I'm going to reserve my rights to--I'm  
10 going to proceed with the cross-examination in the  
11 face of the declaration of privilege on a matter  
12 that he has testified about,, and I'm going to see  
13 where it goes, quite frankly. If I could deal with  
14 it in the face of the claim of privilege, I'm happy  
15 to do so. If it thwarts my cross-examination, I'm  
16 going to reserve the right to circle back and ask  
17 that the declaration be stricken from the record.  
18 Let's look at Paragraph 3 again. You say  
19 that GRE cigarettes in California are not lawful for  
20 sale; correct?  
21 MS. CATE: Counsel, may I have a moment  
22 with the witness privately?

04:57:07 1 provided, and I hope that alleviates any of your  
2 concerns. I do not believe it's necessary to strike  
3 Mr. Eckhart's declaration as a result of his not  
4 revealing the source of the information.  
5 PRESIDENT NARIMAN: He's not revealing the  
6 source?  
7 MS. CATE: He will not reveal the source.  
8 It is attorney work product information.  
9 PRESIDENT NARIMAN: Okay. So, there you  
10 have it. He's not revealing.  
11 BY MR. LUDDY:  
12 Q. Did the answer to any of my prior questions  
13 change as a result of that discussion outside?  
14 A. No.  
15 Q. I got the impression something was  
16 changing, but no?  
17 A. If it would help, my understanding is that  
18 I will talk about the information that was provided  
19 to me, but not tell you who told me or where it came  
20 from.  
21 MR. LUDDY: I request that my prior  
22 Reservation stand. I'm not going to terminate the

04:50:39 1 PRESIDENT NARIMAN: He's in the box just  
2 now.  
3 MS. CATE: Okay.  
4 MR. LUDDY: If it's on the privilege issue,  
5 I have no objection. I'd like it to go away. If  
6 it's on the privilege issue, if counsel will  
7 represent it's on the privilege issue.  
8 PRESIDENT NARIMAN: Go ahead.  
9 MR. LUDDY: I have no objection if she  
10 wants to consult with the witness on the privilege  
11 issue.  
12 MS. CATE: That's exactly it. That's  
13 correct.  
14 MR. LUDDY: I have no objection.  
15 PRESIDENT NARIMAN: Okay.  
16 MS. CATE: Thank you.  
17 (Counsel for Respondent confers with the  
18 witness outside the room.)  
19 MS. CATE: Mr. Chairman, we've conferred  
20 with the witness, and the source of the information  
21 is, indeed, attorney work product. However, he is  
22 able to talk about the information that was

04:58:15 1 cross. I'm going to continue, but I reserve the  
2 right to strike until a later time.  
3 MS. CATE: May I just again state the  
4 source of the information is irrelevant. It was the  
5 information that was provided that is relevant here.  
6 MR. LUDDY: I was just reserving the right  
7 to request. We don't have to argue it..  
8 BY MR. LUDDY:  
9 Q. Okay. What was the information?  
10 A. As stated in my declaration, that  
11 essentially was the information, that--the end of  
12 Paragraph 2, I was informed that the cigarettes in  
13 question were manufactured by Grand River  
14 Enterprises Six Nations Limited (GRE) in Canada, and  
15 that shipments of such cigarettes into the FTZ had  
16 double ed from approximately 300 million cigarettes  
17 in 2006 to over 600 million cigarettes in 2007.  
18 Q. Okay. So, you're not giving me anything  
19 that I don't already have here; right? You're not  
20 giving me any new information after that discussion  
21 outside; right? I want to make sure I don't have to  
22 go back and ask you every question I've asked you.

04:59:16 1 A. What I'm telling you is that this is the  
2 extent of the information that I received, so that  
3 is new.  
4 Q. Okay. Thank you. I appreciate that.  
5 I have lost my train of thought.  
6 Paragraph 3, you indicate there that the  
7 California Attorney General had sued GRE three times  
8 for noncompliance with the Escrow Statute and been  
9 awarded substantial civil penalties in that regard;  
10 correct?  
11 A. Yes.  
12 Q. Those were three separate lawsuits?  
13 A. Yes.  
14 Q. And they were reduced to judgment?  
15 A. Yes.  
16 Q. What's the status of those judgments now?  
17 A. The judgments were the subject of a motion  
18 to vacate made by Grand River. The trial court  
19 granted that motion as to each judgment at the end  
20 of November 2009. We have filed a Motion for  
21 Reconsideration which is scheduled for hearing on  
22 March 6th, I believe. So, the order is not--the

05:01:47 1 from an as yet unidentified source in February of  
2 '07, early '07. Then in--later I guess in February  
3 you said somebody from the BOE. What is the BOE?  
4 A. Board of Equalization? It's the California  
5 state agency which collects, among other things,  
6 cigarette excise taxes.  
7 Q. Before I forget, I skipped one note on  
8 follow-up on the Escrow Statute.  
9 Before California adopted its allocable  
10 share appeal, did it have any economic studies  
11 prepared to determine whether or not the NPMs had a  
12 cost advantage over any other manufacturers under  
13 the MSA?  
14 MS. CATE: Mr. Chairman, objection. This  
15 is not necessarily information that the witness  
16 would have.  
17 PRESIDENT NARIMAN: Let him say that.  
18 THE WITNESS: I'm not aware of any economic  
19 studies of that.  
20 BY MR. LUDDY:  
21 Q. Are you aware of any economic studies at  
22 any time prepared by NAAG on that subject prior to

05:00:35 1 order vacating each of those judgments is not final,  
2 and if the Motion for Reconsideration is denied, we  
3 have the right to appeal the decision vacating the  
4 judgments.  
5 Q. The motion to vacate was granted by the  
6 trial court; correct?  
7 A. That's what I said, yes.  
8 Q. And as of now, on the basis of that  
9 judgment--on the basis of that decision, the  
10 judgments have been vacated; correct, subject to  
11 your right to appeal.  
12 A. It's not a final order. The judgments--the  
13 court has ruled that the judgments are vacated, but  
14 that's not final.  
15 Q. And the court in that case determined that  
16 you did not--that California did not have personal  
17 jurisdiction over Grand River Enterprises to obtain  
18 those judgments; correct?  
19 A. That's correct, but we disagree with that  
20 finding.  
21 Q. Now, let's go back to the information.  
22 You said you first got some information

05:02:59 1 the passage of the Allocable Share Amendments?  
2 A. I can't remember specifically. I know that  
3 there had been studies done by experts in litigation  
4 pending in New York, and perhaps in other states  
5 relating to the--and then with regard to the  
6 significant factor proceeding between the OPMS and  
7 the states. There had been studies--a number of  
8 studies done. I'm not--I can't tell you the exact  
9 chronology when they were prepared or what they  
10 covered, but I know that that is the subject of a  
11 number of studies since then.  
12 Q. Well, the ones that were done in connection  
13 with the New York litigation certainly postdated the  
14 adoption of the Allocable Share Amendments; correct?  
15 A. I don't know the answer to that.  
16 Q. And the ones that were done in connection  
17 with the significant factor proceeding, those were  
18 done in the context of those proceedings, and those  
19 proceedings are subject to confidentiality  
20 constraints, are they not?  
21 A. They are.  
22 Q. Okay. So, none of those studies, to the

05:04:16 1 extent there were any studies done, were provided to  
2 a legislature, were they?  
3 A. I don't believe so.  
4 Q. So, you sent the BOE investigator out to  
5 the FTZ in February, and why did you do that?  
6 A. Because I wanted him to find out if he  
7 could--  
8 (Sirens.)  
9 A. I wanted to find out if any of the  
10 cigarettes that were going into the FTZ that were  
11 reported to me as having come from Native Wholesale  
12 Supply manufactured by Grand River Enterprises were  
13 coming into California.  
14 Q. And he determined that NWS was--that FTZ  
15 was sending cigarettes to Big Sandy Rancheria;  
16 correct?  
17 A. Yes, and possibly other locations. I'm  
18 trying to remember whether he determined from the  
19 records that he obtained that they were--I believe  
20 he came into information that cigarettes were being  
21 shipped to Big Sandy and to at least one other  
22 location in California called Huber Enterprise.

05:06:59 1 recent along the lines of Mr. Feldman's  
2 supplementation with the affidavit of Mr. Williams  
3 in the New York case, but we will bring it to the  
4 Tribunal's attention tomorrow and deal with it then.  
5 MS. CATE: Mr. Chairman, may we have the  
6 right to review the document as well?  
7 MR. LUDDY: Absolutely, and I will even  
8 give it to you in advance.  
9 MS. CATE: Thank you.  
10 MR. LUDDY: A day in advance.  
11 BY MR. LUDDY:  
12 Q. And what does BSR do, Big Sandy Rancheria?  
13 Maybe look at--this will be a memory test. Take a  
14 look at Paragraph 10 of your declaration.  
15 You say here that they are a tribal  
16 business that distributes cigarettes to tribal  
17 casinos, smoke shops, and other retail businesses  
18 located on Indian reservations in California;  
19 correct?  
20 A. That's what I said about BSR Distributing.  
21 Big Sandy Rancheria is a Tribe. They have a tribal  
22 government, they run tribal programs, they operate a

05:05:43 1 Q. Okay. Let's take Big Sandy. What is Big  
2 Sandy Rancheria?  
3 A. Big Sandy Rancheria is a federally  
4 recognized California Indian Tribe. They operate a  
5 business called BSR Distribution.  
6 Q. And as a sovereign Nation in California,  
7 they don't require a distributor's--state license to  
8 distribute or sell cigarettes, do they?  
9 A. Well, I think that's a matter of legal  
10 debate. They are not licensed as a distributor,  
11 that's correct.  
12 Q. Do you know whether the BOE has ever--The  
13 Board of Equalization in California, do you know  
14 whether the BOE has ever given Big Sandy Rancheria a  
15 written notification that they as a sovereign Nation  
16 do not require the license that we are talking  
17 about?  
18 A. I'm not aware of that.  
19 Q. Have you ever--  
20 (Pause.)  
21 Q. We are going to reserve the right to  
22 supplement with that document because it's very

05:08:03 1 casino, they operate a smoke shop and a number of  
2 other things, so that's why I was confused by your  
3 question.  
4 Q. And I appreciate you correcting me because  
5 I had that wrong myself.  
6 And what were the other entities that you  
7 determined that cigarettes went from the FTZ to in  
8 California?  
9 A. At that time, at the time Mr. Lamberth, the  
10 BOE investigator went to the Foreign Trade Zone and  
11 obtained information, my understanding was that the  
12 other location was--the other entity was called  
13 Huber Enterprise.  
14 Q. Is that on Indian--is that on-Reservation  
15 in California?  
16 A. It is on Reservation land in the far  
17 northwest portion of California.  
18 Q. And it's owned by the Indians on that  
19 Reservation?  
20 A. I believe it's owned by Indians. It's not  
21 owned by the Tribe.  
22 Q. Okay. Is that a distinction in your mind?

05:09:03 1 A. Yes.  
 2 ARBITRATOR ANAYA: Excuse me, Mr. Eckhart.  
 3 When you say it's owned by Indians, you mean members  
 4 of that Tribe?  
 5 THE WITNESS: I believe at least one  
 6 members of the owners is a member of the Wyatt Table  
 7 Bluff Indian Tribe.  
 8 ARBITRATOR ANAYA: Which is the owner of  
 9 the land?  
 10 THE WITNESS: Yes. It's their Reservation.  
 11 I actually don't know who owns the land. It's on  
 12 their Reservation.  
 13 ARBITRATOR ANAYA: That's what I meant to  
 14 say. Thank you.  
 15 BY MR. LUDDY:  
 16 Q. And then at some point, if you could turn  
 17 to Core Document 56 in your package there.  
 18 A. I am in 56. Is that what you meant? My  
 19 declaration?  
 20 Q. Oh, yeah, it's actually--your complaint is  
 21 an attachment to the affidavit--no, one second.  
 22 MS. CATE: There are two attachments.

05:11:36 1 that correct?  
 2 A. That's correct.  
 3 PRESIDENT NARIMAN: I don't have that.  
 4 (Comment off microphone.)  
 5 MR. LUDDY: Correct. I probably misspoke.  
 6 BY MR. LUDDY:  
 7 Q. And that's a letter that you had written to  
 8 Mr. Montour. You had also written, and I believe  
 9 it's Exhibit Core Document Number 40, you had also  
 10 written by letter dated August 12th, 2008, it's Core  
 11 Document 40, the next document, to the FTZ in  
 12 Nevada; correct?  
 13 A. Yes.  
 14 Q. And the FTZ was the entity that was  
 15 shipping the cigarettes to Big Sandy Rancheria;  
 16 correct? That's where they were coming from?  
 17 A. That's where they were coming from. I  
 18 don't know--  
 19 Q. I don't want to get into that issue.  
 20 A. That's where they were coming from, yes.  
 21 Q. Fair enough.  
 22 And in this letter, in the last paragraph,

05:10:07 1 MR. LUDDY: I messed up. One second.  
 2 It's Core Document 39. My mistake. I'm  
 3 sorry.  
 4 THE WITNESS: Okay. I have it in front of  
 5 me.  
 6 BY MR. LUDDY:  
 7 Q. And this is a complaint that California  
 8 filed against NWS; correct?  
 9 A. Yes.  
 10 Q. And in this complaint, you sought to stop  
 11 NWS from selling Seneca brand cigarettes to Big  
 12 Sandy Rancheria and Huber; correct?  
 13 A. As far as we know, it was not--Native  
 14 Wholesale was not selling to Huber. The cigarettes  
 15 were being purchased by Big Sandy but shipped to  
 16 Huber, but we did--one of the purposes of the  
 17 complaint was to stop that--those sales, yes.  
 18 Q. Okay. And look at--there is a March 7th,  
 19 2008, letter attached to your complaint.  
 20 A. Yes.  
 21 Q. And you were the author or at least  
 22 signatory of this letter, signer of this letter; is

05:13:10 1 you request--I will read the language.  
 2 "Consequently, we request that you immediately cease  
 3 and desist from releasing any cigarettes for  
 4 shipment via common or private carrier into the  
 5 state of California unless the manufacturer of the  
 6 cigarettes and the cigarettes brands are lawful for  
 7 sale in this state."  
 8 Do you see that?  
 9 A. Yes, and we are talking about Core  
 10 Document 40.  
 11 Q. Correct.  
 12 A. Okay.  
 13 Q. Now, did you have the authority as the  
 14 Attorney General, did the California's Attorneys  
 15 General Office have authority to direct the FTZ to  
 16 cease and desist?  
 17 A. I don't know. I chose the words I chose I  
 18 suppose for a reason. I don't remember what the  
 19 reason was.  
 20 Q. Well, did you do any due diligence before  
 21 you wrote this letter as to whether or not your  
 22 office had any jurisdiction at all over the FTZ in

05:14:15 1 California?  
 2 A. Yes, we had done some research, yes.  
 3 Q. And you determined that you had  
 4 jurisdiction over them?  
 5 A. We determined that we had the right to ask  
 6 them to stop releasing cigarettes that were not  
 7 lawful for sale in the state of California, yes.  
 8 Q. But you did not determine that you had the  
 9 right to direct them to stop?  
 10 A. Frankly, I don't remember.  
 11 Q. Do you know that the FTZ stopped doing  
 12 business with NWS as a result of this letter?  
 13 A. I do not know that, no.  
 14 Q. At some point?  
 15 A. I don't--I do know that they stopped doing  
 16 business with NWS. I do not know that it was as a  
 17 result of this letter. There were many other  
 18 actions. Other States wrote letters to the FTZ.  
 19 Q. We will get to that.  
 20 A. And so on.  
 21 PRESIDENT NARIMAN: Just for my  
 22 information, Mr. Luddy, is the letter of 7th March

05:16:19 1 States to the FTZ.  
 2 And when you say they, you mean the FTZ?  
 3 Q. I do. Thank you.  
 4 A. Yes.  
 5 Q. And those letters or at least two of those  
 6 letters are Core Document 36, letter from Idaho  
 7 dated August 14th. You will correct me if I'm  
 8 wrong.  
 9 A. That letter I have seen before, and I was  
 10 aware of that letter.  
 11 Q. Okay. And also in the record is the Core  
 12 Document Number 38, which is a letter from New  
 13 Mexico to the FTZ.  
 14 A. Yes.  
 15 Q. Now, I assume so that it was not a  
 16 coincidence that all three of these states,  
 17 California, Idaho, and New Mexico, all wrote to the  
 18 FTZ in August of 2008 requesting that FTZ cease and  
 19 desist shipping cigarettes; correct?  
 20 A. I believe that, yes, that's a correct  
 21 assumption. It was not a coincidence, if I  
 22 understand your question.

05:15:11 1 March an admitted letter that you received?  
 2 MR. LUDDY: To be honest with you, Your  
 3 Honor, I'd have to check that date.  
 4 Yes, I have been advised we did.  
 5 PRESIDENT NARIMAN: I just wanted to know.  
 6 MR. LUDDY: Fair enough.  
 7 BY MR. LUDDY:  
 8 Q. And it was your intention to take FTZ out  
 9 of the chain of commerce between NWS and Big Sandy  
 10 Rancheria; correct? If you could.  
 11 A. It was my intention to stop the flow of  
 12 cigarettes into California that were not lawful for  
 13 sale in the state of California because cigarettes  
 14 were not listed on the California Tobacco Directory.  
 15 They were not certified as fire safe, and the  
 16 manufacturer of those cigarettes had been enjoined a  
 17 number of times by the Superior Court from selling  
 18 either directly or indirectly any cigarettes it  
 19 manufactured in the state of California.  
 20 Q. Okay. You had mentioned that they had  
 21 received other letters from other States; correct?  
 22 A. Yes, I'm aware of other letters from other

05:17:20 1 Q. Yes, that was awkward question.  
 2 And you know Brent DeLange, the author of  
 3 the letter from Idaho?  
 4 A. I do.  
 5 Q. And you know Mr. Thompson, the author of  
 6 the letter from New Mexico?  
 7 A. I do.  
 8 Q. And you had spoken to each of them prior to  
 9 these letters being written; correct? About the  
 10 letters.  
 11 A. Yes.  
 12 Q. Okay. Tell me about the context in which  
 13 these discussions first began.  
 14 MS. CATE: Objection. Relevance.  
 15 PRESIDENT NARIMAN: What's your objection?  
 16 MS. CATE: The relevance of what these  
 17 discussions were is not relevant here.  
 18 MR. LUDDY: I would like to know when they  
 19 started, when they decided to gang up on NWS and--  
 20 PRESIDENT NARIMAN: Ask him.  
 21 MS. CATE: I would assume that any  
 22 discussions between Attorneys General in different

05:18:11 1 states would be privileged information.  
 2 MR. LUDDY: I share no such assumption. If  
 3 you want to make a privilege objection, I'd ask you  
 4 to make it on the record.  
 5 MS. CATE: I would like to make a  
 6 privileged objection.  
 7 MR. LUDDY: What's the--why don't I ask you  
 8 a question and then you can object to it.  
 9 MS. CATE: I just did.  
 10 PRESIDENT NARIMAN: Ask, and you could  
 11 answer. Ask it.  
 12 BY MR. LUDDY:  
 13 Q. Okay. When did you first discuss with  
 14 Mr. DeLange and Mr. Thompson the idea of each of  
 15 you--withdrawn.  
 16 When was the first time you discussed with  
 17 Mr. DeLange and Mr. Thompson the FTZ in Nevada?  
 18 MS. CATE: Objection. Privilege.  
 19 PRESIDENT NARIMAN: You could answer it.  
 20 THE WITNESS: He's asking for the time  
 21 frame, and I understand.  
 22 The substance of the discussion is another

05:20:09 1 would you agree with that?  
 2 MR. WEILER: They would be the applicable  
 3 international law rules. The parties still have  
 4 agreed the IBA Rules can be used as a guideline in  
 5 that regard.  
 6 ARBITRATOR CROOK: I believe the parties  
 7 agreed that they would not be used as a guideline,  
 8 but that they would govern, did they not, in our  
 9 original meeting in March of 2005?  
 10 MR. WEILER: But to the extent that they  
 11 involve areas of privilege which might not be--I  
 12 mean, the bottom line is that those IBA Rules are  
 13 not going to give us all of the answers on some  
 14 difficult questions of privilege. At some point the  
 15 source law we go behind is not domestic law but  
 16 rather international law, and there is international  
 17 law that can assist us on issues of privilege,  
 18 though I should mention they're not that different  
 19 from--I mean, they obviously--we both--as  
 20 international lawyers, we know it's comparative law,  
 21 so probably end up in the same place.  
 22 ARBITRATOR CROOK: So, it's the submission

05:19:11 1 matter, but the time frame is sometime between  
 2 February of 2008 and August of 2008. I don't  
 3 remember specifically.  
 4 Q. And who initiated those conversations?  
 5 A. I don't remember.  
 6 Q. And who else was a party to those  
 7 conversations?  
 8 A. That would be work product, attorney work  
 9 product as to who was a party to those discussions.  
 10 MR. LUDDY: Well, I have to tell you, Your  
 11 Honor, if there were not attorneys involved, the  
 12 privilege just went out the window, so we kind of  
 13 need to know who else was there.  
 14 ARBITRATOR CROOK: Mr. Luddy and Ms. Cate,  
 15 we are hearing a lot of discussions about privilege.  
 16 Would someone please tell us what law we're supposed  
 17 to be applying to make such judgments.  
 18 MS. CATE: The IBA Rules of evidence.  
 19 ARBITRATOR CROOK: You're saying the IBA  
 20 Rules should control here?  
 21 MS. CATE: Right.  
 22 ARBITRATOR CROOK: Okay. And, Mr. Luddy,

05:21:07 1 of the Claimants that--well, I won't belabor the  
 2 point, but I think as we throw around these claims  
 3 of privilege, it would be helpful to the Tribunal if  
 4 parties could kindly indicate to us why they think  
 5 their particular claim is somehow consistent with  
 6 the law applicable in this Tribunal.  
 7 MR. LUDDY: Can I--why don't I voir dire  
 8 the witness a little bit on the scope of the  
 9 privilege, and maybe once we know the contours of  
 10 what's involved, we could have a more substantive  
 11 discussion.  
 12 PRESIDENT NARIMAN: What's your case,  
 13 Mr. Luddy, apart from all this privilege and so on?  
 14 I mean, he says that he spoke to Mr. DeLange at a  
 15 particular point in time.  
 16 MR. LUDDY: Fair question, Mr. Chairman.  
 17 I want to know when whether NAAG was  
 18 involved, which I assume they were, whether--when it  
 19 was that various states, three, and there is a  
 20 fourth--  
 21 PRESIDENT NARIMAN: Then ask you him that.  
 22 MR. LUDDY: That's what I'm trying to do.

05:22:10 1 PRESIDENT NARIMAN: No, no, you didn't.  
 2 MR. LUDDY: That's what I'm suggesting.  
 3 PRESIDENT NARIMAN: You ask him then.  
 4 Don't say where else and all that. Put it to him,  
 5 anybody from NAAG, if that's your case. That's a  
 6 legitimate question.  
 7 MR. LUDDY: You guys ready?  
 8 MS. CATE: Yes.  
 9 BY MR. LUDDY:  
 10 Q. Was anyone from NAAG involved in those  
 11 discussions?  
 12 A. Yes.  
 13 Q. Who?  
 14 A. Michael Hering at least, possibly others. I  
 15 don't really recall.  
 16 Q. Were there any AG's offices involved other  
 17 than Idaho and New Mexico?  
 18 A. Oklahoma, possibly Washington. I'm not  
 19 remembering any others than those, but there may  
 20 have been others.  
 21 Q. Were there--were there in person meetings  
 22 or telephone meetings, conferences?

05:24:13 1 information from any tobacco manufacturers about Big  
 2 Sandy Rancheria. And that would not--that  
 3 information could not be privileged, in my view.  
 4 BY MR. LUDDY:  
 5 Q. And what was the decision that came from  
 6 these conversations between you and Messrs. DeLange  
 7 and Hering and Thompson? What was decided in those  
 8 conference calls?  
 9 A. Each state made their own decision. It was  
 10 not a common decision, and my decision was to send  
 11 this letter to the Foreign Trade Zone.  
 12 Q. Well, it was a common decision. Did they  
 13 each send letters?  
 14 A. Each state made their own decision.  
 15 Q. Okay. Was there a recommendation from NAAG  
 16 in that conference?  
 17 A. I don't remember.  
 18 Q. And each state ultimately filed suit as  
 19 well; correct? Idaho and New Mexico and Oklahoma?  
 20 A. And California, yes.  
 21 Q. And California.  
 22 Do you know what happened to the Oklahoma

05:23:22 1 A. These were telephone conferences.  
 2 Q. Do you recall how many?  
 3 A. No.  
 4 Q. And do you recall who it was that initiated  
 5 them? I think I asked this to you, but I'm not  
 6 sure.  
 7 A. I do not remember.  
 8 Q. Okay. Were there any representatives of  
 9 other tobacco manufacturers involved in these  
 10 conference calls?  
 11 A. No.  
 12 Q. Were there--was the information--was any  
 13 information with respect to the Big Sandy Rancheria  
 14 sales provided to you by representatives of other  
 15 tobacco manufacturers?  
 16 MS. CATE: Objection. The actual contents  
 17 of the discussions is privileged.  
 18 MR. LUDDY: That's source.  
 19 THE WITNESS: I understand. I think there  
 20 was a misunderstanding of the question.  
 21 MS. CATE: I apologize.  
 22 THE WITNESS: No, I don't recall any

05:25:21 1 case?  
 2 A. I believe I do, yes.  
 3 Q. What happened to it?  
 4 A. It was--the first complaint was dismissed.  
 5 There was an amended complaint; I think that was  
 6 dismissed on personal and--no, on subject-matter  
 7 jurisdiction grounds, I believe, and then that  
 8 decision is on appeal.  
 9 Q. And the subject-matter jurisdiction, what  
 10 was the basis of the court's finding that it had no  
 11 subject-matter jurisdiction because it involved  
 12 Nation-to-Nation trading; correct?  
 13 A. I would have to review the decision to  
 14 remind myself specifically. I believe it had  
 15 something to do with the Indian Commerce Clause and  
 16 the Indian Trader Statutes, but I'm not absolutely  
 17 certain because I haven't reviewed that in quite a  
 18 while.  
 19 Q. Are you a member or have you ever been--and  
 20 it's not going to be a Communist Party. Are  
 21 you--have you ever been involved with the GRE  
 22 Working Group?

05:26:21 1 MS. CATE: Objection.  
 2 THE WITNESS: Yes.  
 3 BY MR. LUDDY:  
 4 Q. Yes.  
 5 A. Yes.  
 6 Q. In what regard?  
 7 A. Well, the--Working Groups that involve the  
 8 State Attorneys General and the--as facilitated and  
 9 as assisted by NAAG are part of a common interest  
 10 agreement which the states have among themselves.  
 11 NAAG is an association of Attorneys General. Those  
 12 discussions typically are part of that common  
 13 interest agreement. We are all law enforcement  
 14 agencies. We are all--many of us are defendants in  
 15 the litigation that Grand River has filed against  
 16 the state Attorneys General and so those discussions  
 17 and the information that's exchanged in those  
 18 discussions, the strategy discussions would all be  
 19 covered by a common interest agreement and would  
 20 therefore be attorney work product.  
 21 Q. And was the idea of trying to shut down  
 22 NWS's on-reserve sales through the complementary

05:29:12 1 A. That's my understanding.  
 2 Q. And the same in Oklahoma?  
 3 A. Yes, that's my understanding.  
 4 Q. And the same in New Mexico?  
 5 A. Yes.  
 6 Q. And California, obviously?  
 7 A. Yes.  
 8 Q. Was it your expectation that the fact that  
 9 FTZ would be receiving a cease and desist letter  
 10 from not just California but also your colleagues in  
 11 New Mexico and Idaho, that that would help in them  
 12 deciding to not deal with NWS?  
 13 A. It wasn't our intention to have them not  
 14 deal with NWS. It was our intention to keep  
 15 cigarettes that were not legal for sales in our  
 16 states out of our states.  
 17 Q. And it was your intention that the three of  
 18 you writing together would improve the chances that  
 19 they would stop sending Seneca cigarettes to  
 20 California; correct?  
 21 A. Each of us had jurisdiction over our own  
 22 states and responsibility to enforce the laws

05:27:33 1 litigation--legislation, was that ever discussed  
 2 within the GRE Working Group?  
 3 A. I really can't answer that because it's  
 4 privileged.  
 5 Q. Are any members of the representatives of  
 6 the Federal Government involved in the GRE Working  
 7 Group?  
 8 A. No.  
 9 Q. Have you ever had communications  
 10 with--withdrawn.  
 11 Is it your understanding from the  
 12 discussions with Messrs. DeLange and Thompson that  
 13 all of the sales of Seneca coming out of the FTZ in  
 14 Nevada were going to Indian lands in one of the  
 15 various states; correct?  
 16 PRESIDENT NARIMAN: I didn't follow that  
 17 question.  
 18 MR. LUDDY: Yeah. Thank you, Mr. Chairman.  
 19 BY MR. LUDDY:  
 20 Q. Do you know whether the FTZ sales, the  
 21 sales from the FTZ in Idaho were going to Indian  
 22 land in Idaho?

05:30:24 1 applicable to our own states. I could not write a  
 2 letter for New Mexico or Idaho, and they couldn't  
 3 write one for me. We each had to write our own  
 4 letter.  
 5 Q. But it was nevertheless a coordinated  
 6 strategy, wasn't it?  
 7 A. I think the timing of the letters, you can  
 8 draw whatever inference you want. I'm not--I said  
 9 each state made its own decision.  
 10 Q. And you ultimately did file that case  
 11 against NWS, and the court issued a decision in that  
 12 case in September; correct?  
 13 PRESIDENT NARIMAN: Speaking of California?  
 14 MR. LUDDY: Correct.  
 15 THE WITNESS: Yes. The end I think was  
 16 September 23rd, 2009.  
 17 MR. LUDDY: I gave you two, Mr. Chairman.  
 18 It is one of the two that I gave you, yes. There's  
 19 two there, or if there isn't, I messed up.  
 20 (Comment off microphone.)  
 21 BY MR. LUDDY:  
 22 Q. Okay. Now, you took the position in that

05:32:44 1 case that--in the California case that--well, for  
 2 starters, the California court granted a motion  
 3 dismissing that case, did it not?  
 4 A. For lack of personal jurisdiction, correct.  
 5 Q. Okay. And you took the position in that  
 6 case that NWS--that the shipment of cigarettes from  
 7 FTZ to Indian land in California constituted minimum  
 8 contacts by NWS with California; correct?  
 9 A. Yes.  
 10 Q. And if you could look at Page 2 of the  
 11 decision.  
 12 PRESIDENT NARIMAN: Which one? The  
 13 September 1?  
 14 MR. LUDDY: The September 1, yes,  
 15 Mr. Chairman.  
 16 BY MR. LUDDY:  
 17 Q. I'm going to read the second--third full  
 18 paragraph: "Plaintiff has cited no authorities, and  
 19 the court is aware of none, holding that sales by an  
 20 out-of-state corporation to an Indian Tribe on a  
 21 Reservation located in this state constitute minimum  
 22 contact with this state that will support personal

05:35:28 1 a tax that could be passed along to non-Indian  
 2 consumers," cites a revenue code section. "It  
 3 imposes an absolute ban on the sale of certain  
 4 brands of cigarettes that are not listed on the  
 5 Attorneys General directory," and then it jumps to  
 6 the last section.  
 7 The last sentence of that paragraph: "The  
 8 legal incidence of this ban, if applied here, would  
 9 fall directly on Big Sandy as an importer as well as  
 10 NWS as a seller of unregistered cigarettes."  
 11 Do you see that?  
 12 A. Yes.  
 13 Q. So it's your understanding from what the  
 14 court is saying here is that California cannot apply  
 15 the complementary legislation to NWS's unreserved  
 16 commerce to try to shut down the Seneca brand;  
 17 correct?  
 18 A. That's what--that's what the court wrote  
 19 here. I think it's wrong.  
 20 Q. Okay.  
 21 A. On the law.  
 22 Q. And--

05:34:10 1 jurisdiction over the out-of-state corporation.  
 2 Indeed, the court has found no California  
 3 authorities applying minimum contacts analysis where  
 4 any activities on an Indian Reservation were  
 5 involved."  
 6 Do you see that?  
 7 A. Yes.  
 8 Q. You also sought to impose--and this really  
 9 goes to the heart of what you were trying to do in  
 10 the California case. You were trying to apply to  
 11 NWS's sales that were ultimately going to Big Sandy  
 12 on-reserve the California complementary legislation  
 13 because GRE products are, in your view, not legal in  
 14 California; correct?  
 15 A. Yes.  
 16 Q. Okay. And the court addressed that attempt  
 17 to do that, didn't it?  
 18 A. Yes.  
 19 Q. And if you look at Page 3, I'll read the  
 20 paragraph: "Here, the legal incidence of the  
 21 statute at issue in this case would not fall on  
 22 non-Indian consumers. These statutes do not impose

05:36:28 1 ARBITRATOR ANAYA: Can I ask--  
 2 THE WITNESS: And this decision is under  
 3 appeal.  
 4 ARBITRATOR ANAYA: Excuse me. Excuse me.  
 5 Absolutely. Can I just hear briefly what your  
 6 Rejoinder is to that argument, that legal argument?  
 7 THE WITNESS: Professor, it's basically  
 8 that the--as the previous quote indicated, there is  
 9 no California law essentially one way or the other  
 10 about what constitutes minimum contacts when the  
 11 contact is with a business or a Tribe that's on--or  
 12 a Tribe or a business that's on-reservation in  
 13 Indian Country on Reservation land. And it was our  
 14 expectative that under the, you know, existing  
 15 Federal-tribal-state balancing test for regulation  
 16 of activities that take place on a reservation that  
 17 are significant off-reservation interests of the  
 18 state are implicated and there is no absolute  
 19 preemption by Federal law or no long-term  
 20 traditional regulation of this subject by the Tribe  
 21 in question that the state can and--can have  
 22 jurisdiction over those activities in certain

05:37:36 1 instances.  
 2 ARBITRATOR ANAYA: As a matter of Federal  
 3 law.  
 4 THE WITNESS: Excuse me.  
 5 ARBITRATOR ANAYA: As a matter of Federal  
 6 law.  
 7 PRESIDENT NARIMAN: As a matter of Federal  
 8 law.  
 9 THE WITNESS: Yes.  
 10 I think if I'm understanding what you mean  
 11 by "as a matter of Federal law"--  
 12 ARBITRATOR ANAYA: I meant this balancing  
 13 test you're talking about--  
 14 THE WITNESS: Yes.  
 15 ARBITRATOR ANAYA: --is the Federal law  
 16 test.  
 17 THE WITNESS: Yes, it is. Under the  
 18 Bracker case and the Mescalero case as well.  
 19 ARBITRATOR ANAYA: Thank you.  
 20 BY MR. LUDDY:  
 21 Q. Okay. And you also tried to, through your  
 22 court pro--your complaint, you tried to regulate

05:39:16 1 regulate Indian commerce."  
 2 Did I read that accurately, sir?  
 3 A. I actually didn't--couldn't find where you  
 4 were reading from and so I--  
 5 PRESIDENT NARIMAN: Right at the top.  
 6 THE WITNESS: At the top. I think you read  
 7 it accurately.  
 8 And I would--and let me make a  
 9 clarification, Professor Anaya. I did--just for my  
 10 own benefit, I don't consider myself an expert in  
 11 Indian law. I've learned some amount of Indian law  
 12 for purposes of this litigation that we're talking  
 13 about now and other litigation that has come  
 14 subsequent to this, so I--and I--but I'm giving you  
 15 what my best recollection of the argument  
 16 essentially that we would make--we did make in the  
 17 trial court and that we would make on appeal.  
 18 ARBITRATOR ANAYA: That's interesting that  
 19 you say that because I assume from your testimony  
 20 that you are making determinations about these very  
 21 questions of Federal Indian Law.  
 22 THE WITNESS: I--we are.

05:38:11 1 interstate commerce between tribal--and I'm using  
 2 the term "Tribe" because that's the term the court  
 3 uses. I mean our view is that these are sovereign  
 4 Indian Nations, but to conform it to the language  
 5 that the court uses, I'm going to refer to them as  
 6 Tribes. You tried to regulate the commerce between  
 7 the tribal entity NWS and the Tribe in California,  
 8 Big Sandy Rancheria; correct?  
 9 A. Well, I don't consider NWS--I don't  
 10 understand NWS to be a tribal entity.  
 11 Q. Okay. But you understand Big Sandy  
 12 Rancheria to be an Indian Tribe or a tribal entity--  
 13 A. Yes, I do.  
 14 Q. Correct?  
 15 A. I do.  
 16 Q. And the court had this to say, "Plaintiff  
 17 has not cited"--this is Page 4--"Plaintiff has not  
 18 cited, and this court is not aware, of any authority  
 19 permitting a state to regulate interstate commerce  
 20 between Indian tribes or tribal entities. Such  
 21 activities are more properly subject to  
 22 congressional regulation which has plenary power to

05:40:09 1 ARBITRATOR ANAYA: Or someone in your  
 2 office is under your authority I assume.  
 3 THE WITNESS: Yes, and we, you know, as a  
 4 lawyer, we have an ethical response--  
 5 ARBITRATOR ANAYA: Right.  
 6 THE WITNESS: As lawyers we have an ethical  
 7 responsibility to learn the law. I do--there are  
 8 experts in our office in Indian law that I have  
 9 consulted with, and, you know, we read the cases.  
 10 We read the hornbooks. We read Cohen. We read  
 11 other books that tell us what the law is, and we  
 12 enforce our law as we see it.  
 13 ARBITRATOR ANAYA: No, I understand. But I  
 14 just--I guess what I just find interesting is for  
 15 you to say that you're not an expert, but you do  
 16 stand behind the position you're taking.  
 17 THE WITNESS: I do. I do.  
 18 ARBITRATOR ANAYA: Okay, based on whatever  
 19 expertise or...  
 20 THE WITNESS: It's a--  
 21 ARBITRATOR ANAYA: I understand. Okay.  
 22 And to get back to your question about--and

05:40:55 1 maybe I've missed--I've lost track of the question  
2 specifically. You did read that correctly. I do  
3 think the court went beyond the issues made by the  
4 motion to quash for lack of personal jurisdiction  
5 and went beyond it into the areas of subject matter  
6 jurisdiction in order to make her decision on  
7 personal jurisdiction. So that there are some  
8 aspects of the decision where I think she went into  
9 areas that were brought up in the briefing,  
10 understandably by the attorneys for NWS, but I do  
11 think that that--it confused the question that was  
12 raised here, which was purely a question of personal  
13 jurisdiction.

14 BY MR. LUDDY:

15 Q. And then when she got there, she got it  
16 wrong, too, is your position, right?

17 A. Yes.

18 Q. She was not only wrong to go there, but  
19 having gone there, she got it wrong.

20 A. I believe she got it wrong. Obviously  
21 reasonable minds can differ, and attorneys and  
22 judges differ all the time.

05:42:50 1 A. Yes.

2 Q. Yes?

3 A. Yes.

4 Q. And who was that? Who did you make that  
5 recommendation to?

6 A. Ultimately I made that recommendation to  
7 the Attorney General. It was reviewed by my  
8 Division Chief and after him by the Chief Deputy  
9 Attorney General.

10 Q. Is your Division Chief an Indian law  
11 expert?

12 A. I don't know.

13 Q. Does he have any more Indian law expertise  
14 that you, for instance?

15 PRESIDENT NARIMAN: What's the relevance  
16 about this?

17 Nobody has said this is an unauthorized  
18 filing.

19 MR. LUDDY: No, I know. You know what?  
20 It's interesting, Your Honor, and frankly in  
21 following up on Professor Anaya's question because  
22 the same thing had occurred to me. If a state is

05:41:55 1 Q. Who--agreed.

2 Who made the final authority to file this  
3 complaint?

4 A. The Attorney General.

5 Q. You--which at the time was who?

6 A. Edmund G. Brown, Jr.

7 Q. Did you personally consult with him on the  
8 matter?

9 A. We have a process by which we--any time  
10 where we're going to file an action in the name of  
11 the Attorney General--and this action is filed on  
12 behalf of the people on the information of the  
13 Attorney General--we have to get his permission.

14 Q. And who--I assume that process contemplates  
15 some type of recommendation from a senior person  
16 within the AG's office?

17 A. It is reviewed by several people above me,  
18 yes.

19 Q. Okay. And who are those people? Who  
20 make--did you make--I'm just trying to get at the  
21 process. Did you make a recommendation to somebody  
22 that the complaint be filed?

05:43:31 1 going to start throwing its weight around and go  
2 after Indian commerce, it seems to us that they  
3 should know what they're doing, and that they should  
4 have a genuinely competent, well-versed expert in  
5 Indian law giving somebody advice as to--before you  
6 go out and try to send letters to FTZ to try to shut  
7 down millions of dollars worth of commerce. It  
8 shouldn't be undertaken lightly, Mr. Chairman, and  
9 I'm suggesting to you that it was, and I'd like to  
10 follow up on this line of questioning.

11 PRESIDENT NARIMAN: Okay.

12 ARBITRATOR ANAYA: But perhaps you could  
13 help me with that. At some point, at some point, it  
14 would help to relate that to the NAFTA claim.

15 MR. LUDDY: I will do that, yeah.

16 ARBITRATOR ANAYA: That would help. And I  
17 just found it curious, and I just wanted to make  
18 sure in my questioning of Mr. Eckhart that it was,  
19 in fact, a position that his office, the Attorney  
20 General's Office, was standing behind, the  
21 substantive position, legal position that was being  
22 taken on the question of Indian law or Federal law.

05:44:31 1 THE WITNESS: And we do stand behind it to  
 2 this day, and I--perhaps my comment earlier was  
 3 perhaps out of line that I indicated that I was not  
 4 an expert. I don't consider myself an expert in  
 5 Indian law. I am a--I have been a Deputy Attorney  
 6 General since 1980. I take my responsibilities very  
 7 seriously. I do not file complaints frivolously.  
 8 ARBITRATOR ANAYA: And I don't want to  
 9 suggest that you have to represent yourself as an  
 10 expert in the area to take a position on that  
 11 particular area of law. I would just--I wanted to  
 12 make--in light of what you said, I just wanted to  
 13 make sure I understood that your office was--in fact  
 14 stood behind the legal position that was being  
 15 advanced.  
 16 THE WITNESS: And we do.  
 17 ARBITRATOR ANAYA: Thank you.  
 18 BY MR. LUDDY:  
 19 Q. I'll move on.  
 20 Let me draw your attention to Paragraph 15.  
 21 A. Paragraph 15 of?  
 22 Q. I'm sorry, of your declaration.

05:46:59 1 Do you see that?  
 2 A. Yes.  
 3 Q. Were you suggesting to the Tribunal at the  
 4 time you executed this declaration that you thought  
 5 that Mr. Montour had been untruthful in his  
 6 affidavit in the California litigation?  
 7 A. Well, I--  
 8 Q. That was the purpose of that phrase, wasn't  
 9 it?  
 10 A. The purpose of the phrase was to indicate  
 11 that records we had reviewed seemed to indicate and  
 12 tell a different story.  
 13 Q. And you didn't believe Mr. Montour's  
 14 statement, did you?  
 15 A. No, because of the documents that we had  
 16 reviewed, and because of the--of information that we  
 17 had received during the deposition of the FTZ's  
 18 President, which I had taken about a  
 19 month-and-a-half before this declaration was signed.  
 20 Q. Can I draw your attention to Paragraph 5 of  
 21 the opinion, sir.  
 22 PRESIDENT NARIMAN: Of the excerpt?

05:45:24 1 A. Okay.  
 2 Q. 15 of Core Document 56 which is  
 3 Mr. Eckhart's declaration.  
 4 A. Okay. I have it in front of me.  
 5 Q. I'm going to read this. It's a little  
 6 lengthy, so bear with me.  
 7 (Reading) "Despite a sworn statement by  
 8 Mr.--or by Arthur Montour, filed in support of NWS's  
 9 motion to dismiss California's action for lack of  
 10 personal jurisdiction, that 'NWS does not exercise  
 11 any control over its products subsequent to their  
 12 sale to third parties' and that 'any transport of  
 13 products to California occurs solely as a result of  
 14 a third party's conduct or direction'...Not one of  
 15 the 234 shipment records reflect any contact between  
 16 Big Sandy and the FTZ or between BSR and Conway  
 17 other than BSR's being listed as the purchaser and  
 18 cosignee of the cigarettes."  
 19 Do you see that?  
 20 A. Yes.  
 21 Q. Your opening clause to that paragraph,  
 22 despite a sworn statement by Arthur Montour.

05:47:52 1 MR. LUDDY: Of the opinion. The paragraph  
 2 right below "transportation of cigarettes over state  
 3 highway." The second sentence begins as follows--or  
 4 reads as follows: "However, there is no evidence in  
 5 this case on which"--"there is no evidence in this  
 6 case"--  
 7 PRESIDENT NARIMAN: Page?  
 8 MR. LUDDY: It's Page 5, the paragraph  
 9 right below "transportation of cigarettes over state  
 10 highway." It's the second sentence.  
 11 PRESIDENT NARIMAN: Yes.  
 12 PRESIDENT NARIMAN: Yes.  
 13 BY MR. LUDDY:  
 14 Q. "However," and there is--the sentence is  
 15 poorly written, so I'm going to read it as is,  
 16 recognizing that I could read, "However, there is no  
 17 evidence in this case to on which the court may find  
 18 that defendant," NWS, "defendant has directed the  
 19 shipments on California's roadways. Rather, the  
 20 evidence shows only that defendant has sold  
 21 cigarettes to a California Indian Tribe, and at the  
 22 Tribe's direction, has shipped the cigarettes

05:48:50 1 primarily to the Tribe itself and occasionally to  
2 consignees."  
3 So, apparently the court looked at the same  
4 evidence that you looked at and believed  
5 Mr. Montour's statement, did it not?  
6 A. She came to the different conclusion based  
7 upon the evidence that she had.  
8 Q. You know, that's interesting that you  
9 talked about not believing Mr. Montour on a  
10 statement on the subject. Have you ever been in  
11 communication with the authorities, Federal  
12 authorities, in Seattle?  
13 A. Well, let me go back to your assumption of  
14 that question, which is I didn't believe  
15 Mr. Montour.  
16 Q. I thought you said that.  
17 A. I believe what I said was that the document  
18 seemed to tell a different story, and that--and that  
19 perhaps there was something that he was leaving out,  
20 perhaps that was something that he was--I never did  
21 get a chance to take his deposition. The court  
22 stayed discovery, and so--

05:50:59 1 quantities, what freight company was to be used, and  
2 where they were to be sent, that all that  
3 information came from NWS, that none of it came from  
4 Big Sandy Rancheria.  
5 So, I was faced with conflicting evidence.  
6 Q. And on the face of that evidence, the court  
7 reached a factual conclusion that the shipments were  
8 at the Tribe's direction, and not NWS's; correct?  
9 A. I'm not going to second-guess what the  
10 court did when she reviewed the record. The record  
11 in this instance was quite voluminous. I think she  
12 missed some of the evidence and did not understand  
13 its significance, and that's why we are appealing  
14 the decision.  
15 Q. You were going to say something about  
16 discussion or--I don't want to put words in your  
17 mouth. I will rephrase the question.  
18 Have you ever had discussions with the  
19 Federal authorities in Seattle in connection with  
20 Mr. Montour?  
21 MS. CATE: Objection.  
22 PRESIDENT NARIMAN: Why do you object?

05:49:52 1 Q. And I'm sure all is that is true, but let's  
2 go back to the phrase "despite a sworn statement by  
3 Arthur Montour."  
4 I mean, you're a lawyer; right, sir?  
5 Correct?  
6 A. Yes.  
7 Q. When you put that phrase in a brief or a  
8 declaration that you're giving to a court or a  
9 tribunal, aren't you usually signaling to somebody  
10 that you don't think somebody is telling the truth?  
11 A. As a lawyer, my job is to present the  
12 evidence to the court and let the court decide that  
13 that statement is made to contrast--that phrase,  
14 contrast what Mr. Montour said in his declaration  
15 with what documents that I had in my possession that  
16 I submitted to the court and appeared to show and  
17 that the operator of the Foreign Trade Zone  
18 testified at her deposition was not the case, that  
19 she testified that she never had any contact  
20 whatsoever with Big Sandy Rancheria, that all of the  
21 instructions came from NWS as to where--how many  
22 cigarettes were to be shipped out, what brands, what

05:51:52 1 MS. CATE: Again, wouldn't discussions  
2 between two attorneys be a privilege?  
3 MR. LUDDY: Depends on what they talked  
4 about.  
5 MS. CATE: If you are going to continue  
6 along those lines...  
7 MR. LUDDY: I know, but this was the  
8 problem we ran into the last time. Until I know  
9 what the scope of the privilege is, it's premature.  
10 THE WITNESS: Your question is did I have  
11 discussions with?  
12 BY MR. LUDDY:  
13 Q. Yeah.  
14 Have you ever talked to Federal  
15 authorities--  
16 PRESIDENT NARIMAN: Federal authorities  
17 about Montour.  
18 THE WITNESS: I had one telephone  
19 conversation with an Assistant U.S. Attorney in  
20 Seattle, and that she was the woman that was  
21 handling the indictment against Mr. Montour for  
22 perjury.

05:52:37 1 BY MR. LUDDY:  
 2 Q. When was that?  
 3 A. Last fall. I don't remember if it was  
 4 September or October.  
 5 Q. Did you tell her in that conversation that  
 6 you thought Mr. Montour had been untruthful in an  
 7 affidavit in your case?  
 8 MS. CATE: Objection. The content of the  
 9 discussion would, indeed, be privileged.  
 10 MR. LUDDY: That is clearly not privileged.  
 11 MR. VIOLI: It's not attorney-client.  
 12 MR. LUDDY: Who is the client?  
 13 PRESIDENT NARIMAN: Very sorry, I'm only  
 14 asking you what's the point of pursuing this now?  
 15 Your point was that it's contrary to sworn testimony  
 16 means, and he has explained what he meant by it.  
 17 MR. LUDDY: Mr. Chairman, I will move on.  
 18 PRESIDENT NARIMAN: That's much better.  
 19 MR. FELDMAN: Mr. President, we have  
 20 another witness waiting outside. Can we release  
 21 him?  
 22 MR. LUDDY: I'm not going to get to him

05:58:23 1 I think that was the first that I knew that  
 2 it was possible that cigarettes were coming into  
 3 California unlisted off-directory, not-fire-safe  
 4 cigarettes were coming into California from the FTZ  
 5 in Las Vegas. I did not have prior knowledge of  
 6 cigarettes being sold, Seneca cigarettes or other  
 7 brands made by Grand River that were being sold on  
 8 Reservations in California prior to that time.  
 9 BY MR. LUDDY:  
 10 Q. Over the last couple of days we talked a  
 11 little bit, and I believe--were you here during  
 12 openings?  
 13 A. I was.  
 14 Q. Mr. Violi, I think, was talking about an  
 15 action that the State of New York had commenced  
 16 against Philip Morris and others under the MSA,  
 17 seeking basically a declaration that the MSA didn't  
 18 apply on-reserve and that the states didn't have to  
 19 take actions in that regard.  
 20 Are you familiar with that case?  
 21 A. I'm generally familiar with it. I can't  
 22 say that I have read the complaint, but I am

05:54:14 1 today.  
 2 MR. FELDMAN: Okay.  
 3 (Pause.)  
 4 PRESIDENT NARIMAN: All right.  
 5 BY MR. LUDDY:  
 6 Q. Just to wrap up, my overriding question:  
 7 Why now? Why suddenly in 2008 when NWS had been  
 8 shipping or selling to on-reserve customers all  
 9 these years, why now in 2008 did the three or four  
 10 states decide independently or together to try to  
 11 shut down that off-reserve business--on-reserve  
 12 business? I'm sorry.  
 13 MS. CATE: Objection. The witness can only  
 14 speak to what California has done.  
 15 THE WITNESS: I think I address that in  
 16 Paragraph 1--Paragraph 2, I guess it is, of my  
 17 declaration. I was not aware prior to early 2007  
 18 that on-reserve cigarettes were being sold in  
 19 California.  
 20 Well, let me be more direct, more accurate  
 21 than that. I did not know until--no, let's see.  
 22 I'm trying to get the chronology down.

05:59:29 1 generally familiar that New York did file such an  
 2 action. I'm not sure that I would agree with your  
 3 characterization.  
 4 Q. My characterization might have been wrong.  
 5 A. But they did file a declaratory relief  
 6 action against Philip Morris and other tobacco  
 7 makers.  
 8 Q. Did California file a similar action at any  
 9 time?  
 10 A. No. In California, it has been the law for  
 11 many years that all California licensed  
 12 distributors, all those licensed to distribute  
 13 cigarettes in California are required to distribute  
 14 tax-stamped cigarettes, tax-paid cigarettes to all  
 15 entities other than other licensed distributors.  
 16 So, if they distribute to a retailer, a wholesaler,  
 17 a jobber or anybody else for consumption in the  
 18 State of California, the cigarettes have to be  
 19 stamped. And after the Directory Statute, the  
 20 complementary law was passed in California, only  
 21 cigarettes that are on the directory are legal for  
 22 stamping by licensed California distributors.

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06:00:37 1 Q. But--and this brings us back to the issue  
2 we talked about at the very beginning--in fact, I  
3 can't remember your answer whether you were unclear  
4 or whether you had an answer as to whether Big Sandy  
5 Rancheria needs to be a licensed California  
6 distributor. Do you know the answer to that?  
7 A. You mean between now and the beginning of  
8 my testimony?  
9 Q. I actually don't remember your answer. I'm  
10 not making that up. I'm embarrassed to tell you  
11 that.  
12 A. The Board of Equalization is an independent  
13 state agency. We do work with them, but we do not  
14 advise them on those matters. They make their own  
15 decisions.  
16 As far as I know, they have--they have not  
17 required Big Sandy to get a license, but I do not  
18 know of any communications between them and Big  
19 Sandy. There was implication that there was such a  
20 communication that was going to be the case, but I'm  
21 not aware of any such communication.  
22 Q. All right. And just as a technical matter,

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06:02:41 1 that California had no right to interfere with the  
2 commerce between NWS and Big Sandy Rancheria, did  
3 you call or contact the FTZ to tell them about that  
4 development in the matter?  
5 A. No.  
6 Q. You know, having accepted and--  
7 A. Let me clarify my answer. I don't  
8 necessarily agree with your characterization of the  
9 decision which is--that it was a declaration that we  
10 had no authority. This was the reasoning of the  
11 court how she got to the point of ruling that we had  
12 no personal jurisdiction, and again that--to the  
13 extent that she made comments about subject-matter  
14 jurisdiction about authority to regulate activities  
15 on Indian land, I think she went beyond the scope of  
16 the motions that were before her, and one could  
17 argue as a lawyer that that's dicta.  
18 Q. That's fine.  
19 I mean, that's why--not that I agree with  
20 you, but I don't want to rehash a decision.  
21 A. I wouldn't expect you to agree with me.  
22 Q. Thank you.

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06:01:36 1 the decision by the court in September did, in fact,  
2 vacate the judgments; correct? As a technical  
3 procedural matter, those judgments are vacated;  
4 correct?  
5 A. You're talking about the judgments--you're  
6 talking about the decision in December.  
7 Q. I am. Thank you for the correction.  
8 A. Regarding Grand River, the judgments  
9 against Grand River.  
10 Q. Correct.  
11 A. I don't know what that means. Technically  
12 speaking, the order is not final. The order  
13 vacating the judgments is not final because it's  
14 subject to appeal. I don't believe that we would  
15 have the ability to enforce those judgments while  
16 they are vacated. But if that order is reversed by  
17 the Court of Appeal, which it could well be or it  
18 is--yeah, again, if it's reversed by the Court of  
19 Appeal by the California Supreme Court, then that  
20 would change the same situation legally.  
21 Q. You know, after you got that September  
22 ruling with all those determinations by the court

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06:03:50 1 But having injected yourself into the  
2 stream of commerce with FTZ and made allegations in  
3 that August of '08 letter about the impropriety of  
4 NWS's actions and the fact that the cigarettes they  
5 were selling were contraband and the fact that they  
6 shouldn't be selling them to Big Sandy Rancheria in  
7 California, having done all that, did it ever occur  
8 to you that maybe the right thing to do would have  
9 been to contact the FTZ and say, "By the way, that  
10 lawsuit I mentioned, it got tossed?"  
11 PRESIDENT NARIMAN: It got what?  
12 MR. LUDDY: It got thrown out.  
13 BY MR. LUDDY:  
14 Q. Did that ever occur to you?  
15 A. It did not because we appealed that  
16 decision. We thought it was wrong. It was not  
17 final.  
18 Q. Well, how did if the decision is ultimately  
19 upheld by the appeal? Are you going to contact the  
20 FTZ and tell them you were wrong?  
21 A. If at that time they are still handling  
22 cigarettes that are coming and due us, I suppose we

06:04:47 1 could, yes.  
 2 Q. Don't you think that would be the fair  
 3 thing to do--  
 4 ARBITRATOR ANAYA: Mr. Luddy, I'm having a  
 5 hard time understanding how this relates to the  
 6 NAFTA claim.  
 7 MR. LUDDY: I'm done, but we will tie it  
 8 together.  
 9 I have no further questions.  
 10 PRESIDENT NARIMAN: Anything, Ms. Cate?  
 11 MS. CATE: Yes, I do have redirect, if I  
 12 could beg your indulgence for a little bit longer,  
 13 if you prefer to resume tomorrow.  
 14 PRESIDENT NARIMAN: No, go ahead.  
 15 MS. CATE: Thank you.  
 16 I prefer to do it from here rather than  
 17 standing up, if you don't mind.  
 18 PRESIDENT NARIMAN: Yes, please.  
 19 Don't ask your own witness too many  
 20 questions. Friend leap advice I give you.  
 21 MS. CATE: I need about a couple of  
 22 minutes, if you don't mind.

06:07:33 1 even predominantly  
 2 'on-Reservation'--"on-Reservation" is in  
 3 quotations--"activities. The Seneca cigarettes  
 4 shipped at NWS's direction from the FTZ to BSR,  
 5 Huber and Native Made traveled hundreds of miles  
 6 across off-Reservation Territory in California  
 7 before reaching their destination, and virtually all  
 8 of NWS's sales of Seneca cigarettes to these  
 9 entities in California ultimately were resold to  
 10 nonmembers of the governing tribe resulting in  
 11 substantial off-Reservation effects."  
 12 Q. Thank you.  
 13 With respect to the first half of that  
 14 paragraph, it discusses the shipment of Seneca  
 15 cigarettes hundreds of miles across off-Reservation  
 16 Territory in California.  
 17 A. Correct.  
 18 Q. Could you explain how that relates to the  
 19 statute that you're enforcing.  
 20 A. Well, the statute--the complementary  
 21 legislation are "Directory Statute," as I prefer to  
 22 call it, does prohibit the transportation of

06:06:02 1 PRESIDENT NARIMAN: Yes, take your time.  
 2 (Pause.)  
 3 REDIRECT EXAMINATION  
 4 BY MS. CATE:  
 5 Q. Mr. Eckhart, I believe Paragraph 22 was  
 6 mentioned in cross-examination.  
 7 A. Paragraph 22 of my declaration?  
 8 Q. Exactly, which we will use Claimants' Core  
 9 Bundle Tab Number 56. It's Page 8, Paragraph 22.  
 10 A. Paragraph 22 is not in this binder of--it  
 11 skips from Page 7 to Page 9 of my declaration, so I  
 12 don't have a complete copy right here.  
 13 MR. LUDDY: The next page. It's possible  
 14 at one point I saw it was reversed.  
 15 THE WITNESS: Okay, seven and eight are  
 16 reversed.  
 17 I have Paragraph 22, thank you.  
 18 BY MS. CATE:  
 19 Q. Okay. Great.  
 20 Could you read that paragraph, please.  
 21 A. "I do not believe that NWS's activities in  
 22 California can be characterized as exclusively or

06:08:44 1 cigarettes that are not listed on the directory, and  
 2 so there is an issue that because the cigarettes are  
 3 being transported across the highways, and there is  
 4 U.S. Supreme Court authority for the states to seize  
 5 contraband cigarettes when they are on the states'  
 6 highways that is off-Reservation, and that that  
 7 there is not--Big Sandy is a Reservation in the  
 8 Sierra Nevada mountains east of Fresno occupying  
 9 somewhere in the neighborhood of 4,500 acres; and,  
 10 in order to get to Big Sandy from Las Vegas, a truck  
 11 would have to pass through several hundred miles of  
 12 highways that are not on Reservation land.  
 13 And, in addition, the shipments that were  
 14 going to Huber Enterprise would--that would be  
 15 approximately a six or 700-mile trip from Las Vegas  
 16 to Huber which is up right near Eureka in the north,  
 17 in Humboldt County in the northwest portion of  
 18 California, and Native Made was a recipient of  
 19 cigarettes also from the Foreign Trade Zone, and  
 20 Native Made is a smoke shop in Palm Springs, it's on  
 21 the Agua Caliente Reservation, but it would also  
 22 require transport across non-Indian country to get

06:10:10 1 the cigarettes from the FTZ to the--to that  
2 location, as well.  
3 Q. Okay. And then with respect to the second  
4 part of the paragraph, which starts with "Virtually  
5 all of NWS's sales, Seneca cigarettes to these  
6 entities in California ultimately were resold to  
7 nonmembers of the governing tribe resulting in  
8 substantial off-Reservation effects," could you  
9 explain what you mean by "substantial  
10 off-Reservation effects."  
11 A. Well, the off-Reservation effects include  
12 that the cigarettes--it is our understanding based  
13 upon this--the information we had at this time as  
14 well as subsequent information gained about Big  
15 Sandy Rancheria's operations that the cigarettes are  
16 transported to about 40 or so locations across the  
17 state, and that we have visited those locations.  
18 And non-Indians working for us have purchased  
19 cigarettes at--Seneca cigarettes at many locations.  
20 They're not asked for their tribal identification  
21 cards. They're simply--if they come in the store  
22 and have the money to buy the cigarettes, the

06:12:30 1 quantities.  
2 ARBITRATOR ANAYA: Where are they shipping?  
3 THE WITNESS: They're shipping to smoke  
4 shops.  
5 ARBITRATOR ANAYA: On-Reservation?  
6 THE WITNESS: On-Reservation business.  
7 But those businesses are open to the  
8 general public and are advertising on the Internet  
9 at cheaper prices such that they attract customers  
10 from off-Reservation. Customers come on to the  
11 Reservation, buy cigarettes that are untaxed.  
12 ARBITRATOR ANAYA: Do you have any data on  
13 that, what percentage of the sales go to  
14 non-Indians?  
15 THE WITNESS: Just given the volume.  
16 We have so far--in our court proceedings,  
17 the courts have stayed discovery. We have a current  
18 case pending against a smoke shop in Palm Springs  
19 called Black Hawk Tobacco. It has received over  
20 four-year period almost 7,000 master cases of  
21 cigarettes. The master case has 60 cartons in it  
22 specifically. Sometime a half-master case has 30

06:11:23 1 cigarettes are sold to them.  
2 Big Sandy itself sells, and Huber and  
3 Native Made have all sold cigarettes to our  
4 investigators without asking for their status as  
5 members of any tribe, let alone the Tribe on which  
6 the businesses are located.  
7 ARBITRATOR ANAYA: Excuse me. So, are the  
8 substantial off-Reservation effects the fact that  
9 they sold them to your investigators?  
10 THE WITNESS: And that because of the  
11 quantity. We are talking hundreds of millions of  
12 cigarettes, and Big Sandy Rancheria is a tribe of  
13 approximately 400 members, and only 71 of whom live  
14 on the Reservation. So, it would be impossible,  
15 literally impossible, for those 71 members, assuming  
16 they're all adults, would be smoking that many  
17 cigarettes, and so we know that--  
18 ARBITRATOR ANAYA: That's an inference,  
19 though. Do you have any data, other than--  
20 THE WITNESS: It's an inference. It's also  
21 based upon a list of information that we have of  
22 where Big Sandy is shipping these cigarettes and the

06:13:31 1 cartons. So, we are talking truck loads and truck  
2 loads of cigarettes being delivered, and the Agua  
3 Caliente Reservation, although it's fairly large in  
4 terms of its land area, according to the Tribe, has  
5 only 219 members living on the Reservation.  
6 ARBITRATOR ANAYA: I understand the  
7 argument and the inferences that can be made; they  
8 seem reasonable. I'm just wondering the extent to  
9 which you have some data or there is something  
10 about--evidence to this effect in the record.  
11 THE WITNESS: The court in that case--the  
12 court in the Black Hawk case decided beginning of  
13 January that it had subject-matter jurisdiction over  
14 our litigation, and he has continued a stay of  
15 discovery which has been in place since the first  
16 motion to quash--the complaint for lack of  
17 subject-matter jurisdiction was made last September.  
18 And at this point we only have information from  
19 third parties and we could get through  
20 noncourt-compelled discovery because of the stay on  
21 discovery.  
22 ARBITRATOR ANAYA: It is your testimony,

06:14:36 1 though, that there are substantial off-Reservation  
2 effects, right?  
3 THE WITNESS: Yes.  
4 ARBITRATOR ANAYA: Okay. I'm trying to  
5 get--  
6 THE WITNESS: The cigarettes that are not  
7 on our directory, which means that non-Indians are  
8 smoking those cigarettes and developing whatever  
9 tobacco-related diseases they might develop over the  
10 course of time, these cigarettes are also not  
11 certified as firesafe in the State of California,  
12 and that has off-Reservation effects to the extent  
13 that cigarettes that are going off the Reservation  
14 are--have the propensity to start a fire whereas if  
15 they were certified and had been tested according to  
16 standards set by the state and many other states for  
17 their ability to go out and to self-extinguish after  
18 a few moments of not being puffed on, that there  
19 would be less danger of forest fires, brushfires,  
20 house fires and so on. So, that's another  
21 off-Reservation effect.  
22 ARBITRATOR ANAYA: Is there evidence to

06:16:37 1 MR. FELDMAN: Thank you, Professor.  
2 Sitting here at this time, I know that we  
3 have the numbers on the various reservations and the  
4 volumes of Seneca cigarettes passing through those  
5 reservations, and we relied heavily on those figures  
6 in both of our briefs. We would need to review the  
7 record to see whether also the fire-safety issues  
8 that Mr. Eckhart has identified, whether those are  
9 included in the record, as well.  
10 ARBITRATOR ANAYA: Okay. Thank you.  
11 MS. CATE: I would just like to note as  
12 well in addition that the public health effects  
13 obviously would not be something that you could  
14 easily see at this stage.  
15 ARBITRATOR ANAYA: Understood.  
16 MS. CATE: Thank you.  
17 BY MS. CATE:  
18 Q. With regard to your declaration again at  
19 Paragraph 16--  
20 A. Okay.  
21 Q. --you note here the numbers of shipments.  
22 A. Yes.

06:15:36 1 this effect in the record? Specific evidence?  
2 MS. CATE: With respect to the volume and  
3 to the numbers of persons living on the actual  
4 Reservations, yes.  
5 PRESIDENT NARIMAN: That's an inference.  
6 ARBITRATOR ANAYA: We only have information  
7 from which to draw inferences. We don't have any  
8 evidence about the actual substantial  
9 off-Reservation effects beyond that kind--  
10 THE WITNESS: I don't believe it's in the  
11 record of this proceeding.  
12 ARBITRATOR ANAYA: Okay.  
13 THE WITNESS: This declaration was filed a  
14 year and two months ago, and there is--we had  
15 additional information about individual sales, but  
16 anecdotal information about sales.  
17 ARBITRATOR ANAYA: I pose the question to  
18 you but also to the Respondent which is asserting  
19 that the sales have substantial off-Reservation  
20 effects. I'm just trying to see what is in the  
21 record to that effect, at least to support that  
22 factual assertion.

06:17:45 1 Q. And again these were how many exactly were  
2 going--these were all going to either NWS or Huber;  
3 is that correct?  
4 A. No. These were going to either--primarily  
5 going to Big Sandy, to BSR--the majority of them  
6 went to BSR. A smaller number were going directly  
7 to Huber Enterprise. And a few of the shipments, I  
8 think it was approximately 25 or 30, went to Native  
9 Made in Palm Springs. I don't have the exact  
10 number. I would have to review Mr. Gruber's  
11 declaration to get the exact numbers.  
12 Q. Actually, if you wouldn't mind turning to  
13 Exhibit A of your declaration, which is Mr.  
14 Buehler's declaration, just to take an example of  
15 the kinds of documents that you have submitted, if  
16 we could look at Exhibit A-1 of Mr. Buehler's  
17 declaration, and there are four documents there.  
18 You mentioned that you had done a  
19 deposition of the official at the FTZ, and she had  
20 explained the process of how these cigarettes came  
21 into the FTZ and then subsequently went out.  
22 And in light of that deposition, would you

06:19:25 1 be so kind as to explain each of these documents in  
2 turn.  
3 A. The first document has at the top, Exhibit  
4 A-1, these don't have page numbers, so at the top  
5 it's dated--I believe that's 2/7. Let me see if  
6 it's February 7th or--apparently February 7th, 2008,  
7 and it says "Nevada FTZ No. 89." Number 89 is the  
8 number of that Foreign Trade Zone, I believe.  
9 And this document, as I understand it, as  
10 explained by Joanne Tornberg at her deposition, is a  
11 document that is prepared by the Foreign Trade Zone  
12 based upon information that the Foreign Trade Zone  
13 receives from Native Wholesale on this, which is the  
14 second document in this exhibit.  
15 The second document essentially is--not  
16 essentially, but--her explanation was, and it would  
17 appear from the face of the document as well is that  
18 it was faxed to the Foreign Trade Zone by NWS,  
19 indicating a group of--or a shipment of cigarettes  
20 or a number of cigarettes which were to be sent from  
21 the Foreign Trade Zone, released from the Foreign  
22 Trade Zone, and shipped to Big Sandy Rancheria.

06:22:15 1 which the FTZ receives from the customs broker for  
2 Native Wholesale, for NWS, indicating that the  
3 customs duties and whatever other paperwork is  
4 necessary for U.S. customs to release the product  
5 for sale in the United States has been completed,  
6 but the customs duties have been paid. And I  
7 believe also that the Federal excise tax has to be  
8 paid at that point before they could be released.  
9 Q. With respect to this last document, it's  
10 interesting--could you just note here, the ultimate  
11 consignee and importer of record, who is that?  
12 A. This particular document which we are  
13 looking at, if it's part of Exhibit A-1 to  
14 Mr. Buehler's declaration, says the ultimate  
15 consignee is Native Wholesale Supply Company, and  
16 the importer of record is also Native Wholesale  
17 Supply Company.  
18 Q. And then moving back to the third document,  
19 which is the straight bill of lading, as it's  
20 entitled, who was this billed to?  
21 A. There is a "bill to" line on the left side  
22 of the document below the information about where it

06:20:57 1 So, the first document essentially is the  
2 Foreign Trade Zone's spreadsheet, if you will, of  
3 where--of the order that's been placed by Native  
4 Wholesale on the prior page or the direction that  
5 was given by Native Wholesale to pull those  
6 cigarettes off of the shelves and put them on  
7 pallets and get them ready to be loaded on to a  
8 truck.  
9 And the third document in this exhibit is a  
10 Conway Freight straight bill of lading which the FTZ  
11 prepares in relationship to this shipment, once they  
12 hear from somebody at NWS that it is Conway Freight  
13 that will be picking up this shipment, and these are  
14 the arrangements. This is the day they will be  
15 there and have it ready for them by X date. So,  
16 they prepare this document--the Foreign Trade Zone  
17 prepares this document, and it's signed by the  
18 driver of the--I think the driver of the truck signs  
19 it at the bottom, acknowledging that he has  
20 received--he or she has received it.  
21 The third document or the fourth document,  
22 excuse me, as it was explained to me, is a form

06:23:35 1 says "shipper (from)," and there is a separate set  
2 of boxes that say "bill to," and it says "bill to  
3 Native Wholesale Supply." So, that led me to  
4 understand that Native Wholesale Supply was the  
5 entity paying the bill for the shipping.  
6 Q. And on the second document--again this is  
7 the invoice/bill of lading--  
8 A. Yes.  
9 Q. --who is noted as the seller?  
10 A. The seller is noted as Native Wholesale  
11 Supply in Gowanda, New York.  
12 Q. And again going back to the first document  
13 which is FTZ's document, what cigarettes, what brand  
14 of cigarettes, are noted there as being held?  
15 A. Two different brands, Seneca 60s and Opal  
16 30s, and another style of Senecas, 120s--I believe  
17 that refers to the length of the cigarette role.  
18 Q. Thank you.  
19 ARBITRATOR ANAYA: I just have one  
20 question. Does California tax cigarettes sales to  
21 non-Indians?  
22 THE WITNESS: I have to answer it in two

06:24:47 1 parts. As I explained to Mr. Luddy when he asked me  
2 the question, the law in California is that a  
3 California licensed distributor can only sell tax  
4 pre-paid cigarettes to retailers in California. So,  
5 if a licensed distributor--bear with me, please. A  
6 licensed distributor sells to Black Hawk Tobacco  
7 on-Reservation in Palm Springs, that distributor has  
8 to sell tax-stamp cigarettes to Black Hawk. The  
9 only way Black Hawk can get unstamped cigarettes is  
10 to purchase from something like Big Sandy.

11 The State of California does not--there was  
12 a Supreme Court decision in 1985 I believe was  
13 called "Board of Equalization versus Chemeuvi  
14 Tribe," in which the Supreme Court said that the  
15 state has the right and authority to require the  
16 Tribe to collect the state tax on sales to  
17 non-Indians.

18 That decision, as far as I'm concerned, is  
19 the law of the land. The Board of Equalization does  
20 not currently have a scheme or process set up to  
21 collect or to enforce that with the Tribes, who  
22 don't have tax compacts with the Tribes, but legally

06:27:19 1 THE WITNESS: I could escape the snowstorm?

2 BY MS. CATE:

3 Q. Could you just briefly explain, what are  
4 the activities that are regulated under a  
5 complementary legislation of California?

6 A. I don't have the statute in front of me,  
7 but generally speaking, no person is supposed to  
8 stamp a cigarette for distribution in California  
9 that is not on the directory, and no person is  
10 supposed to sell, possess, import, transport  
11 cigarettes that they know will be distributed in  
12 violation of the statute, meaning they're not on the  
13 directory.

14 Q. Have GRE's cigarettes ever been listed on  
15 California's directory of compliant cigarettes?

16 A. No. No cigarettes that I know of made by  
17 Grand River have ever been listed on the directory.

18 Q. What must GRE do to become listed on  
19 California's directory?

20 A. GRE would have essentially have to become  
21 compliant with our Escrow Statute for past sales  
22 that would include sales that were included as under

06:26:11 1 it's my position, and I believe the law, that sale  
2 to a nontribal member who does not reside on that  
3 land is taxable.

4 ARBITRATOR ANAYA: My question, though, is  
5 whether you do, and you're saying you don't.

6 THE WITNESS: We don't have a mechanism,  
7 but the mechanism is that the combination of the  
8 Directory Statute and the Tax Law that you have to  
9 have to buy--the licensed distributor has to sell  
10 tax-stamped cigarettes, and that's the way it should  
11 work.

12 And many of the Tribes, I will state just  
13 as a matter of fact, many of the Tribes--the  
14 majority of the Tribes purchased tax-stamp  
15 cigarettes from licensed distributors, and only a  
16 few purchase from Big Sandy and others who may be  
17 selling unstamped cigarettes.

18 MS. CATE: I do have a couple more  
19 questions.

20 THE WITNESS: My flight is not until  
21 tomorrow morning.

22 PRESIDENT NARIMAN: They don't want you.

06:28:39 1 the liability, allegations in our complaints against  
2 them as well as subsequent sales on which taxes,  
3 California taxes, were collected.

4 To maybe clarify my answer to Professor  
5 Anaya a moment ago, if taxes are not collected on a  
6 cigarette, it's not considered a unit sold, and  
7 therefore there is escrow obligation. But if taxes  
8 are collected--and I would submit that in some  
9 instances--in many instances taxes should be  
10 collected on cigarettes that are sold to non-Indians  
11 on the Reservation, there would be an escrow  
12 obligation that would be attendant upon that.

13 Q. Are there any other--

14 A. There is certain paperwork requirements  
15 they would have to submit--we would have to resolve  
16 the outstanding penalty issues, depending upon--the  
17 judgments are on appeal, so those are still in play  
18 as far as any kind of a settlement. We would have  
19 to resolve that in some way to our satisfaction and  
20 to Grand River's satisfaction. And there were some  
21 paperwork requirements they would have to provide us  
22 with certain information that's required under our

06:29:44 1 regulations for anybody who wants to be listed on  
2 the directory such things as we have to know that  
3 they have filed their rotation plan with the Federal  
4 Government for the Surgeon General's warnings. They  
5 have to disclose their ingredients from the  
6 Department of Health and Human Services and so  
7 forth.

8 So, those things--again, paperwork has to  
9 be completed. Once that paperwork is completed and  
10 they are in compliance with our escrow law, they  
11 could be listed. Would be listed.

12 MS. CATE: I have one further line of  
13 questioning with regard to the recently admitted  
14 Black Hawk decision.

15 Do you have copies of that? If not, I  
16 could provide them to you.

17 BY MS. CATE:

18 Q. Mr. Eckhart, this is a very recent decision  
19 of the Superior Court of California.

20 A. Yes. I mentioned it a moment ago. It's a  
21 decision issued at the beginning of January in our  
22 case against Black Hawk Tobacco.

06:32:22 1 it.

2 This can't be done in re-examination.  
3 Nobody objected so it's all right, but normally  
4 speaking you should--whatever question--that's why I  
5 told you please ask him additionally whatever you  
6 want to ask him from the sworn statement. That's  
7 the correct matter; thereafter, you leave the  
8 witness to cross-examining counsel. But here the  
9 objection is with regard to a sort of fact situation  
10 in respect of a fact witness. I mean, if it's a  
11 case, then you refer to it in your argument. I have  
12 no objection to that argument. How does he know  
13 anything about this case?

14 MS. CATE: I would just note that the  
15 witness has noted this case in the  
16 cross-examination; therefore, it is within the scope  
17 of the redirect for me to discuss it.

18 In addition, this case actually involves,  
19 to my understanding, Seneca cigarettes; and, as a  
20 result, it is fully within this case.

21 PRESIDENT NARIMAN: What's the date?

22 MS. CATE: It is well after our Rejoinder

06:31:11 1 Q. And can you provide a background on the  
2 facts of the case.

3 A. Well, we are also aware that--

4 MR. VIOLI: I would like to mention one  
5 thing. When Claimants agreed to the submission of  
6 the developments of law to the Tribunal, it was not  
7 in the context of presenting fact witnesses with  
8 those opinions for purposes of colloquy or  
9 discussion with the Tribunal.

10 The decisions that relate to the Claimants  
11 in this action are perfectly proper to speak to this  
12 witness about, but to bring in a separate lawsuit, a  
13 decision in a separate lawsuit not involving these  
14 Claimants and starting to present to a fact witness  
15 is nothing we have agreed to, and it's improper.

16 MS. CATE: My next question will clarify it  
17 and why it's related to this case.

18 PRESIDENT NARIMAN: I didn't want to  
19 interrupt you at the beginning, but the proper thing  
20 for all this questioning should have been in your  
21 examination and further examination-in-chief. So,  
22 if they had anything to say, then they cross-examine

06:33:32 1 dated 12/23/2009.

2 PRESIDENT NARIMAN: Oh, okay. Yes,  
3 December 2009, so he's entitled to--

4 THE WITNESS: It was January 8, 2010. The  
5 hearing, the oral hearing, was on the 23rd of  
6 December, and we--

7 PRESIDENT NARIMAN: We could read this, but  
8 if there is something special to say, say it, and  
9 they will ask you some questions.

10 THE WITNESS: I'm sorry, what was the--the  
11 factual circumstances.

12 PRESIDENT NARIMAN: Yes, factual.

13 THE WITNESS: Very simply, we have  
14 documents from a shipping company within the State  
15 of California that indicated that Black Hawk Tobacco  
16 was the largest customer of Big Sandy Rancheria, and  
17 we contacted Black Hawk, we sent them a letter  
18 similar to the letter we sent to Mr. Montour before  
19 we sued Native Wholesale, asking him to stop selling  
20 cigarettes that were on the directory. And when we  
21 got no reply to that letter after several months,  
22 and after we had contacted the--and actually--I

06:34:39 1 should back up.  
 2 Before we sent the letter to the owner of  
 3 this business, we contacted the Tribe to see if they  
 4 had any sovereign concerns about our enforcing our  
 5 law on their land, and they said they did not. We  
 6 then contacted the owner of this business. He did  
 7 not respond. We then sued him for selling  
 8 cigarettes that were not listed on our Tobacco  
 9 Directory that were not fire-safe and that were  
 10 not--did not bear evidence of state tax had been  
 11 paid.  
 12 PRESIDENT NARIMAN: Okay.  
 13 BY MS. CATE:  
 14 Q. And what is the holding of the court?  
 15 PRESIDENT NARIMAN: That we could read.  
 16 MR. LUDDY: Objection.  
 17 PRESIDENT NARIMAN: Is there anything you  
 18 want to ask?  
 19 MR. LUDDY: One question.  
 20 ARBITRATOR ANAYA: This is a tribally owned  
 21 company?  
 22 THE WITNESS: No. It's owned by an

06:36:28 1 the record that assists, helps with the enforcement  
 2 of the Escrow Statutes and the purposes of the  
 3 Escrow Statutes; right?  
 4 A. Yes.  
 5 Q. Okay. Now, a minute ago--withdrawn.  
 6 Has the State of California, BOE, Board of  
 7 Equalization, sent any tax bill to the Big Sandy  
 8 Rancheria for cigarettes sold on that land?  
 9 A. I don't believe so.  
 10 Q. You don't believe so.  
 11 So, they're not units sold under the Escrow  
 12 Statute; correct? Just the Escrow Statute.  
 13 A. They're not units sold because tax has not  
 14 been collected, that's correct.  
 15 Q. Correct. So, they're not sold under the  
 16 Escrow Statute.  
 17 And Grand River hasn't been sued for any of  
 18 the Seneca cigarettes sold on the Big Sandy  
 19 Rancheria Reservation or sold by Big Sandy; is that  
 20 correct? By your office. Yes or no. Have they  
 21 been sued--  
 22 A. Because tax has not been collected on them,

06:35:38 1 individual, and he was incorporated under the law of  
 2 the State of California as well as under the law of  
 3 the Sac and Fox Nation. He is--as far as I know,  
 4 and he's with the Sac and Fox Tribe. He's not a  
 5 member of the Tribe, of the Agua Caliente Tribe on  
 6 whose reservation he's doing business.  
 7 ARBITRATOR ANAYA: Okay. So, he's a member  
 8 of another tribe doing business in California.  
 9 THE WITNESS: Yes.  
 10 ARBITRATOR ANAYA: And the California  
 11 Reservation.  
 12 THE WITNESS: That's correct, yes.  
 13 PRESIDENT NARIMAN: Okay.  
 14 Sure, you are entitled to ask.  
 15 RE-CROSS-EXAMINATION  
 16 BY MR. VIOLI:  
 17 Q. Mr. Eckhart, the issue known as  
 18 complementary legislation, what is it complementary  
 19 to?  
 20 A. I think that phrase is used because it  
 21 complements the state's Escrow Statute enforcement.  
 22 Q. And it assists--we have seen documents in

06:37:27 1 that's correct.  
 2 Q. So, if these cigarettes are not subject to  
 3 the Escrow Statute, Grand River is not being sued  
 4 for them, and they're not units sold, then why is  
 5 the State of California telling the Foreign Trade  
 6 Zone do not ship these cigarettes to an Indian  
 7 Reservation in California and that these cigarettes  
 8 are illegal as contraband under California law when  
 9 they are not being sold, satisfying that definition?  
 10 A. Because the Directory Statute or the  
 11 "complementary legislation," as you called it,  
 12 is--stands on its own. It doesn't require--in my  
 13 view, it doesn't require that it only be enforced if  
 14 it complements the Escrow Statute enforcement. It  
 15 is a stand-alone provision of law that--  
 16 Q. It's a stand-alone provision, but when it  
 17 was presented to the legislatures, it was because we  
 18 needed to enforce the statutes; correct? There is  
 19 something wrong with the Escrow Statutes, and we  
 20 need to enforce them. We need better powers to  
 21 enforce them; correct?  
 22 A. Correct.

06:38:26 1 Q. Okay. Now, you mentioned a Bracker test;  
2 right? The Federal Bracker test?  
3 A. I did.  
4 Q. That arises out of taxation on cigarettes  
5 on Indian land or Indian or sovereign land; right?  
6 A. Not necessarily taxation. The question is  
7 regulation, not necessarily taxation.  
8 Q. But they--the cases you talked about are  
9 taxation on cigarettes on Indian land; correct?  
10 A. The Mescalero case did not involve  
11 taxation.  
12 ARBITRATOR ANAYA: Mr. Violi, just so I'm  
13 clear this late in the day, are you trying to elicit  
14 more information from him, or is it just legal  
15 information?  
16 MR. VIOLI: More information because I want  
17 to find out what the answer the incidence of this  
18 regulation, unlike tax, does not fall on the  
19 non-Native consumer that comes to the Indian  
20 Reservation.  
21 ARBITRATOR ANAYA: But that's a legal  
22 argument.

06:40:10 1 Q. Do you know whether or not the Seneca  
2 cigarettes--withdrawn.  
3 Isn't it true that the fire-safe cigarettes  
4 that are sold to the Big Sandy Rancheria and go to  
5 California are all made with the fire-safe paper  
6 that various states have approved as far as  
7 safe-certified?  
8 A. I'm not aware of that.  
9 Q. Did you ever test them?  
10 A. That's the--the issue is that in order to  
11 be compliant with California law, the manufacturer  
12 has to certify to the state that they have had the  
13 cigarettes tested and provide the test results. And  
14 that hasn't been done. Grand River has never done  
15 that.  
16 Q. But you're not saying--that's different  
17 than saying that Seneca cigarettes are not  
18 fire-safe; correct? There is just not fire  
19 cigarette certified according to state law which you  
20 believe applies to the Big Sandy Rancheria; correct?  
21 A. Yes.  
22 Q. You have no information on whether or not

06:39:24 1 MR. VIOLI: Well, the incidence is a  
2 factual issue. If the Tribunal determines if the  
3 incidence--these statutes and those measures applied  
4 not to the consumer, not to the immediate seller but  
5 to the upstream Native supplier--  
6 ARBITRATOR ANAYA: You need to get that  
7 from him?  
8 MR. VIOLI: I do, unless there's a  
9 different view.  
10 PRESIDENT NARIMAN: How long?  
11 MR. VIOLI: About another minute.  
12 BY MR. VIOLI:  
13 Q. But the incidence of the Escrow  
14 Statute--the complementary legislation is falling  
15 upon NWS; correct?  
16 A. It falls on anybody who sells cigarettes in  
17 California that are not on the directory.  
18 Q. To an Indian Reservation; correct?  
19 A. Yeah. That's my--that's my position.  
20 That's the position of our office, yes.  
21 Q. You mentioned fire-safe cigarettes before.  
22 A. Yes.

06:41:01 1 they are not or they are fire-safe cigarettes;  
2 correct?  
3 A. I don't. That's correct.  
4 Q. Okay. Thank you.  
5 MR. VIOLI: No further questions.  
6 PRESIDENT NARIMAN: Good.  
7 MS. CATE: Thank you for your indulgence.  
8 PRESIDENT NARIMAN: We might meet at 9:00.  
9 (Whereupon, at 6:41 p.m., the hearing was  
10 adjourned until 9:00 a.m. the following day.)  
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## CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

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DAVID A. KASDAN